IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-IA-00621-SCT

CHARLES E. BUNTON, III, and HOUSING AUTHORITY OF THE CITY OF VICKSBURG — **APPELLANTS**

VS.

DARRELL KING AND MARY KING — **APPELLEES**

INTERLOCUTORY APPEAL FROM THE CIRCUIT COURT OF WARREN COUNTY, MISSISSIPPI

APPELLEES' BRIEF

ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

The Kings were injured in a motor vehicle accident. They mistakenly sued the City of Vicksburg believing that an entity called the Housing Authority of the City of Vicksburg was a City agency.

The City was dismissed and the Kings were granted leave to amend to delete the City as a defendant and to add the Housing Authority of the City of Vicksburg ("HAV") as a body politic independent of the City. In a non-MTCA case, the relation-back of an amendment correcting a defendant's mistaken identity would have proceeded without controversy, assuming Rule 15's conditions were met. The conundrum of this case is how can a plaintiff initiate the Mississippi Tort Claims Act's 90 day notice period "prior to maintaining an action" when the true identity of the defendant is not learned until after the lawsuit was filed?

This is a question of first impression – and it is easy to imagine events in a particular case raising other questions about how the statutory and rule "gears" mesh. One of an appellate court's most important and difficult jobs is to attempt to foresee how a decision might affect future cases. On one hand, the decision here should seek to effect the MTCA's policy of providing an efficient means for resolving controversies arising from public business. And on the other, the decision should also seek to avoid confusing well-settled law relating to, here, Rule 15. The best means to achieve the most accurate decision possible is to hear counsel discuss these matters with the Court.

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons[1] have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court may evaluate possible disqualification or recusal.

1. The Appellants, Charles E. Bunton, III, and the Housing Authority of the City of Vicksburg, Mr. James Stirgus, Executive Director.

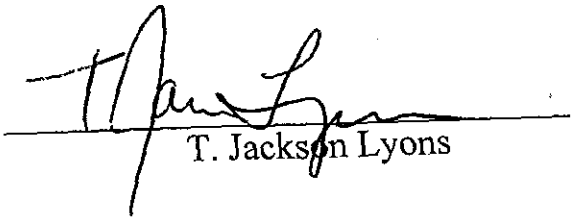
2. The Appellants' counsel, Mr. Steven Lacey and Mr. David Barfield, practicing with Barfield & Associates, P.A.

3. The Appellees, Darrell and Mary King.

4. The Appellees' counsel, Mr. T. Jackson Lyons and Mr. Raju Aundre'

[1]In the Appellants' Certificate of Interested Persons, Mississippi Housing Authorities Risk Management, Inc., is listed. That entity was dismissed as a party to this action. Also listed is Mr. Adam Draney as "Counsel for Housing Authority for the City of Vicksburg." Mr. Draney represented the City of Vicksburg in the trial court proceedings and the City has been dismissed from the lawsuit. Finally, the trial court judge is listed as having an "interest" in the case. If that were true, Judge Patrick would have disqualified himself from presiding over the case.

Branson.



T. Jackson Lyons

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STATEMENT OF THE ISSUE

This case involves the Mississippi Tort Claims Act's requirement that "ninety (90) days prior to maintaining an action [on a claim against a political subdivision], such [claimant] shall file a notice of claim . . .." Miss. Code Ann. § 11-46-11(1). Two entities, Mississippi Housing Authorities Risk Management, Inc. ("MHARM"), and the City of Vicksburg's housing authority, were mistakenly sued. Only after the defendants' pleadings and some discovery was it learned conclusively that Bunton was not a City or MHARM employee and that the "Housing Authority of the City of Vicksburg" was not a branch of municipal government.

The trial court allowed the complaint to be amended to name the correctly-identified HAV as an independent political entity. Under the peculiar circumstances of this case, the issue is whether HAV's having actual written notice of the claim for far more than ninety days prior to its joinder under Rule 15 is sufficient compliance with the MTCA's requirement that the claimant provide written notice at least ninety days prior to "maintaining an action" against the public defendant.

STATEMENT OF THE CASE

With respect for counsel's effort, the Kings must reject the Appellants' statement of the case as confusing and repetitive. This case arose from a motor vehicle accident that occurred on August 26, 2004. (V. 1: C.P. 7) The Kings were passengers in a vehicle that was rear-ended by a truck driven by Charles Bunton.

