IN THE SUPREME COURT OF MISSISSIPPI

MORRIS E. COURTNEY,	*	
Plaintiff/Appellant,	*	
vs.	*	**NO. 2007-CA-01440**
WALLACE B. MCCLUGGAGE,	*	
Defendant/Appellee.	*	

On Appeal From Green County Circuit Court
Case No. 2005-04-041(2)

REPLY BRIEF OF APPELLANT,
Morris E. Courtney

ORAL ARGUMENT NOT REQUESTED

Stewart L. Howard[redacted]
STEWART HOWARD, P.C.
Post Office Box 1903
Mobile, Alabama 36633
Ph: (251) 431-9364
Fx: (251) 431-9368
Stewart@slhpc.com

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MORRIS E. COURTNEY	**PLAINTIFF/APPELLANT**
vs.	**Docket No. 2007-CA-01440**
WALLACE B. MCCLUGGAGE	**DEFENDANT/APPELLEE**

CERTIFICATE OF FILING

Pursuant to the Mississippi Rules of Appellate Procedure 25(a), I, Stewart L. Howard, attorney for the Appellant, MORRIS E. COURTNEY, hereby certify that I have placed the original and three copies of the REPLY BRIEF OF APPELLANT, Morris E. Courtney, including the Appendix of the Reply Brief of Appellant, along with a copy of the Reply Brief on an electronic disk and pursuant to Rule 30(b), 4 bound copies of the "Appellant's Record of Excerpts," by the United States Postal Service, fee prepaid, to:

Ms. Betty Stephton
Supreme Court Clerk
Post Office Box 249
Jackson, Mississippi 39205-0249

Myles E. Sharp, Esq.
Post Office Box 6669
D'Iberville, Mississippi 39564

Done this 13 day of March , 2008.

Respectfully submitted,

By: 

STEWART L. HOWARD (9730)
Attorney for Plaintiff/Appellant, Morris E. Courtney

OF COUNSEL:
Stewart Howard, P.C.
Post Office Box 1903
Mobile, Alabama 36633
Ph: 251.431.9364
Fx: 251.431.9368

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Mobile, Alabama 36633
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Stewart@slhpc.com

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STATEMENT OF THE CASE

Plaintiff/Appellant is Morris E. Courtney. He received injuries in a wreck. Defendant/Appellee is Wallace B. McCluggage.

In reply to Defendant's Statement of the Case, Defendant's attorney states that Plaintiff's counsel failed to appear at a hearing on a Motion to Dismiss filed by the Defendant. Defense counsel raises this four times in his brief, with the implication that Plaintiff's counsel chose not to appear at one of the hearings.

Instead, undersigned Plaintiff's counsel did go to the hearing but arrived minutes after the hearing had concluded and the Judge had left, due to a calendaring mistake caused in part by Defendant. Defendant had sought pre-approval with the undersigned's office to have the hearing at 2:00 p.m. which was calendared. Later however, Defendant's effort with the Court resulted in a 1:00 p.m. order, and the discrepancy was not noted by staff confirming the calendar. Defendant's office never verified the new time. Plaintiff arrived for a 2:00 hearing. Suggestions of a "failure to appear" are misleading, especially as Defense counsel was aware of the circumstances.

After arriving at the hearing, Plaintiff's counsel met with the Judge's assistant, confirmed with the Court the reasons for the delay, sent a letter the same day to the Judge confirming the mistake, apologized, and prepared and mailed/faxed to the Court the arguments in writing in reply to the Defendant's Motion to Dismiss. (See R. 112 and the fax notation of March 12, 2007). The Court did not rule on the Motion that date and only after

the filing of the reply by the Plaintiff.

The undersigned did not realize the calendar mistake until arriving at Court. Had Defense counsel contacted the undersigned who was available by cell telephone or waited a few minutes before presenting arguments to the Court without the opposing attorney present, the confusion would have been avoided. However, missing the oral argument of that date has no bearing on the merits of this appeal.

Additionally, Plaintiff would note in reply to Defendant's statement to the contrary, that a Motion for Leave to File an Amended Complaint was also filed with the Court on the same day, March 12, 2007 (notice was received and filed by the Clerk's office on March 13, 2007). (See R. 109-111). The Motion for Leave to File an Amended Complaint requested the Court to treat the amended complaint as relating back to the original complaint, or alternatively, to allow it as a re-filed complaint since it contained a new summons. (See R. 115 at ¶ 6). As provided herein however, a Motion for Leave has no bearing on the merits of this case.

SUMMARY OF THE ARGUMENT

When the first complaint was filed, the Defendant originally waived service and in personam jurisdiction in this case by filing a general notice of appearance and pleadings directed at getting the damage order of the default judgment set aside, by not preserving those defenses as required by M.R.C.P. 12. Raising the lack of service defense later was too late. The trial court entered an order setting the default aside for lack of service of the complaint. No appeal was filed at that time, as the order of the trial court was not an appealable order pursuant to M.R.C.P. 54. Service was clearly waived, and the resulting arguments over whether the Defendant was subsequently served within the statute of limitations by the second complaint should be moot.

But to further reply, a M.R.C.P. 4(h) defense is waived if not preserved in the original pleadings filed after service of the complaint, pursuant to M.R.C.P. 12. Defendant did not raise a M.R.C.P 4(h) defense in his initial pleading after service of the second complaint, and therefore that defense was waived, and the second complaint is thus timely.

Assuming for argument that M.R.C.P. 4(h) defense was not waived, the Plaintiff has met its burden of proof to demonstrate that either the new complaint resurrected the 120 day window, or that it related back, and tolled the statute. Alternatively, Plaintiff's pleadings sufficiently requested additional time. If the Court should disagree, the Plaintiff has at least met the burden of proof to show good cause why service of the complaint in this instance should be allowed. A decision to grant or deny this request is one reviewed by this Court de

novo. Triple C Transp. v. Dickens, 870 So.2d 1195 (2004).

ARGUMENT OF LAW

I. YOU CAN COLLATERALLY ATTACK A VOID JUDGMENT AND WAIVE SERVICE, IF YOU DO NOT RESERVE LACK OF SERVICE AS A DEFENSE. MOREOVER, DEFENDANT'S FIRST TWO MOTIONS WERE NOT COLLATERAL ATTACKS ON THE JUDGMENT, BUT RATHER ATTACKS ON THE JUDGMENT DAMAGES AMOUNT. BOTH FAILED TO RESERVE THE DEFENSE OF IMPROPER SERVICE. AS SUCH, THE ORIGINAL COMPLAINT WAS VALID, AND THE ISSUE OF GOOD CAUSE AND TIMING OF THE SECOND COMPLAINT SHOULD BE MOOT.

The trial court entered a default judgment after Defendant failed to answer the first complaint. Defendant's first pleading after the trial court entered a default judgment was a Motion for Relief from Judgment complaining that the damage award must be set aside because a hearing was not scheduled on the damages. (R. 25). A default judgment of liability and an award of damages, are different. The entry of default was entered by the Clerk of the Court (R. 21). See Journey v. Long, 585 So.2d 1268, 1272 (Miss. 1991) (noting that entry of default and order of judgment are separate matters). Nevertheless, the Defendant did not reserve lack of service as a defense. The second pleading of Defendant after the default was a Supplemental Motion for Relief from Judgment, requesting discovery and a jury trial, on the issue of damages only. (R.32). It also did not raise the lack of service defense. Neither of the first two pleadings attacked the judgment for lack of service or jurisdiction. The certified mail return with the mistaken omission of "restricted delivery" was at all times available in the court file for Defendant's review, and his tardiness in failing to raise it and the failure of service initially, waives service and jurisdiction. The failure of service defense

was first raised in the third pleading directed at attacking the order of the trial court. This results in a waiver of service and the trial court had jurisdiction over the Defendant at that point. Terrell v. The Mississippi Bar, 635 So.2d 1377 (1994). Therefore, the first complaint obtained jurisdiction of the Defendant, and there is no dispute it was filed and served within the statute of limitations.

Even if the two initial pleadings were a collateral attack on a judgment, you can still waive service if not preserved. Id. When one files a notice of appearance in a case and does not assert improper service, service is waived. M.R.C.P. 12(h). M.R.C.P. 12(h) provides that a defense of lack of personal jurisdiction may be waived through the filing of a motion in which the defense of personal jurisdiction (service) is not raised. Hamm v. Hall, 693 So.2d 906 (1997 Miss.). There is no exception for collateral attacks on judgment. What the law does allow you to do is to collaterally attack a judgment, so long as you specifically preserve a non waiver of service in your motion. The defendant in Terrell did exactly as Defendant in this case. He filed two pleadings directed at attacking a default judgment, but did not raise the defense of jurisdiction. On the third pleading, the issue of failure of service was raised for the first time. The Court correctly held that service of the complaint and jurisdiction, had been waived. Id. ("Terrel waived these defenses. . . ."). *So did Defendant in the case at bar.*

Defendant argues that a motion filed after "the entry of a judgment complained of" cannot serve to give validity to the judgment if invalid for the want of proper process, citing Home Insurance Co. v. Watts, 93 So.2d 848,850 (Miss. 1957). I agree, but that is not the

issue. Counsel for the Defendant confuses the issues before the Court. The issue is not one of giving "validity to the judgment." The issue is one of waiver of service. Regardless of what motion you file, and whether it results in giving validity to the judgment or not, you still can waive service of process if that defense is not reserved. Unlike in Home Insurance Co. v. Watts, the Plaintiff here is not arguing or has it ever, that Defendant's collateral attack on the default judgment made the judgment invalid or void. Plaintiff only argues that failing to reserve the affirmative defense of service by attacking the damages in his first two pleadings, waived service.

