

2007-CA-01627

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IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS

KATHY CAMPBELL

APPELLANT

VS.

CAUSE NO. 2007-CA-01627

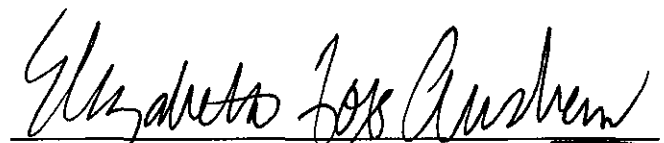
JEREMY E. DAVIS

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

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

1. Kathy Campbell, Appellant, 242 CR 86, Houston, MS 38851
2. Jeremy E. Davis, Appellee, 300 Furr Cove, Houston, MS 38851
3. Honorable Henry L. Lackey, Circuit Court Judge, Calhoun City, MS 38916
4. Elizabeth B. Fox, Attorney for Appellant, Houston, MS 38851
5. Eric J. Dillon, Attorney for Appellee, Jackson, MS 39205-0750



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STATEMENT OF THE ISSUES

1. Whether Kathy Campbell's Motion to Set Aside the Order of Dismissal as to Jeremy Davis should have been granted.
2. Whether Jeremy Davis would be prejudiced by having the Amended Complaint relate back to the date of the original pleading.
3. Whether the trial court had authority to set aside a previous order entered by an interim judge.

STATEMENT OF THE FACTS

On July 13, 2000, Kathy Campbell was rear-ended by a 1995 Dodge Neon driven by Jeremy E. Davis of Houston, Mississippi. Jeremy was born July 14, 1982, and was 17 years on the date of the accident and, therefore, turned 18 the following day. Thereafter, a Complaint was initiated in the Circuit Court of the First Judicial District of Chickasaw County, Mississippi, against "Dorothy Davis, as Guardian of Jeremy E. Davis, a Minor." (R 2 - 4)

The vehicle driven by Jeremy was owned by Dorothy Davis. (R 59, 61) Later, throughout discovery, it was revealed that Ms. Davis was Jeremy's grandmother, he resided in her home and was a permissive user of the vehicle. (R 61) (T 2 - 8) In his deposition, Jeremy conceded that Ms. Davis was in fact his legal guardian. (T 2 - 8)

Defendant Dorothy Davis subsequently filed a Motion for Summary Judgment which was argued before the Honorable Henry L. Lackey on March 7, 2003. (RE 14 - 15, T 1 - 15)

At this hearing, Defendant's counsel acknowledged Jeremy Davis as the grandson of Defendant Dorothy Davis. (T 2 - 8) Also, it was acknowledged that Ms. Davis owned the 1995 Dodge Neon being driven by Jeremy on the date of the accident and that he resided in her home. (T 2 - 8)

Counsel for Defendant also noted while Jeremy was being deposed he admitted his grandmother was his legal guardian as he resided in her home. (T 8) The proposed Order submitted following the hearing allowed:

It is further ordered and adjudged that the action itself will not be dismissed and the Plaintiff, Kathy Campbell, is allowed thirty days to file an amended complaint naming Jeremy E. Davis as a defendant and properly serve Jeremy E. Davis. It is still further ordered and adjudged that Jeremy E. Davis will then have thirty days to respond pursuant to Mississippi Rules of Civil Procedure, and will also have sufficient time to conduct discovery as to the claims against him.

Finally, in accordance with M.R.C.P. 54(b), the Court expressly finds and determines that is no just reason for delay, and expressly directs the entry of this judgment as final judgment dismissing the claims against Dorothy Davis.

(RI 12 - 13)

An Order that was entered allowing amendment to substitute Jeremy Davis as Defendant by Henry L. Lackey on July 14, 2003. (RE 16 - 17) An Amended Complaint was filed on August 8, 2003, naming Jeremy E. Davis defendant. (RE 17 - 20) Likewise, Jeremy E. Davis was served on August 8, 2003. (RE 21) An Answer was filed by the Defendant on September 5, 2003. (RE 22 - 26) Throughout pleadings, Defendant's counsel has previously responded on behalf of Jeremy E. Davis. (Notice of Service of Defendant Jeremy E. Davis' Designation of Expert Witness) (RE 8 - 11)

In an Order dated May 10, 2002, Defendant's counsel prepared an Agreed Order for Production of Medical Records in Compliance with a Subpoena. (RE 5 - 6) In this Order, Defendant's counsel outlines

...this court is aware, Defendant, Jeremy E. Davis, by and through counsel, served a Subpoena Duces Tecum on...and the court is further aware and specifically note that the parties, Kathy Campbell and Jeremy E. Davis,...and THEREFORE, IT IS ORDERED AND ADJUDGED that the Circuit Clerk may release the Plaintiff's medical records from North Mississippi Medical Center that are not in the court file directly to counsel for Defendant, Jeremy E. Davis, a minor, immediately upon receipt thereof, and that counsel for the Plaintiff, Kathy Campbell, shall be provided a complete copy of the documents released by the Circuit Clerk's office.

