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

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

BARBARA RIGDON
Appellant

vs.

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 JOHN DOE #1 THROUGH JOHN DOE #25
Appellees

On Appeal from the Circuit Court of Hinds County, Mississippi
Second Judicial District
Civil Action Nos. 252-07-9 and 252-07-27

REPLY BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Mississippi Appellate Rule of Procedure 28(a)(1), the undersigned counsel of record certifies that the following 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 judges of the Court of Appeal may evaluate possible disqualification or recusal.

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

2. Samuel E. Scott, Counsel for Appellee-Defendants, Mississippi Farm Bureau Federation and Lauderdale County Farm Bureau;

3. Dale G. Russell, Counsel for Appellee-Defendants, Rural Insurance Agency Inc., Southern Farm Bureau Life Insurance Co., Southern Farm Bureau Casualty Insurance Co, Mississippi Farm Bureau Casualty Insurance Co, and Mississippi Farm Bureau Mutual Insurance Co.;

4. Ken R. Adcock, Counsel for Appellee-Defendant, Tommy Allen;

5. Mitchell H. Tyner, Sr., Counsel for Appellant-Plaintiff, Barbara Rigdon;

6. Mark T. McLeod, Counsel for Appellant-Plaintiff, Barbara Rigdon; and

7. Tyner Law Firm, P.A., Plaintiff Counsel Firm for Appellant-Plaintiff, Barbara Rigdon.

Mark T. McLeod
Attorney of Record for Appellant

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REPLY

I. Because the Court never entered a Final Judgment of Dismissal with Prejudice giving effect to its Findings of Fact and Conclusions of Law set forth in its February 12, 2008 Memorandum Opinion, this Appeal is not Ripe for Determination until such time as a Final Judgment Dismissing all claims with Prejudice is Entered

The Appellees assert in their Principal Briefs that this appeal must be dismissed because the Appellant's Notice of Appeal was not timely filed. The Appellant agrees there is a procedural issue presenting difficulties to consideration of this appeal; however, it is the failure of the trial Court to enter a Final Judgment of Dismissal giving legal effect to its Memorandum Opinion findings presenting the procedural obstacle, and not a deficiency with the filing of the Notice of Appeal. Until such time as the trial Court enters a Judgment actually dismissing all of Appellant's claims with prejudice, there is no final judgment subject to appellate review.

Miss. R. Civ. P. 54 defines "Judgment" as a final pronouncement of a decision and the act that gives it legal effect. Miss R. Civ. P. 54(a), Comment, ¶2; *Vaughn v. Monticello Ins. Co.,* 838 So.2d 983, 985 (Miss.Ct.App. 2001). It is quite clear that a Court's decision without entry of a Judgment expressly directing dismissal of all claims without prejudice fails to procedurally affect the act of dismissal. In *Vaughn* the Court of Appeals dealt with entry of a judgment that "resulted in the company's (Monticello Insurance Company) dismissal with prejudice." *Vaughn,* 838 So.2d at 987. The Court of Appeals noted the trial court expressly directed dismissal with prejudice "to the extent of the policy proceeds which Monticello paid into Court." *Id.* The decisions are legion pointing out that an express judgement directing dismissal with prejudice is the procedural act constituting final dispensation of claims, and therefore, final judgment. *Rice v. Perma Corp.*, 908 So.2d 875, 876 (Miss.Ct.App. 2005)(pertaining to entry of a "final judgment of dismissal with prejudice"); *Nobles v. State,* 843 So.2d So.2d 734 (Miss.Ct.App.

2003)(wherein the Court expressly notes that the appeal is "dismissed with prejudice"); *Cox v. Cox,* 976 So.2d 869, 873 (Miss. 2008); *Marshall v. Kansas City Southern Railways Co.,* 2007 WL 3257011 at *2 (Miss.Ct.App. 2007)(noting that an order that does specify the manner of dismissal lacks the requisite finality to confer appellate jurisdiction); *Hubbard v. Wansley,* 954 So.2d 951, 962 (Miss. 2007); *Farmer v. Richardson,* 970 So.2d 261 (Miss.Ct.App. 2007).