(V. 1: C.P. 7) Suit was filed on August 22, 2005, against Bunton, a private non-profit entity MHARM, and the City of Vicksburg through its Housing Authority. (V. 1: C.P. 7) Bunton was alleged to have been negligent in causing the accident and that liability was imputed to his employer, either MHARM or the City's housing authority. (V. 1: C.P. 8-9)

The uniform traffic accident form stated that the truck Bunton was operating was owned by MHARM. (V. 1: C.P. 45) As can be seen from the schematic drawing contained in the accident form, the GMC "Jimmy" in which the Kings were passengers was stopped in a turn lane on Warrenton Road waiting for traffic to clear to enter Highway 61 when Bunton struck the small SUV from behind. (V. 1: C.P. 41, 44)

Due to difficulty in locating MHARM's agent for service of process, the Kings requested additional time to serve process under Rule 4. (V. 1: C.P. 12) An order granting an additional 120 days was entered on December 22, 2005.[2] (C.P. 14) The 120th day following the order was April 21, 2006.

In lieu of answering, Bunton moved to dismiss on April 19, 2006. (V. 1: C.P. 15-23) Bunton contended that he was an HAV employee, that written notice had been sent to HAV on August 15, 2005, and that suit was filed only seven days later. Bunton alleged that this was a violation of the ninety-day notice requirement in the MTCA. (V. 1: C.P. 16-17) A claim notice letter was sent by the Kings to

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[2]Service was returned on Bunton on December 16, 2005; on the City April 21, 2006, and on MHARM April 20, 2006. (V. 1: C.P. 3)

Mr. James Stirgus at HAV on August 15, 2005. (V. 1: C.P. 24)

The Kings responded on May 1, 2006, asserting that Bunton was an employee of MHARM. (V. 1: C.P. 31) The Kings recited the traffic accident report saying that Bunton was operating an MHARM vehicle. In addition, the Kings had received correspondence from an insurance adjuster stating that the adjuster's client was "Mississippi Housing Authorities." (V. 1: C.P. 31, 45, 46)

The Kings response also referred to a letter received on September 9, 2005, from Vicksburg's city attorney. (V. 1: C.P. 32) The City Attorney's letter informed the Kings that Bunton was not a City employee and that the Housing Authority of Vicksburg was not a City entity. (V. 1: C.P. 32, 47) However, Bunton's motion to dismiss had referred to him as a City employee as well as a "Mississippi Housing Authorities" employee. (V. 1: C.P. 32; V. 1: C.P. 18, 21)

The City's lawyer was not quiet during this period, either. In May of 2006, the City requested dismissal asserting that it had been incorrectly sued. (V. 1: C.P. 90) The City asserted that neither MHARM nor the Housing Authority of the City of Vicksburg were municipal entities and that the City could not be vicariously liable for Bunton's acts. (V. 1: C.P. 91) And like Bunton's motion, the City's motion also contributed to the confusion over the issue of the correct "housing authority" to sue. The City alleged that MHARM and the Housing Authority of the City of Vicksburg were both non-profit corporations registered with the Secretary of State. (V. 1: C.P. 91)

Attached to the City's motion was a down-loaded form from the Secretary

of State's website, showing that the "Housing Authority of he City of Vicksburg Residents Council, Inc.," is a non-profit Mississippi corporation. (V. 1: C.P. 93-96)

Bunton's rebuttal explained forthrightly that his lawyer had erred in the original motion in saying that Bunton was a City employee. (V. 1: C.P. 70) The Executive Director of Housing Authority of the City of Vicksburg, one James Stirgus, averred in an affidavit exhibit to Bunton's rebuttal that Bunton was an employee of the HAV, not the City of Vicksburg. (V. 1: C.P. 78) Stirgus explained that HAV was an independent public body under the authorizing statute. (V. 1: C.P. 78) MHARM, Stirgus said, was the insurer of the vehicle Bunton was driving at the time of the accident and that the truck was owned by HAV. (V. 1: C.P. 78-79)

Following the Clerk's entry of default against MHARM (V. 1: C.P. 105), that entity found its voice and moved to set aside the default in June of 2006. (V. 1: C.P. 121-28) MHARM claimed that the default was taken against an improper party. (V. 1: C.P. 123) The motion said that Bunton was never its employee and that no direct action against it was available as it had never denied coverage. (V. 1: C.P. 123) In an affidavit exhibit, MHARM's plan administrator, Thomas Robinson, described MHARM and its business, denied Bunton was its employee, and asserted that it did not own the Ford truck involved in the accident. (V. 1: C.P. 147-48)

The City re-entered the fray in June, admitting that it, too, had made

mistaken assertions in its motion to dismiss. (V. 2: C.P. 169-70) The City had been confused about the "housing authorities" and explained that the "Housing Authority of the City of Vicksburg Residents Council, Inc.," was a Section 501(c)(3) citizens group that advised the real housing authority, HAV. (V. 2: C.P. 170) The City's amended motion to dismiss was not verified and there is no accompanying affidavit attesting these facts.