(RE 5 - 6)

This Order was acknowledged by Circuit Judge Henry L. Lackey on May 10, 2002. (RE 5 - 6) Certainly, the parties acknowledged Jeremy E. Davis as a defendant. In this sensitive order requesting the production of medical records, the Defendant acknowledged his active

participation in the litigation well before any statute had run.

A trial was set for March 15, 2003. (R 7)

On November 20, 2003, Jeremy filed a Motion to Dismiss. (R 122 - 156)

Ultimately, Ms. Davis, grandmother of Jeremy, was dismissed by Order dated May 25, 2004. (RE 28 - 29)

On February 11, 2005, Defendant's counsel argued Jeremy Davis' Motion to Dismiss before the Honorable William Coleman, interim judge. Plaintiff's counsel did not receive any Order setting the motion hearing for February 11, 2005, only a re-notice. (RE 30 - 31).

Obviously, much discussion and several dates were rescheduled and much confusion ensued as to whether Judge Lackey would be present, and the argument would take place. Judge Henry Lackey had previously acknowledged that Judge Howorth refused to hear arguments presented in this case. (T 25) Therefore, Plaintiff's counsel was correct to assume Judge Lackey would continue to hear any subsequent motions. No order agreeing to the date and time was ever entered by counsel for the defense.

Nevertheless, the Order was entered February 11, 2005, by Judge Coleman. (RE 32)

Thereafter, a Motion to Set Aside the Order of the Court was filed by Plaintiff's counsel on February 22, 2005 (eleven days after entry, but ten days in view of a legal holiday, of February 21, 2005, President's Day). (RE 33 - 37) On April 12, 2007, Plaintiff argued her Motion to set aside the Order of Judge William Coleman. The motion was denied by the Honorable Henry L. Lackey by order dated August 15, 2007. (RE 38 - 39)

Judge Lackey's Order stated

The Court is of the opinion this Court does not have the authority to set aside the order of another trial judge. Therefore, the motion to set aside the order of Judge William Coleman granting

Defendant's Motion for Summary Judgment is hereby overruled
and the relief therein granted is hereby denied.

(RE 38 - 39)

Plaintiff perfected a timely appeal.

SUMMARY OF THE ARGUMENT

This is an appeal whereby the circuit judge overruled Plaintiff's Motion to Reinstate this cause of action against party defendant, Jeremy E. Davis. Previously, the circuit judge acknowledged Jeremy E. Davis by Order dated May 10, 2002, whereby Defendant, **Jeremy E. Davis**, (*emphasis added*) subpoenaed sensitive confidential medical records of the Plaintiff, Kathy Campbell. (RE 5 - 6)

On the date of the accident, July 13, 2000, Jeremy E. Davis was a minor, being 17 years old. (R 2 - 4) The day following he turned 18 years on July 14, 2000.

Other pleadings and responses filed by the Defendant have acknowledged Jeremy E. Davis as a defendant in this litigation. (RE 8 - 11)

Nevertheless, the Order entered allowing amendment dated July 14, 2003, permits the Plaintiff to add Jeremy E. Davis and relate back to the original date of the Complaint, that being May 30, 2001, well within the statutory period.

Plaintiff's counsel attempted to maintain civility throughout the proceedings by honoring the defense counsel's wishes to not depose Dorothy Davis, grandmother and legal guardian of Jeremy E. Davis. Much conversation and discussion was had about Dorothy Davis' physical impairments and delicate condition. Likewise, many discussions were had about a resolution of this matter but instead, the defense has spent numerous dollars in defending the dismissal of a case involving damages with clear liability based on what they allege to be a clerical error. However, the same defense counsel has filed pleadings throughout this record indicating their acknowledgment and representation of the insured, Jeremy E. Davis, party defendant. (RE 5 - 6, 8 - 11) Therefore, the Order dismissing Jeremy E. Davis should be set aside.

In the interest of justice and fairness, the Motion to Set Aside the Order should be granted

and Plaintiff allowed to pursue her claim against the Defendant, Jeremy E. Davis.

ARGUMENT

I. The Amended Complaint filed on August 8, 2003, and served on Jeremy E. Davis on August 8, 2003, relates back to the date of the original pleading.

According to M.R.C.P. 15(c):

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 the service of the summons and complaint the (1) parties have brought in by amendment has received such notice of the institution of the action **if the party will not be prejudiced in maintaining the party's defenses on the merits** (*emphasis added*) 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.

