IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BARBARA RIGDON — **APPELLANT**

V.

NO. 2008-CA-00777
(Consolidated with No. 2008-CA-00780

MISSISSIPPI FARM BUREAU FEDERATION, LAUDERDALE COUNTY FARM BUREAU (A.A.L.), RURAL INSURANCE AGENCY, INC., SOUTHERN FARM BUREAU LIFE INSURANCE CO., SOUTHERN FARM BUREAU CASUALTY INSURANCE CO., MISSISSIPPI FARM BUREAU CASUALTY INSURANCE CO., TOMMY ALLEN AND JOE DOE #1 THROUGH JOHN DOE #25 — **APPELLEES**

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 or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Samuel E. Scott, Attorney for Appellees Mississippi Farm Bureau Federation and Lauderdale County Farm Bureau, Inc.

2. Mississippi Farm Bureau Federation and Lauderdale County Farm Bureau, Inc., Appellees

3. Rural Insurance Agency, Inc., Southern Farm Bureau Life Insurance Company, Southern Farm Bureau Casualty Insurance Company and Mississippi Farm Bureau Casualty Insurance Company, Appellees

4. Charles G. Copeland, Dale Russell, and Ellen Robb, Attorneys for Appellees Rural Insurance Agency, Inc., Southern Farm Bureau Life Insurance Company, Southern Farm Bureau Casualty Insurance Company and Mississippi Farm Bureau Casualty Insurance Company

5. Tommy Allen, Appellee

6. Ken Adcock, Attorney for Appellee Tommy Allen

7. Barbara Rigdon, Appellant

8. Mitchell H. Tyner and Mark T. McLeod, Attorneys for Appellant

9. Honorable Bobby B. DeLaughter, Hinds County Circuit Court Judge

Respectfully submitted,

By: 

Samuel E. Scott, Esq. (MSB [redacted]), Attorney for MISSISSIPPI FARM BUREAU FEDERATION, and LAUDERDALE COUNTY FARM BUREAU, INC.

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2. Are Plaintiff's claims barred by the three-year statute of limitations, Miss. Code Ann. of 1972, §15-1-49?

3. Does Plaintiff have any claims against Mississippi Farm Bureau Federation ("MFBF") and Lauderdale County Farm Bureau, Inc. ("Lauderdale CFB")?

4. Was the Circuit Court of the Second Judicial District of Hinds County correct in dismissing Plaintiff's suits against them with prejudice?

MFBF and Lauderdale CFB do not believe oral argument is needed.

STATEMENT OF THE CASE

Though there are two cases involved in this appeal and two more in a companion case (*Martha Via v. Mississippi Farm Bureau, et al*; In the Supreme Court of Mississippi; Case No. 2008-TS-00782), they all involve the same Plaintiffs in the same court, alleging the same facts. The first cases were filed on March 2, 2007, though process was never issued or served and the latter cases were filed on August 25, 2007. Plaintiffs, in their briefs, did not assert separate assignments or arguments for the latter cases. For the reasons set forth herein, these Defendants would show that the filing of the latter cases was of no legal significance.

This is the second appearance in this Court of the Plaintiff's claims, though the first one was in a different context. Plaintiff, along with four other former insurance agents, filed suit in the Circuit Court of Claiborne County nine years ago, one day before the statute of limitations ran on her claim (R. Vol. 1 of 2 p. 5). The Defendants sought to sever the claims of the five, and eventually the case came to this Court on interlocutory appeal. *MFBF, et al v. Martha Via, et al*, No. 2004-IA-02016-SCT. Part of the record in that case was Plaintiff's deposition. This Court ordered the cases severed on March 2, 2006, and pursuant to the mandate, the Circuit Court of Claiborne County dismissed Plaintiff's case without prejudice on July 10, 2006 (R. Vol. 1 of 2 p. 44).

