Case No. 2007-CA-00618-SCT
Consolidated with Case No. 2007-CA-00669-SCT

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ANTHONY KEYES,
APPELLANT

v.

DONALD BERRY AND HIRED TRUCKS, INC.,
APPELLEES

Appeal from the Circuit Court
of Simpson County, Mississippi

BRIEF OF THE APPELLANT

ORAL ARGUMENT REQUESTED

Submitted by:

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ANTHONY KEYES **APPELLANT**

v. Case No. 2007-CA-00618-SCT (Consolidated with Case No. 2007-CA-00669-SCT)

DONALD BERRY AND HIRED TRUCKS, INC. **APPELLEES**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and/or entities have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

I. Anthony Keyes, Appellant;

II. Donald Berry and Hired Trucks, Inc., Appellees;

III. Judge Robert G. Evans, Circuit Court Judge of Simpson County, Mississippi;

IV. Honorable Don H. Evans, Attorney for Appellant;

V. Honorable Joe S. Deaton, III and Honorable Clarence T. Guthrie, III, Attorneys for Appellees;

VI. Honorable D. Jason Embry and Honorable David Brisolara, Attorneys for Donald R. Berry and Margaret D. Berry in their plaintiff's action;

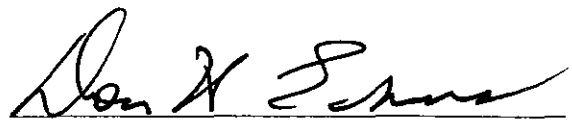
VII. Louisiana Commerce & Trade Association Self Insurers' Fund, Intervenor; and

VIII. Honorable H. Byron Carter, III, Attorney for Louisiana Commerce & Trade Association Self Insurers' Fund.

IX. Honorable Michael J. Tarleton, Attorney for Defendant Simpson County, Mississippi and

Anthony C. Keyes.

RESPECTFULLY SUBMITTED, this the 18th day of October, 2007.

BY: 
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Anthony C. Keyes.

RESPECTFULLY SUBMITTED, this the 18th day of October, 2007.

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STATEMENT OF THE ISSUES

1. Whether the trial court erred in granting the Appellee, Donald Berry's, Motion to Dismiss on the bases that the Appellant, Anthony Keyes, never filed an answer; was allegedly not served process; and had not entered an appearance and/or obtained permission from the trial court prior to filing his Counter Complaint against the Appellee, Donald Berry?

2. Whether the trial court erred in granting the Appellee, Hired Trucks, Inc.'s, Motion to Dismiss on the bases that the Appellant, Anthony Keyes, was never properly before the trial court and had failed to obtain leave of court prior to adding Hired Trucks, Inc. as a party defendant?

STATEMENT OF THE CASE

A. Nature of the Case

This case is submitted to the Supreme Court of Mississippi to determine whether the Appellees' Motions to Dismiss should have been granted.

Anthony Keyes filed a Counter Complaint against the Appellees, Donald Berry and Hired Trucks, Inc., in the Circuit Court of Simpson County, Mississippi, for injuries he sustained as a result of a motor vehicle collision. Donald Berry and Hired Trucks, Inc., filed two (2) separate Motions to Dismiss, and both Motions were granted by the trial court. Anthony Keyes intends to prove that the trial court erred in granting said Motions.

B. Course of Proceedings and Disposition of the Court Below

This case is an action for damages by Anthony Keyes [hereinafter referred to as "Keyes"] against Donald Berry [herein after referred to as "Berry"] and Hired Trucks, Inc. for injuries that Keyes suffers from as a result of an automobile collision that occurred on August 18, 2003. Prior to the action at hand being filed, Berry and his wife, Margaret D. Berry, filed a lawsuit against Simpson County, Mississippi; Keyes; and four fictitious parties on August 9, 2004. There was a dispute over whether Keyes had ever been properly served. The Return, that was filed in the matter, showed that there was secondary or residence service made on Keyes' mother; however, process was never completed by mailing a copy of the summons and complaint to Keyes, as required by Rule 4(d)(1)(A) of the Mississippi Rules of Civil Procedure. In any event, the County was properly served as a defendant, and the defense attorney, retained by the County, filed an Answer for Simpson County on September 24, 2004. (R. at 10.) Apparently, no answer was filed for Keyes, even though the County was required, by statute, to fully defend Keyes. However, since Keyes was not properly

served, the County may have determined that it did not need to file an answer for him.

On January 11, 2005, Louisiana Commerce & Trade Association Self Insurers' Fund (hereinafter referred to as "Louisiana Commerce") filed a Motion to Intervene and Notice of Statutory Lien. Said Motion was granted on November 3, 2005, and Louisiana Commerce filed its Complaint for Intervention on June 9, 2006.