The problem in the instant case is the fact that the February 12, 2008 Memorandum Opinion does not direct dismissal of the Appellant's claims. [R.2 at 180]. It is apparent that the Court and all parties failed to notice this defect as this appeal wound its way to the briefing stage. The Opinion simply contains the decision of the trial Court, but not the act of dismissal with prejudice that carries the decision into legal effect. The document also is titled with the peculiar name "Memorandum Opinion and Order", which not only lacks any explicit edict directing dismissal with prejudice, but it also fails to distinguish itself as the final "judgment" of the trial Court. *Smith v. Parkerson Lumber, Inc.,* 890 So.2d 832, 835 (Miss. 2003)(noting Miss.R.Civ.P. 58 directs that every judgment shall be set forth on a separate document which bears the title 'judgment').

Although the former strict requirement concerning the proper titling of judgments has been relaxed by amendments to Rule 58, the Rule establishes a preferential title that clearly signifies that the document is a 'final judgment.' In the instant case, the title of the decisional document is ambiguous at best and in its terms it fails to set forth the act of dismissal with prejudice that carries the decision into legal effect. Without such action, the trial Court has yet to issue a final judgment that dismisses all claims with prejudice that is subject to appellate review.

However, given that the entire record of this appeal has now been lodged with this Court, the most judicially economical measure is to for this Court to direct the trial Court to enter final

judgment of dismissal in compliance with the requirements of Miss. R. Civ. P. 54, 58 and 79. *Smith v. Parkerson Lumber, Inc.,* 890 So.2d 832 (Miss. 2003). In *Smith* the Mississippi Supreme Court ordered the trial court to promptly enter final judgment so that it would not be necessary to dismiss the appeal and face the wasteful prospect of repeating the appeal work that had already transpired. *Smith,* 890 So.2d at 832. This Court should proceed in the same fashion in the interest of judicial economy.

II. The Appellant has Asserted as an Issue in this Appeal that the Trial Court erred in Failing to Convert the Motions to Dismiss into Motion for Summary Judgment and Consider all Pertinent Submissions, like the Appellant's Affidavit

The Appellees have misconstrued the issue on appeal, stating that the contention is that the trial Court "...improperly converted the Motion to Dismiss to a Motion for Summary Judgment and deprived her [the Appellant] of a reasonable opportunity to present all matters relevant to whether the statue of limitations expired." [*See* Brief of Appellees, pg.19]. The Plaintiff has not raised this issue, because it is incontrovertible from the plain terms of the February 12, 2008 Memorandum Opinion that the trial court never converted the 12(b)(6) motions into Rule 56 summary judgment motions.[1]

The Appellant argued in previous briefing that the trial Court improperly failed to convert the Defendants' Rule 12(b)(6) motion into Rule 56 summary judgment motions, in violation of the mandatory conversion provisions of Miss. R. Civ. P. 12(b)(6) when matters extrinsic to the complaints were considered and not excluded by the Court. The mischaracterization of the issue

[1]In her Principal Brief, the Appellant framed the following issue: "Did the trial court consider matters extrinsic to the pleadings, and erroneously fail to convert the Defendants' Miss. R. Civ. P. 12(b)(6) motion to a Rule 56 motion for Summary Judgment and deprive the Plaintiff of a reasonable opportunity to present all matters relevant to the issues raised by the Defendants' statute of limitations argument?"

on appeal by the Appellees, whether such was intentional or by mistake, means the Appellees in their response failed to adequately address the error the Appellant has raised in this appeal.

If matters outside the pleadings are presented and accepted by the Court during consideration of a Rule 12(b)(6) motion, the motion is converted to a motion for summary judgment and disposed of in line with the rules of decision provided under Miss. R. Civ. P. 56. Miss. R. Civ. P. 12(b); *Bolton v. Equiprime, Inc.*, 964 So.2d 529, 533-34 (Miss. Ct. App. 2007). When this occurs, all parties must be given reasonable opportunity to present all material made pertinent to the motion by Rule 56. *Id.* The Appellees do not dispute these rules. In fact, they clarify that the trial Court considered and did not exclude multiple documents and matters extrinsic to the Complaints; indeed, there appears to be a consensus among the parties that the trial Court considered letters of resignation, various contract documents, and other extraneous submissions made by the Appellees in support of their motions.