Since the original service was good, the issues over the second Complaint are really moot, and this matter should be remanded for trial.

II. THE ORDER OF THE COURT SETTING ASIDE THE DEFAULT JUDGMENT OF THE PLAINTIFF WAS NOT AN APPEALABLE FINAL ORDER. IT WAS NOT A "JUDGMENT"AND IS ONLY NOW APPEALABLE.

The Court entered an "Order Granting Defendant's Motion to Set Aside Entry of Default." (R. 56). It was not a judgment. If it was, it was not final and did not resolve all of the issues in the case. As such, it was a non appealable order. Williams v. Delta Regional Medical Center, 740 So.2d 284 (1999). The order of the Trial Court has no M.R.C.P. 54 language for it to be considered a final order. (R. 56-57).

III. DEFENDANT WAIVED ANY M.R.C.P. 4(H) DEFENSE BY NOT PLEADING IT IN THE FIRST APPEARANCE HE FILED AFTER SERVICE OF THE SECOND COMPLAINT WAS SERVED ON HIM.

After the second Complaint was served on the Defendant on April 11, 2006,

Defendant attorney filed a Motion for Enlargement of Time to File an Answer asserting that he had been retained as counsel for Defendant and needed more time to communicate with him before filing an answer. (R. 60). Only later did the Defendant file a responsive pleading seeking to dismiss the Complaint pursuant to M.R.C.P 4(h).

A party who appears and fails to raise a M.R.C.P 4(h) objection waives that defense. See Burleson v. Lathem, 968 So.2d 930 (2007).

IV. M.R.C.P. (4)(H) DOES NOT ALWAYS REQUIRE THE FILING OF A MOTION FOR EXTENSION WHEN GOOD CAUSE EXISTS. EVEN IF IT DID, THE RELIEF REQUESTED BY THE PLAINTIFF IN THE REPLY TO DEFENDANT'S MOTION TO DISMISS, AND IN THE MOTION FOR LEAVE TO FILE AMENDED COMPLAINT, SATISFIES THIS REQUIREMENT.

Defendant argues repeatedly through his Appellee Brief that a motion requesting additional time has not been requested. Appellee's contentions rely on absence of a pleading entitled "Motion for Additional Time" specifically addressed to requesting additional time. ("Plaintiff's assertion that the Trial Court was in error for finding it never moved for an extension of time was unconscionable.") (Appellee's Brief, p.7). Plaintiff admits that a motion specifically requesting this relief was not filed since Plaintiff assumed it had met the statute of limitations deadline by filing the Amended Complaint [new complaint], that it would relate back to the filing of the original Complaint (all arguments presented at the Trial Court), and that the original complaint had at least allowed Plaintiff to show good cause. However, the relief was requested within Plaintiff's pleadings.

Defendant's arguments are ones of semantics. While there may not be a pleading

titled as the Defendant would have it, the Plaintiff's reply brief in opposition to the Motion to Dismiss the Complaint, requests additional time, albeit not specifically a Motion with that title. (R. 112). Moreover, the Leave to File Amended Complaint requests relief of the Court to treat the Plaintiff's Amended Complaint as a properly filed complaint (which essentially requests that the time be extended to accommodate the Complaint). (R. 109). Also, a prior brief of Plaintiff raising all of the same relation back and good cause arguments was filed on June 28, 2006 by Plaintiff. (R. 74).

All pleadings shall be construed to do substantial justice to the parties. Brown v. Winn Dixie Montgomery, Inc., 669 So.2d 92 (1996)(court allowed a plaintiff to serve a defendant after the Statute of Limitations had ran under an amended complaint). See also, M.R.C.P. 8(f). The Court can note from the totality of the pleadings of the Defendant that all available relief was being sought from the Court seeking to advance the Plaintiff's Complaint. A dismissal in light of the totality of the circumstances and pleadings is a deprivation or basic rights of the Plaintiff to a trial for damages incurred due to no fault of his own. "Unconscionable" does not describe the efforts, relief, or arguments presented by the Plaintiff.

V. THE NEW COMPLAINT MEETS THE REQUIREMENTS FOR A RE-FILED COMPLAINT.

Defendant admits in his time line that the "Amended Complaint" of the Plaintiff was filed and served within the statute of limitations. While titled "Amended Complaint", it made no new claims and was a re-filing of the first Complaint. It was identical to the first

Complaint, except containing new service instructions (R. 59) with the son's new address at the jail and was accompanied with a new summons (See entry of 4-6-06 of R. 5). Both father and son were named "Wallace McCluggage." However, the son has a middle initial "B" while the father does not. (R. 44 - Affidavit of Mrs. McCluggage).

A. Leave of Court is Not Required to Amend a Complaint Until After a Responsive Pleading is Filed.

While leave of Court must be filed to amend a complaint, an amended complaint can be filed at any time without leave of Court before service on the Defendant or at any time before a responsive pleading is filed. M.R.C.P. 15(a). Since the Court found Defendant had not been served with the first complaint, no leave of Court was required.

As the first complaint had been ruled not to effect service on the Defendant, the subsequent complaint is not an amended complaint, but should under the circumstances, be considered a new complaint. Mississippi law under special circumstances, does allow an amended complaint to serve as a new complaint. See Wilner v. White, 929 So.2d 315 (2006). As this new complaint meets all of the requirements discussed in Wilner (there is no splitting of a cause of action; it was filed during the statute; there are no newly named parties; there is no violation of the requirement for leave of Court to amend), it should be treated as a new complaint, starting again the running of the 120 day period.

B. Alternatively, If an Amended Complaint, it Should Be Allowed to Relate Back.

At a minimum, the Defendant's family, insurance agent, and eventually attorney, had

notice of the pending matter, and the Amended Complaint should be allowed to relate back, pursuant to M.R.C.P. 15. See Brown v. Winn Dixie Montgomery, Inc, 669 So.2d 92 (1996), wherein the court allowed a plaintiff to serve a defendant after the Statute of Limitations had expired, under an amended complaint which related back to the original transaction, wherein the newly named defendant was represented by the same attorney that defended the original mistakenly named defendant. Wilner discusses when an amended complaint should be allowed to relate back:

> When an amended complaint changes or adds a party, those requirements are: (1) the claim in the amended complaint must arise out of the same conduct, transaction, or occurrence as that set forth in the original complaint; (2) the newly-named defendant must have received notice of the action within the period provided by Miss. R. Civ. P. 4(h) such that the party will not be prejudiced; and, (3) the newly-named defendant must have or should have known that an action would be brought against him but for a mistake existing [**21] as to the parties' identities. Miss. R. Civ. P. 15(c). The first "same conduct, transaction, or occurrence" requirement is clearly met in this case, as both complaints refer to the January 27, 1997, laparoscopy. This is not disputed. The second requirement is also met here. The question under Miss. R. Civ. P. 15(c)(1), is whether White, within 120 days after the filing of the complaint, had received sufficient notice so that he would not be prejudiced in maintaining his defense on the merits. There is no doubt that White knew enough within 120 days of the original complaint that he would have suffered no prejudice to be named a party to the action. White's name was mentioned in the body of the original complaint, and White was deposed months before trial. White was well aware of the ongoing lawsuit and his involvement in the actions leading up to it. We must therefore determine if the other requirement is met; that is, whether, but for a mistake on Wilner's part, White knew, or should have known, that an action would be brought against him. Curry, 832 So.2d at 513; Brown v. Winn-Dixie Montgomery, 669 So.2d 92, 94 (Miss. 1996). If the answer [**22] is in the affirmative, the amended complaint will relate back to the date of the original complaint, and the suit will not be time-barred by the statute of limitations.

Id. at 323. While a new party was not added, a new party with a different address was added by the new Complaint. The Plaintiff had no knowledge that there were two persons named "Wallace McCluggage." Further, Defendant's mother took the original served complaint

to the insurance agent of her son on August 19, 2005 (R. 44); Defendant was ultimately served within the 120 day period; there has been no prejudice to Defendant; he knew he was the correct one to have been served as he was the only one involved in the accident at issue and his insurance company had been negotiating the cause of the accident for a significant period of time; and the only reason he was not initially served was due to the interference by his father who had the same name, but testified via affidavit he knew the certified letter was not for him, since it was addressed to "Wallace B" instead of just "Wallace." (R. 54). He further exacerbated the problem by not telling anyone he had received it. He admitted he signed for it on May 5, 2005, and his wife inadvertently discovered it on August 19, 2005, over three months later. (R. 44 and 54).

Mississippi Rule of Civil Procedure 15 also states that when an amendment is necessary, is should be allowed freely when justice requires it. In this case, justice requires it. In Brown as cited above, the Court noted in a case where the complaint was amended and filed beyond the statute of limitations, and beyond the 120 day deadline, that all pleadings shall be construed to do substantial justice to the parties. If the notice requirement is met within the M.R.C.P. 4(h), a Complaint may be amended at any time to correct a formal defect such as a misnomer or misidentification. Nhut Van Nguyen v. Miss. Valley Gas Company, 859 So.2d 971 (2002). Since the Defendant in this case, apparently knew of the pending complaint within the M.R.C.P. 4(h), he cannot defeat the complaint by M.R.C.P. 4(h) argument, where a judgment had to be set aside and service began all over.