Keyes, believing that the County and its attorney would defend and answer for him, hired a private attorney to pursue his claim for damages, for his injuries, against Berry and his employer, Hired Trucks, Inc. On August 11, 2006, Keyes' private attorney filed a Counter Complaint even though an answer was never filed on his behalf. In said Complaint, Keyes countersued Berry and named Hired Trucks, Inc. as a third-party defendant, without first obtaining leave of court to add Hired Trucks, Inc. in such Complaint. (R. at 67.) The Counter Complaint, however, was filed in the same Cause before the statute of limitations had run, and both parties were properly served within the time allowed by the Mississippi Rules of Civil Procedure and prior to the running of the statute.

On November 10, 2006, the following motions were filed: (1) Motion to Dismiss, or, In the Alternative, Answer and Affirmative Defenses of Donald Ray Berry, to "Counter Complaint" of Anthony C. Keyes and (2) Motion to Dismiss, or, In the Alternative, Answer and Affirmative Defenses of Hired Trucks, Inc., to "Counter Complaint" of Anthony C. Keyes. (R. at 74.) (R. at 87.) Said motions were filed on the bases that: (1) Keyes was never properly before the Court because he was never served process for the Complaint filed by Donald Ray Berry and Margaret D. Berry, and he did not make an appearance prior to filing his "Counter Complaint"; (2) Keyes never filed an Answer, or otherwise responded, to the Complaint filed by Donald Ray Berry and Margaret D.

Berry; (3) Keyes never moved for and/or received permission from the court to file a counterclaim against Donald Ray Berry; (4) Keyes never moved the court for leave to implead Hired Trucks, Inc.; and (5) Any claims asserted against Berry and/or Hired Trucks, Inc. are barred by Mississippi's Statute of Limitations. Meanwhile, Keyes' attorney, in order to correct the failure to obtain leave of court before adding Hired Trucks, Inc., filed a Motion for Additional Time to Serve Defendants With Process (in order to serve Berry and Hired Trucks, Inc. a **second** time), Motion for Leave to Amend Complaint to Correct and Add a Third Party and Declare the Lawsuit Proper, or, In the Alternative, Motion to Consolidate Lawsuits, which was granted by the trial court by order entered on January 2, 2007. (R. at 104.) (R. at 174.) However, Keyes' attorney never received a copy of said Order nor did any other attorney in the proceeding receive a copy, and none of the parties were aware of the ruling. Therefore, Keyes' attorney never took any further action on the matter.

Then, on February 14, 2007, notwithstanding the fact that Berry is arguing that Keyes was never properly served, Berry and his wife requested and obtained a clerk's entry of default judgment against Keyes. (R. at 108.) (R. at 110.) (R. at 111.) (R. at 113.) Attached to Berry and his wife's Application to the clerk for entry of default was an Affidavit, which stated that Keyes "made a voluntary entry of appearance in this matter, at least, on the 11th day of August, 2006." (R. at 109.) On February 26, 2007, Keyes filed a motion to set aside that entry of default. (R. at 138.) Then, on March 2, 2007, an Answer was filed for Keyes by the defense attorney who was retained to defend the County in the tort claims act matter. (R. at 166.)

Oral arguments on the Appellees' motions to dismiss were heard by Judge Evans on February 9, 2007. See T.R.O. Hrg. Transcr. (Feb. 9, 2007). At that time, Louisiana Commerce joined in said motions. Berry and Hired Trucks, Inc. filed a Memorandum Brief in Support of Donald Ray Berry

and Hired Trucks, Inc.'s Motions to Dismiss on February 23, 2007, and they filed a Supplement to that Brief on March 1, 2007. (R. at 117.) (R. at 160.) Also, Keyes filed a Memorandum of Law In Opposition to Hired Truck's Motion to Dismiss on February 26, 2007, and a Response In Opposition to Donald Berry's Motion to Dismiss on March 7, 2007. (R. at 145.) (R. at 169.)

On April 5, 2007, the Circuit Court Judge of Simpson County, Mississippi, Honorable Robert G. Evans, filed an Order granting the Appellees' Motions to Dismiss *with prejudice*, dismissing Keyes' counterclaim against Berry and his claim against Hired Trucks, Inc. (R. at 199.) It is from said Order that the Appellant, Keyes, perfects his appeal.

C. Statement of the Facts

On August 18, 2003, the Appellant, Keyes, was driving a vehicle, owned by Simpson County, while in the course and scope of his employment with Simpson County. Keyes was traveling southbound on U.S. Highway 49 South when he was suddenly rear ended by a vehicle being driven by the Appellee, Berry. At the time of said accident, Berry was driving a vehicle belonging to Hired Trucks, Inc., while in the course and scope of his employment with such company. Both Keyes and Berry suffered serious injuries as a result of this collision.

