

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
COURT OF APPEALS**

ERVIN FUNDERBURG, ET AL.

APPELLANTS

VERSUS

CAUSE NO: 2008-CA-00235

PONTOTOC ELECTRIC POWER ASSOCIATION

APPELLEE

**APPEAL FROM THE CIRCUIT COURT OF CALHOUN COUNTY, MISSISSIPPI
CAUSE NO: 2005-178**

**BRIEF OF APPELLEE,
PONTOTOC ELECTRIC POWER ASSOCIATION**

ORAL ARGUMENT NOT REQUESTED

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POWER ASSOCIATION**

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed people have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

- (1) Honorable Andrew K. Howorth, *Circuit Court Judge of Calhoun County, Mississippi;*
- (2) Honorable David L. Sanders, Columbus, Mississippi, Mitchell, McNutt & Sams, *Attorney for Defendant/Appellee;*
- (3) Honorable Christopher J. Latimer, Columbus, Mississippi, Mitchell, McNutt & Sams, *Attorney for Defendant/Appellee;*
- (4) Honorable Jon T. Crump, Tupelo, Mississippi, *Attorney for Plaintiff/Appellants;*
- (5) Chuck Howell, General Manager, *Pontotoc Electric Power Association;*
- (6) Ervin Funderburg, *Plaintiff/Appellant;*
- (7) Nancy Funderburg, *Plaintiff/Appellant;*
- (8) Pam Burt, *Plaintiff/Appellant;*
- (9) Ervin Funderburg, Nancy Funderburg and Pam Burt, collectively d/b/a Corner Closet, Inc., *Plaintiff/Appellant;*
- (10) Corner Closet, Inc., a dissolved corporation, *Plaintiff/Appellant;*

- (11) Ervin Funderburg, Nancy Funderburg and Pam Burt, collectively d/b/a CC Blouses, *Plaintiff/Appellant*.

Respectfully submitted, this the 8th day of July, 2008.

A handwritten signature in black ink, appearing to read 'D. Sanders', written over a horizontal line.

DAVID L. SANDERS, MS Bar #6442

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ATTORNEYS FOR DEFENDANT/
APPELLEE

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I.
STATEMENT OF THE ISSUE

Whether the trial court erred in determining that the statute of limitations barred Plaintiffs' claims brought in the second lawsuit.

II.
STATEMENT OF THE CASE

This case has had a long and winding procedural history. It has been filed, dismissed due to staleness, reinstated with a new plaintiff, dismissed for a second time, filed again in a separate lawsuit with new plaintiffs, dismissed for a third time, and now appealed.

The case actually dates back to March 3, 2002, when employees of Pontotoc EPA allegedly spilled a portion of fuel while retrieving two above-ground fuel tanks located near a cement building that housed second-hand clothes. (R. 14).¹ As a result of that incident, Ervin Funderburg sued Pontotoc EPA in the Circuit Court of Calhoun County, Mississippi on June 14, 2002, in cause number C2002-082 (the "first lawsuit"). (R. 13). After Funderburg failed to prosecute the case for over a year, the lower court dismissed it as being stale. (R. 17).

Funderburg then moved the lower court to reinstate the case, and as part of that reinstatement, to substitute plaintiffs. He moved to substitute Corner Closet, Inc. in place of himself as the plaintiff. (R. 21). As grounds for the substitution, he argued that "(d)uring the prosecution of this matter, facts came to light that show clearly that the

¹ While the lower court has never reached the underlying facts of this case, it was proffered during oral argument on Pontotoc EPA's Motion to Dismiss that only about a gallon of fuel spilled. (Transcript of Oral Argument, p. 4, Plaintiffs' Record Excerpts). That fact was not disputed by Plaintiff's counsel.

proper Plaintiff is Corner Closet, Incorporated "and that "Corner Closet, Incorporated . . . owns the damaged property, which is the subject of this suit." (*Id.*; R. 44-5) In addition, land records showed that Funderburg did not own the real property in question. (R. 45, 49).² The Court granted the motion, and the Complaint was reinstated and amended on June 24, 2004 to list Corner Closet, Incorporated ("Corner Closet, Inc.") as the plaintiff. (R. 24).