VI. GOOD CAUSE HAS BEEN DEMONSTRATED IN THIS CASE IF THE COURT FINDS THAT SERVICE WAS NOT PERFECTED WITHIN THE 120 DAYS.

These reasons combined to cause and further the delay:

1. Admittedly, the mistake to mark the certified mail as restricted delivery was an oversight and clerical error. This mistake is not the only reason that caused the original complaint not get served. However, There is only one Wallace "B." McCluggage which was on the certified mail, and Plaintiff could reasonably assume that someone who did not have that name would not sign for it. (R. 20).

2. Defendant and his father had the same name;

3. The mistake was perpetuated by the Defendant's father who admitted he knew the mail was for his son. Not only did he wrongfully sign for the mail, he then did not tell anyone, leaving it for his wife to find over three months later.

4. Plaintiff filed an Amended Complaint [new complaint], with a new summons to correct this mistake within the applicable time and thought it consistent with Mississippi law;

5. The Defendant lived out of state;

6. The Defendant is incarcerated;

7. Plaintiff had to rely on the sheriff of the county and the detention center in South Carolina, to determine how, and then, get Defendant re-served. (R. 77 - ¶14).

8. Plaintiff immediately undertook to get service after the Court's order setting aside service on February 14, 2006;

9. The Trial Court entered the Order of February 14, 2006, some four (4) months after the Defendant filed a Motion to Set aside the Default (which delay has now prejudiced Plaintiff);

10. Defendant's carrier knew all along that Plaintiff was filing the complaint; a copy was sent to the adjuster. (R. 27, 30).

11. All the pleadings on file in this case confirm that the Plaintiff had not been dilatory in seeking to get the Defendant served;

12. Defendant was served within the 120 day period;

13. Defendant was served only 56 days after the Order setting aside the judgment.

14. Defendant originally waived jurisdiction when the first complaint was filed.

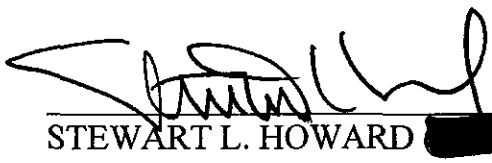
So, while there may have been a mistake on the certified mail initially that could be considered inexcusable inadvertence, the resulting string of events that satisfy the good cause requirement, perpetuated the delay in service.

Holmes v. Coast Transit Authority, 815 So.2d 1183, 1186 (2002), (a case the Defendant cites), clearly provides that good cause is likely to be found when the plaintiff's failure to complete service in timely fashion is a result of the conduct of a third person; where the defendant has evaded service; where the defendant has engaged in misleading conduct; where the plaintiff has been diligent; or where there are mitigating circumstances. The Court in Spurgeon v. Egger, No. 2005-CA-01952-COA (Miss. COA Dec. 11, 2007) overruled the trial court and found good cause where a process server (3rd party) had failed to correctly serve the defendant, there was no evidence of lack of diligence by plaintiff, and the statute of limitations had actually expired. Kingston v. Splash Pools of Mississippi, 956 So.2d 1062 (Miss. COA 2007) held that good cause will likely be found when failure to serve a defendant in time is due to a third party [Wallace, the father]; defendant has evaded service [no evidence, but his carrier knew at all times, and it is unlikely that during its investigation of this accident that Defendant did not know he had been sued, or had ever seen the

complaint; what is missing from Mr. And Mrs. McCluggages' affidavits is no mention that they did or did not tell their son about the complaint; they go through great detail about the events, but don't broach that topic]; or Plaintiff acted diligently [which is undisputed].

Defendant relies on the one event of a restricted delivery certified mail mistake, ignoring all of the other reasons that caused any late service. Based on the affidavit of Mr. McCluggage, it appears he would have signed it anyway, and having the same name as his son, there is no way that the Defendant can state with certainty that the father would not have been allowed to sign for the complaint anyway. In other words, the failure to mark "restricted delivery" may not have made any difference.

Respectfully submitted,

By: 
STEWART L. HOWARD [redacted]
Attorney for Plaintiff, Morris E. Courtney

OF COUNSEL:
Stewart Howard, P.C.
Post Office Box 1903
Mobile, Alabama 36633
Ph: 251.431.6394

CERTIFICATE OF SERVICE

I do certify that I have on the 13 day of March, 2008, served a copy upon the following, by mailing same by United States mail, properly addressed, and first class postage prepaid:

Myles E. Sharp, Esq.
1635-D Popps Ferry Road
D'Iberville, Mississippi 39540

Honorable Judge Kathy King Jackson
Circuit Court of Green County
Post Office Box 998
Pasgagoula, Mississippi 39568-0998

OF COUNSEL

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DOCKET NO. 2007-CA-01440

MORRIS E. COURTNEY — PLAINTIFF/APPELLANT

vs.

WALLACE B. MCCLUGGAGE — DEFENDANT/APPELLEE

APPEAL FROM THE CIRCUIT COURT
OF GREEN COUNTY, MISSISSIPPI
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APPENDIX of the REPLY BRIEF of the APPELLANT MORRIS E. COURTNEY

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OF THE REPLY BRIEF OF
THE APPELLANT
MORRIS E. COURTNEY

M.R.C.P. Rule 4

MISSISSIPPI COURT RULES ANNOTATED

*** THIS DOCUMENT REFLECTS CHANGES RECEIVED THROUGH JANUARY 10, 2008 ***

MISSISSIPPI RULES OF CIVIL PROCEDURE
CHAPTER II. COMMENCEMENT OF ACTION: SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

M.R.C.P. Rule 4
(2008)

Review Court Orders which may amend this Rule

Rule 4. Summons.

(a) Summons: issuance. Upon filing of the complaint, the clerk shall forthwith issue a summons.

(1) At the written election of the plaintiff or the plaintiff's attorney, the clerk shall:

(A) Deliver the summons to the plaintiff or plaintiff's attorney for service under subparagraphs (c)(1) or (c)(3) or (c)(4) or (c)(5) of this rule.

(B) Deliver the summons to the sheriff of the county in which the defendant resides or is found for service under subparagraph (c)(2) of this rule.

(C) Make service by publication under subparagraph (c)(4) of this rule.

(2) The person to whom the summons is delivered shall be responsible for prompt service of the summons and a copy of the complaint. Upon request of the plaintiff, separate or additional summons shall issue against any defendants.

(b) Same: form. The summons shall be dated and signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint. Where there are multiple plaintiffs or multiple defendants, or both, the summons, except where service is made by publication, may contain, in lieu of the names of all parties, the name of the first party on each side and the name and address of the party to be served. Summons served by process server shall substantially conform to Form 1A. Summons served by sheriff shall substantially conform to Form 1AA.

(c) Service:.

(1) By process server. A summons and complaint shall, except as provided in subparagraphs (2) and (4) of this subdivision, be served by any person who is not a party and is not less than 18 years of age. When a summons and complaint are served by process server, an amount not exceeding that statutorily allowed to the sheriff for service of process may be taxed as recoverable costs in the action.

(2) By sheriff. A summons and complaint shall, at the written request of a party seeking service or such party's attorney, be served by the sheriff of the county in which the defendant resides or is found, in any manner prescribed by subdivision (d) of this rule. The sheriff shall mark on all summons the date of the receipt by him, and within thirty days of the date of such receipt of the summons the sheriff shall return the same to the clerk of the court from which it was issued.

(3) By mail.

(A) A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (4) of subdivision (d) of this rule by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to Form 1-B and a return envelope, postage prepaid, addressed to the sender.

(B) If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint may be made in any other manner permitted by this rule.

(C) Unless good cause is shown for not doing so, the court shall order the payment of the costs of personal service by the person served if such person does not complete and return within 20 days after mailing the notice and acknowledgment of receipt of summons.

(D) The notice and acknowledgment of receipt of summons and complaint shall be executed under oath or affirmation.

(4) By publication.

(A) If the defendant in any proceeding in a chancery court, or in any proceeding in any other court where process by publication is authorized by statute, be shown by sworn complaint or sworn petition, or by a filed affidavit, to be a nonresident of this state or not to be found therein on diligent inquiry and the post office address of such defendant be stated in the complaint, petition, or affidavit, or if it be stated in such sworn complaint or petition that the post office address of the defendant is not known to the plaintiff or petitioner after diligent inquiry, or if the affidavit be made by another for the plaintiff or petitioner, that such post office address is unknown to the affiant after diligent inquiry and he believes it is unknown to the plaintiff or petitioner after diligent inquiry by the plaintiff or petitioner, the clerk, upon filing the complaint or petition, account or other commencement of a proceeding, shall promptly prepare and publish a summons to the defendant to appear and defend the suit. The summons shall be substantially in the form set forth in Form 1-C.

(B) The publication of said summons shall be made once in each week during three successive weeks in a public newspaper of the county in which the complaint or petition, account, cause or other proceeding is pending if there be such a newspaper, and where there is no newspaper in the county the notice shall be posted at the courthouse door of the county and published as above provided in a public newspaper in an adjoining county or at the seat of government of the state. Upon completion of publication, proof of the prescribed publication shall be filed in the papers in the cause. The defendant shall have thirty (30) days from the date of first publication in which to appear and defend. Where the post office address of a defendant is given, the street address, if any, shall also be stated unless the complaint, petition, or affidavit above mentioned,

avers that after diligent search and inquiry said street address cannot be ascertained.