The trial Court relied on the submissions of the Defendants to establish the resignation date the Appellees allege triggered running of the applicable statutes of limitations. The Appellant submitted an Affidavit containing additional matters as well, which the Defendants referred to in their oppositional replies to the Appellant's response. However, the trial Court, while obviously considering matters extrinsic to the Complaints, considered only the Defendants' submissions and the first filed Complaint. The Appellant's Affidavit as well as the contentions contained in the second filed Complaint were silently overlooked. The Appellant has never argued that the trial Court improperly converted the motions to dismiss. Rather, she contends that it was error for the trial Court not to convert the motions to ones for summary judgment, when it is quite clear that matters extrinsic to the Complaints were considered and not excluded by the Court.

The Appellees believe that the Appellant was given a reasonable opportunity to present all matters relevant to the evaluation of their affirmative assertion that the statute of limitations had expired. The trial Court in professing that it was proceeding under Rule 12(b)(6) nonetheless considered matters outside the Complaints. The Appellees note that summary judgment analysis extends to consideration of the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits to determine if there is no genuine issue as to any material fact. *McDonald v. Mississippi Dept. of Transp.*, 955 So.2d 355, 359-60 (Miss.Ct.App. 2006). They also note that 12(b)(6) motions and summary judgment motions involve different rules of decision. They correctly point out that the focus of a 12(b)(6) is merely on the legal sufficiency of claim statements in the Complaint, that the allegations in the challenged Complaints must be taken as true, and that there must be no set of facts that would allow the claimant to prevail. *Cook v. Brown,* 909 So.2d 1075, 1077-78 (Miss. 2005); *Ralph Walker, Inc. V Gallagher,* 926 So.2d 890, 893 (Miss. 2006). By contrast, the operative inquiry with regard to summary judgment is whether, after viewing the evidence in the light most favorable to the nonmoving party, there is a genuine issue as to any material fact. *Meyers v. American State Ins. Co.,* 914 So.2d 669, 673 (Miss. 2005); *McDonald v. Mississippi Dept. of Transp.,* 955 So.2d 355, 359-60 (Miss.Ct.App. 2006).

The ground upon which the Defendants sought dismissal was very narrow and related to an asserted affirmative defense the Defendants had the burden of proving. This kind of defense is most suitably asserted by motion for summary judgment, when one considers that it will require the movant to submit some evidence to establish the affirmative burden. *Robertson v. Moody,* 918 So.2d 787, 789 (Miss.Ct.App. 2005). The Appellees quote the Appellant's assertions at hearing that the Defendants, having requested the trial Court to consider matters

extrinsic to the Complaints, filed Rule 12(b)(6) motions that had to be converted to summary judgment motions under the Rule. The statements in the hearing were intended to inform the trial Court that conversion was required in this case. For some reason the Appellees assert that the Appellant did not object to the trial Court considering matters outside the Complaints. The Appellant never intended to object and in fact was exhorting the trial Court to address the motions as converted summary judgment motions, because the Court was being asked to consider extrinsic matters. In its Memorandum Opinion the trial Court represented it had conducted a Rule 12(b)(6) analysis, but the Defendants concede that matters outside the Complaints were considered. Therefore, it appears there is little genuine dispute that the trial Court committed error when it failed to convert the motions.

The Appellees also misconstrue the Appellant's assertion that she was deprived of a genuine opportunity to present matters falling within the appropriate scope of summary judgment anlysis, i.e., consideration of the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits to determine if there is no genuine issue as to any material fact. The Appellees themselves reference one such source, the Appellant's Affidavit, in their replies to the Appellant's Opposition to Motions to Dismiss and again in their Principal Briefing. The trial Court ignored altogether the Affidavits that were submitted, as well as the contents of the second filed Complaint, but considered, without dispute, other extrinsic matters. Therefore, the Appellant's contention is that the trial Court erred both in failing to convert the motions as well as failing to consider all submissions made by the Appellant. The deprivation of the opportunity to present relevant material arises from the trial Court's decision to ignore the Affidavit, the allegations of the second filed Complaint, and any other submissions. There is no

justification for the trial Court's arbitrary act of ignoring the Plaintiff's submissions and the allegations of the second Complaint.