Following the amendment, Pontotoc EPA discovered that Corner Closet, Inc. had dissolved back in 1993, and had never sought reinstatement since its dissolution. (R. 29-30, R.E. 1). Upon learning that information, Pontotoc EPA moved for the case to be dismissed without prejudice because Corner Closet, Inc., as a dissolved corporation, had no right to sue in this context. (R. 29-30). The lower court found the motion well-taken and dismissed the case without prejudice on October 26, 2005. (R. 51). The Order of Dismissal stated that:

Having dissolved in 1993, Corner Closet Incorporated does not have the power or statutory right to bring this lawsuit. Additionally, this case cannot proceed with Ervin Funderburg as the real party plaintiff because he does not own the clothing or land allegedly damaged by Defendant in this case. Neither Corner Closet Incorporated nor Ervin Funderburg is the real party in interest in this case and Corner Closet Incorporated has therefore failed to state a claim upon which relief can be granted.

(*Id.*) Neither Corner Closet, Inc. nor Ervin Funderburg appealed or contested this dismissal.

² The land records actually revealed that Pam Burt owned the property. (*Id.*)

Instead, a new and independent lawsuit was filed against Pontotoc EPA on December 2, 2005. This new lawsuit was brought by the following Plaintiffs:

- Ervin Funderburg, individually;
- Nancy Funderburg, individually;
- Pam Burt, individually;
- Ervin Funderburg, Nancy Funderburg, and Pam Burt, collectively d/b/a Corner Closet, Inc.;
- Corner Closet, Inc., a dissolved corporation;
- Ervin Funderburg, Nancy Funderburg and Pam Burt, collectively d/b/a CC Blouses.

This second lawsuit was brought in the Circuit Court of Calhoun County, Mississippi, and assigned new cause number C2005-178. (R. 1) (the "second lawsuit"). Notably, Ervin Funderburg and Corner Closet, Inc. were again listed as plaintiffs, despite the fact that the lower court had determined in the first lawsuit that they could not be proper plaintiffs. Moreover, other than the addition of new plaintiffs, the second lawsuit was identical to the first one.³

Pontotoc EPA then moved to dismiss the second lawsuit on the following grounds: 1) the lower court already determined in the first lawsuit that Ervin Funderburg, individually, and Corner Closet, Inc. could not be real party plaintiffs; and 2) the remaining plaintiffs' claims were barred by the statute of limitations. (R. 10-11).

³ The second lawsuit actually listed the date of the incident as being March 3, 2003, in contrast to March 3, 2002, as alleged in the first lawsuit. This discrepancy in this date, however, was just a typo or clerical oversight. It is undisputed that the incident occurred on March 3, 2002. (Appellants' Brief, p. 9).

After taking evidence and considering arguments of counsel, the lower court granted Pontotoc EPA's Motion. (R. 66). The Order of Final Judgment on the second lawsuit stated that:

This Court has already determined in Cause No. C2002-082 that Corner Closet, Inc. cannot be a proper plaintiff because it is a dissolved corporation and Ervin Funderburg cannot be a proper plaintiff because he does not own the clothing or land allegedly damaged by the Defendant. The expiration of the statute of limitations bars the claims of the remaining Plaintiffs in this new and independent lawsuit.

(R. 66).

Plaintiffs in the second lawsuit then perfected this appeal. (R. 76). During the appeals process, however, Plaintiffs' counsel filed a Motion to Withdraw on the ground that he materially disagreed with Plaintiffs regarding the merits of the appeal. (R. 79). Nevertheless, because Plaintiffs had not agreed to proceed *pro se* or obtained substitute counsel, the Motion to Withdraw was denied. (R. 94).

III. SUMMARY OF THE ARGUMENT

Mississippi's general three year statute of limitations bars the second lawsuit brought by Plaintiffs. It is undisputed that the incident when the fuel allegedly spilled occurred on March 3, 2002. It is further undisputed that the second lawsuit was not filed until December 2, 2005, more than three years later. Accordingly, the second lawsuit is time-barred.

Plaintiffs' argument that the statute of limitations was somehow tolled by the filing, or reinstatement, of the first lawsuit fails for the following reasons. First, the second lawsuit was a new and independent proceeding. It was not an amendment to,

or reinstatement of, the first lawsuit. This distinction is a key one because the doctrines of tolling and relation-back to not apply to an independent proceeding. *Yazoo Mfg. Co. v. Schaffer*, 179 So.2d 784, 789 (Miss. 1965); *see also City of Tupelo v. Martin*, 747 So.2d 822, 828-29 (Miss. 1999).

Second, even if tolling could apply to a new and independent proceeding, it would not apply in this case because Ervin Funderburg was not a real party in interest and Corner Closet, Inc., had dissolved nine years before the filing of the first lawsuit. Because Funderburg and Corner Closet, Inc. had no power to sue in the first place, they had no power to toll the running of the limitations period.