(C) It shall be the duty of the clerk to hand the summons to the plaintiff or petitioner to be published, or, at his request, and at his expense, to hand it to the publisher of the proper newspaper for publication. Where the post office address of the absent defendant is stated, it shall be the duty of the clerk to send by mail (first class mail, postage prepaid) to the address of the defendant, at his post office, a copy of the summons and complaint and to note the fact of issuing the same and mailing the copy, on the general docket, and this shall be the evidence of the summons having been mailed to the defendant.

(D) When unknown heirs are made parties defendant in any proceeding in the chancery court, upon affidavit that the names of such heirs are unknown, the plaintiff may have publication of summons for them and such proceedings shall be thereupon in all respects as are authorized in the case of a nonresident defendant. When the parties in interest are unknown, and affidavit of that fact be filed, they may be made parties by publication to them as unknown parties in interest.

(E) Where summons by publication is upon any unmarried infant, mentally incompetent person, or other person who by reason of advanced age, physical incapacity or mental weakness is incapable of managing his own estate, summons shall also be had upon such other person as shall be required to receive a copy of the summons under paragraph (2) of subdivision (d) of this rule.

(5) Service by certified mail on person outside state. In addition to service by any other method provided by this rule, a summons may be served on a person outside this state by sending a copy of the summons and of the complaint to the person to be served by certified mail, return receipt requested. Where the defendant is a natural person, the envelope containing the summons and complaint shall be marked "restricted delivery." Service by this method shall be deemed complete as of the date of delivery as evidenced by the return receipt or by the returned envelope marked "Refused."

(d) Summons and complaint: person to be served. The summons and complaint shall be served together. Service by sheriff or process server shall be made as follows:

(1) Upon an individual other than an unmarried infant or a mentally incompetent person,

(A) by delivering a copy of the summons and of the complaint to him personally or to an agent authorized by appointment or by law to receive service of process; or

(B) if service under subparagraph (1)(A) of this subdivision cannot be made with reasonable diligence, by leaving a copy of the summons and complaint at the defendant's usual place of abode with the defendant's spouse or some other person of the defendant's family above the age of sixteen years who is willing to receive service, and by thereafter mailing a copy of the summons and complaint (by first class mail, postage prepaid) to the person to be served at the place where a copy of the summons and of the complaint were left. Service of a summons in this manner is deemed complete on the 10th day after such mailing.

(2)(A) upon an unmarried infant by delivering a copy of the summons and complaint to any one of the following: the infant's mother, father, legal guardian (of either the person or the estate), or the person having care of such infant or with whom he lives, and if the infant be 12 years of age or older, by delivering a copy of the summons and complaint to both the infant and the appropriate person as designated above.

(B) upon a mentally incompetent person who is not judicially confined to an institution for the mentally ill or mentally deficient or upon any other person who by reason of advanced age, physical incapacity or mental weakness is incapable of managing his own estate by delivering a copy of the summons and complaint to such person and by delivering copies to his guardian (of either the person or the estate) or conservator (of either the person or the estate) but if such

person has no guardian or conservator, then by delivering copies to him and copies to a person with whom he lives or to a person who cares for him.

(C) upon a mentally incompetent person who is judicially confined in an institution for the mentally ill or mentally retarded by delivering a copy of the summons and complaint to the incompetent person and by delivering copies to said incompetent's guardian (of either the person or the estate) if any he has. If the superintendent of said institution or similar official or person shall certify by certificate endorsed on or attached to the summons that said incompetent is mentally incapable of responding to process, service of summons and complaint on such incompetent shall not be required. Where said confined incompetent has neither guardian nor conservator, the court shall appoint a guardian ad litem for said incompetent to whom copies shall be delivered.

(D) where service of a summons is required under (A), (B) and (C) of this subparagraph to be made upon a person other than the infant, incompetent, or incapable defendant and such person is a plaintiff in the action or has an interest therein adverse to that of said defendant, then such person shall be deemed not to exist for the purpose of service and the requirement of service in (A), (B) and (C) of this subparagraph shall not be met by service upon such person.

(E) if none of the persons required to be served in (A) and (B) above exist other than the infant, incompetent or incapable defendant, then the court shall appoint a guardian ad litem for an infant defendant under the age of 12 years and may appoint a guardian ad litem for such other defendant to whom a copy of the summons and complaint shall be delivered. Delivery of a copy of the summons and complaint to such guardian ad litem shall not dispense with delivery of copies to the infant, incompetent or incapable defendant where specifically required in (A), and (B) of this subparagraph.

(3) Upon an individual confined to a penal institution of this state or of a subdivision of this state by delivering a copy of the summons and complaint to the individual, except that when the individual to be served is an unmarried infant or mentally incompetent person the provisions of subparagraph (d)(2) of this rule shall be followed.

(4) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process.

(5) Upon the State of Mississippi or any one of its departments, officers or institutions, by delivering a copy of the summons and complaint to the Attorney General of the State of Mississippi.

(6) Upon a county by delivering a copy of the summons and complaint to the president or clerk of the board of supervisors.

(7) Upon a municipal corporation by delivering a copy of the summons and complaint to the mayor or municipal clerk of said municipal corporation.

(8) Upon any governmental entity not mentioned above, by delivering a copy of the summons and complaint to the person, officer, group or body responsible for the administration of that entity or by serving the appropriate legal officer, if any, representing the entity. Service upon any person who is a member of the "group" or "body" responsible for the administration of the entity shall be sufficient.

(e) Waiver. Any party defendant who is not an unmarried minor, or mentally incompetent may, without filing any pleading therein, waive the service of process or enter his or her appearance, either or both, in any action, with the same effect as if he or she had been duly served with process, in the manner required by law on the day of the date thereof. Such waiver of service or entry of appearance shall be in writing dated and signed by the defendant and duly sworn to or

acknowledged by him or her, or his or her signature thereto be proven by two (2) subscribing witnesses before some officer authorized to administer oaths. Any guardian or conservator may likewise waive process on himself and/or his ward, and any executor, administrator, or trustee may likewise waive process on himself in his fiduciary capacity. However, such written waiver of service or entry of appearance must be executed after the day on which the action was commenced and be filed among the papers in the cause and noted on the general docket.

(f) Return. The person serving the process shall make proof of service thereof to the court promptly. If service is made by a person other than a sheriff, such person shall make affidavit thereof. If service is made under paragraph (c)(3) of this rule, return shall be made by the sender's filing with the court the acknowledgment received pursuant to such subdivision. If service is made under paragraph (c)(5) of this rule, the return shall be made by the sender's filing with the court the return receipt or the returned envelope marked "Refused." Failure to make proof of service does not affect the validity of the service.

(g) Amendment. At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process is issued.

(h) Summons: time limit for service. If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

HISTORY: Amended effective May 1, 1982; March 1, 1985; February 1, 1990; July 1, 1998; January 3, 2002

NOTES:
ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 1998, Rule 4(f) was amended to state that the person serving process shall promptly make proof of service thereof to the court.

Effective February 1, 1990, Rule 4(c)(4)(B) was amended by striking the word "calendar" following the word and figure "thirty (30)"; Rule 4(c)(4) was amended by adding subsection (E); Rule 4(c)(5) was amended by changing the title to reflect service by certified mail; Rule 4(d)(2)(A) was amended by substituting the word "person" for "individual" in reference to the one having care of the infant. 553-556 So. 2d XXXIII (West Miss. Cas. 1990).

Effective March 1, 1985, a new Rule 4 was adopted. 459-462 So. 2d XVIII (West Miss. Cas. 1985).

Effective May 1, 1982, Rule 4 was amended. 410-416 So. 2d XXI (West Miss. Cas. 1982).

COMMENT

The original version of Rule 4, effective as of January 1, 1982, was amended by the Mississippi Supreme Court on March 5, 1982. The amending order deleted the entire text of Rule 4 and substituted the prior statutory procedure for service of the summons. On December 28, 1984, the Supreme Court adopted a new Rule 4, effective March 1, 1985. Forms applicable to the new Rule 4 were adopted on May 2, 1985. This comment pertains to new Rule 4 and its forms.

After an action is commenced, the clerk is required to issue a separate summons for each defendant except in the case of summons by publication. The plaintiff or his attorney has the right, by written election, to determine whether each summons shall be delivered to the plaintiff or his attorney for service by process server or delivered by the clerk to the sheriff of the county

in which the defendant resides or may be found. Where service is by publication, the clerk shall hand the summons to the plaintiff or to his attorney, or, if so requested by either of them, the clerk shall hand it to the publisher of the proper newspaper for publication.

Forms 1A, 1AA, 1B and 1C are provided as suggested forms for the various summons. All summonses used pursuant to Rule 4 must be in substantial conformity with these forms.

Various "Processes" provided for by statute, other than the summons and subpoena (the subpoena is governed by Rule 45), will continue to be governed by statute.

Rule 4(a)(2) requires that a copy of the complaint be served with the summons. Rule 4(b) requires that the summons form notify defendant that his failure to appear will result in a judgment by default against defendant for the relief demanded in the complaint. Although the "judgment by default will be rendered" language may be an overstatement, the language is included in Rule 4 for two reasons. First, the language is part of Federal Rule 4(b), and an effort has been made to maintain procedural conformity between the Mississippi and federal systems where possible. Second, the strong language is deemed more likely to encourage defendants to appear to protect their interests.