In the face of this, the Kings moved to amend their complaint to include both of the "housing authorities" for Vicksburg, and to sue HAV as either a City entity or alternatively as an independent public body corporate. (V. 2: C.P. 268-79)

Following a hearing in August, 2006, the trial court, the Hon. Isadore Patrick presiding, set aside the entry of default against MHARM to allow it to proceed to file an answer. (V. 3: C.P. 399) The trial judge also foresaw a ruling on MHARM's continued presence in the lawsuit by finding that Bunton was not MHARM's employee and that the truck Bunton was driving was not owned by MHARM. (V. 3: C.P. 399)

Judge Patrick went on to find that the City was not Bunton's employer and dismissed it. (V. 3: C.P. 399) A final judgment dismissing the City from the lawsuit was entered on September 27, 2006. (V. 3: C.P. 353) Because of the misleading statement in the traffic accident report, the trial court also granted the Kings' request to amend their complaint to name the proper parties to the lawsuit as reflected by the order. (V. 3: C.P. 399)

The Kings filed their amended complaint on September 26, 2006. It named MHARM, HAV, and Bunton as parties but deleted the City. (V. 4: C.P. 466-71) The amended complaint alleged in the alternative that Bunton was MHARM's employee or HAV's. (V. 4: C.P. 469) Bunton, MHARM, and HAV – represented by the same lawyer initially appearing on Bunton's behalf – filed a joint answer on October 2, 2006. (V. 3: C.P. 354-63) MHARM claimed that it was not a proper party because it was neither Bunton's employer nor the owner of the vehicle. (V. 3: C.P. 354) The other defendants alleged that the Kings failed to comply with the MTCA's notice provision and that the one-year limitations period had run. (V. 3: C.P. 355)

Following discovery (V. 3: C.P. 364-68; C.P. 390), the three defendants requested dismissal in January of 2007. (V. 3: C.P. 390-98) They raised familiar bases: MHARM was not a proper party and that Bunton and HAV, as persons covered by the MTCA, were entitled to the notice period of ninety days prior to a claimant's maintaining an action. (V. 3: C.P. 394) Even if the amended complaint related back to the original filing date, the defendants argued, the notice letter to HAV's executive director was sent only seven days after the original filing, not ninety. (V. 3: C.P. 397)

The Kings' response recited the confusion over who the proper defendants were, and averred that there was no obvious reason that Rule 15 should not allow joinder of a new defendant that is a governmental entity. (V. 3: C.P. 425) The Kings further noted that the lawsuit had been filed within the one-year MTCA

limitations period and that the amended complaint joining HAV was filed long after the ninety day waiting period ended: the notice of claim was sent to HAV's executive director, Stirgus, on August 15, 2005, and the amended complaint was filed on September 26, 2006. (V. 3: C.P. 426)

In their reply, the defendants argued that the Kings were trying to "have it both ways." (V. 4: C.P. 477) According to the defendants' reasoning, if the amended complaint related back to the original filing date, then the Kings still failed to initiate the ninety day waiting period. Or, if the Kings' amended complaint did not relate back, then the limitations period had run, according to the defendants' calculation, on March 24, 2006. (V. 4: C.P. 477)

The trial court resolved these issues in an order entered April 6, 2007. MHARM was dismissed. The Amended Complaint properly named HAV as a party defendant, and the amended complaint related back to the initial filing date and was therefore timely. And, finally, the trial court ruled that the Amended Complaint joining HAV was filed after the ninety day notice provision of the MTCA. (V. 4: C.P. 482)

As reflected by the Court's docket, the defendants timely requested leave of the Court to file an interlocutory appeal under Rule 5 on April 18, 2007, and that request was granted on June 14, 2007.

SUMMARY OF THE ARGUMENT

Rule 15 applies to Tort Claims Act cases and HAV was properly joined once it became clear that a mistake had been made as to the proper defendant, that

HAV had actual notice of the institution of the lawsuit, and that HAV knew that but for a mistake it would have been sued originally and not the City of Vicksburg. HAV's complaint that it was denied the ninety day notice period to which it was statutorily entitled is belied by the fact that it had actual notice of the Kings' claims for over a year prior to its being joined pursuant to Rule 15.