On March 2, 2007, Plaintiff filed this suit asserting the same claims against the same Defendants in the Second Judicial District of Hinds County but never served process on any of the Defendants (R. Vol. 1 of 2 p. 3). She then filed another suit containing the same allegations in the same Court on August 25, 2007, and did serve process; however, the three-year statute of limitations had already run (R. Vol. 1 of 3 p. 3).

The Circuit Court of the Second Judicial District of Hinds County, after motions to dismiss based upon the statute of limitations were filed, held a hearing, received briefs and responses and entered an Order dismissing the suits with prejudice on February 13, 2008. (R. Vol. 1 of 3 p. 173). From that Order, Plaintiff has appealed (R. Vol. 1 of 3 p. 181), though notice of appeal was not filed until May 5, 2008, and was not timely within 30 days as required by M.R.A.P. 4(a).

FACTS

The Farm Bureau organization has its roots in the Grange Movement of the late 19th and early 20th centuries. It is now a nationwide group of organizations with the primary purpose of improving agriculture and rural life. The grass roots part of the Farm Bureau in Mississippi is the County Farm Bureau ("CFB"). There are eighty-two CFBs in this state, each one of which is a non-profit, non-share Mississippi corporation. CFBs are operated by volunteer members elected annually by the membership to serve as officers and directors and are not compensated for their work except for out-of-pocket expenses.

CFB members are individuals and various entities who pay annual dues (usually $25 to $35) and receive a wide range of member benefits ranging from agricultural marketing plans to truck discounts. Each CFB is a separate corporation and all of the CFBs together have a total of over 225,000 members in the state. CFBs are not empowered by law to sell insurance, contract with agents, set rates, adjust or pay claims or do anything an insurance company can and must

do. They have no liability for insurance company matters. CFB offices are usually located in county seats and have 82 different sets of directors and officers, as well as separate books, records, bank accounts, etc. One of the 82 CFBs, Lauderdale CFB, is one of the Defendants in this case.

The Mississippi Farm Bureau Federation is the statewide Farm Bureau organization. It is a non-profit, non-share Mississippi corporation chartered in 1922 and throughout its 86-year existence, it has been located in Jackson. MFBF is a true federation of all 82 CFBs. Each CFB has a voice in the affairs of MFBF, including the right to vote for its four elected officers, the MFBF president and three vice presidents elected from a northern, central and southern regions of the state. CFBs also have the right to vote for the selection of directors of MFBF.

MFBF is also a separate corporation from the 82 corporate CFBs. None of them are controlled by any of the others. MFBF has only the CFBs as members. There are no individual members of MFBF. MFBF is not an insurance company nor does it perform any of the duties or exercise the privileges of an insurance company. MFBF has its own offices, officers, directors, minutes, books and records, bank accounts, members and pays its own separate taxes on the matters it is taxed for. It has its own financial statements, bylaws, etc. In summary, it is a separate corporation not obligated for the acts or omissions, if any, of any other persons or entities involved in this case.

On the national level, the American Farm Bureau Federation is a true federation of state organizations such as MFBF and it is a significant voice for agriculture.

There are many insurance companies across the United States with the words "Farm Bureau" in their names. This is the case with the four insurance company defendants here which are all separate for-profit Mississippi corporations. They were organized after World War II at a time when rural people could not easily get fire or casualty insurance. They are not operated or

controlled by MFBF which has only a minority stock interest in Southern Farm Bureau Life Insurance Company (10%) and Southern Farm Bureau Casualty Insurance Company (16%). The other shareholders are other state Farm Bureau federations. The insurance defendants are regulated by the Mississippi Department of Insurance. See Affidavit of David Waide R. Vol. 1 of 2 p. 85.

Plaintiff executed four agent's contracts with the four named insurance company Defendants between January 23, 1990 and March 7, 1991. These contracts, attached to the Complaint, made Plaintiff an independent contractor insurance agent for each of the four separate insurance companies with which she signed the four separate contracts. She was an agent in Lauderdale County. All of the contracts were terminable at-will by either party. Neither MFBF or Lauderdale CFB were parties to any of the contracts, nor are they insurance companies.