Therefore, whether or not the Appellant failed to object to the trial Court considering matters outside the pleadings is simply not a bonafide issue on appeal. The Appellant readily concedes that she did not object; she asked the trial Court, after the Appellees did, to consider outside matters and convert the motions to summary judgment motions. The Appellant does not content the "letter of resignation...deprived her of an opportunity to present material regarding the statute of limitations." She contends the failure of the trial Court to convert the motions and consider all submissions within the scope of the summary judgment analysis was reversible error.

III. Because the Trial Court committed in Failing Properly Consider the Motions under Rule 56, the Entirety of Its Determinations must Reversed and Remanded for a Proper Hearing

Although the trial Court did not conduct any sort of summary judgment analysis, the Appellees endeavor to defend a hypothetical summary judgment analysis the trial Court could have but did not engage in. Whether or not summary judgment would be proper in this case is not an issue ripe for determination, since the trial Court did not issue any sort of order purporting to conduct any sort of summary judgment analysis. The summary judgment arguments of the Appellees at this time are not appropriately raise in this appeal, and they cannot reasonably assert that they unilaterally can raise such arguments now. They postured their motions in the trial Court as "Motions to Dismiss" under Rule 12(b)(6), but they were also quite aware that they were asking the trial Court to consider matters extrinsic to the Complaints. They never asked the trial Court to convert their motions and never objected to any failure to convert. However, the Appellant addresses their contentions below.

The Appellant cannot agree that she was entitled to payment of monies after resignation only with regard to the contract with Appellee Southern Farm Bureau Life Insurance Company. The Appellees note the fact that the Complaints at issue make several explicit allegations of how business was miscoded, and that the all Defendants at some point or another acted like these were mistakes and that they would collectively work to correct instances of miscoding. The same allegations also note that these mistakes and efforts to the correct the same extended up to and through the date of resignation. Nontheless, the Appellees assert that claims for unpaid commissions and other monies owed as claimed in the Complaints are contractually foreclosed upon resignation against all Defendants except Southern Farm Bureau Life Insurance Company. The Appellees reference the provision 6(F) (R2. at 71, ¶F) of the Southern Farm Bureau Casualty Insurance Company Agent Contract as constituting an absolute contractual bar to any agent's claim to commissions that were earned prior to separation.

The Appellees cite no authority in support of the proposition that such a term could be used to broadly forfeit any agent's right to bring claim for earned commissions that were deceptively and wrongfully retained by one or more of the Appellees. When a party fails to support an argument with authority, this Court and the Mississippi Supreme Court routinely find that such arguments need not be considered on appeal. *Phelps v. Phelps,* 937 So.2d 974 (Miss.Ct.App. 2006); *Grey v. Grey,* 638 So.2d 488, 491 (Miss. 1994). Further, the interpretation the Appellees have made of this term is not a reasonable interpretation, and even if it does represent a reasonable interpretation, it is not the only one. A contract is ambiguous when any of its terms are susceptible to two or more reasonable meanings. *Miss. Farm Bureau Cas. Ins. Co. v. Britt,* 826 So.2d 1261, 1265 (Miss. 2002). Therefore, contractual construction is necessary to arrive at the meaning the Appellees urge. Mississippi law has firmly established that when terms

of a contract are vague or ambiguous, they are always construed more strongly against the party that prepared the agreement. *Stampley v. Gilbert,* 332 So.2d 61, 63 (Miss. 1976).

Here the language referenced by Appellees is a provision that pertains to the situation where the contract is terminated by the death of an agent. The Appellees have not explained how this term is of such a scope that it prevents the Appellant from claiming monies she was entitled to under the contracts that were miscoded, concealed, and/or were going to be paid once the Defendants had sorted out the problems as they represented they would do. Provision 6(H)(1) calls the payments addressed in the entirety of Provision 6 "benefits." [R.2 at 71, ¶ H(1), (2)]. The most reasonable interpretation for the term the Appellees rely upon is that it dealt with a vested benefit that would arise in the event an agent remained in active service for 10 or more years; the term "benefit" does mean the commissions that were due to be paid under the contract. It basically refers to a kind of retirement benefit that agents working for a certain duration would be vested to receive after they left the employ of Farm Bureau. The Appellees drafted their agent contracts and under Mississippi law ambiguous terms will be construed more strongly against them. Accordingly, the Provision 6 terms should be construed narrowly to embrace, as expressly stated, "benefits" and not commissions and other monies that were not paid in violation of the compensation terms of the agreements.