Rule 4(b) provides that where there are multiple plaintiffs or defendants, the summons may name just the first party on each side, together with the name and address of the party to be served. However, the complaint, which must accompany the summons, will provide the names of all parties to the action.

Exhibits to the complaint form a part of the complaint and in most cases should be attached to the complaint [See Rule 10(d)]. However, in cases where unusually lengthy exhibits are attached to the complaint, plaintiff may elect not to attach copies of the lengthy exhibits to the copies of the complaint served, but instead may attach a statement to the effect that such exhibits are not attached because of their size and that the exhibits are available for inspection and copying.

Rule 4(c)(1) provides for service by a process server and Rule 4(c)(2) provides for service by a sheriff. There is no limit to the territorial jurisdiction of a process server who may serve the summons anywhere in the world. A sheriff, however, may serve the summons only within his county. However, the mere service of the summons and complaint does not, of itself, resolve all questions as to jurisdiction over the person of the defendant, and any such questions may be raised at appropriate times.

A party using a process server may pay such person any amount that is agreed upon. However, only that amount statutorily allowed to the sheriff under Miss. Code Ann. § 25-7-19 (Supp. 1984) may be taxed as recoverable costs in the action.

Plaintiff is given the option under Rule 4(c)(3) of obtaining service by first-class mail. Defendant's failure to complete and return one copy of the "Notice and Acknowledgment for Service by Mail" may trigger the cost-shifting provisions of Rule 4(c)(3)(B). The provisions for service by first-class mail are modeled upon Federal Rule 4(c)(2)(C)(ii). The completion and return of Form 1B (Notice and Acknowledgment for Service by Mail) does not operate as a waiver of objections to jurisdiction. All jurisdictional objections are preserved whether Form 1B is completed and returned from inside or outside the State.

Rule 4(c)(4) provides for service of summons by publication and generally tracks the previous statutory requirements for summons by publication under Miss. Code Ann. § 13-3-19 et seq. (1972). However, a few major changes should be noted. Under Rule 4(c)(4)(B), "[t]he defendant shall have thirty (30) days from the date of first publication in which to appear and defend." The thirty days from first publication is a shorter time in which one must respond than was previously provided by statute.

Publication under this rule is deemed complete with the third publication in those instances where the time of an event is related to completion of publication. However, it should be noted that this

is not deemed to alter the time for response by defendant.

It should be noted that there will be instances under Rule 4(c)(4)(E) where service by publication is appropriate for persons under disability, but service of the summons and complaint upon the "other person" required to be served under Rule 4(d)(2) will not be appropriate by publication because the "other person" may be found within the State of Mississippi.

Rule (4)(c)(4)(C) continues the previous statutory requirement that the clerk send a copy of the summons (and now also of the complaint) by first-class mail to the address of the defendant. The mailing provides further opportunity to give defendant notice of the action. If the defendant's post office address is unknown to plaintiff after diligent inquiry, then the mailing of the summons and complaint is not required.

Rule 4(c)(5) provides for "Service by Certified Mail on Person Outside State" by sending a copy of the summons and complaint to the person to be served by certified mail, return receipt requested. The certified mail procedure is not available to serve a person within the state. It is an alternative form of service because a person outside of the state may also be served under Rule 4(c)(1), 4(c)(3) or 4(c)(4).

The Rule 4(c)(5) procedure supplants the circuitous procedures previously available to obtain in personam jurisdiction against nonresidents. E.g. Miss. Code Ann. § 13-3-63 (1972). However, the criteria for subjecting nonresidents to the jurisdiction of Mississippi courts are those established by the legislature.

Rule 4(d) provides the methods by which the summons and complaint may be served by a sheriff or process server. The basics of service follow generally the previous statutory practice under Miss. Code Ann. § 13-3-33 et seq. (1972). However, there are differences which must be noted. Rule 4(d)(1)(A) tracks previous statutory practice by providing that reasonable diligence be made to deliver a copy of the complaint and summons to the person personally or to his authorized agent. Where the summons and complaint cannot be delivered to the defendant personally, the copies may be delivered at defendant's usual place of abode by leaving the same with defendant's spouse or some other person of the defendant's family above the age of sixteen years who is willing to receive service. The corresponding Federal Rule 4(d)(1) has no such requirement. A new procedural safeguard has been added to this mode of "residence service." A copy of the summons and complaint must thereafter be mailed (first-class mail, postage prepaid) to the person to be served at the place where a copy of the summons and complaint were left. Such "residence service" of a summons is not deemed complete until the 10th day after such mailing.

Rule 4(2)(A) provides for service upon an unmarried infant and makes several changes from previous practice. The unmarried infant must only be served a copy of the summons and complaint if twelve years of age or older (previously there was no age limitation). The rule now specifies that the guardian served may be the guardian of either the person or of the estate of the unmarried minor, and such service is now permitted upon "the individual having care of such infant or with whom he lives" in addition to the infant's mother, father or legal guardian. This rule is not intended to depart from the basic concepts of traditional Mississippi practice which must still be followed. See: Section 232, Griffith, Mississippi Chancery Practice. The record, exclusive of server's return, should reflect facts sufficient to establish service upon the proper person.

Rule 4(e) provides for waiver of service of the summons and complaint and tracks the provisions of Miss. Code Ann. § 13-3-71(1) (Supp. 1984). The waiver must be dated and signed by the defendant after the day on which the action is commenced. A waiver may be executed without a summons having been issued since for purposes of Rule 4(e) "commencing the action" means merely filing the complaint. Although the Statutory provisions of Miss. Code Ann. § 13-3-71(2) (Supp. 1984) dealing with when causes are triable after waiver by a fiduciary are not mentioned in Rule 4(e), such provisions are not in conflict with Rule 4(e) and continue in effect.

Rule 4(f) provides that the person serving the process shall promptly file a return of service with

the court. Prior to revision in 1997, the rule sanctioned making the return at any time before the person served was required to respond. The failure to promptly file a return may precipitate a default or defeat a defendant's right to remove the case. The purpose of the requirement for prompt filing is to avoid these problems that may arise when a defendant is unable to verify the date of service by examining the return of service in the court records.

Rule 4(h) provides that service upon a defendant must be made within 120 days after the filing of the complaint or the cause will be dismissed without prejudice as to that defendant unless good cause can be shown as to why service could not be made.

[Comment adopted effective March 1, 1986; amended effective February 1, 1990; July 1, 1998; April 13, 2000.]

JUDICIAL DECISIONS

Construction.
Applicability.
Commencement of action.
Defenses.
Dismissal.
Good cause.
Due process.
Filing of amended complaint as summons.
Jurisdiction.
Notice In annexation cases.
Service of process.
Statute of limitations.
Waiver.

Construction.

Miss. R. Civ. P. 4(h) states that if the 120-day period elapses without service of process being effected, the action shall be dismissed upon the court's own initiative with notice to such party or upon motion and the comments state that the complaint will be dismissed unless good cause can be shown as to why service cannot be made; the rule therefore provides that the plaintiff will have an opportunity to show good cause after the 120-day period elapses.. Webster v. Webster , 834 So. 2d 26 , 2002 Miss. LEXIS 306 (Miss. 2002).

Miss. R. Civ. P. 4(h) does not require that a motion for additional time for service of process be filed within 120 days of the filing of the complaint.. Webster v. Webster , 834 So. 2d 26 , 2002 Miss. LEXIS 306 (Miss. 2002).

It is apparent from reading the text of this rule that while the word "complaint" sometimes refers to a duplicate copy, the word "summons" means an original, not a duplicate or photocopy.. Bilbo v. Thigpen , 647 So. 2d 678 (Miss. 1994).

Legislature created Public Employees' Retirement System in the juridical form of a corporation; as such, System was subject to service of process under subdivision (d)(4) of this rule as a "domestic corporation," rather than under subdivision (d)(5) as a "department" or "institution" of the State.. Public Employees' Retirement Sys. v. Dillon , 538 So. 2d 327 (Miss. 1988).

Applicability.

In a medical malpractice action, on remand from a first appeal denying an amended complaint, the trial court granted summary judgment for defendants based on the two-year limitations period. However, upon a petition for rehearing, the appellate court held that based on the unique facts of the case, the amended complaint should have been treated as an original complaint as to the added parties; since the amended complaint was filed prior to the expiration of the statute of limitations (exactly two years after the alleged negligence), and a summons, along with the amended complaint, was served upon the added parties within the time period required by Miss. R. Civ. P. 4(h), the trial judge erred in granting summary judgment for defendants.. Wilner v. White , 929 So. 2d 343 , 2005 Miss. App. LEXIS 1033 (Miss. Ct. App. 2005).

Party who is granted permission to intervene pursuant to M.R.C.P. Rule 24(b)(2) is not required

M.R.C.P. Rule 8

MISSISSIPPI RULES OF CIVIL PROCEDURE
CHAPTER III. PLEADINGS AND MOTIONS

M.R.C.P. Rule 8
(2008)

Review Court Orders which may amend this Rule

Rule 8. General rules of pleading.

(a) Claims for relief. A pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim, or third-party claim, shall contain

(1) a short and plain statement of the claim showing that the pleader is entitled to relief, and,

(2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) Defenses: form of denials. A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials or designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all of its averments, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) Affirmative defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counter-claim or a counter-claim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been proper designation.

(d) Effect of failure to deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) Pleading to be concise and direct: consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has, regardless of consistency. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of pleadings. All pleadings shall be so construed as to do substantial justice.