Third, Plaintiffs have failed to present any authority for their argument that Ervin Funderburg, Nancy Funderburg, and Pam Burt should step into the shoes of Corner Closet, Inc., and allow Corner Closet, Inc.'s reinstatement of the first lawsuit to toll the statute of limitations as to them. Plaintiffs have not cited any law for such a proposal because none exists. In fact, the law actually precludes such a proposal. Ervin Funderburg cannot be a real party in interest because he did not own the clothes or land in question. *See* Miss. R. Civ. P. 17(a). Moreover, assuming, for the sake of argument, that Corner Closet, Inc. had the power to toll the statute by reinstating the first lawsuit, it would then be its own "person" under the law. *Sears, Roebuck & Co. v. Ingram*, 206 So.2d 204, 206 (Miss. 1968) ("A corporation is deemed to be a 'person' within the meaning of the statute of limitations"). Accordingly, as its own "person," Corner Closet, Inc. would not need Nancy Funderburg or Pam Burt to step into its shoes for the purposes of tolling.

Finally, Plaintiffs argument contravenes public policy in that it would allow them to benefit from their failure to adhere to corporate formalities. Plaintiffs should not be allowed to let their corporation lapse and yet still preserve what they assert to be a corporate cause of action.

IV. ARGUMENT

A. Standard of Review.

The application of a statute of limitations is a question of law. *Sarris v. Smith*, 782 So.2d 721, 723 (Miss. 2003). This Court applies a *de novo* standard of review to the denial or granting of a motion brought under Rules 12(b)(6) or 56 of the Mississippi Rules of Civil Procedure concerning the application of the statute of limitations. *Ralph Walker, Inc. v. Gallagher*, 926 So.2d 890, 893 (Miss. 2006); *Simpson v. Boyd*, 888 So.2d 1047, 1050 (Miss. 2004).

B. The Lower Court Correctly Determined that Plaintiffs' Second Lawsuit Was Barred by the Statute of Limitations.

Despite Plaintiffs best attempts to confuse the issue, this case is about the application of Mississippi's three-year statute of limitations to Plaintiffs' second, independent lawsuit.⁴ It is undisputed that the subject incident occurred on March 3, 2002, and that the second lawsuit was not filed until Dec. 2, 2005, more than 3 years later. Consequently, the second lawsuit is time-barred.

⁴ In both the first and second lawsuits, identical claims of negligence and trespass were brought. These claims fall under the general three-year limitations period contained in Miss. Code Ann. § 15-1-49.

Plaintiffs argue, however, that the first lawsuit somehow tolled the running of the limitations period with respect to the second lawsuit. Plaintiffs' argument misses the mark for at least the following reasons.

1. The filing or reinstatement of the first lawsuit did not toll the statute of limitations because the second lawsuit was an "independent proceeding."

First, Plaintiffs' argument ignores the fact that the second lawsuit was a new and independent suit. It was not an amendment to, or a reinstatement of, the first lawsuit. This distinction is paramount because tolling does not apply, and the statute of limitations does not relate back, to the time of an original or amended filing if the new pleading is a new lawsuit or "independent proceeding." *Yazoo Mfg. Co.*, 179 So.2d at 789; *see also Martin*, 747 So.2d at 828-29. Therefore, Plaintiffs' argument fails because the doctrine of tolling does not apply to the second lawsuit, which was an "independent proceeding." Because the second lawsuit was a new lawsuit, filed after the three-year limitations period had already expired, the doctrines of tolling and relation-back do not apply. Consequently, the second lawsuit was time-barred.

2. The filing of the first lawsuit by Ervin Funderburg and the reinstatement of it by Corner Closet, Inc. cannot toll the statute of limitations because both Funderburg and Corner Closet, Inc. were improper party plaintiffs.

Second, even if the doctrine of tolling could somehow come into play by the filing and/or reinstatement of the first lawsuit, Plaintiffs conveniently ignore the fact that the person and entity upon which they hang their tolling arguments have been repeatedly determined by the lower court to be improper party plaintiffs. The filing of the first suit by Ervin Funderburg, as the original plaintiff, and the reinstatement of it by Corner Closet, Inc., as the amended plaintiff, could not toll the limitations period

because Funderburg and Corner Closet, Inc. did not have the right to prosecute the claim in the first place. Stated differently, they were not the real parties in interest. *See* Miss. R. Civ. P. 17(a). It is undisputed that Ervin Funderburg did not own the clothes or land at issue. Accordingly, he had no right to pursue the cause of action. Moreover, because Corner Closet, Inc. had been dissolved for over nine years at the time it took over as the party plaintiff, it was a legal nullity with no right to sue.⁵

In sum, even if the statute of limitations in this case could theoretically be tolled by filing or reinstating the first lawsuit, that filing or reinstatement would still have to be made by a proper plaintiff, which Funderburg and Corner Closet, Inc. were not.