For the Court to accept HAV's argument that when a governmental entity is joined by amended complaint and that amendment relates back to the original pleading for statute of limitations purposes, then the government entity cannot receive its ninety day notice would read Rule 15 out of the rule book with respect to Tort Claims Act cases.

ARGUMENT

I. The rules of civil procedure apply to joinder of a party by way of amended complaint in cases arising under the Mississippi Tort Claims Act.

A. Standard of Review

Since HAV along with its insurer MHARM were the proponents of the facts ultimately accepted by the trial court relating to which "housing authority" was Bunton's employer and owner of the truck he drove, the decisions of the trial court sought to be reviewed here are ones of law. HAV makes no argument that the conditions of Rule 15 were not met. The interpretation of the rules of civil procedure are questions of law where the undisputed facts create no ambiguity to be resolved by a fact-finder and the Court applies a *de novo* standard of review. *Mullen v. Green Tree Financial Corp.-MS*, 730 So.2d 9, 11 (Miss.

1998)(procedural matters concerning the Mississippi Rules of Civil Procedure questions of law). Similarly, interpreting statutes, including issues arising under jurisdictional or prescriptive periods, are prototypical issues of law decided by courts. *Sheriff v. Morris*, 767 So.2d 1062, 1064 (Miss.App. 2000)(de novo review when addressing questions of law including matters involving statutes of limitation).

B. Rule 15 provides the appropriate rule for amended complaints being considered timely as to a new defendant.

Before turning to the merits of how Rule 15, Miss.R.Civ.P., and Miss. Code Ann. § 11-46-11 work together, there are two necessary preliminary points. First, claims under the MTCA are not among those actions listed in Rule 81, Miss.R.Civ.P., where a statute provides the relevant special procedures for the listed actions and the Rules of Civil Procedure only provide supplemental rules of process where the statute either is silent or where the Rules do not conflict with the prescribed statutory process. Nor has the Court ever held that the Tort Claims Act ousts the procedural norms specified in the Rules of Civil Procedure.

Second, Rule 15 has been interpreted broadly to allow parties to be added and dropped as well as for one party to be substituted for an original party. The Rule states that "[a]n amendment changing the party against whom a claim is asserted relates back" if the Rule's conditions are met. The rule drafters could have chosen more limited terms than "changing." For example, if the rule only applied to exchanging a new defendant for the original one, then it would have

read something like "An amendment substituting a new party against whom a claim is asserted for a previously named party relates back . . .." As a major civil procedure treatise states, "The word 'changing' has been liberally construed by the courts, so that amendments simply adding or dropping parties, as well as amendments that actually substitute defendants, fall within the ambit of the rule." 6A Charles Alan Wright, et al., *Federal Practice and Procedure* § 1498 (2d ed. 1990); *Wilner v. White*, 929 So.2d 315, 322 (Miss. 2006)(rule "clearly contemplates" new party added by amendment).

HAV argues that pursuant to Rule 15(c), the amended complaint relates back to the date the original complaint was filed. (Blue brief at 8) HAV points out that both it and its employee, Bunton, were named in the original complaint. (Blue brief at 4, 8) The "relation back" date, HAV contends, is only seven days after the date of the notice of claim. (Blue brief at 8) This argument ignores the fact that HAV initially was sued as an arm of the City of Vicksburg: "The defendant, Housing Authority of the City of Vicksburg, who (sic) is a government entity, may be served with process by and through its agent for process, Mayor Laurence E. Leyens, Vicksburg Office of the Mayor, 1401 Walnut Street, Vicksburg, Warren County, Mississippi 39180." (V. 1: C.P. 7)

HAV's argument does not correspond with the facts. No one disputes that there were three separate "housing authorities" named in various documents or that both the City and Bunton made mistakes in the motions to dismiss that fostered the confusion. Nor can it be disputed that the City, as HAV, was

dismissed, and HAV as an independent body corporate and politic was added by the Amended Complaint.

While HAV does not contest that the Amended Complaint relates back for purposes of the statute of limitations, it should be noted that there are ample facts in the record supporting the trial court's ruling. Under Rule 15 three conditions must be present for the amendment coming after the limitations period has run to relate back to the date of the original complaint.[3] First, the amendment must concern the same "conduct, transaction, or occurrence set forth" in the original pleading. Second, the new defendant added by the amendment must have received appropriate notice. And third, the new defendant knew or should have known that but for a mistake concerning the identity of the proper party that the action would have been brought against the new defendant.

The first requirement, that the claim arose from the same events stated in the original complaint, is met here. The original and amended complaints are all but identical with respect to the facts relating to the accident and the claims asserted

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[3]Rule 15(c), in relevant part, presently reads as follows:

(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. . . .

by the Kings.