In the facts before the Court, it is uncontested that Jeremy Davis was the driver of the vehicle which struck Ms. Campbell. Likewise, Jeremy was a minor on the day of the accident. It is also undisputed that Jeremy resided in the home of and was under the care of Ms. Dorothy Davis. As such, all parties had notice of the litigation when filed initially with the court on May 30, 2001. (R 2 - 4) As previously stated, the counsel for Defendant, responded on behalf of Defendant, Jeremy E. Davis, in more than one correspondence and pleadings filed herein. (RE 5 - 6, 8 - 11) Rather, Defendant, Jeremy E. Davis, admits he is a party by correspondences and pleadings filed by Defendant's counsel. The most significant in the record being an Agreed Order prepared by Defendant's counsel dated May 10, 2002, titled "Agreed Order for Production of Medical Records in Compliance with Subpoena." (RE 5 - 6)

This Order was entered by the Honorable Henry L. Lackey on May 10, 2002, and counsel

for both parties approved and agreed to the Order. Certainly, Jeremy E. Davis had notice of his involvement in the litigation if he has authority to subpoena personal, confidential medical records of the Plaintiff.

It is apparent the Defendant was acknowledged as a party with actual and constructive notice. Therefore, the Circuit Court ruled in error in overruling Plaintiff's Motion to Set Aside the dismissal of party defendant, Jeremy E. Davis, when this Judge acknowledged by the Order dated May 10, 2002, Davis as a party defendant.

The Rules of Civil Procedure in evidence are to be interpreted liberally in the interest of justice. Absolutely no prejudice on the part of Jeremy E. Davis will be created by the relation back to the initial pleading. As such, Plaintiff's Motion to Set aside dismissal of Jeremy E. Davis should have never been granted by the Court.

In Mieger v. Pearl River County, 2007 MSCA 2006-CA-01379,, the court found that the plaintiff was allowed to file a motion for leave to amend her complaint to add Pearl River County as a defendant on March 27, 2006, well outside the 120 period after the filing of the original complaint allowed in Rule 4(h) and after the expiration of the statute of limitations. The court found that the motion for leave to amend and relate back, even though not timely filed, related back to the initial filing date and should be allowed. Meiger. As in the case before the bar, the parties did not dispute the amended claim arose out of the same "conduct, transaction or occurrence," as the original complaint. Therefore, the remaining question is whether the new party to be added by the amendment is served or put on notice before the expiration period provided in M.R.C.P. 15(c). Meiger.

Obviously, in the case at the bar, every pleading filed by plaintiff has listed Jeremy Davis in some form of the pleading. Therefore, Jeremy had actual and constructive notice. Again, the

In the case before the bar, Jeremy certainly had notice of the claims pending before him as all pleadings filed by Plaintiff referred to him as a minor residing with his grandmother, Dorothy Davis. In fact, responses by the Defendant replied as "Jeremy Davis, Defendant." (RE 5 - 6, 8 - 11) Specifically, an agreed order prepared by counsel for defense acknowledged Jeremy's active participation. (RE 5 - 6)

The court in *Estes* goes on to state the Rule 15(a) allows for the liberal amendment of pleadings and Rule 15(c) has been construed as allowing the relationship back of additional parties where the newly named party is aware of the proceedings during the statutory time limit for bringing suit, knew or should have known that but for a mistaken identity he would have been named, and would not be prejudiced in his defense of his case. *Estes*, 732 So.2d at 253-54. See also *Womble v. Singing River Hospital*, 618 So.2d 1252 (Miss. 1993).

II. Plaintiff's Motion to Set Aside was timely filed in accordance with M.R.C.P. 6(a).

The Order was signed and filed on a Friday. Plaintiff's counsel got notice of the Order dated February 11, 2005, on a Saturday, February 19, 2005. The following Monday, February 21, 2005, was a holiday, President's Day, and the courthouse was closed. Plaintiff's counsel filed a Motion to Set Aside Judge Coleman's Order on the next day, Tuesday, February 22, 2005, eight days after receipt of the Order and ten days after the hearing, not counting the Monday, President's Day, on February 21, 2005.

M.R.C.P. 6(a) states that "the last day of the period so computed shall be included, unless it is Saturday, Sunday or a legal holiday...in which event the period runs until the end of the next day which is not a Saturday, Sunday or legal holiday." *Sheffield v. State of Mississippi*, 881 So.2d 249, 255 (October 2003).

Defendants have answered pleadings and referred to Defendant, Jeremy Davis, in documents filed before the court. (RE 5 - 6, 8 - 11)

In another case with similar facts, Ilene F. Estes was treated at Winston County Community Hospital on February 25, 1993, for injuries sustained in an automobile accident. Estes v. Starnes, 732 So.2d 251 (Miss. 1999). She initiated a proceeding against Donald Starnes on February 24, 1994, alleging he had caused the accident by negligently running a red light. Approximately three years later, on April 10, 1997, Estes filed a motion to amend the complaint. Estes v. Starnes, 732 So.2d 251, 252 (Miss. 1999) A hearing followed on April 20, 1997, whereby the circuit court denied her motion. Thereafter, Donald Starnes filed a motion to dismiss the action against him or, alternatively, for summary judgment Id. A dismissal as to Donald Starnes was entered on October 7, 1997. Id.

