

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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

APPELLANTS

VS.

NO. 2007-IA-00621-SCT

DARRELL KING AND MARY KING

APPELLEES

REPLY BRIEF OF APPELLANTS

ORAL ARGUMENT NOT REQUESTED

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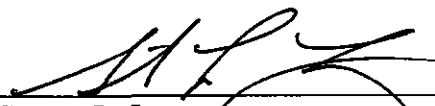
COUNSEL FOR APPELLANTS

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons 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:

- A. Charles E. Bunton, III, Appellant
- B. Housing Authority of the City of Vicksburg, Appellant
- C. Darrell King, Appellee;
- D. Mary King, Appellee;
- E. Mississippi Housing Authorities Risk Management, Inc.
- F. David A. Barfield and Steven L. Lacey, Barfield & Associates, Attorneys at Law,
P.A., Counsel for Appellants;
- G. Adam K. Draney, Esq., Counsel for Housing Authority for the City of Vicksburg
- H. Raju Aundre Branson, Esq. Counsel for Appellee;
- I. T. Jackson Lyons, Esq., Counsel for Appellee;
- J. Isadore W. Patrick, Circuit Judge, Warren County, Mississippi.

Respectfully submitted, this the 9th day of January, 2008



Steven L. Lacey

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ARGUMENT

I. The Appellees Concede That They Filed this Suit Seven Days after Sending MTCA Notice to the Housing Authority of the City of Vicksburg.

There is no dispute that this case arises out of an automobile accident that occurred on August 26, 2004. (Red Brief at 1). Appellees concede that a Mississippi Tort Claims Act Notice of Claim was sent to Executive Director of the Housing Authority of the City of Vicksburg, Mr. James Stirgus on August 15, 2005. (Red Brief at 2-3). The Appellees also concede that on August 22, 2005 “[t]he Kings filed this suit seven days after sending claims notices to several persons, including the City, HAV¹, the Attorney General, and HUD.” (Red Brief at 23). As such, the analysis concerning whether or not the Kings complied with the Mississippi Tort Claims Act ninety-day notice requirement of Miss. Code Ann. §11-46-11(1) in their attempt to sue a government entity ends on August 22, 2005. They clearly did not.

Appellees Concede That They Always Knew They Were Suing a Government Entity

Appellees go to great lengths in an attempt to excuse their alleged confusion as to whether they sued the Housing Authority of the City of Vicksburg as an entity of the City of Vicksburg or the Housing Authority of the City of Vicksburg as its own public body politic. However, Appellees Brief admits that “the Kings were always aware that a ‘housing authority’ of some description was a defendant.” (Red Brief at 17). Importantly, the Notice of Claim sent to the Executive Director of the Housing Authority (Mr. Jim Stirgus) specifically states “[t]he claim is based on injuries he received as the direct result of a collision with a government vehicle.” (RE 2). As such, Appellees

¹The Housing Authority of the City of Vicksburg is identified in Appellees’ Brief as “HAV.”

assertion that their notice of claim was addressed to the wrong party is a false argument. (Red Brief at 21).

As noted above, the Kings' complaint at ¶ 15 sued Defendant, Charles E. Bunton, III, as a Housing Authority employee in a representative capacity pursuant to Miss. Code Ann. § 11-46-7(2). (RV 1 at p. 6-10)(RE 3). The Kings' complaint specifically states that Bunton was "acting as an employee and agent of Defendant, Housing Authority of the City of Vicksburg; that Defendant, Charles E. Bunton, III, was acting within the scope and authority and as such in the furtherance of the business of the Defendant, Housing Authority of the City of Vicksburg; and that all acts of negligence of said Defendant, Charles E. Bunton, III, were and are imputed to the Housing Authority of the City of Vicksburg, defendant named herein. In fact, the caption and paragraph 15 of the original Complaint and Amended Complaint are identical. (RV 1 at p. 6-10)(RE 3) & (RV 3 at p. 347-352)(RE 6).

The Mississippi Tort Claims Act Ninety Day Notice Requirement Cannot Be Ignored

Appellants' reliance on *Pascagoula v. Tomlinson*, 741 So.2d 224 (Miss. 1999) and its progeny for the proposition that they could ignore the ninety day notice requirement is misplaced. (Red Brief at 23). Reliance on *Tomlinson*, and its progeny in August 2005 ignores the fact that in 2004, this Court found in *Wright v. Quesnel*, 876 So.2d 362 (Miss. 2004), that "[a]llowing a plaintiff to file suit before ninety days have passed since noticing the claim is tantamount to reading out the notice provisions of the Mississippi Tort Claims Act."² Moreover, this Court's holding in *University of Mississippi Medical Center v. Easterling* 928 So.2d 815 (Miss. 2006) relied on 2004 cases and states as follows:

²The Plaintiff in *Wright* filed her complaint eleven days after filing her Notice of Claim and this Court ruled that she failed to follow the ninety-day rule. *Id.* at 366.