The second condition requires that the new defendant have had notice sufficient that the defendant's defense is not prejudiced. This condition has three elements: (1) notice of the "institution" of the lawsuit; (2) within Rule 4's time for service of process; (3) such that the new party will not be prejudiced in defending on the merits.

While the "notice" requirement has not been elaborately examined by the appellate courts in Mississippi, examples taken from the cases that have found notice to have been imparted are illustrative. In *Womble v. Singing River Hosp.*, 618 So.2d 1252 (Miss. 1993), two physicians sought to be added by amendment had received correspondence about the lawsuit from their insurer and met with a lawyer retained by the insurance company to represent them. There is no doubt that actual notice constitutes "notice" for purposes of Rule 15.

Constructive notice is also alive and well within the terms of Rule 15. In *Bedford Health Prop. v. Estate of Williams*, 946 So.2d 335 (Miss. 2006), one of the added defendants was an individual who served as the agent for service of process for the original defendant. *Id.* at 353. The Court noted that other corporate defendants had the same address as the originally-named defendant and that all the entities shared closely held ownership. The close corporate relationship and over-lapping ownership among four added defendants imparted notice, according to the Court.

As HAV points out, it had received notice of the Kings' claims on August

15, 2005, when the Kings' lawyer, mistakenly believing HAV to be part of the City, sent claim letters to the Mayor and to HAV's executive director, among others. (Blue brief at 4; V. 3: C.P. 432-34, 441-43) On April 19, 2006, Bunton filed a motion to dismiss which shows that he had access to the claim notice sent to his employer, HAV – erroneously believed at the time to be part of the City. That Bunton's insurance defense counsel was asserting a defense based on the Kings' alleged improper notice to Bunton's employer can only mean that Bunton and his employer, HAV, were equally aware of the lawsuit that had been filed in August, 2005. Otherwise Bunton's counsel would not have known of or had access to the claim letter.

The second element under the notice requirement is that notice have been received with the time for serving process under Rule 4. In this case the service period was extended by order of the trial court and did not expire until April 21, 2006. Two days earlier Bunton filed his motion to dismiss with the Kings' claim letter to his employer, HAV, attached as an exhibit. Obviously, in order to develop the motion to dismiss the Kings' lawsuit prior to filing the motion on April 19, 2006, HAV would have had to have communicated with its employee and his lawyer. Notice can only have been received within the Rule 4 period applicable to this case.

The third element of the Rule 15(c)'s notice condition requires that the new defendant have received "such notice of the institution of the action that the party will not be prejudiced in maintaining the party's defense." With respect to

"prejudice" HAV might suffer, it has been an active participant from an early point in the litigation. There is no showing that the collateral litigation over the proper parties to the lawsuit has in any way affected HAV's ability to defend itself on the merits. Moreover, HAV has never claimed that it has been prejudiced and its argument to the Court – that the amended complaint relates back – concedes the point.

The third condition contains two elements: (1) that the Kings have made a mistake in failing to name HAV instead of the City; and (2) that HAV knew or should have known that but for the mistake it would originally have been sued. As for the Kings' "mistake" in having failed to originally name HAV as an independent political subdivision of the state, Mississippi's general law has always recognized that the word "mistake" encompasses a variety human failings, inadvertence, and honest error. *Mississippi State Bldg. Commission v. Becknell Const., Inc.*, 329 So.2d 57, 61 (Miss. 1976). What "mistake" does not encompass is intentional misconduct, willful neglect, or gross negligence. *Id.*

Rule 15's requirement that a defendant would have been named originally "but for" a mistake of the plaintiff's has not received very much direct attention from Mississippi's appellate courts. However, three cases shed some light: *Womble, supra, Ralph Walker, Inc. v. Gallagher*, 926 So.2d 890 (Miss. 2006), and *Bedford Health, supra.*

In *Womble*, the issues under Rule 15 were whether the physicians had proper notice and whether Womble's lawyer's failure to obtain the medical

records earlier and to refer the records to an expert – which review eventually revealed the claims against the physicians – was a "mistake" within the meaning of Rule 15.

Womble's complaint was filed on March 28, 1988. The physicians' insurance company and the lawyer retained by the insurer corresponded with them about the case and their involvement on April 20 and 21, 1988. Though an earlier version of Rule 15 did not expressly incorporate Rule 4's service period as the current version does, the physicians' actual notice was obviously within the modern Rule 4's 120 time period. The Court held "[o]n these facts the conclusion that, within the statutory period provided by law for commencing this action, Longmire and Weatherall had notice of this suit and knew or should have known that but for a mistake concerning their identities, they would have been included in this suit when it was originally filed on March 28, 1988, is virtually compelled." *Id.* at 1268.