3. No legal authority exists to support Plaintiffs' argument.

Third, it is notable that Plaintiffs have not presented this Court with any authority for their request that Ervin Funderburg, Nancy Funderburg, and Pam Burt step into the shoes of Corner Closet, Inc. for the purposes of tolling the statute of limitations. Appellants have not cited any law because no law exists that authorizes such a scheme.

In fact, the law actually precludes such a proposal. Ervin Funderburg cannot be a real party in interest because he did not own the clothes or land in question. *See* Miss. R. Civ. P. 17(a). Moreover, even assuming, for the sake of argument, that Corner Closet, Inc. could have maintained its legal status (despite dissolution) to prosecute the first

⁵ A "corporation has the power to sue in the corporate name only insofar as the state grants that power." *Bryant Const. Co., Inc. v. Cook Const. Co., Inc.*, 518 So.2d 625, 631, (Miss. 1987) (citing Miss. Code Ann. § 79-4-3.02). "When the corporation is suspended, it loses all rights acquired by the form of the organization, one of which, no doubt, is the right to sue in the corporate name." *Id.*

lawsuit, it would then be its own "person" under the law. *Sears, Roebuck & Co. v. Ingram*, 206 So.2d 204, 206 (Miss. 1968) ("A corporation is deemed to be a 'person' within the meaning of the statute of limitations"). Under this scenario, when the original complaint was reinstated and amended to make Corner Closet, Inc. the plaintiff, it would have been the only "person" that could affect the running of the statute. Therefore, if Corner Closet Inc. was a valid "person" at the time it reinstated the first lawsuit, then Nancy Funderburg, and Pam Burt cannot now step into its shoes for the purposes of tolling.

4. Plaintiffs' argument contradicts public policy.

Finally, Plaintiffs ask this Court "as a matter of public policy to treat Corner Closet, Inc., as named in the Amended Complaint of April 17, 2004, as whatever entity Corner Closet, Inc. has operated as in fact rather than treating it as a dissolved corporation." (Appellants' Brief, p. 13). Actually, this argument directly contravenes public policy. Plaintiffs' request would allow the members of Corner Closet, Inc. to benefit from their failure to follow corporate formalities. It would allow them to label their business entity in whatever way would be most legally advantageous at a particular time - i.e., on the one hand, holding itself out for business as a corporation (despite dissolution), while on the other hand, arguing that it was really some other form of business for the purposes of tolling the statute. Plaintiffs should not be allowed to let their corporation lapse and yet still preserve what they assert to be, in essence, a corporate cause of action.

V.
CONCLUSION


Plaintiffs have had three chances to properly file this lawsuit: first, when it was originally brought by Ervin Funderburg; second, when it was reinstated by Corner Closet, Inc.; and third, when the first suit was not amended, but rather brought back as a new and independent proceeding. The three year statute of limitations simply bars the second suit.

While the expiration of the statute of limitations can lead to a harsh result, the fact that a proper party in this case will not get his or her "day in court is of no consequence." *Martin*, 747 So.2d at 829. There is nothing in the record to indicate that the failure to properly file the first or second lawsuit resulted from anything other than the parties own inactions or omissions, which are no excuse. *Id.*

For all of the above reasons, and any others this Court deems appropriate, it should affirm the lower court's dismissal of the second lawsuit with prejudice.

Respectfully submitted, this the 8th day of July, 2008.

PONTOTOC ELECTRIC POWER ASSOCIATION

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CERTIFICATE OF SERVICE

I, the undersigned, David L. Sanders, do hereby certify that I have this day mailed, postage prepaid, U.S. Mail, a true and correct copy of the foregoing **Brief of Appellee, Pontotoc Electric Power Association** to:

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SO CERTIFIED, this the 8th day of July, 2008.



DAVID L. SANDERS

CERTIFICATE OF FILING

The undersigned, an employee of Mitchell, McNutt & Sams, P.A., certifies that on July 8, 2008, she deposited with the Federal Express trailer, addressed to the clerk of the Mississippi Supreme Court, the original and three copies of the Brief of Appellee, Pontotoc Electric Power Association, and the original and three copies of Appellee's Record Excerpts.

Kim Magou