Plaintiff worked as an independent contractor insurance agent from the date of her first contract until she voluntarily terminated all her contracts, as she had the right to do, effective September 13, 1996, approximately six years (R. Vol. 1 of 2 p. 43).

The applicable three-year statute of limitations is Miss. Code of 1972 Ann., §15-1-49. The following chronology sets forth pertinent times and dates related to Plaintiff's contracts and her claims arising out of them:

March 8, 1991	4 contracts attached to complaint signed by Plaintiff and the respective insurance companies on or before this date.
September 3, 1996	Plaintiff gives notice of termination of contracts effective September 13, 1996.
September 14, 1996	3-year statute of limitations, Miss. Code of 1972 Ann. §15-1-49, begins to run.
August 30, 1999	Plaintiff and three other plaintiffs file suit against same Defendants as herein in the Circuit Court of Claiborne County. This tolled the statute of limitations which had 15 days to run.
October 5, 2004	Motions to sever filed in Claiborne County action were denied but

	Court certified interlocutory appeal.
March 2, 2006	Mississippi Supreme Court orders severance.
July 10, 2006	Pursuant to mandate, Circuit Court of Claiborne County dismisses the three non-Claiborne County plaintiffs' cases without prejudice. Under Miss. Code §15-1-69, Plaintiff had one year to re-file suit.
March 2, 2007	Suit filed in Second Judicial District of Hinds County. No process was served on any Defendant.
July 2, 2007	120-day period of time to serve process expires. No extension was sought or granted. Statute of limitations resumed running.
July 17, 2007	The 15 days left for the statute of limitations to bar these claims expired. Since there were only 15 days left when the original suit was filed, the running of those 15 days after the expiration of the time to serve process barred the claim as follows: September 14, 1996 to August 30, 1999 – 11 months, 15 days August 30, 1999 to July 2, 2007 – statute of limitations is tolled July 2, 2007 to July 17, 2007 – 15 days left on statute of limitations ran and the claims asserted by Plaintiff are time barred

SUMMARY OF THE ARGUMENT

First, the notice of appeal in this case was not timely filed and this Court lacks jurisdiction.

Second, the issue as to whether the statute of limitations has run is a question of law. The essential facts are not subject to legitimate dispute. The failure of Plaintiff to serve process or even seek an extension of time to serve process are the reasons why her claims are time barred. Since the statute of limitations has run there are no other issues. The argument of Plaintiff that the statute did not begin to run when it did because she was due more payments for insurance commissions and that "Defendants failed and refused to perform their obligations under the contracts," including failure to pay her commissions after she resigned (Rigdon brief p. 8) could not apply to MFBF or Lauderdale CFB. They had no contract with Plaintiff, had no obligation to pay her any commissions or anything else. Even if she had a claim against the non-insurance

Defendants, certainly the statute of limitations as to those purported claims began to run the day after Plaintiff terminated her insurance company contracts because she cannot claim either of them owed her additional commissions, nor has she shown that they fraudulently covered up any claims she might have had.

Third, there is not even alleged any basis on which to hold Lauderdale CFB or MFBF liable in this case. Lumping them in with the other insurance defendants by using the plural tense of "defendant" does not state a cause of action. Plaintiff has not produced a shred of evidence in the six years this case has consumed that would hold them liable to Plaintiff.

Both the failure to file a timely notice of appeal and the running of the statute of limitations make any other issues argued by Plaintiff moot.

Even assuming, *arguendo*, that notice was timely and the statute did not begin to run as it did, the dismissal was still proper as to the non-insurance Defendants, MFBF and Lauderdale CFB. There is no statement or allegation in the Complaint or in the record which states any claim against the non-insurance company Defendants except by using the plural tense of the word "Defendant." Everywhere the word "Defendants" is used in every claim, even those relating to breach of a contract, these Defendants were not a party to them and the claims about further commissions due against these parties that do not pay commissions and are not insurance companies are without merit. A perfect example is found on page 9 of Plaintiff's brief which states, "...the contracts contemplated payment of monies due to the Plaintiff after her resignation. Her monetary damages accrued after her resignation when the Defendants elected not to pay her as required by contract after separation." The only contracts in this case are the four attached to the Complaint with the insurance companies.

