

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DARRELL KING AND MARY KING

PLAINTIFF

VS.



NO. 2007-IA-00621-SCT

**CHARLES E. BUNTON III
MISSISSIPPI HOUSING AUTHORITIES
RISK MANAGEMENT, INC.; and
HOUSING AUTHORITY OF THE CITY
OF VICKSBURG**

DEFENDANTS

BRIEF OF APPELLANTS

ORAL ARGUMENT NOT REQUESTED

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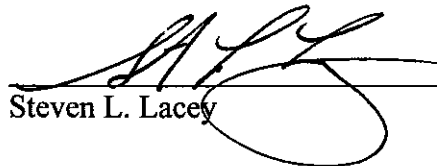
COUNSEL FOR APPELLANTS

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 27th day of September, 2007.



Steven L. Lacey

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STATEMENT REGARDING ORAL ARGUMENT

Appellants do not believe oral argument will be helpful to the Court.

STATEMENT OF THE ISSUE

- I. Whether the Trial Court erred in denying the Defendants' Motion to Dismiss based upon Plaintiffs' failure to comply with the statutorily-prescribed ninety day period before filing suit pursuant to the Mississippi Tort Claims Act? Miss. Code Ann. § 11-46-11(1).

STATEMENT OF THE CASE

This case arises out of an automobile accident that occurred on August 26, 2004. Plaintiffs sent a Mississippi Tort Claims Act (“hereinafter known as MTCA”) Notice of Claim to the proper Executive Director of the Housing Authority of the City of Vicksburg (Mr. Jim Stirus) on August 15, 2005 pursuant to Miss. Code Ann. § 11-46-11. (RV 1 at p. 24)(RE 2). Plaintiffs then filed their cause of action on August 22, 2005 in the Warren County Circuit Court against Charles E. Bunton (a Housing Authority Employee) and the Housing Authority of the City of Vicksburg only seven (7) days after serving their Notice of Claim. (RV 1 at p. 6-10)(RE 3). On August 31, 2006, the Honorable Circuit Court Judge Isador Patrick granted Plaintiff’s request for leave to file an Amended Complaint to add the Housing Authority of the City of Vicksburg. (RV 2 at p. 268-269)(RE 5). On September 26, 2006, Plaintiffs filed an Amended Complaint without naming any new parties. (RV 3 at p. 347-352)(RE 6). In fact, the caption and paragraph 15 of the original Complaint and the Amended Complaint are identical. (RV 1 at p. 6-10)(RV 3 at p. 347-352)(RE 3 & 6). On February, 22, 2007, Defendants argued a Motion to Dismiss based upon the MTCA ninety-day notice requirement and in the alternative the MTCA statute of limitations. (RV 3 at p. 392-397)(RE 7). The Trial Court issued its Order denying the Defendants’ Motion to Dismiss on April 5, 2007 opining that Plaintiffs’ Amended Complaint relates back under MRCP 15(c) and was therefore not barred by the statute of limitations. The Court also opined that Plaintiffs’ Amended Complaint was filed after the ninety-day notice provision of the Mississippi Tort Claims Act. (RV 4 at p. 482)(RE 8). From this Order, Defendants timely filed their Petition for Permission to Appeal that this Court granted on June 14, 2007.

STATEMENT OF THE FACTS

It is undisputed by the parties that the automobile accident in question occurred on August 26, 2004. It is also undisputed that Plaintiffs sent a Mississippi Tort Claims Act Notice of Claim to the Executive Director of the Housing Authority of the City of Vicksburg (Mr. Jim Stirgus) on August 15, 2005. (RV 1 at p. 24)(RE 2). In addition, it is undisputed that Plaintiffs filed their cause of action against Charles E. Bunton (a Housing Authority Employee) and the Housing Authority of the City of Vicksburg only seven (7) days after serving their Notice of Claim on August 22, 2005. (RV 1 at p. 6-10)(RE 3).