(g) Pleadings shall not be read or submitted. Pleadings shall not be carried by the jury into the jury room when they retire to consider their verdict, except insofar as a pleading or portion thereof has been admitted in evidence.

(h) Disclosure of minority or legal disability. Every pleading or motion made by or on behalf of a person under legal disability shall set forth such fact unless the fact of legal disability has been disclosed in a prior pleading or motion in the same action or proceeding.

NOTES:
COMMENT

The purpose of Rule 8 is to give notice, not to state facts and narrow the issues as was the purpose of pleadings in prior Mississippi practice. Consequently, the distinctions between "ultimate facts" and "evidence" or conclusions of law are no longer important since the rules do not prohibit the pleading of facts or legal conclusions as long as fair notice is given to the parties. 5 Wright & Miller, Federal Practice and Procedure, Civil §§ 1202, 1218 (1969); 2A Moore's Federal Practice /P/P 8.12, 8.13 (2d ed. 1968); contra, Pigott v. Boeing Co., 240 So.2d 63 (Miss.1970); and King v. Mississippi P. & L. Co., 244 Miss. 486, 142 So.2d 222 (1962) (it is not sufficient to allege negligence as a mere conclusion of the pleader, but facts must be pleaded showing actionable negligence); see also Bennett v. Hardwell, 214 Miss. 390, 59 So.2d 82 (1952); McLemore v. McLemore, 173 Miss. 765, 163 So. 500 (1935) (ultimate essential facts upon which action is based must be averred, but not the items of evidence by which ultimate facts are to be proved); and Barnes v. Barnes, 317 So.2d 387 (Miss.1975) (where issue of possession of property was not presented by the pleadings in divorce action and no proof as to possession appeared in record, that portion of decree awarding possession of land to complainant was not substantiated by proof and was not valid).

Although Rule 8 abolishes many technical requirements of pleadings, it does not eliminate the necessity of stating circumstances, occurrences, and events which support the proffered claim. Averments of residency are no longer required unless needed by the claim, as in divorce proceedings. See Miss. Code Ann. § 93-5-5 (1972). The rule allows the claims to be stated in general terms so that the rights of the client are not lost by poor drafting skills of counsel.

The list of affirmative defenses in Rule 8(c) is not intended to be exhaustive. Useful in determining what must be pleaded under 8(c) are considerations of policy, fairness, and probability. See 5 Wright & Miller, supra, 1271. The pleader normally will not be penalized for stating matter that technically is not an affirmative defense.

As with the statement of claims, notice of the defense raised by the defendant, Rule 8(d), is all that is required.

Rule 8(f) repudiates the prior Mississippi doctrine of construing the pleadings most strongly against the pleader. See, e.g., Taylor v. Twiner, 193 Miss. 410, 9 So.2d 644 (1942); V. Griffith, Mississippi Chancery Practice, §§ 82, 175, 288, 307, 432 (2d ed. 1950).

Rule 8(g) accords with traditional Mississippi practice. See Miss. Code Ann. § 11-7-151 (1972) (all papers read in evidence on the trial of any cause may be carried from the bar by the jury).

Rule 8(h) is intended to ensure that adequate notice is provided when one sues or defends for the beneficial interest of another. See generally V. Griffith, supra, §§ 127-150.

JUDICIAL DECISIONS

In general.
Construction.
Applicability.
Affirmative defenses.
Alternative pleadings.
Claims for relief.
Sufficiency of pleadings.

In general.

When a circuit court accepted a judgment debtor's letter of credit in lieu of a supersedeas bond, the circuit court retained jurisdiction to do so; however, the circuit court correctly determined that it lacked jurisdiction to cancel the judgment and to remove the judgment from the county's rolls.. Fitch v. Valentine , 946 So. 2d 780 , 2007 Miss. LEXIS 10 (Miss. 2007).

In her negligence action against a homeowner, decided in the homeowner's favor on summary judgment, on appeal, the worker asserted that Miss. R. Civ. P. 8(c) clearly set forth that the defense of statute of limitations was an affirmative defense which had to be set forth in responsive pleadings and that Miss. R. Civ. P. 12(b) required every defense to be asserted in responsive pleadings, except the seven which could be made by motion, and that the statute of limitations defense was not included therein; however, the defense of statute of limitations was proper for summary judgment where there existed no genuine issues of material fact on the issue.. Robertson v. Moody , 918 So. 2d 787 , 2005 Miss. App. LEXIS 327 (Miss. Ct. App. 2005).

In a suit to confirm title to real property, the plaintiff was required to state with reasonable certainty the nature of a named defendant's claim to the property, and the trial court's entry of judgment on the pleadings, given a lack of such statement, was plain error.. Derby v. 20/20 Invs., LLC , 807 So. 2d 500 , 2002 Miss. App. LEXIS 81 (Miss. Ct. App. 2002).

While this rule abolishes many technical requirements of pleadings, it does not eliminate necessity of stating circumstances, occurrences, and events which support the proffered claim.. PACCAR Fin. Corp. v. Howard , 615 So. 2d 583 (Miss. 1993).

While it is unnecessary for a party to state facts in detail, it is necessary to state at least enough facts to put the opposing side on fair notice of the basis of one's claim.. Hester v. Bandy , 627 So. 2d 833 (Miss. 1993).

Construction.

Miss. R. Civ. P. 8 does require that a party assert a demand for prejudgment interest in the appropriate pleading; on the other hand, Rule 8 does not require that a party seeking prejudgment interest must plead the specific date on which the prejudgment interest allegedly is due.. Upchurch Plumbing, Inc. v. Greenwood Utils. Comm'n , 964 So. 2d 1100 , 2007 Miss. LEXIS 495 (Miss. 2007).

Neither attorney's letter to member of bar complaint tribunal nor her discovery requests constituted an "answer" or a sufficiently responsive pleading to a disciplinary complaint of the Mississippi Bar, and therefore tribunal did not err in entering default against attorney.. Harrison v. Mississippi Bar , 637 So. 2d 204 (Miss. 1994).

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M.R.C.P. Rule 12

*** THIS DOCUMENT REFLECTS CHANGES RECEIVED THROUGH JANUARY 10, 2008 ***

MISSISSIPPI RULES OF CIVIL PROCEDURE
CHAPTER III. PLEADINGS AND MOTIONS

M.R.C.P. Rule 12
(2008)

Review Court Orders which may amend this Rule

Rule 12. Defenses and objections -- when and how presented -- by pleading or motion -- motion for judgment on the pleadings.

(a) When presented. A defendant shall serve his answer within thirty days after the service of the summons and complaint upon him or within such time as is directed pursuant to Rule 4. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within thirty days after the service upon him. The plaintiff shall serve his reply to a counter-claim in the answer within thirty days after service of the answer or, if a reply is ordered by the court, within thirty days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court:

(1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the court's action;

(2) if the court grants a motion for a more definite statement, the responsive pleading shall be served within ten days after the service of the more definite statement. The times stated under this subparagraph may be extended, once only, for a period not to exceed ten days, upon the written stipulation of counsel filed in the records of the action.

(b) How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(1) Lack of jurisdiction over the subject matter,

(2) Lack of jurisdiction over the person,

(3) Improper venue,

(4) Insufficiency of process,

(5) Insufficiency of service of process,

(6) Failure to state a claim upon which relief can be granted,

(7) Failure to join a party under Rule 19. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56; however, if on such a motion matters outside the pleadings are not presented, and if the motion is granted, leave to amend shall be granted in accordance with Rule 15(a).

(c) Motion for judgment on the pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56; however, if on such a motion matters outside the pleadings are not presented, and if the motion is granted, leave to amend shall be granted in accordance with Rule 15 (a).

(d) Preliminary hearings. The defenses specifically enumerated (1) through (7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment on the pleadings (subdivision (c) of this rule), shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for more definite statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within thirty days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of defenses in motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

(h) Waiver or preservation of certain defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances

described in subdivision (g), or (B) if it is neither made by a motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15 (a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion that the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action or transfer the action to the court of proper jurisdiction.

NOTES:
COMMENT

The purpose of Rule 12 is to expedite and simplify the pretrial phase of litigation while promoting the just disposition of cases. The periods of time referred to in Rule 12(a) relate to service of process, motions, pleadings or notices, and not to the filing of the instruments. Because of the nature of divorce cases, Rules 12(a)(1) and (2) do not apply to such proceedings. See also M.R.C.P. 81(b). Rule 12(a) represents a marked change from the former procedures which linked the return date or response date to a term of court. See Miss. Code Ann. §§ 11-5-17; 11-7-121; and 13-3-13 (1972).

Rules 12(b)(6) and 12(c) serve the same function, practically, as the general demurrer. See Investors Syndicate of America, Inc. v. City of Indian Rocks Beach, Florida, 434 F.2d 871, 874 (5th Cir. 1970). They are the proper motions for testing the legal sufficiency of the complaint; to grant the motions there must appear to a certainty that the plaintiff is entitled to no relief under any set of facts that could be proved in support of the claim.

If the complaint is dismissed with leave to amend and no amendment is received, the dismissal is a final judgment and is appealable unless the dismissal relates to only one of several claims. See Ginsburg v. Stern, 242 F.2d 379 (3rd Cir. 1957).

A motion pursuant to Rule 12(c) may be granted if it is not made so that its disposition would delay the trial; the moving party must be clearly entitled to judgment. See Greenberg v. General Mills Fun Group, Inc., 478 F.2d 254, 256 (5th Cir. 1973).