SUMMARY OF THE ARGUMENT

The first issue that this Court must decide in this appeal is whether the trial court erred in granting the Appellee, Berry's, Motion to Dismiss on the bases that the Appellant, Keyes, never filed an answer; was allegedly not served process; and had not entered an appearance and/or obtained permission from the trial court prior to filing his Counter Complaint against the Appellee, Donald Berry. The second issue that this Court must decide is whether the trial court erred in granting the Appellee, Hired Trucks, Inc.'s, Motion to Dismiss on the bases that the Appellant, Keyes, was never properly before the trial court and had failed to obtain leave of court prior to adding Hired Trucks, Inc. as a party defendant.

As stated above, the first issue that this Court must decide is whether the trial court erred in granting the Appellee, Berry's, Motion to Dismiss. Berry's primary argument in his motion to dismiss was that Keyes was not properly before the court because he was not served process and had not entered an appearance prior to filing his Counter Complaint against Berry. Berry states that, for this reason, Keyes did not have standing to file a counterclaim against Berry, and therefore, his Counter Complaint against Berry should be dismissed.

Even if Keyes had not been served, he may voluntarily appear and counterclaim against a plaintiff who has sued him. Indeed, a party can always waive service of process. *Schustz v. Buccaneer, Inc.*, 850 So. 2d 209 (Miss. App. 2003).

Whether or not Keyes was served with process, he was named as a defendant in the lawsuit and, thus, had an absolute right under Miss. R. Civ. P. 13 to file a counterclaim against Berry without requesting leave of court, and is in fact required to do so or risks waiving that claim. Keyes' counterclaim, which was his first initial pleading and entry, was filed and served within the statute

of limitations. It is reversible error to dismiss it.

The next issue that this Court must decide is whether the trial court erred in granting the Appellee, Hired Trucks, Inc.'s, Motion to Dismiss. Hired Trucks, Inc.'s primary argument, in its motion to dismiss, was that Keyes failed to obtain leave of court prior to adding Hired Trucks, Inc. to the lawsuit at hand.

Hired Trucks, Inc. completely ignores the fact that this claim is a compulsory counterclaim under Miss. R. Civ. P. 13, and Keyes is required to file without leave of court unless it is an omitted counterclaim under Miss. R. Civ. P. 13(f). However, as Keyes had not filed an answer or any pleading for that matter, at the time of the filing of the counterclaim, it could not be considered an omitted counterclaim. Furthermore, Hired Trucks, Inc. also ignores the fact that it would be considered a necessary party under Miss. R. Civ. P. 19. At the time of the accident in question, Berry worked for Hired Trucks, Inc.; was on duty for Hired Trucks, Inc.; and was within the course and scope of his employment with Hired Trucks, Inc. Also, it is Hired Trucks, Inc.'s insurance company that is defending the lawsuits.

Even if leave of court was required, the trial court should not have dismissed the case just for that reason. In *Brown v. Credit Ctr., Inc.*, 444 So. 2d 358, 364 n. 1 (1983), the Mississippi Supreme Court held that it is appropriate to look at federal law interpreting the federal rules since the Mississippi Rules of Civil Procedure were patterned after the Federal Rules of Civil Procedure. Like Miss. R. Civ. P. 21, Fed. Rule 21 requires a party to file a motion and obtain leave of court to add additional parties. "However, if a plaintiff files an amended complaint adding additional parties without first obtaining leave of the court, **the defect may be corrected and does not, in itself,**

justify dismissal of the action." *Ed Miniat, Inc. v. Globe Life Ins. Group, Inc.*, 805 F.2d 732, 736 (7th Cir. 1986) cert. denied, 482 U.S. 915 (1987) (emphasis added).

Also, the Plaintiff filed a Motion for Additional Time to Serve Defendants with Process, Motion for Leave to Amend Complaint to Correct and Add a Third Party and Declare the Lawsuit Proper, or, In the Alternative, Motion to Consolidate Lawsuits. The trial court granted said motion and entered an Order on January 2, 2007, giving Keyes one hundred twenty days for request relief. However, neither counsel for Keyes nor any other party or attorney received said Order, and they did not know that the trial court had ruled on the motion. Apparently, the judge prepared his own order because it appears that no one submitted him an order. As such, Keyes' counsel never took any further action on the matter. However, when the trial court entered its Order dismissing Keyes' matter with prejudice, Keyes was still well-within the one hundred twenty days to comply with the January 2, 2007 Order. By the time Keyes' attorney found out that the Order was granted, the case had already been dismissed. However, this would have been the second time each of the Appellees, Berry and Hired Trucks, Inc., were served, if Keyes had served them again. The statute would not have run because they were properly served the first time. If it is contended that Keyes did not serve Berry and Hired Trucks, Inc. per the Order, within the new time period allowed, Keyes would argue that it would relate back with regard to Hired Trucks, Inc. since Hired Trucks, Inc. was, in essence, involved in the case anyway and was totally aware of everything and could not say it was prejudiced or surprised in any way. This should relate back, and the statute would still not run.