The Appellees claim a portion of the Southern Farm Bureau Life Insurance Company Contract that the Appellant cites is "not in the record." Upon review of the record, it appears that provisions 3 and 4 of this contract were erroneously not copied and included when the record was prepared (this page should be included in the record at R.2, pgs. 47-48). It is obvious that all parties and the clerk's office overlooked what is essentially a copying clerical error; as such, the missing page has been attached as an appendix to this Brief and should be considered a part of

the record. The instant case is clearly distinguishable from *Hardy v. Brock,* where a party failed to designate for record inclusion an entire complaint filed in a different case. *Hardy v. Brock,* 826 So.2d 71, 76 (Miss. 2002). The contract addressed in this case has been designated for inclusion in this appellate record and is a part thereof; the missing page is not "out of the record," rather there has been an erroneous failure to physically copy and include but one page of the designated document. The Appellant will file a motion to correct this clerical omission and request that the page be copied and included as designated.

The Appellant claims payment of all commissions that were not paid as a result of uncorrected miscoding, concealed miscoding and any other amounts that were earned but not paid prior to resignation. The Appellees suggest, again without reference to authority, that resignation is the trigger date for the statute on these claims. At not time have the Appellees felt it necessary to present some sort of authority standing for the proposition that resignation serves as the indisputable date upon which the statute of limitations begins to run. This is not a matter the trial Court addressed because it arrived at the astonishing finding that the Plaintiff did not claim contract damages. This new argument by the Appellees ignores the fact that the Plaintiff has asserted that the Defendants represented they would sort out the problems and pay her what she was entitled to. It also does not dismiss the assertion that there are other instances that have not yet been discovered because of concealment by the Defendants. The Plaintiff specifically alleges entitlement to all such commissions and asserts that the Defendants misrepresented the procedure they would employ to work out the problems. The Appellant, as expressed in her Affidavit, also was entitled to commissions from policy business the Appellees asked her to service for other carriers, like Progressive. These amounts are part of the claims against all companies that were to be paid after she resigned.

work that has already transpired, this Court should direct the Trial Court to enter the necessary Final Judgment so that this appeal may proceed.

The chief issue the Appellant raised in this Appeal is the Trial Court erroneous failure to convert the Appellee's 12(b)(6) motion to motions for summary judgment as required by the rule. Further, the Appellant has raised the contention that trial Court's failure to convert also lead it to erroneously ignore matters falling within the scope of proper summary judgment analysis, such as the Appellant's Affidavit and her second filed Complaint. The Appellee's misconstrue the issue and submit a response that fails to adequately address the issues raised by the Appellant.

The trial Court did not convert the motions to motions for summary judgment and failed to conduct any sort of summary judgment analysis. The Defendants wanted the trial Court to consider their motions under Rule 12(b)(6) and explicitly requested such treatment in their motions, while nonetheless submitting matters outside the Complaints for the trial Court's consideration. They never objected to the failure to convert the motions and cannot now unilaterally raise summary judgment arguments on appeal. Further, since the Trial Court did not conduct any sort of summary judgment analysis, there is no order or judgment subject to review giving rise to the Defendant's summary judgment arguments. Therefore, the arguments cannot properly be considered.

This Trial Court must be reversed and ordered to convert the motions. Further, the Trial Court must be directed to resolve the converted motions under the appropriate rules of decision application to summary judgment analysis.

This the 19th day of February, 2009.

Respectfully Submitted,

Barbara Rigdon, Plaintiff

BY: _____
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CERTIFICATE OF SERVICE

I, the undersigned counsel for Martha Via, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing documents by U.S. mail, postage prepaid thereon, to the following:

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