And that was the conclusion of the *Bedford Health* case: notice of the lawsuit itself also led to the awareness that but for the plaintiff's mistake another five defendants would have been named. *Id.* at 354. Here the same is true: in the original complaint – of which HAV had notice – it was sued as an arm of a municipality, not an independent political subdivision. Both the City and Bunton responded to point out that HAV was a statutory creature independent of the City. Miss. Code Ann. § 43-33-1 *et seq.* (creating city and regional housing authorities to provide low income housing and employment). HAV's knowledge that the City

had been sued in its stead imparted awareness that the Plaintiffs had made a mistake in knowing who to sue.

The sources of the confusion were manifold. The traffic accident report form from the investigating police officer named "Mississippi Housing Authorities Risk Management" as the owner of the truck Bunton drove. A reasonable conclusion would be that Bunton either had permissive use of the truck or was MHARM's employee; in either case vicarious liability would attach assuming proof of Bunton's negligence. MHARM is a private domestic non-profit corporation and not a political subdivision of the state. *See*, Office of the Attorney General, Opinion No. 1999-0150 (April 9, 1999)(nonprofit corporation established by housing authorities excluded from the provisions of the MTCA).

Then the City and Bunton piped up with contradictory assertions regarding Bunton's employer and the City offered yet another "housing authority" as a proper defendant. While the confusion was straightened out, it is clear that the Kings were not the only ones having made a "mistake" in attempting to sort out the identity of the real party in interest as a defendant.

As the Court in *Ralph Walker* observed, the purpose of the second prong of Rule 15(c) "is to allow some leeway to a party who made a mistake, so long as the party does what is required within the time period under the rule." *Ralph Walker*, 926 So.2d at 896. In *Womble*, the plaintiff's lawyer waited for a time to obtain medical records that reflected the potential liability of the two physicians sought to be added. The Supreme Court concluded that this sufficed for a mistake in the

identity of the two physicians. *Womble*, 618 So.2d at 1268.

The federal courts of appeals are split on the question of whether ignorance of a potential defendant is a "mistake" within the meaning of Rule 15, Fed.R.Civ.P. See, *Arthur v. Maersk, Inc.*, 434 F.3d 196, 208 (3rd Cir. 2006)(holding that ignorance of existence of potential defendant is "mistake" and collecting cases). However, in this case the Kings were always aware that a "housing authority" of some description was a defendant.

As the Third Circuit said in *Arthur*, "A 'mistake' is no less a 'mistake' when it flows from lack of knowledge as opposed to inaccurate description. See Webster's Third New International Dictionary 1446 (1981) (defining 'mistake as 'a wrong . . . statement proceeding from faulty judgment, inadequate knowledge, or inattention')." As did the *Arthur* Court, Mississippi's appellate courts refer to standard dictionary sources to determine the plain meaning of language whether the words are contained in private law such as contracts, or public law such as ordinances and statutes. *Anglin v. Gulf Guaranty Life Ins. Co.*, 956 So.2d 853, ¶ 15 (Miss. 2007).

Not knowing which entity was a proper party, or whether the entity was a municipal agency, is the kind of "mistake" that, as here, normally gets worked out in the pleadings and discovery. The trial court's order allowing the complaint to be amended is an example of the kind of "leeway" referred to by the *Ralph Walker* court. The policy underlying the rule is that a meritorious claim should not be lost because of mistake or inadvertence that causes no prejudice to the party to be

joined.

Consistent with the trial court's ruling and HAV's contention that the amended complaint relates back, Rule 15(c)'s three conditions are met in this case. The complaint against the correctly-identified HAV is therefore within the one year limitations period provided by the MTCA.

C. The Appellants confuse "relation back" for purposes of considering a defendant to have been sued within the statute of limitations with whether the defendant has had at least 90 days under the MTCA to investigate the claim before the plaintiff maintains an action.

HAV admits that it had actual notice of the Kings' claims. HAV admits that the Kings sent its executive director a claim letter on August 15, 2005. HAV admits that it was not joined as a defendant until September 26, 2006. (Blue brief at 4, 8) That the Kings believed HAV a City instrumentality for many months before and after the original complaint was filed is not contested nor relevant when it comes to whether HAV had its ninety days prior to the Kings' "maintain[ing] an action." It is not contested that HAV had notice not ninety days but one year and forty-two days prior to being joined.