The Mississippi Supreme Court has declared that the mandate that leave to amend "shall be freely given when justice so requires" is one that must be heeded. *Moeller v. Am. Guar. and Liab. Ins. Co.,* 812 So. 2d 953, 962 (Miss. 2002). Indeed, the outright refusal to grant leave to amend,

without any justifying reason, is an abuse of discretion. *Red Enters., Inc. v. Peashooter, Inc.*, 455 So. 2d 793, 795 (Miss. 1984).

Keyes' failure to obtain leave of court before adding Hired Trucks, Inc. to the instant lawsuit, even assuming that leave was required, does not require dismissal. After filing the counterclaim adding Hired Trucks, Inc., Keyes filed a Motion requesting that he be allowed to add Hired Trucks, Inc. which was granted by the trial court. The court has the authority to allow Hired Trucks, Inc. to be added as a party. Indeed, because Hired Trucks, Inc. was served with the lawsuit prior to the running of the statute of limitations, dismissal of the claims against it would be an abuse of discretion.

This Court should hold that the trial court erred when it granted the Appellee, Berry's, Motion to Dismiss. This Court should also hold that the trial court erred when it granted the Appellee, Hired Trucks, Inc.'s, Motion to Dismiss.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT GRANTED THE APPELLEE, DONALD BERRY'S, MOTION TO DISMISS.

A. Standard of Review

When considering a motion to dismiss, the standard of review is de novo. *Scaggs v. GPCH-GP, Inc.*, 931 So. 2d 1274, 1275 (Miss. 2006). The de novo standard of review is also used "when passing on questions of law." *Carter v. Citigroup Inc.*, 938 So. 2d 809, 817 (Miss. 2006) (quoting *Stephens v. Equitable Life Assurance Society*, 850 So. 2d 78, 82 (Miss. 2003)).

B. Keyes filed and served a proper and timely counterclaim. There is no basis for dismissing it.

Berry filed a Motion to Dismiss Keyes' counterclaim. Keyes filed and served a proper and timely counterclaim. There is no basis for dismissing it. Berry argues that Keyes, although named as a defendant by Berry, was never properly served and, thus, does not have standing to file a counterclaim. Berry has nonetheless obtained a clerk's entry of default and moved the trial court for a judgment of default. Yet Berry still insists that Keyes has absolutely no right to file a counterclaim against him.

1. Contrary to Berry's allegations, Keyes was properly before the trial court. Berry argued in his motion to dismiss that Keyes was never properly before the court because (1) he was never served process in the initial cause of action, whereby the Berrys are the Plaintiffs and Keyes is named as one of the defendants and (2) he had not made an appearance in that cause of action. Throughout the course of this cause of action, there has been an issue of whether Keyes was ever properly served with process. On October 7, 2004, an Amended Summons was filed with the trial court stating that

Dempsey Lawler served Keyes a Summons, Complaint, Interrogatories, Request for Admissions, and Requests for Production of Documents on September 29, 2004, by way of residence service on his mother, Annice Osby. (R. at 13-A.) However, process was never completed by mailing a copy of the summons and complaint to Keyes, as required by Rule 4(d)(1)(A) of the Mississippi Rules of Civil Procedure; or, at least, there is no document proving that Keyes was ever sent the aforementioned documents by First Class Mail. Therefore, there is no evidence that Keyes was ever properly served with process. However, the fact that Keyes was not actually or legally served does not mean that he was never properly before the court.

Even if no service on Keyes was ever attempted, he may voluntarily appear and counterclaim against a plaintiff who has sued him. Indeed, a party can always waive service of process. *Schustz,* 850 So. 2d at 209. "A defendant appearing and filing an answer or otherwise proceeding to defend the case on the merits in some way-such as participating in hearings or discovery - may not subsequently attempt to assert jurisdictional questions based on claims of defects in service of process." *Id.*

In *Hawkspere Shipping Co. Ltd. v. 65 Bundles of Secondary Aluminum*, 178 F. Supp. 2d 486 (D. Md. 2001), a carrier filed a claim for payment and the shippers filed a counterclaim alleging that payment had been made. The court rendered a verdict against the shippers. The shippers argued that they had never been served with process. The court soundly rejected this argument. The shippers had filed a counterclaim and even a third-party claim in the action. Thus, even if they had not been validly served, they "should not be heard to say that the court had the power to decide in its favor but no power to render a decree against it." *Hawkspere*, 178 F. Supp. 2d at 491 (citing *Savas v. Maria Trading Corp.*, 285 F.2d 336 (4th Cir. 1960)).