Under 12(d), the decision to defer should be made when the determination will involve the merits of the action, thus making deference generally applicable to motions on Rules 12(b)(6) and (c).

Rule 12(e) abolishes the bill of particulars. Miss. Code Ann. § 11-7-97 (1972). The motion for a more definite statement requires merely that -- a more definite statement -- and not evidentiary details. The motion will lie only when a responsive pleading is required, and is the only remedy for a vague or ambiguous pleading.

Ordinarily, Rule 12(f) will require only the objectionable portion of the pleadings to be stricken, and not the entire pleading. Motions going to redundant or immaterial allegations, or allegations of which there is doubt as to relevancy, should be denied, the issue to be decided being whether the allegation is prejudicial to the adverse party. Motions to strike a defense for insufficiency should, if granted, be granted with leave to amend. Rule 12(f) is generally consistent with past Mississippi procedure. See Miss. Code Ann. § 11-7-59(3) (1972); Parish v. Lumbermen's Mut. Cas. Co., 242 Miss. 288, 134 So.2d 488 (1961).

Rule 12(g) allows the urging of all defenses or objections in one motion with no waiver. There are three important qualifications which permit at least two rounds of motions: (1) the requirement of consolidation applies only to defenses and objections then available to the moving party; (2) the requirement applies only to defenses and objections which this rule permits to be raised by

motion; (3) the prohibition against successive motions is subject to the exceptions stated in Rule 12(h).

Rule 12(h)(1) states that certain specified defenses which may be available to a party when he makes a pre-answer motion, but which he omitted from the motion, are waived. A party who by motion invites the court to pass upon a threshold defense should bring forward all the specified defenses he then has and thus allow the court to do a reasonably complete job. The waiver reinforces the policy of Rule 12(g) forbidding successive motions. 5 Wright & Miller, Federal Practice and Procedure, Civil § 1391 (1969).

Rule 12(h)(2) preserves three defenses against waiver during the pleading, motion, discovery, and trial stages of an action; however, such defenses are waived if not presented before the close of trial. 5 Wright & Miller, supra, § 1392.

Under Rule 12(h)(3) a question of subject matter jurisdiction may be presented at any time, either by motion or answer. Further, it may be asserted as a motion for relief from a final judgment under M.R.C.P. 60(b)(4) or may be presented for the first time on appeal. Welch v. Bryant, 157 Miss. 559, 128 So. 734 (1930); Brown v. Bank, 31 Miss. 454 (1856). This provision preserves the traditional Mississippi practice of transferring actions between the circuit and chancery courts, as provided by Miss. Const. § 157 (all causes that may be brought in the circuit court whereof the chancery court has jurisdiction shall be transferred to the chancery court) and § 162 (all causes that may be brought in the chancery court whereof the circuit court has exclusive jurisdiction shall be transferred to the circuit court), but not reversing for a court's improperly exercising its jurisdiction, Miss. Const. § 147. Cazeneuve v. Curell , 70 Miss. 521, 13 So. 32 (1893).

[Amended effective February 1, 1990.]

JUDICIAL DECISIONS

Construction.
Costs.
Dismissal.
Failure to state a claim.
Hearings.
Motions.
Necessary parties.
Personal jurisdiction.
Pleadings.
Service of process.
Subject matter jurisdiction.
Summary judgment.
Venue.
Waiver.

Construction.

A court's inquiries under M.R.C.P. Rule 12(b)(2) are not only separate from, but also precede, consideration of Rule 12(b)(6) inquiries.. Petters v. Petters , 560 So. 2d 722 (Miss. 1990).

When a complaint is tested via motion to dismiss for failure to state a claim, its sufficiency in substantial part is determined by reference to M.R.C.P. Rules 8(a) and (e).. Grantham v. Mississippi Dep't of Corrections , 522 So. 2d 219 (Miss. 1988).

When a complaint is tested via motion under M.R.C.P. Rule 12(b)(6) for failure to state a claim upon which relief may be granted, sufficiency of complaint is in substantial part determined by reference to subdivisions (a) and (e) of Rule 8.. Luckett v. Mississippi Wood, Inc. , 481 So. 2d 288 (Miss. 1985).

Costs.

Trial court did not err in failing to award plaintiff her expenses, costs and attorney's fees when

M.R.C.P. Rule 15

MISSISSIPPI RULES OF CIVIL PROCEDURE
CHAPTER III. PLEADINGS AND MOTIONS

M.R.C.P. Rule 15
(2008)

Review Court Orders which may amend this Rule

Rule 15. Amended and supplemental pleadings.

(a) Amendments. A party may amend a pleading as a matter of course at any time before a responsive pleading is served, or, if a pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within thirty days after it is served. On sustaining a motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6), or for judgment on the pleadings, pursuant to Rule 12(c), leave to amend shall be granted when justice so requires upon conditions and within time as determined by the court, provided matters outside the pleadings are not presented at the hearing on the motion. Otherwise a party may amend a pleading only by leave of court or upon written consent of the adverse party; leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders.

(b) Amendment to conform to the evidence. When issues not raised by the pleadings are tried by expressed or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the maintaining of the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence. The court is to be liberal in granting permission to amend when justice so requires.

(c) Relation back of amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set

forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by Rule 4(h) for service of the summons and complaint, the party to be brought in by amendment:

(1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining the party's defense on the merits, and

(2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party. An amendment pursuant to Rule 9(h) is not an amendment changing the party against whom a claim is asserted and such amendment relates back to the date of the original pleading.

(d) Supplemental pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions, occurrences, or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

HISTORY: Amended effective July 1, 1998; amended effective April 17, 2003 to allow amendments on dismissal under Rule 12(b)(6) or judgment on the pleadings under Rule 12(c) where the court determines that justice so requires

NOTES:
ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 1998, Rule 15(c) was amended to state that the relation back period includes the time permitted for service of process under Rule 4(h).

COMMENT

"It is an invariable principle of practice that the admissible proof in any case must come within the allegations of the pleadings and that it avails nothing to prove what is not charged. But courts are organized for the purpose of hearing and determining causes on their actual merits; and, although it is true that good faith and a reasonable diligence are expected of parties in equity and of their solicitors, and that every party when he comes into court will in the first instance unfold his whole case or defense in accordance with the rules that govern the pleadings and proceedings therein, nevertheless it would be a hopelessly visionary and impractical expectation that every party in every case could always successfully communicate at once to his solicitor all the material facts with complete accuracy, or that any solicitor, although having all the facts, may reach such a height of professional perfectibility as to stand above the possibility of error or omission in pleading them -- as a consequence of which there would sometimes be a failure of full justice on the actual merits unless amendment and correction in the pleadings, and in other procedural steps, were seasonably and judiciously allowed." V. Griffith, Mississippi Chancery Practice, § 388 (2d ed. 1950).

The preceding statements state well the theory underlying Rule 15 and demonstrate that amended pleadings have been liberally permitted throughout Mississippi legal history. See Miss. Code Ann. §§ 11-5-45, 11-5-57, 11-5-59, 11-5-61, 11-5-63, 11-7-55, 11-7-59(3), 11-7-115, and 11-17-117 (1972); See also, Grocery Co. v. Bennett, 101 Miss. 573, 58 So. 482 (1912) (courts are organized for the purpose of trying cases on their merits and only in exceptional cases should trial courts refuse to permit amendments to pleadings or proceedings); Field v. Middlesex Bkg. Co., 77 Miss. 180, 26 So. 365 (1899) (the presentation of a case on its merits should not be defeated by reason alone of any formal rules of pleading and practice, if within the legitimate powers of a court of conscience to avoid it).

M.R.C.P. 15(a) now varies from Federal Rule 15(a) in one important instance. The federal rule

permits a party to amend his pleading only once as a matter of course before a responsive pleading is served; the Mississippi rule places no limit on the number of amendments.

Prior to the 2003 amendment of Rule 15(a), a party could, as a matter of right, amend within thirty days after losing on Rule 12(b)(6) and 12(c) motions on which matters outside the pleadings were not presented. In Poindexter v. Southern United Fire Ins. Co., 838 So. 2d 964 (2003), the Supreme Court recognized that the rule mandated an opportunity to amend upon dismissal under Rule 12(b) even though circumstances might be such as would make an amendment futile. Recognizing that the federal rule gives no such absolute right to amend, it was suggested there that "the better course is to temper M.R.C.P. 15(a)'s mandate with the paramount concerns of logic, futility of amendment, and judicial economy." Poindexter, 838 So. 2d at 972, Waller, J., concurring. Now, M.R.C.P. 15(a) expressly provides that in the event a Rule 12(b)(6) or 12(c) motion is granted, leave to amend may be granted by the trial court where justice so requires.

Under M.R.C.P. 15(b), when evidence is introduced or an issue is raised with the express or implied consent of the other party, the pleadings shall be treated in all respects as if they had been amended to conform to such evidence. If the opposing party objects but fails to persuade the court that such party will be prejudiced in maintaining the party's claim or defense, the court must then grant leave to amend the pleadings to allow the evidence on the issue. If the objecting party can show prejudice, the court may grant a continuance to meet the evidence, but should again allow amendment of the pleadings. 6 Wright & Miller, supra, Civil § 1495.