All of the causes of action relate directly to the contracts attached to the Complaint. There is no legal relationship alleged, much less existed between Plaintiff and MFBF and

Lauderdale CFB, the non-insurance company Defendants. Therefore, Plaintiff had no claims against them and her Complaint against them was properly dismissed under either Rule 12(b)(6) or 56.

ARGUMENT

1. Notice of Appeal Was Not Timely Filed

The Court's Order of Dismissal was entered February 13, 2008, but the notice of appeal was not filed until May 5, 2008. Failure to timely file the notice of appeal as required by M.R.A.P. 4(a) mandates dismissal of all of these appeals for lack of jurisdiction. The jurisdictional issue of whether the notice of appeal in this case was timely filed is fully discussed in the brief of Appelees Southern Farm Bureau Life Insurance Company, *et al.* and is adopted here by reference.

Plaintiff makes three arguments in her brief:

a) that the statute of limitations had not run;

b) that the Court erred in going outside the pleadings; and

c) that her attorney did not receive notice of the Order of Dismissal Without Prejudice of the Claiborne County Circuit Court. Nothing is mentioned about whether the notice of appeal was timely filed.

MFBF and Lauderdale CFB respond to these as follows:

a) The statute of limitations began to run against these Defendants on September 1, 1996 and expired on July 17, 2007. The argument that Plaintiff makes against its running is that she was due further commissions at the time she terminated her contract, but that could not possibly apply to these Defendants who were not parties to the contracts under which she claims commissions.

b) Plaintiff made no objections in the Court below to going outside the pleadings, and she filed her own exhibits, including affidavits, outside the pleadings and her counsel in open court, stated again and again these were motions for summary judgment (R. Vol. 2 of 2 pp. 11, 12, 13, 18, 24). Failure to object to the proceedings waives the point. Finally, the Court did not have to go outside the pleadings to determine that Plaintiff had not stated a claim against these Defendants.

c) It makes no difference whether Plaintiff's attorney received notice of dismissal of the Claiborne County suit or not. It seems odd that if he did not know of the July 10, 2006 Order, why would he have filed this suit? Moreover, this suit was filed within the one-year savings period so the notice *vel non* is irrelevant. It was the failure to serve process in that suit within 120 days or even a failure to request additional time to do so which allowed the statute to run. It cannot be blamed on the Circuit Clerk of Claiborne County.

2. The Statute Of Limitations Has Run.

The chronology set forth above contains the various stops along the way for the statue of limitations on Plaintiff's claims, when it began, when it was tolled, when it resumed running and when and why the three years expired. Nothing in the Plaintiff's brief contradicts any of it except when she claims the statute began to run. The argument made that it did not begin to run because of some alleged commissions due Plaintiff could not possibly apply to MFBF and Lauderdale CFB because they did not have any obligation to make any such payments because they were not parties to the contracts under which Plaintiff claims such commissions. As a result, the chronology is accurate as to them and not contested in any other manner.

A statute of limitations begins to run when a cause of action accrues. *Johnson v. Crisler*, 156 Miss. 266, 125 So. 724 (Miss. 1930). The cause of action on a contractual claim accrues on the date of actual injury, the date the facts occurred which enabled the plaintiffs to bring a cause

of action. *Citifinancial Mortgage Co., Inc. v. Washington*, 967 So.2d 16 (Miss. 2007). With respect to the non-insurance Defendants, the latest date this could have been was the date Plaintiff terminated her contracts since everything she could claim against those Defendants transpired before she terminated her contracts on September 13, 1996, and any claim she might have had accrued no later than said date. This is true regardless of what claims, if any, Plaintiff alleges against the insurance Defendants with whom she executed contracts which provided for payment of certain commissions to her. As a matter of law, the non-insurance Defendants did not, in fact, could not, have any obligation to pay her commissions at any time.