Berry also argues that Keyes was not properly before the court because he had not made an appearance in the initial cause of action, whereby the Berrys filed a complaint against Keyes and other defendants. Oddly enough, about three months after Berry filed his motion to dismiss arguing that Keyes had never made an appearance in the cause of action, Berry changed his position in order to obtain a default judgment against Keyes. Attached to the Berrys' Application to the clerk for entry of default, which was filed on February 14, 2007, was an Affidavit stating that Keyes "made a voluntary entry of appearance in this matter, at least, on the 11th day of August, 2006." (R. at 109.) August 11, 2006, was the date on which Keyes filed his Counter Complaint, naming Berry as a Counter Defendant and naming Hired Trucks, Inc. as a Defendant. In order to get the case dismissed, Berry aruged that the filing of the counterclaim was not an appearance on Keyes' part. Then, Berry turned around and, in order to obtain a default judgment against Keyes, argued that Keyes made an appearance when he filed his counterclaim. It is absurd that Berry can argue complete opposite positions on the same issue in two different proceedings and win in each proceeding.

Keyes made an appearance in this action the day that he filed his Counter Complaint. Therefore, Keyes was properly before the trial court.

2. The County's failure to defend Keyes should not operate as a hardship to Keyes. Berry also argued in his motion to dismiss that Keyes never filed an Answer, or otherwise responded, to the Complaint filed by Donald Ray Berry and Margaret D. Berry. When the initial Complaint was filed against Simpson County, Mississippi; Keyes; and four other fictitious parties, there was an issue of whether Keyes had been properly served. However, the County was properly served as a defendant, and the defense attorney, retained by the County, filed an Answer for Simpson County

on September 24, 2004. Probably because the lawyer did not deem Keyes properly served, the Answer did not purport to be on behalf of Keyes and no separate answer was filed on behalf of Keyes by the County. The County, however, by statute, is required to defend Keyes. M.C.A. § 11-46-7(3) requires every governmental entity to "be responsible for providing a defense to its employees and for the payment of any judgment in any civil action or the settlement of any claim against an employee for money damages arising out of any act or omission within the course and scope of his employment . . . ." The County, then, is responsible for defending Keyes. The failure of the County of its statutory obligation to defend Keyes should not operate as a hardship to Keyes.

In point of fact, to the extent that Keyes can be sued in this action, it is in his representative capacity only. As the statute states, any judgment against the employee must be paid by the governmental entity. *See, e.g., Cotton v. Paschall,* 782 So. 2d 1215, 1219 (Miss. 2001) (holding that employee could not be personally liable for negligent acts committed in the course and scope of her employment with governmental entity).

Eventually, Keyes, believing that the County and its attorney would defend and answer for him, hired a private attorney to pursue his claim for damages, for his injuries, against Berry and his employer, Hired Trucks, Inc. On August 11, 2006, Keyes' private attorney filed a Counter Complaint, countersuing Berry and naming Hired Trucks, Inc. as a third-party defendant. And while Keyes had hired counsel, that was for the purpose of pursuing a recovery against Donald Berry and Hired Trucks, Inc. It was in that capacity that undersigned counsel appeared for Keyes and filed counterclaims. On March 2, 2007, the defense attorney, who was retained to defend the County in the tort claims act matter, filed an Answer on behalf of Keyes.

Keyes may not have filed an answer immediately; however, Keyes responded to the suit

against him when he filed his Counter Complaint. Also, as stated above, the County's failure to defend Keyes should not operate as a hardship to Keyes.

3. Keyes had standing to file a Counter Complaint against Berry. Berry argued in his motion to dismiss that any counterclaim brought by Keyes is compulsory and should be asserted as specified by Rule 13 of the Mississippi Rules of Civil Procedure. He stated that because Keyes never made an appearance before the trial court, he had no standing to file any counter complaint.

Rule 13(a) of the Mississippi Rules of Civil Procedure states:

> (a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction. . . .

Miss. R. Civ. P. 13(a).

According to the above-mentioned rule, Keyes' counterclaim would be considered compulsory. However, there is nothing in the rule that implies that Keyes did not have standing to file a counter complaint. Keyes made an appearance when he filed his Counter Complaint; therefore, Keyes had standing.

4. Berry also argued in his motion to dismiss that Keyes never moved for and/or received permission from the court to file a counterclaim against Berry. Whether or not Keyes was served with process, he was named as a defendant in the lawsuit and, thus, had an absolute right under Miss. R. Civ. P. 13 to file a counterclaim against Berry without requesting leave of court, and is in fact required to do so or risks waiving that claim. Keyes' counterclaim, which was his first initial pleading and entry, was filed and served within the statute of limitations. It is reversible error to dismiss it.