“ We adhere to our controlling cases of *Davis v. Hoss*, 869 So.2d 397 (Miss.2004), and *Wright v. Quesnel*, 876 So.2d 362 (Miss.2004), and accordingly find that Easterling failed to follow the ninety-day notice rule which this Court strictly enforces.”

Easterling at 816.

As such, Appellees’ assertion that “the Kings will be subject to a procedural regimen that did not exist at the time they sent their claims letters to all and sundry and filed suit” is also without merit. (Red Brief at 24).

II. Relation Back Pursuant to Mississippi Rule of Civil Procedure 15(c)

As a starting point, Appellees concede that they did not comply with the MTCA since they filed this suit only seven days after sending out their claims notices to various government entities. (Red Brief at 23). Defendants’ Motion to Dismiss argued that pursuant to M.R.C.P. 15(c) Plaintiffs’ Amended Complaint must relate back to the date of the original pleading, which in this case is August 22, 2005 and only seven days after the notice of claim was sent to Mr. James Stirgus. M.R.C.P. 15(c)(2). (RV 3 at p. 392-397)(RE 2). In light of Appellees admission at page 17 of their Brief that “the Kings were always aware that a ‘housing authority’ of some description was a defendant” and considering that Defendant Charles Bunton (a housing authority employee) was sued in the original complaint in a representative capacity of the housing authority pursuant to Miss. Code Ann. § 11-46-7(2), they should not be allowed to carve out an exception to the MTCA Notice of Claim requirements by way of amending their complaint to include already named parties. The undersigned counsel has not found any Mississippi authority that would allow the relation back doctrine in Rule 15(c) to circumvent the requirements set out in the Mississippi Tort Claims Act ninety-day notice requirement of Miss. Code Ann. §11-46-11(1) nor should this Court create such an exception at this time.

CONCLUSION

On April 5, 2007, the Honorable Circuit Court Judge Isadore W. Patrick, opined that Plaintiffs' Amended Complaint relates back under M.R.C.P.15(c), and was therefore filed within the one (1) year statute of limitations. The Court further ruled that Plaintiffs' Amended Complaint was filed after the 90 days notice provision of the Mississippi Tort Claims Act. (RV 4 at p. 482)(RE 8). Based upon the case law referenced herein above, the Appellants respectfully submit that this reasoning is flawed, and that the Court erred in denying their Motion to Dismiss. Appellees' attempt to carve out an exception to the ninety-day (90) notice provision of the Mississippi Tort Claims Act by way of amending their complaint to re-name an already named defendant should not be rewarded. This Court made abundantly clear in *University of Mississippi Medical Center v. Easterling* 928 So.2d 815 (Miss. 2006) that the ninety-day (90) notice provision of the Mississippi Tort Claims Act is a hard-edged, mandatory rule that this Court strictly will strictly enforce. *Id.* at 820.

There is no dispute that Plaintiffs sent a MTCA Notice of Claim to the Executive Director of the Housing Authority of the City of Vicksburg (Mr. Jim Stirgus) on August 15, 2005 and then filed their cause of action against a government entity and a government employee only seven (7) days later on August 22, 2005 in violation of the MTCA notice provision. Therefore, Charles E. Bunton, III and Housing Authority of the City of Vicksburg respectfully submit that the Trial Court's denial of their Motion to Dismiss based upon the relation back doctrine was in error and request that this Court reverse and render the Trial Court's April 5, 2007 Order denying Defendants' Motion to Dismiss.

Respectfully submitted this the 10th day of January, 2008.

CHARLES E. BUNTON III; and HOUSING
AUTHORITY OF THE CITY OF VICKSBURG

BY: _____

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CERTIFICATE OF SERVICE

I, Steven L. Lacey, one of the attorneys for the Defendants, Charles E. Bunton III and the Housing Authority of the City of Vicksburg, do hereby certify that I have this day caused a true and correct copy of the foregoing document to be mailed via United States Mail to the following:

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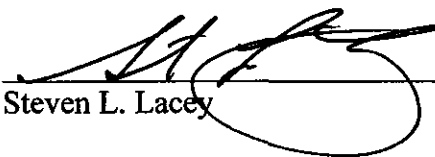
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Honorable Isadore W. Patrick
c/o Ms. Brenda Williams
Court Administrator
P. O. Box 351
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CIRCUIT COURT JUDGE

SO CERTIFIED, this the 10th day of January, 2008.



Steven L. Lacey