During a hearing of Defendants' original Motion to Dismiss, Plaintiffs argued that they were confused and sued the City of Vicksburg instead of the Housing Authority of the City of Vicksburg. (RV 5 p. 44 lines 8-29; p. 45 lines 1-22). On August 31, 2006, the Warren County Circuit Court granted Plaintiffs' request for leave to file an Amended Complaint in order to have the proper Defendants in this lawsuit. However, on September 26, 2006, Plaintiff filed an Amended Complaint without naming any new parties. 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).

On February 22, 2007, the Defendants argued that Plaintiffs' cause of action should be dismissed for failure to comply with the MTCA ninety-day notice requirement and that Plaintiffs' Amended Complaint did not cure their procedural deficiency. In particular, Defendants argued that the Relation Back of Amendments pursuant to M.R.C.P. 15(c), relates back to the date of the original pleading, which in this case is August 22, 2005. (RV 5 p. 80-82)(RE 10). Therefore, the relation back date is only seven days after Plaintiffs filed their Notice of Claim on August 15, 2005. Finally, the undersigned Counsel has been unable to find any authority in Mississippi allowing

the relation back doctrine of M.R.C.P. 15(c) to circumvent the Mississippi Tort Claims Act ninety-day notice requirement.

Accordingly, because Plaintiffs did not comply with the notice provisions of § 11-46-11(1), their allegations against Bunton (a Housing Authority employee) and the Housing Authority of the City of Vicksburg Plaintiffs are procedurally barred and the Defendants' Motion to Dismiss should have been granted by the Trial Court in this matter.

SUMMARY OF THE ARGUMENT

The ruling of the Trial Court is inconsistent with the decisions of this Court in *Wright v. Quesnel*, 876 So.2d 362 (Miss. 2004) and *University of Mississippi Medical Center v. Easterling* 928 So.2d 815 (Miss. 2006). This Court found in *Wright*, 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. Gross disregard for the notice provisions is not considered substantial compliance.” *Wright* at 366. In *Easterling*, this Court stated that the ninety-day notice requirement under section 11-46-11(1) is a “hard-edged, mandatory rule which the Court strictly enforces.” *Easterling* at 820.

Plaintiffs’ 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 can not relieve their obligation to comply with the notice provisions of § 11-46-11(1). There is no doubt that Plaintiffs knew they were suing a government entity as evidenced by paragraph 15 of the original Complaint, Amended Complaint, and the MTCA Notice of Claim sent to the Executive Director of the Housing Authority (Mr. Jim Stirgus) which specifically referenced Miss. Code Ann. § 11-46-11. (RV 1 at p. 6-10)(RE 3) & (RV 3 at p. 347-352)(RE 6).

ARGUMENT

Mississippi Torts Claims Act 90 Day Notice Requirement

This Court has been abundantly clear that under Mississippi law, in all claims against a “governmental entity,” the MTCA mandates, as a prerequisite to suit, written notice of the claims be served ninety days *before* any action is filed:

[A]ny 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.*

Miss. Code Ann. § 11-46-11(1) (emphasis added).

Furthermore, this Court in *Wright v. Quesnel*, 876 So.2d 362, 366 (Miss. 2004) stated that:

[w]hile a plaintiff need only substantially comply with the MTCA notice statute, “we can hardly afford relief under the [MTCA] when there is no effort to comply with the procedural mandates.” *Little v. Miss. Dep’t of Human Servs.*, 835 So.2d 9, 12-13 (Miss.2002) (emphasis added). That is, “[t]hough substantial compliance with the notice provisions is sufficient, ‘substantial compliance is not the same as, nor a substitute for, non-compliance.’” *Gale v. Thomas*, 759 So.2d 1150, 1158 (Miss.1999) (quoting *Carr v. Town of Shubuta*, 733 So.2d 261, 265 (Miss.1999)).

The Plaintiff in *Wright* filed her complaint eleven days after filing her Notice of Claim. *Id.* at 366. In other words, she filed a Notice of Claim, but did not wait the statutorily-prescribed ninety day period before filing suit. Similarly, Plaintiffs in this case filed their MTCA Notice of Claim on August 15, 2005 and their original Complaint only seven (7) days later on August 22, 2005, instead of waiting the statutorily required ninety (90) days prior to maintaining a cause of action. When analyzing *Wright’s* claim, this Court found 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 MTCA. Gross disregard for the notice provisions is not considered substantial compliance.” *Id.* at 366.