The reason the statute has run is straightforward and supported by a long line of Mississippi cases.

The Defendants filed a joint motion to dismiss Plaintiff's claim with prejudice on the ground that all of her claims are barred by the three-year statute of limitations, Mississippi Code of 1972 Ann. §15-1-49 (R. Vol. 1 of 3 p. 116). Plaintiff responded, a hearing was held and the issue briefed. Plaintiff made no contention that the matter was not ripe for hearing, nor made any objection that matters outside the pleadings had been filed. In fact, she filed her own separate matters outside the pleadings (R. Vol. 1 of 3 p. 146).

The statute of limitations began to run on Plaintiff's claims after the effective date of her unilateral termination of her contracts, September 13, 1996. At the time her suit was first filed in Claiborne County on August 30, 1999, only one day remained before the 3-year statute of limitations ran. The judicial proceedings that were ultimately heard in this Court in 2004-2006 and the one-year savings statute, Mississippi Code of 1972 Ann. §15-1-69, tolled the running of the statute. She filed this suit on March 2, 2007, but process was never served on any Defendant. No extension of time to serve process was sought or granted.

Rule 4(h) of the Mississippi Rules of Civil Procedure provides as follows:

> ...service upon a defendant must be made within 120 days after the filing of the complaint or the cause will be dismissed without prejudice as to that defendant unless good cause can be shown as to why service could not be made.

The Defendants' motion to dismiss was not based on the 120-day rule, but upon the line of cases which hold that once the 120-day period or an extension of time, if any, expires without service of process, the statute of limitations resumes running and therefore her claims were time barred.

The recent case of *Owens v. Mai*, 891 So.2d 220 (Miss. 2005) is directly in point. There, the Court dismissed a complaint with prejudice because the statute of limitations began to run after the 120-day period when no process was served. In reaching this conclusion, the Court held:

> "While the filing of a complaint tolls the statute of limitations, if service is not made upon the defendant within 120 days as required by M.R.C.P. 4(h), the limitations period resumes running at the end of the 120 days. *See Moore ex rel. Moore v. Boyd*, 799 So.2d 133, 137 (Miss. Ct. App. 2001); *Young v. Hooker*, 753 So.2d 456, 460 (Miss. Ct. App. 1999).
>
> However, the record reflects that Owens failed to properly serve process upon Mai within 120 days. We have clearly noted in cases past that unless process is served within the 120-day period as provided by Rule 4(h), the running of the statute of limitations resumes. *Triple 'C" Transport, Inc. v. Dickens*, 870 So.2d 1195, 1199-1200 (Miss. 2004); *Perry v. Andy*, 858 So.2d 143, 147 (Miss. 2003); *Fortenberry v. Mem'l Hosp. At Gulfport, Inc.*, 676 So.2d 252, 254 (Miss. 1996). Thus, Owen's failure to properly serve Mai with process caused the statute of limitations to resume running."

The *Owens* case and the cases it cites make it crystal clear that the three-year statute resumed running 120 days after this case was filed and no process was served, nor an extension of time to serve process was sought or granted. The chronology set out above conclusively demonstrates that Plaintiff's claim was time barred on July 17, 2007. The cases cited are controlling and compelled a dismissal with prejudice, as the Circuit Court properly did.

3. The Statute Of Repose, §15-1-69 Miss. Code of 1972, Was In Effect For One Year After The Circuit Court Of Claiborne County Entered Its Order Of Dismissal Without Prejudice And The Statute of Limitations Was Tolled During This Time.

Plaintiff filed her suit within the one year period of repose which seems strange when she also claimed she did not know her case had been dismissed without prejudice by the Circuit Court of Claiborne County. But that makes no difference.