Under Rule 15(c) the first test for whether an amendment relates back, is merely whether the amended claim or defense arose from the same "conduct, transaction, or occurrence" as the original. The remaining tests are whether the new party to be added by the amendment (if any) is served before expiration of the period provided by Rule 4(h) for service of a summons and complaint. An intended defendant who is notified of an action within the period allowed by Rule 4(h) for service of a summons and complaint may not defeat the action on account of a defect in the pleading with respect to the defendant's name, provided that the requirements of clauses (1) and (2) have been met. If the notice requirement is met within the Rule 4(h) period, a complaint may be amended at any time to correct a formal defect such as a misnomer or misidentification. In allowing a name-correcting amendment within the time allowed by Rule 4(h), this rule allows not only the 120 days specified in that rule, but also any additional time resulting from any extension ordered by the court pursuant to that rule, as may be granted, for example, if the defendant is a fugitive from service of the summons.

Amendments pursuant to Rule 9(h) (fictitious parties) are not considered as changing parties and do relate back.

Rule 15(d) permits supplemental pleadings when such are reasonably necessary to show transactions, occurrences, or events which have transpired since the date of the pleading sought to be supplemented. This conforms, generally, to prior Mississippi practice. See Wright v. Frank, 61 Miss. 32 (1883).

While Rule 15(d) does not expressly incorporate the relation back doctrine of Rule 15(c), it appears sensible that supplemental pleadings should be subject to the basic relation back tests of 15(c). 6 Wright & Miller, supra, Civil § 1508.

[Amended effective September 1, 1987; amended August 21, 1996; amended July 1, 1998; amended effective April 17, 2003.]

JUDICIAL DECISIONS

In general.
Construction.
Applicability.
Ad damnum clause.

M.R.C.P. Rule 54

MISSISSIPPI RULES OF CIVIL PROCEDURE
CHAPTER VII. JUDGMENT

M.R.C.P. Rule 54
(2008)

Review Court Orders which may amend this Rule

Rule 54. Judgments; costs.

(a) Definitions. "Judgment" as used in these rules includes a final decree and any order from which an appeal lies.

(b) Judgment upon multiple claims or involving multiple parties. When more than one claim for relief is presented in an action, whether as a claim, counter-claim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an expressed determination that there is no just reason for delay and upon an expressed direction for the entry of the judgment. In the absence of such determination and direction, any order or other form of decision, however designated which adjudicates fewer than all of the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled by the proof and which is within the jurisdiction of the court to grant, even if the party has not demanded such relief in his pleadings; however, final judgment shall not be entered for a monetary amount greater than that demanded in the pleadings or amended pleadings.

(d) Costs. Except when express provision therefor is made in a statute, costs shall be allowed as of course to the prevailing party unless the court otherwise directs, and this provision is applicable in all cases in which the State of Mississippi is a party plaintiff in civil actions as in cases of individual suitors. In all cases where costs are adjudged against any party who has given security for costs, execution may be ordered to issue against such security. Costs may be taxed by the clerk on one day's notice. On motions served within five days of the receipt of notice of

such taxation, the action of the clerk may be reviewed by the court.

NOTES:
COMMENT

The first sentence of Rule 54(a) defines "judgment," for the purposes of these rules, to include a decree and any appealable order. Traditionally, in Mississippi courts in equity suits judges rendered a "decree," and an action at law resulted in the entry of a "judgment." There is no longer any purpose in preserving a technical distinction between a decree and a judgment. Therefore, Rule 54(a) indicates that a judgment at law and a decree in equity are to be treated in the same fashion.

Although it is not specifically described in the rule itself, there are several different stages that lead to the creation of a judgment that is final and appealable. It is important to differentiate the various steps that are part of this process. The first distinction is between the adjudication, either by a decision of the court or a verdict of the jury, and the judgment that is entered thereon. The terms "decision" and "judgment" are not synonymous under these rules. The decision consists of the court's findings of fact and conclusions of law; the rendition of judgment is the pronouncement of that decision and the act that gives it legal effect.

A second distinction that should be noted is between the judgment itself and the "filing," or the "entry," of the judgment. A judgment is the final determination of an action and thus has the effect of terminating the litigation; it is "the act of the court." "Filing" simply refers to the delivery of the judgment to the clerk for entry and preservation. The "entry" of the judgment is the ministerial notation of the judgment by the clerk of the court pursuant to Rule 58; however, it is crucial to the effectiveness of the judgment and for measuring the time periods for appeal and the filing of various motions. See 10 Wright & Miller, Federal Practice and Procedure, Civil § 2651 (1973).

Rule 54(b) is designed to facilitate the entry of judgments upon one or more but fewer than all the claims or as to one or more but fewer than all the parties in an action involving more than one claim or party. It was proposed because of the potential scope and complexity of civil actions under these rules, given their extensive provisions for the liberal joinder of claims and parties. The basic purpose of Rule 54(b) is to avoid the possible injustice of a delay in entering judgment on a distinctly separate claim or as to fewer than all of the parties until the final adjudication of the entire case by making an immediate appeal available.

The rule does not require that a judgment be entered when the court disposes of one or more claims or terminates the action as to one or more parties. Rather, it gives the court discretion to enter a final judgment in these circumstances and it provides much needed certainty in determining when a final and appealable judgment has been entered. If the court chooses to enter such a final order, it must do so in a definite, unmistakable manner.

Absent a certification under Rule 54(b), any order in a multiple party or multiple claim action, even if it appears to adjudicate a separable portion of the controversy, is interlocutory.

If the court decides that an order that does not dispose of all the claims of all the parties and that is not appealable under any other statute or rule should be given the status of a final judgment, Rule 54(b) requires it to take two separate steps before an appeal can be perfected. The court must make "an express determination that there is no just reason for delay" and it must make "an express direction for the entry of judgment."

When the court is asked to direct the entry of a judgment under Rule 54(b), it must consider whether the entire case as a whole and the particular disposition that has been made and for which the entry of a judgment is sought falls within the scope of the rules. The general requirements are that the case include either multiple claims, multiple parties, or both, and that either one or more but fewer than all the claims have been decided, or that all the rights and liabilities of at least one party have been adjudicated.

Despite its apparently broad scope, Rule 54(b) may be invoked only in a relatively select group of cases and applied to an even more limited category of decisions. The rule itself sets forth three basic conditions on its applicability. The first requirement is that either multiple claims for relief or multiple parties be involved. If there are multiple parties, there need only be one claim in the action. All of the rights or liabilities or one or more of the parties regarding that claim must have been fully adjudicated. A decision that leaves a portion of the claim pending as to all defendants does not fall within the ambit of Rule 54(b). Whether multiple parties are before the court is, basically, a simple question that should pose no problems.

The second prerequisite for invoking Rule 54(b) is that at least one claim or the rights and liabilities of at least one party must be finally decided. The words "final judgment" in Rule 54(b) should not be construed too narrowly. A dismissal for lack of subject matter or personal jurisdiction may dispose of a claim completely and thus bring it within the scope of the rule; however, a dismissal for failing to state a claim upon which relief may be granted, made with leave to amend, clearly does not finally decide that claim and Rule 54(b) would not apply.

The third prerequisite to the issuance of a Rule 54(b) certificate is that the court must find that there is no just reason for delaying an appeal. A request that this determination be made is addressed to the trial judge's discretion and whether it will be granted depends on the facts of each case. See 10 Wright & Miller, supra § 2656.

Rule 54(c) has two central elements. The first sentence in the rule provides that a default judgment shall not give relief "different in kind from" or that "exceeds in amount that prayed for in the demand for judgment." The second sentence in Rule 54(c) provides that in non-default cases the judgment need not be limited in kind or amount by the demand, but may include the relief to which the successful party is deemed entitled. The rule must be read in conjunction with Rule 8, which requires that every pleading asserting a claim include a demand for the relief to which the pleader believes himself entitled. Thus, Rule 54(c) applies to any demand for relief, whether made by defendant or plaintiff or presented by way of an original claim, counter-claim, cross-claim, or third-party claim. But See, Cain v. Robinson, 523 So.2d 29 (Miss. 1988). A default judgment may not extend to matters outside the issues raised by the pleadings or beyond the scope of the relief demanded; a judgment in a default case that awards relief that either is more than or different in kind from that requested originally is null and void and defendant may attack it collaterally in another proceeding.

Three related concepts should be distinguished in considering Rule 54(d): These are costs, fees, and expenses. Costs refers to those charges that one party has incurred and is permitted to have reimbursed by his opponent as part of the judgment in the action. Although costs has an everyday meaning synonymous with expenses, taxable costs under Rule 54(d) is more limited and represents those official expenses, such as court fees, that a court will assess against a litigant. Costs almost always amount to less than a successful litigant's total expenses in connection with a law suit and their recovery is nearly always awarded to the successful party. See Miss. Code Ann. § 11-53-27 (1972) (successful party to recover costs, generally).

Fees are those amounts paid to the court or one of its officers for particular charges that generally are delineated by statute. Most commonly these include such items as filing fees, clerk's and sheriff's charges, and witnesses' fees. In most instances an award of costs will include reimbursement for the fees paid by the party in whose favor the cost award is made.

Expenses include all the expenditures actually made by a litigant in connection with the action. Both fees and costs are expenses but by no means constitute all of them. Absent a special statute or rule, or an exceptional exercise of judicial discretion, such items as attorney's fees, travel expenditures, and investigatory expenses will not qualify either as statutory fees or reimbursable costs. These expenses must be borne by the litigants. 10 Wright & Miller, supra § 2666. See also 6 Moore's Federal Practice /P/P 54.01-.43 (1972).

[Amended effective February 1, 1990.]