Subsequent to the *Wright* case, this Court decided *University of Mississippi Medical Center v. Easterling* 928 So.2d 815 (Miss. 2006) and stated as follows:

In order to make it perfectly clear to all that strict compliance is required, as stated in *Davis* and *Wright*, we hereby overrule *Tomlinson* and its progeny, including *Booneville*, *Givens*, *City of Wiggins*, *Mississippi School for Blind*, and *Clay County*, but only as to those cases' analysis of the ninety-day notice requirement.

* * *

Since the MTCA's passage in 1993, a considerable amount of time has passed for the legal profession to become aware of the ninety-day notice requirement in section 11-46-11(1). See 1993 Miss. Laws 476. The result here, as in *Ivy*, is that the ninety-day notice requirement under section 11-46-11(1) is a "hard-edged, mandatory rule which the Court strictly enforces." *Ivy*, 612 So.2d at 1116.

Easterling at 820.

Before the Trial Court, Plaintiffs argued that they sent a Notice of Claim to the Housing Authority of the City of Vicksburg on August 15, 2005. That they filed their original Complaint on August 22, 2005, however, did not file the Amended Complaint until September 26, 2006 and therefore Defendants had been on "notice" for well over ninety days by the time the Amended Complaint was filed. (RV 5 at p. 83-84)(RE 10). However, the caption and paragraph 15 of the original Complaint and Amended Complaint are identical. Both Complaints name Charles E. Bunton and the Housing Authority of the City of Vicksburg as parties to this lawsuit. (RV 1 at p. 6-10)(RE 3) & (RV 3 at p. 347-352)(RE 6). Defendants' Motion to Dismiss Plaintiffs' cause of action argued that pursuant to M.R.C.P. 15(c) Plaintiffs' Amended Complaint relates back to the date of the original pleading, which in this case is August 22, 2005. M.R.C.P. 15(c)(2). (RV 3 at p. 392-397). As such, the Amended Complaint relation back date (August 22, 2005) remains only seven days after Plaintiffs filed their Notice of Claim with Jim Sturgus the Executive Director of the Housing Authority of the City of Vicksburg. Under these circumstances, Plaintiffs should not have been relieved of their procedural deficiency in failing to comply with the MTCA Notice of Claim

requirements. Miss. Code Ann. §11-46-11(1). 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).

Accordingly, because Plaintiffs did not comply with the notice provisions of Miss. Code Ann. § 11-46-11(1) their allegations against Bunton (a Housing Authority employee) and the Housing Authority of the City of Vicksburg is procedurally barred and their cause of action should be dismissed with prejudice.

Alternatively, Plaintiffs' Amended Complaint Is Time Barred

Plaintiffs' Motion to Amend their original Complaint asserted that they were adding a party. (RV 2 at p. 268-260)(RE 5). Therefore, Defendants argued, in the alternative, that Plaintiffs Amended Complaint to the extent it added any new government entities to this suit was barred by the MTCA statute of limitations. That the actionable conduct in this case occurred on August 26, 2004. That Plaintiffs' Notice of Claim was sent and received on August 17, 2005, 356 days after the action occurred. The statute of limitations was tolled for 120 days from August 17, 2005, because the action was against the Housing Authority of the City of Vicksburg; therefore, the tolling period would have ended on December 15, 2005. Miss. Code Ann. §11-46-11(3). That after the tolling period ended, the Plaintiffs had only 9 days left in the original one-year statute (365 days minus 356 days), or until December 24, 2005, plus the additional 90 days, to file suit. Miss. Code Ann. 11-46-11(3). (RV 5 at p. 80-83) (RE 10). Therefore, Plaintiffs' cause of action needed to be filed by March 24, 2006 in order to be timely. See *Page v. University of Southern Mississippi*, 878 So.2d 1003, 1005-09 (Miss. 2004). However, Plaintiffs' Amended Complaint was not filed until September 26, 2006. Therefore, the Amended Complaint is time-barred under the MTCA statute

of limitations to the extent that Plaintiffs assert that their Amended Complaint added the Housing Authority of the City of Vicksburg as new party. *Id.*