Also, on December 5, 2006, Keyes filed a Motion for Additional Time to Serve Defendants with Process, Motion for Leave to Amend Complaint to Correct and Add a Third Party and Declare the Lawsuit Proper, or, In the Alternative, Motion to Consolidate Lawsuits. The trial court granted said Motion and entered an Order on January 2, 2007, giving Keyes one hundred twenty days for request relief. However, neither counsel for Keyes nor any other party or attorney ever received said Order, and they did not know that the trial court had ruled on the Motion. Apparently, the judge prepared his own order because it appears no one submitted him an order. As such, Keyes' counsel never took any further action on the matter. When the trial court entered its Order Dismissing Keyes' matter with prejudice, Keyes was still well-within the one hundred twenty days to comply with the January 2, 2007 Order. By the time Keyes' attorney found out that the Order was granted, the case was already dismissed. However, this would have been the second time each of the Appellees, Berry and Hired Trucks, Inc., were served, if Keyes had served them again. The statute would not have run because they were properly served the first time.

Due to the fact that Judge Evans entered an Order granting the above-mentioned Motion, he should have never granted Berry's Motion to Dismiss, as the time period for Keyes to make his amendments had not passed. Therefore, Keyes should still be allowed to amend his Complaint.

5. Finally, Berry argued in his motion to dismiss that three years has passed since the automobile accident, which is the subject of the initial litigation, occurred. He claims that Keyes is, therefore, barred by Mississippi's statute of limitations to institute any cause of action against Berry. On the date that Keyes' counterclaim was filed, August 11, 2006, the statute of limitations had not run against Berry and Berry was served on August 30, 2006 - well within the 120 days allowed for

service by Miss. R. Civ. P. 4 and, thus, before the statute of limitations had run.[1] (R. at 193.) Due to the fact that Keyes timely filed his Counter Complaint against Berry, the statute of limitations in this matter should be considered a non-issue.

The Mississippi Supreme Court has made it clear that dismissal should only be used as a last resort. *Beck v. Sapet,* 937 So. 2d 945, 949 (Miss. 2006); *Clark v. Miss. Power Co.,* 372 So. 2d 1077, 1080 (Miss. 1979). Whether or not Keyes was served with process, he was named as a defendant in the lawsuit and, thus, had an absolute right under Miss. R. Civ. P. 13 to file a counterclaim against Berry without requesting leave of court, and is in fact required to do so or risks waiving that claim. Keyes' counterclaim, which was his first initial pleading and entry, was filed and served within the statute of limitations. It is reversible error to dismiss it.

II. THE TRIAL COURT ERRED WHEN IT GRANTED THE APPELLEE, HIRED TRUCKS, INC.'S, MOTION TO DISMISS.

A. Failure to obtain leave of court, prior to bringing in an additional party, even if it was ever required in the first place, does not require dismissal of the claim against the additional party.

1. Keyes was properly before the trial court. Like Berry, Hired Trucks, Inc. also argued in its motion to dismiss that Keyes was never properly before the court because he was never served and he had not made an appearance in the cause of action. However, as stated above, even if no service on Keyes was ever attempted, he may voluntarily appear and counterclaim against a plaintiff who has sued him. Indeed, a party can always waive service of process. *Schustz,* 850 So. 2d at 209.

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[1]The 120 day period for service tolls the statute of limitations. *Heard v. Remy,* 937 So. 2d 939, 942 (Miss. 2006).

Keyes made an appearance in this action the day that he filed his Counter Complaint. Therefore, Keyes was properly before the trial court.

2. Failure to obtain leave of court to implead a third-party defendant, alone, is not enough to justify dismissal. Hired Trucks, Inc. argued in its motion to dismiss that, even if Keyes was properly before the court, he never moved the court for leave to implead Hired Trucks, Inc. Hired Trucks, Inc. argued that Keyes' Counter Complaint against it is not a Counter Complaint, but, rather, an attempt to improperly assert an actual third-party claim against it.

Hired Trucks, Inc. relied on the language of Miss. R. Civ. P. 14 in citing Plaintiff's failure to obtain leave of court to add it as a party. Specifically it cites the following:

> (a) After commencement of the action and upon being so authorized by the court in which the action is pending on motion and for good cause shown, a defending party may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. . . .
> (b) When Plaintiff May Bring in Third Party. When a counter-claim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

However, Hired Trucks, Inc. completely ignores the fact that this claim is a compulsory counterclaim under Miss. R. Civ. P. 13, and Keyes is required to file without leave of Court unless it is an omitted counterclaim under Miss. R. Civ. P. 13(f). However, as Keyes had not filed an answer or any pleading for that matter, at the time of the filing of the counterclaim, it could not be considered an omitted counterclaim. Furthermore, Hired Trucks, Inc. also ignores the fact that it would be considered a necessary party under M.R.C.P 19. At the time of the accident in question, Berry worked for Hired Trucks, Inc.; was on duty for Hired Trucks, Inc.; and was within the course and scope of his employment with Hired Trucks, Inc. Also, it is Hired Trucks, Inc.'s insurance company that is defending the lawsuits.