She had no statute of limitations problem when her suit was filed, it was timely. What caused the statute of limitations to begin to run again was failure to serve process within 120 days of the filing of the first suit in the Second Judicial District of Hinds County. Notice or lack of notice of the dismissal of the Claiborne County case has nothing to do with this.

All of the Defendants could have easily been served with process and why they were not is only known to Plaintiff or her attorney. The running of the statute of limitations was caused by this failure and this failure alone. Plaintiff and her attorney have no one to blame for this but themselves.

The failure to get notice argument is nothing more than a red herring.

4. Plaintiff Has No Claim Against MFBF And Lauderdale CFB.

Even if the statute of limitations had not run, there is an equally compelling reason why the Order of the Circuit Court should be affirmed as to MFBF and Lauderdale CFB.

All of the claims asserted by Plaintiff in the Complaint stem from the alleged breaches of the contracts Plaintiff executed to become an agent for the Insurance Companies. If there is any doubt about this, please note the following statements from Plaintiff's brief:

"The Plaintiff claimed compensatory monetary damages arising from breach of contract because the Defendants failed to pay what they owed her in the months following her resignation." at p. 8

"...damages that the Defendants were required to pay her, by contract, after resignation." at p. 8

"...Plaintiff alleges that the Defendants failed and refused to perform their obligations under the contract..." at p. 8

"By contract, the Defendants were obligated to pay her for all the monies she was entitled to in the months following the contract, and the Plaintiff's claims for monetary relief arising from contract are predicated upon this obligation." at p. 9

"...the contracts contemplated payment of monies due to the Plaintiff after her resignation. Her monetary damages accrued after her resignation with the Defendants elected not to pay her as required by contract after separation." at p. 9

"...both Complaints made general and specific allegations that the Defendants did not meet contractual obligations owed to Plaintiff, referenced the specific contracts wherein provisions for payment after separation were contained, and claimed damages for contractual compensatory damages for the post breaches of these provisions." at p. 12 (Emphasis added)

These repeated references to the contracts make it clear that all of Plaintiff's contentions are based upon the contracts that MFBF and Lauderdale CFB were not parties to.

It is a general rule of contracts law that in order to maintain an action to enforce the breach of a contract, or to recover damages growing out of the breach, or for failure to carry out the terms of the contract, it is ordinarily a necessary prerequisite that the relationship of privity of contract exist between the party damaged and the party sought to be held liable for the breach of the contract. *Burns v. Washington Savings & Loan*, 251 Miss. 789, 794, 171 So.2d 322, 324 (1965). *See also*, *Allgood v. Bradford*, 473 So.2d 402, 415 (Miss. 1985); *Heartsouth PLLC v. Boyd*, 865 So.2d 1095, 1103 (Miss. 2003) ("As it is simple contract law that a valid and enforceable contract is required to maintain an action for breach of contract or injunctive relief

thereon, the chancery court did not err by granting the Rule 12(b)(6) motion to dismiss."); *Hunt v. Preferred Risk Mutual Ins. Co.*, 568 So.2d 253, 255 (Miss. 1990) ("Where there is no privity of contract, a suit for breach of contract cannot be maintained.") (*citation omitted*); *Beacon Syracuse Assocs. v. City of Syracuse*, 560 F.Supp. 188, 201 (N.D.N.Y.1983) ("Only those who are parties to a contract may be held liable for a breach of that contract.") (*citation omitted*); *Dember Constr. Corp. v. Staten Island Mall*, 56 A.D.2d 768, 769, 392 N.Y.S.2d 299, 300 (1977) ("Since [the defendant] was not a party to the contract, the complaint against it must be dismissed.").

There is no basis in fact or law to make MFBF and the CFB defendants in this action. It is obvious from the Complaint alone that they are not parties to the contracts and it is not alleged that they have assumed or been assigned any of the contracts. Indeed, Plaintiff does not even contend that MFBF and Lauderdale CFB entered into any contracts with her. Attached to the Complaint are copies of all contracts Plaintiff executed that are the subject of this action. In the many pages Plaintiff's Complaint and exhibits, not once are MFBF or the CFBs mentioned. Plaintiff testified in her deposition that she negotiated her contract with the insurance company agency manager that recruited her. MFBF and the CFBs did not make any promises or representations in any of the contracts, nor are they even mentioned therein. All claims asserted arise out of the contracts. Accordingly, MFBF and the CFBs should have been dismissed under either M.R.C.P. 12(b)(6) or Rule 56.