Succinctly, Plaintiffs inappropriately filed their original Complaint without waiting the statutorily required period pursuant to Miss. Code Ann. §11-46-11(1); then Plaintiffs failed to serve the inappropriately filed Complaint on the Housing Authority of the City of Vicksburg pursuant to M.R.C.P. 4(h); and then Plaintiffs failed to amend their Complaint on or before March 24, 2006, the expiration of the statute of limitations in this case. As a result, Plaintiffs' August 4, 2006 Motion to Amend their Complaint and their Amended Complaint subsequently filed on September 26, 2006, were filed beyond the MTCA one year statute of limitations. See *Page v. University of Southern Mississippi*, 878 So.2d 1003, 1005-09 (Miss. 2004); Miss. Code Ann. §11-46-11(3).

Plaintiffs can not have it both ways. Either the Amended Complaint relates back to the date of the original Complaint pursuant to M.R.C.P.15(c), leaving the Plaintiffs in the same position of failing to comply with the MTCA's Notice of Claim provision. Or, Plaintiffs' Amended Complaint does not relate back because they named a new party and was therefore filed after the statute of limitations had run. This Court recently ruled as follows: "[I]f an amended complaint is filed after the statute of limitations has run-regardless of when the motion to amend was made-the statute of limitations bars suits to newly named defendants." *Wilner v. White*, 929 So.2d 315, 319. (Miss. 2006).

The Trial Court's Ruling

On April 5, 2007, the Honorable Circuit Court Judge Isadore W. Patrick, denied the Defendants' Motion to Dismiss Plaintiffs' Amended Complaint. In summary, the Court 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. Therefore the present action will proceed against Charles Bunton and the Housing Authority of the City of Vicksburg. (RV 4 at p. 482)(RE 8).

Based upon the case law referenced herein above, the Defendants respectfully submit that this reasoning is flawed, and that the Court erred in denying their Motion to Dismiss. It only stands to reason that if the Amended Complaint relates back to August 22, 2005 (the original filing date) pursuant to M.R.C.P. 15(c) then it is impossible for it to have been filed ninety (90) days after August 15, 2005 as determined by the Trial Court. It should not be lost that the proper Executive Director of the Housing Authority of the City of Vicksburg was timely served with a Tort Claims Act Notice of Claim.

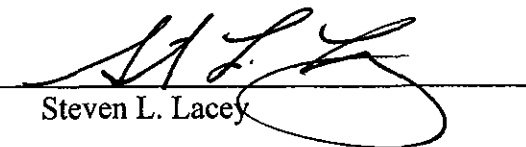
Plaintiffs attempt to carve out an exception to the ninety-day (90) notice provision of the Mississippi Tort Claims Act by way of amending their complaint to re-name an already named defendant should not be rewarded. This Court made abundantly clear in *University of Mississippi Medical Center v. Easterling* 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.

CONCLUSION

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. If Plaintiffs' Amended Complaint relates back to August 22, 2005 pursuant to M.R.C.P. 15(c) it puts Plaintiffs in the same procedural deficiency under the MTCA and can not cure the fact that their lawsuit against a government entity and its employee was filed only seven days after providing their Tort Claims Act Notice of Claim. On the other hand, if Plaintiff's Amended Complaint adds a new party as suggested by Plaintiffs' Motion to Amend it is time barred for all the reasons set out above. 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 was in error and request that this Court should reverse and render the Trial Court's April 5, 2007 Order denying Defendants' Motion to Dismiss.

Respectfully submitted this the 27TH day of September, 2007.

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

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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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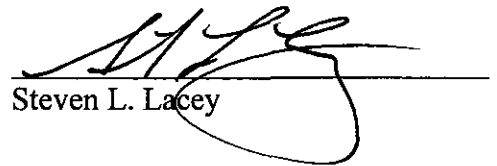
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Honorable Isadore W. Patrick
c/o Ms. Brenda Williams
Court Administrator
P. O. Box 351
Vicksburg, MS 39181-0351

CIRCUIT COURT JUDGE

SO CERTIFIED, this the 27th day of September, 2007.


Steven L. Lacey