The court held that

Rule 15(a) declares that leave to amend: 'shall be freely given' when **justice so requires** (*emphasis added*); this mandate is to be heeded...if the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test claim on the merits. In the absence of any apparent or declared reason...such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc...the leave sought as the Rules required be 'freely given'.

Estes v. Starnes, 732 So.2d at 252 (quoting Frank v. Dore, 635 So.2d 1369, 1375 (Miss. 1994); Forman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227 (1962)).

In this case the senior Starnes, as well as his minor son, the driver of the vehicle had notice of Estes' claim within the applicable statute of limitations by virtue of Estes negotiations with the Starnes' insurer and ultimately, Estes' action against the elder Starnes.

III. It is illogical for the Circuit Judge to opine he has not authority to set aside a previous order entered in his court.

This Honorable Court appointed Judge William Coleman to assist Judge Lackey during a illness. Contrary to Judge Lackey's assertions, he has inherent and explicit authority to set aside a previous order of the court. If this was his basis in denying Plaintiff's Motion to Set Aside, the reasoning is illogical and unsound. The circuit judge had knowledge of the confusion surrounding the February 11, 2005, hearing. Additionally, Plaintiff would note that this hearing was not an order agreed to by counsel of the parties, but took place on a notice present by Defendant's counsel. (RE 30 - 31)

Likewise, the circuit judge previously acknowledged Jeremy E. Davis as a party defendant by entering an Agreed Order for Production of Medical Records in Compliance with a Subpoena whereby **Jeremy E. Davis** (*emphasis added*) subpoenaed sensitive confidential medical records of the Plaintiff. (RE 5 -6)

The circuit judge's opinion that he had no authority to set aside a previous order is inconsistent with previous acknowledgment that Judge Howorth refused to hear Judge Lackey's motions. (T 26, 30) As such, the circuit judge would have had continuing jurisdiction of this case and be able to intervene on any orders entered by interim judges appointed.

If Judge Lackey assumed that he did not have authority to set aside a previous order, Judge Coleman should have been noticed to hear the argument presented by Plaintiff's counsel. Obviously, Judge Lackey handled the case initially and had authority to make any determinations or reversals of previous orders.

CONCLUSION

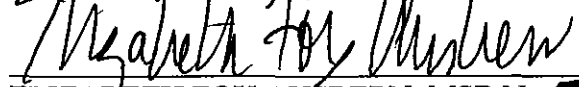
In the present case at the bar, the Motion to Set Aside the Order of Dismissal as to Jeremy E. Davis should have been granted by the trial court. Accordingly, Rule 15(a) and 15(c) of Mississippi Rules of Civil Procedure provide that a party's name should be substituted, allowed and related back to the original filing date where it would not prejudice the Defendant. Clearly, in the case at the bar, the Defendant would not be prejudiced by the reinstatement of the case against Jeremy E. Davis.

Plaintiff's counsel was well within in the appropriate ten day time in filing a motion to set aside the judgment as it was filed eleven days after the Friday, February 11, 2005, hearing before the Honorable William Coleman. The courthouse was closed on Monday, February 21, 2005, President's Day, allowing 10 days to file on February 22, 2005. Plaintiff's attorney did not receive notice of the Order until Saturday, February 19, 2005.

The Order allowing Plaintiff to amend to substitute Jeremy E. Davis as a party, dated July 14, 2003, allows relation back to the original Complaint and is, therefore, within the statutory requirements of notice and limitations.

Barring Plaintiff from her litigation against Defendant would err on the side of injustice and would be inherently unfair.

Respectfully submitted,



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APPELLEE

CERTIFICATE OF SERVICE

I, Elizabeth Fox Ausbern, attorney for Appellant, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing Brief of Appellant to the following parties:

**Honorable Henry L. Lackey
Circuit Court Judge
P.O. Drawer T
Calhoun City, MS 38916**

**Eric J. Dillon, Esq.
Currie Johnson Griffin Gaines & Myers
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So certified on this the 25th day of April, 2008.


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CERTIFICATE OF HAND DELIVERY

I, John Fox, certify pursuant to Rule 25(a) of the Mississippi Rules of Appellate Procedure that on the 25 day of April, 2008, I hand delivered cost prepaid, to the Mississippi Supreme Court Clerk the original and three copies of the Brief of Appellant.

SO CERTIFIED, this the 25 day of April, 2008.

John P. Fox
JOHN P. FOX