The notice provision of the Mississippi Tort Claims Act, set out in the margin in relevant part,[4] requires (1) written notice to the government agency, (2)

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[4]Miss. Code Ann. § 11-46-11, states in relevant part:

(1) After all procedures within a governmental entity have been exhausted, any person having a claim for injury arising under the provisions of this chapter against a governmental entity or its employee shall proceed as he might in any action at law or in equity; provided, however, that ninety (90) days prior to maintaining an action thereon, such person shall file a notice of claim with the chief executive officer of the governmental entity.

delivered at least ninety days prior to the claimant's "maintaining an action" on the claim. The issue, as it has arisen in this case, is how does a claimant initiate the ninety day period "prior to maintaining an action" when the claimant is mistaken about the identity of the governmental actor until after suit has been filed?

It is not contested that the Kings believed the City to be the governmental actor. Nor is it contested that this was a mistake and that HAV is a political subdivision of the state that is independent of its namesake city. Literally speaking, it is impossible for a person intentionally to give notice of any kind prior to filing a lawsuit when the true defendant is not known until after the lawsuit has been filed.

And that suggests at least one possible answer to the conundrum of the impossibility of giving notice to an unknown person. The statute says that the notice must be given ninety days before an action is "maintained." The statute does not say that the notice must be given prior to "filing" a lawsuit, or, like Rule 15, the "institution" of the action. All the statute says is that prior to "maintaining an action" notice must be given.

As the Court has previously had occasion to observe, a statute referring to

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. . .

(2) Every notice of claim required by subsection (1) of this section shall be in writing, and shall be delivered in person or by registered or certified United States mail. Every notice of claim shall contain a short and plain statement of the facts upon which the claim is based, including the circumstances which brought about the injury, the extent of the injury, the time and place the injury occurred, the names of all persons known to be involved, the amount of money damages sought and the residence of the person making the claim at the time of the injury and at the time of filing the notice.

"maintaining" an action can be referring either to commencing an action or to continuing an action. *Mississippi Ins. Guaranty Assoc. v. Harkins & Co.*, 652 So.2d 732, 737 (Miss. 1995), *citing Parker v. Lin-Co Producing Co.*, 197 So.2d 228, 229 (Miss.1967); *Harris v. Garner*, 216 F.3d 970, 973 (11th Cir. 2000)(noting difference between statute using phrase "bring" an action and "maintain" action); see also, Black's Law Dictionary.

Here, while the lawsuit had been pending since August of 2005, no action was "maintained" against HAV until September of 2006 when the trial court ordered it joined by amended complaint. Again, the time period between August, 2005, and September, 2006, exceeds the ninety day statutory minimum.[5]

HAV concedes it had actual notice of the Kings' claims and that the relation-back rule applies. It is true as HAV argues that in *University of Miss. Med. Ctr. v. Easterling*, 928 So.2d 815, 820 (Miss. 2006), the Court overruled one line of cases and clarified that the ninety day notice period would be strictly construed. Nevertheless, the notice itself is still subject to the substantial compliance rule of *Carr v. Town of Shubuta*, 733 So.2d 261, 263, ¶¶ 6-9 (Miss.

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[5]Candor requires the Court be informed that a similar, but not identical, argument was raised in *Pascagoula v. Tomlinson*, 741 So.2d 224, 227-28, ¶¶ 7-10 (Miss. 1999), and rejected by the Court. Tomlinson argued that while he did not wait 90 days before filing suit, the statute did not prohibit the "filing" of a complaint only "maintaining" an action. The Court rejected this construction, holding that the statute clearly referred to filing a complaint. The internal evidence for this was that the 90 day notice period tolled the statute of limitations; a matter which relates to the period in which a complaint may be filed. This part of *Tomlinson*, dealing with the 90 day notice period, was expressly overruled by *University of Miss. Med. Ctr. v. Easterling*, 928 So.2d 815, 820 (Miss. 2006). Also, the argument the Kings advance has to do with when HAV was joined, not when the lawsuit was filed.

1999).

The Court in *Carr* explained the purposes of both the notice period and the notice itself. The policy behind the notice period is to "give the governmental entity an opportunity to investigate the claim and notifying the appropriate agencies or officials of dangerous conditions or inappropriate conduct to allow for corrective or remedial measures, as well as to permit or encourage amicable settlement with the citizenry and/or prepare a defense to the claim." *Id.* at ¶ 8.