The Mississippi Rules of Civil Procedure are modeled on the Federal Rules. In *Brown*, the Mississippi Supreme Court held that it is appropriate to look at federal law interpreting the federal rules since the Mississippi Rules of Civil Procedure were patterned after the Federal Rules of Civil Procedure. *Brown*, 444 So. 2d at 364 n. 1. *See also Bourn v. Tomlinson Interest, Inc.*, 456 So. 2d 747, 749 (Miss. 1984).

Like Miss. R. Civ. P. 21, Fed. Rule 21 requires a party to file a motion and obtain leave of court to add additional parties. "However, if a plaintiff files an amended complaint adding additional parties without first obtaining leave of the court, **the defect may be corrected and does not, in itself, justify dismissal of the action.**" *Ed Miniat, Inc.*, 805 F.2d at 736. *See also* 7 C. Wright & A. Miller & M. Kane, Federal Practice and Procedure § 1688 at 475 (1986); *Orloff v. Hayes*, 7 F.R.D. 75 (S.D.N.Y 1946); and *Tex. Energy Reserve Corp. v. Dept. of Energy*, 535 F. Supp. 615, 620 (D. Del. 1982).

Rule 15 contemplates that leave to amend "shall be freely given," even where new claims or parties are added. *See Foman v. Davis*, 371 U.S. 178 (1962). The rules themselves provide that they are to be construed "to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. As the United States Supreme Court has declared,

> In the absence of any apparent or declared reason-such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.-the leave sought should, as the rules require, be 'freely given'.

Foman, 371 U.S. at 182.

The Mississippi Supreme Court has declared that the mandate that leave to amend "shall be

freely given when justice so requires" is one that must be heeded. "[I]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Moeller,* 812 So. 2d at 962. Indeed, the outright refusal to grant leave to amend, without any justifying reason, is an abuse of discretion. *Red Enters., Inc.,* 455 So. 2d at 795.

Hired Trucks, Inc. also cites *Salts v. Gulf Nat. Life Ins. Co.*, 872 So. 2d 667 (Miss. 2004), as authority for dismissing Keyes' claims against it. In that case, the court dismissed the plaintiff's lawsuits after four years of procedure wrangling culminated by the plaintiffs' failure to comply with discovery orders and refusal to show up for scheduled depositions. *Id.* at 671. Hired Trucks, Inc. contends that *Salts* means that dismissal is appropriate whenever a party fails to adhere to the Rules of Civil Procedure. Nothing could be further from the truth. The Mississippi Supreme Court has made it clear that dismissal should only be used as a last resort. *Beck,* 937 So. 2d at 949; *Clark,* 372 So. 2d at 1080. Dismissal is certainly not warranted for a mere mistake that can be corrected.

Also, on December 5, 2006, Keyes filed a Motion for Additional Time to Serve Defendants with Process, Motion for Leave to Amend Complaint to Correct and Add a Third Party and Declare the Lawsuit Proper, or, In the Alternative, Motion to Consolidate Lawsuits. The trial court granted said Motion and entered an Order on January 2, 2007, giving Keyes one hundred twenty days for request relief. However, neither counsel for Keyes nor any other party or attorney ever received said Order, and they did not know that the trial court had ruled on the Motion. Apparently, the judge prepared his own order because it appears no one submitted him an order. As such, Keyes' counsel never took any further action on the matter. When the trial court entered its Order Dismissing Keyes' matter with prejudice, Keyes was still well-within the one hundred twenty days to comply

with the January 2, 2007 Order. By the time Keyes' attorney found out that the Order was granted, the case had already been dismissed. However, this would have been the second time each of the Appellees, Berry and Hired Trucks, Inc., were served, if Keyes had served them again. The statute would not have run because they were properly served the first time. If it is contended that Keyes did not serve Berry and Hired Trucks, Inc. per the Order, within the new time period allowed, Keyes would argue that it would relate back with regard to Hired Trucks, Inc. since Hired Trucks, Inc. was, in essence, involved in the case anyway and was totally aware of everything and could not say it was prejudiced or surprised in any way. This should relate back, the statute would still not have run.

Due to the fact that Judge Evans entered an Order granting the above-mentioned Motion, he should have never granted Hired Trucks, Inc.'s Motion to Dismiss, as the time period for Keyes to make his amendments had not passed. Therefore, Keyes should still be allowed to amend his Complaint.