Further support for this position is found:

a) By the fact that Plaintiff has not made any specific allegations regarding MFBF and Lauderdale CFB but sought to include them by using "Defendants" throughout. Adding an "s" does not create a claim upon which relief can be granted and this was the only way in which Plaintiff tried to lump together MFBF and Lauderdale CFB with the insurance Defendants.

b) Plaintiff made no allegations about or advanced any argument below about the structure and relation of MFBF and Lauderdale CFB. However, the Affidavit of David Waide, MFBF President, was before the Court and not contested (R. Vol. 1 of 2 p. 85). Indeed Plaintiff's own affidavit tends to confirm that she had no legal relationship with MFBF or Lauderdale CFB. Mr. Waide's uncontested affidavit establishes the following:

1. MFBF was incorporated on October 30, 1922, in the State of Mississippi as a non-profit, non-share corporation. The members of MFBF are County Farm Bureaus ("CFBs"), which are also non-profit, non-share corporations. MFBF has no other members.

2. CFBs are the grass roots organizations of the Farm Bureau and their members are individuals or business entities who have an interest in the member programs provided by the CFBs and MFBF with the main emphasis on agriculture and rural life. Each CFB, including Lauderdale CFB, is a separate corporate entity with its own members. The number of members of each CFB vary widely. It is common knowledge that these are farmers' organizations with volunteer leadership.

3. MFBF is not an insurance company. It has no insurance agents and it does not underwrite insurance risks nor set or collect premiums for insurance policies. MFBF is not and never has been licensed to sell or sold insurance, nor does its corporate charter authorize any such sale.

4. The insurance company Defendants herein are separate corporate entities even though they use the Farm Bureau name (as many do throughout the United States), and they are insurance companies authorized by law and licensed to issue policies of insurance. None of them is owned or controlled by MFBF and are neither a parent or subsidiary of MFBF.

5. As a separate corporate entity, MFBF has its own offices, employees, officers, directors, separate corporate books and records, members and directors, bank accounts, and pays

its own separate taxes. MFBF is a non-profit, non-share corporation. The insurance company Defendants are for profit stock corporations.

6. MFBF has never entered into a contract of any kind with the Plaintiff, nor has she been an agent or employee of MFBF.

7. Neither MFBF or the CFB Defendant herein is controlled by, nor do they control any other Defendant.

There are no allegations at all of whether one entity controls another or is liable for the acts or omissions of any other and for good reason: they do not and are not.

5. The Court Acted Properly In Hearing The Motion

The issue about whether the Court acted under M.R.C.P. Rule 12 or Rule 56 is not the important question. The real question is did the Court reach the right result. A form over substance argument misses the point and it was waived. M.R.C.P. Rule 1 makes clear: "These rules shall be construed to secure the just, speedy, and inexpensive determination of every action." Moreover, Plaintiff did not object to the Court considering matters outside the pleadings and, in fact, she submitted 20 pages of exhibits to her response to the motion to dismiss, including three affidavits. Thus, the argument was waived or barred. In *Champluvier v. Beck*, 909 So.2d 1061 (Miss. 2004), this Court held that:

> The language of Rule 12 granting a respondent to a motion to dismiss subsequently converted to a summary judgment motion an opportunity to present further material is not self-executing. A litigant desiring to avail herself of the right to present more evidentiary material has an affirmative duty to timely raise the issue with the trial court or be deemed to have waived objection to the court proceeding on the motion. Because the appellant did not raise the issue of appropriate notice for the conversion with the trial court, this issue is barred.