The Court observed that where the writing has fulfilled the purpose of the statute to give notice of a claim, then construing the form and content requirements so strictly that any deviation would lead to the destruction of the claim would defeat the purpose of the MTCA. *Id.* at ¶ 9, *quoting Collier v. Prater,* 544 N.E.2d 497, 498 (Ind.1989). The Tort Claims Act, and the Court's interpretations of it, often straddle a difficult line: "the act is intended to limit the government's liability for tortious conduct, just as the Worker's Compensation Act was intended to limit the exposure of Mississippi employers, but it is also intended to allow for the orderly administration of legitimate claims against governments for such tortious conduct, and like the workers' compensation act, serves as an exclusive remedy for such claims." *Id.*

In this case HAV received written notice in two forms: the August, 2005, notice to its executive director and the original complaint. The formal defect in these forms is patent: they were addressed to the "wrong" party. At the time, the Kings believed they were serving the City and its agency head. Nevertheless, it is

clear that HAV had notice fulfilling the purposes of the Tort Claims Act: information about the claim, the claimant, and the underlying facts, to enable HAV to investigate, and otherwise properly handle the claim either through settlement or litigation.

The MTCA's notice requirement has been met and HAV had many more than ninety days to conduct its investigation and determine a proper course of action. The statutory purposes having been met, HAV's argument boils down to nothing more than using an arch construction of the statute to defeat the purpose of the Act. HAV's reasoning would write Rule 15 out of existence with respect to joining government defendants after mistakes were made in the claim and complaint.

For example, assume that no erroneous claim letter had been sent and that, as in a more typical case, the correct defendant was only identified after the complaint was filed. See, *e.g.*, *Brown v. Winn-Dixie Montgomery, Inc.*, 669 So.2d 92 (Miss. 1996)(*en banc*)(confusion about which Winn-Dixie entity was store owner). According to HAV, if the correct government defendant were identified after the suit was commenced, then that defendant could never be properly joined because no ninety day notice period had been effected prior to the lawsuit being "maintained."

HAV's reasoning erases Rule 15 for purposes of MTCA claims and also defeats the purpose of the act.

There is one other reason HAV's reasoning is incorrect. *Easterling* was

decided after this case was filed. It overruled a line of cases having held that the ninety day time line was not a jurisdictional requirement but rather a mandatory one. Under the overruled line of cases, a lawsuit having been filed prior to the expiration of ninety days was subject to an injunctive stay pending the proper exercise of the government actor's rights and obligations under Section 11-46-11. The Kings filed this suit seven days after sending claims notices to several persons, including the City, HAV, the Attorney General, and HUD. This was done on August 22, 2005, in reliance on *Tomlinson*, *supra*, and its progeny.

These cases were not overruled until the mandate was issued in *Easterling* in June of 2006. Generally, judicial decisions have retrospective effect. However, non-retroactive application is appropriate in cases where settled law has been overturned. The Supreme Court of the United States has held that non-retroactive application of a holding may be appropriate in certain circumstances. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971).

Three considerations are relevant to the determination of retroactive or prospective-only application of a holding: (1) the decision at issue establishes "a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed"; (2) retroactive application of the decision would retard the operation of a federal statute as determined by its prior history, purpose, and effect; and (3) retroactive application would "produce substantial inequitable results." *Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 1036 (5th

Cir. 1990)(*en banc*).

The first point is established here: *Easterling* overruled a line of cases that had endured a substantial period of time. The question of whether retrospective application of the *Easterling* holding would "retard" the operation of the MTCA is a more difficult question. The purpose of Section 11-46-11(1)'s ninety day notice period has already been stated *supra*. In this case there was far more than ninety days notice for HAV to investigate and otherwise fulfill its obligations under Section 11-46-11(1).

The final factor is the most compelling one at least in terms of traditional due process: notice and hearing. If the Court accepts HAV's argument, then the Kings will be subject to a procedural regime that did not exist at the time they sent claims letters to all and sundry and filed suit. Kids on a playground are familiar with the fundamental idea that it is often unfair to someone when the rules are changed in the middle of the game. Cases filed after *Easterling* would have notice of how the statute was to be applied. Here the Kings would be surprised by the imposition of a new procedural regime.

II. Conclusion

The Court should affirm the trial court's ruling that HAV was properly joined under Rule 15(c) and that HAV duly was accorded appropriate notice and had many more than ninety days within which to investigate and otherwise exercise its rights and duties under Section 11-46-11. The case should be remanded to the Circuit Court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND FILING

The undersigned counsel of record to the Kings hereby certifies that the original of the above and foregoing Appellees' Brief has been filed with the Clerk of the Court by hand delivery of the undersigned to the Clerk, together with paper and electronic copies, and that true and correct copies have been deposited into the United States mail, first class postage prepaid, to the following addressees:

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