3. Like Berry, Hired Trucks, Inc. also argued in its motion to dismiss that three years has passed since the automobile accident, which is the subject of the initial litigation, occurred. Hired Trucks, Inc. claims that Keyes is, therefore, barred by Mississippi's statute of limitations to institute any cause of action against it. On the date that Keyes' counterclaim was filed, August 11, 2006, the statute of limitations had not run against Hired Trucks, Inc. and Hired Trucks, Inc. was served on September 8, 2006 - well within the 120 days allowed for service by Miss. R. Civ. P. 4 and, thus, before the statute of limitations had run. (R. at 191.) Had Keyes' sought leave of court before adding Hired Trucks, Inc. as a party, there would have been no reason to justify this Court's denying the amendment. Hired Trucks has not identified or even argued that it has suffered any prejudice as a result of being added to the lawsuit at the time Keyes' Counter Complaint was filed. In fact,

both Berry and Hired Trucks, Inc. are now represented by the same counsel. And because Hired Trucks, Inc.'s liability is predicated merely on the theory of *respondeat superior*, the addition of Hired Trucks, Inc. should have no impact whatsoever on discovery or trial.[2] There is no justification, then, for not allowing Keyes to test the merits of his case against Hired Trucks, Inc. Due to the fact that Keyes timely filed his Counter Complaint, the statute of limitations in this matter should be considered a non-issue.

Further responding to the Motion to Dismiss filed by Hired Trucks, Inc. on the ground that Keyes did not get leave of court to file his Counter Complaint against it, Keyes would show that the suit against Hired Trucks, Inc. is a perfectly good suit and it was filed within the statute of limitations and was properly served within the time required by law. Since, under the law, the court would have been required to give Keyes leave of court to file this suit and since Hired Trucks, Inc. was the company actually involved in the wreck, it was so interwoven that if Keyes had just filed the same Complaint that he filed and if he had left off the word "Counter" on his Complaint and had just given it a separate cause number, then nothing would have been wrong with the suit, especially, since he had not been served process. If he had filed the Complaint in a separate cause number, then the court would have definitely consolidated the cases and Hired Trucks, Inc. would have been in the exact same place and tried in this same cause number. Therefore, Keyes' position is that he has properly sued Hired Trucks, Inc. and he has properly served Hired Trucks, Inc. within the time required by

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[2]*Respondeat superior* imposes fault upon an innocent employer for the negligence of its employees regardless of whether the employer has done anything wrong. W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 69, at 499 (5th ed. 1984). Adding Hired Trucks as an additional party, then, should entail no change in the conduct of discovery or trial since the sole question, vis-a-vis liability of Berry and Hired Trucks, will still focus solely on the conduct of Berry.

law and that the only thing that he did wrong was that he put the suit in this cause number as opposed to having filed it in a separate cause number. Hired Trucks, Inc. is exactly where it would be if the case was filed separately and was consolidated. Therefore, there could be no prejudice in any way to Hired Trucks, Inc. by this claim having been filed in this cause number. The Claim against Hired Trucks, Inc. was not a compulsory counterclaim because Hired Trucks, Inc. had not sued Keyes. Also, since Keyes was not served, he should not be required to get leave to file the suit that he filed against Hired Trucks, Inc. Keyes certainly could have filed the same complaint that he filed and gave it a separate cause number, and no one could have said that he did anything wrong. He would not have been required to obtain leave of court to file it in the same court but with a separate cause number. Since there was no prejudice in any way to Hired Trucks, Inc. and since Hired Trucks, Inc. was sued just like any other normal suit would have been filed and since it is exactly where it would have been if the suit had been filed with a different cause number, it was reversible error for the court to have dismissed Keyes' case against Hired Trucks, Inc.

Keyes' failure to obtain leave of court before adding Hired Trucks, Inc. to the instant lawsuit, even assuming that leave was required, does not require dismissal of the claim. After filing the counterclaim adding Hired Trucks, Inc., Keyes filed a Motion requesting that he be allowed to add Hired Trucks, Inc. which was granted by the trial court. The Court has the authority to allow Hired Trucks, Inc. to be added as a party. Indeed, because Hired Trucks, Inc. was served with the lawsuit prior to the running of the statute of limitations, dismissal of the claims against it would be an abuse of discretion.

CONCLUSION

Appellant would show that the trial court abused its discretion in dismissing the claims of Anthony Keyes with prejudice and that as a result, he will suffer irreparable injury if he cannot proceed against the parties for compensation for his injuries. The trial court's grant of the Motions to Dismiss was error; and the case should be reversed and remanded for trial.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I, Don H. Evans, attorney for Appellant, do hereby certify that I have served, via U.S. Mail, postage prepaid, a copy of the foregoing Appellant's Brief to the following:

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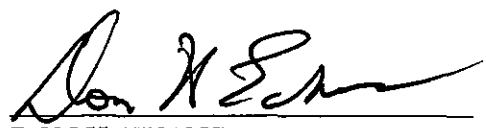

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