Earlier the Mississippi Court of Appeals in *Koestler v. Miss. College*, 749 So.2d 1112 (Miss. Ct. App. 1999) held:

> Where a Rule 12 motion is converted to a summary judgment motion, the requirement that the opposing party be given an opportunity to present additional material is not self-executing and the party has a duty to timely raise the issue or be deemed to have waived it.

Even where it is not waived, as it was here, the Court's concern in considering Rule 12 motions that are converted to Rule 56 is to make sure that the non-movant is given notice that a motion to dismiss may be treated as a summary judgment as M.R.C.P. 12(b)(7) allows. *See, e.g., Jones v. Jackson Public Schools*, 760 So.2d 730 (Miss. 2000)That the Plaintiff had notice of it here is incontrovertible. It is also worthy of note that Plaintiff took three months to even respond to the motion, one day before the hearing date. A transcript of that hearing is in the record which contains the following statements by Plaintiff's counsel:

> Yes, Your Honor. May it please the Court. My name is Mark McLeod, and I'm representing plaintiffs Barbara Rigdon and Martha Via in opposition to these motions, these summary judgment motions, to dismiss these claims with prejudice. I'll first take up the issue of the basis of the with prejudice dismissal that they're arguing. Counsel opposite has indicated that this motion was filed as a 12(b) (6) motion and that the standard applicable that this Court is required to apply is under that. However, under the rules of Mississippi Civil Procedure 12, it does indicate that if matters outside the pleadings, that is, the complaint and the motion that the defendants file, are presented to the court for consideration, then the court shall convert that into a Rule 56 summary judgment motion. And in this case, the defendants in support of their motion submitted the letters of resignation of Ms. -- Ms. Via and Ms. Rigdon. And so that's a matter which exceeds the pleadings, and so it will be, in fact, a Rule 56 motion that the Court is considering today regarding the dismissal with prejudice. At pp. 11-12
>
> Of course, regarding summary judgment motions, you can submit affidavits up to the day before, and that's we've really added nothing new except those affidavits which go into the issues that are raised under their motions factually. At p. 13
>
> And so for that reason we're asking the Court to deny their motion for summary judgment a dismissal with prejudice. At p. 18

> So I would ask the Court to consider all those and deny their motion for summary judgment. At p. 24 (Emphasis added)

Even if Plaintiff did not waive her argument by failing to object, her counsel made numerous references that he knew this was being treated as a summary judgment under Rule 12(b)(7) and participated on that basis.

This argument is without merit. Also it is not necessary to go outside the record to see that no claim was stated against MFBF and Lauderdale CFB so they were entitled to dismissal on that ground even if there was no statute of limitations question.

CONCLUSION

The determination of this case has been anything but speedy. It has been on the dockets for over nine years and for the last seven years Plaintiff has not tried to bring her case to trial. Finally, Plaintiff never served, attempted to serve process or get an extension of time to do so in the March 2007 suit. Her duplicate suit was filed after the statute had run so it adds nothing. The notice of appeal herein was not timely. The argument that the Court should not have considered anything but the Complaint certainly does not ring true since Plaintiff waived that argument and made her own submission of matters outside the Complaint. This case must be laid to rest along with the other three appeals here which are all alike and involve the exact same issue. This Court has no jurisdiction, the statute of limitations has run and the Circuit Judge properly dismissed these cases.

THIS, the 31st day of December, 2008.

Respectfully submitted,

By: _____
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and LAUDERDALE COUNTY FARM BUREAU, INC.

CERTIFICATE OF SERVICE

I, the undersigned counsel for Mississippi Farm Bureau Federation and Lauderdale County Farm Bureau, Inc. do hereby certify that I have this day mailed a true and correct copy of the above and forgoing document by U.S. Mail, postage prepaid thereon, to the following:

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Honorable Bobby B. DeLaughter
Hinds County Circuit Judge
Second Judicial District
P.O. Box 27
Raymond, MS 39154

THIS, the 31st day of December, 2008.

Sam E. Scott