

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

BRIEF OF APPELLANT
Oral Argument is not requested

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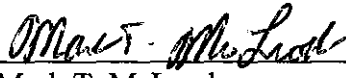
APPELLEES

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.



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STATEMENT OF ISSUES

The issues raised in this appeal are as follows:

(1) 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?

(2) Did the trial court erroneously find that the Defendants met their burden under Miss. R. Civ. P. 12(b)(6), and could the Court have found that Defendants met their burden under Rule 56, regarding the statute of limitations defense?

(3) In the event the trial court was otherwise correct in any respect in granting the Defendants' Motions to Dismiss, was its decision to apply Miss. Code Ann. § 15-1-69 prior to the time the Plaintiff received notice required by law of entry of the order of dismissal from the original action, after she diligent inquired with state actors and was misinformed, contrary to due process of law and a violation of her constitutional rights?

STATEMENT OF THE CASE

This appeal arises from the improper dismissal with prejudice of Appellant Barbara Rigdon's (hereinafter "Plaintiff") action against Mississippi Farm Bureau Federation, Rankin 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., Mississippi Farm Bureau Mutual Insurance Co., and Tommy Allen (hereinafter "Defendants"). The Plaintiff originally filed her action against the Defendants on or about August 30, 1999, with four other Plaintiffs in Claiborne County, Mississippi. Ultimately, the Plaintiffs in that case were severed by Supreme Court Mandate. The Plaintiff re-filed her case in the circuit court of the Second Judicial District of Hinds County, Mississippi in Complaints filed on March 2, 2007 and August 25, 2007, consecutively.

On August 21, 2007, the Defendants filed a motion to dismiss the March 2, 2007 Complaint ostensibly under Miss. R. Civ. P. 12(b)(6), alleging a statute of limitations defense.¹ [R.(777) at 23]. Thereafter, the Defendants filed a motion to dismiss the August 25, 2007 Complaint asserting once again that the suit was barred by the applicable statute of limitations. [R.(780) at 116]. The Plaintiff filed an Opposition to both motions to dismiss on November 15, 2007. [R.(777) at 46; R.(780) at 128]. The Court initially heard the matters on November 16, 2007 and concluded the hearing with the request that the Defendants submit a rebuttal to Plaintiff's Opposition. At the Court's request, a notice of hearing on all motions and rebuttals was set for May 9, 2008. [R.(780) at 2]. Without notice, the Court, while the Honorable Judge

¹Record citations for Case Number 2008-CA-00777 are designated as "R.(777)" and "R.(780)" for Case Number 2008-CA-00780.

Delaughter was voluntarily commencing a temporary suspension from his position, elected to cancel the May 9, 2008 hearing shortly before it was to be conducted and sent its disposition to all parties. In its Memorandum Opinion and Order, the Court found the statute of limitations barred both actions and dismissed them with prejudice. [R. (780) at 173].

STATEMENT OF THE FACTS

The Plaintiff served as a contracted agent for the Defendants and the Plaintiff entered into contracts with each insurance company Defendant on or about March 8, 1991. [R.(780) at 25]. In both Complaints at issue in this appeal, the Plaintiff brought causes of action arising out of her dealings with the Defendants, including breach of contract, tortious breach of contract, fraud, conspiracy, intentional misrepresentation, negligent misrepresentation, intentional infliction of emotional distress and negligent infliction of emotional distress. [*Id.* at 27-35].

The Defendants sought dismissal of these Complaints on the theory that the statute of limitations had expired on the Plaintiff's claims, arguing that her date of resignation from employment with the Defendants somehow emerged as the trigger date for the commencement of the statute of limitations. [R.(780) at 116]. In both motions to dismiss, the Defendants introduced matters outside the pleadings, consisting of letters of resignation and affidavits, in an attempt to meet their burden to prove the affirmative defense that the statute of limitations had run. [*Id.* at 117; R.(777) at 24, 43, 85]. Further, the Defendants made reference to the Plaintiff's Affidavit attached to her opposition. [R.(780) at 161]. The motions to dismiss were couched as Miss. Civ. P. 12(b)(6) motions, but the Defendants clearly asked the trial court to engage in a summary judgment analysis. The Plaintiff pointed this out in argument to the trial court in the first noticed hearing conducted on November 16, 2008. [*Id.* at Transcript pgs. 11-12].

The Plaintiff's Complaints are silent about the date of her resignation and make no reference to that date in alleging any right to recover the contract compensatory damages she has made in these actions. That is why the Defendants were compelled to introduce subject matter outside the pleadings, because an examination of the only filed pleadings, the Complaints, did not establish the Defendant's affirmative defense or sustain any sort of dismissal under Rule 12(b)(6). 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. Both Complaints clearly make claims for these monetary damages that the Defendants were required to pay her, by contract, after resignation. The Plaintiff alleges the Defendants entered into written contracts with her and agreed to meet certain obligations and promises. [R.(777) at 12; R.(780) at 27]. Upon looking at the terms of the actual contracts, one will find provisions such as subsection 7(c) under "Payment after Termination" in the contract with Defendant Southern Farm Bureau Life Insurance Company, wherein it is provided that "...the Company will pay you an monies earned and due you at the date of your termination and, out of premiums received by the Company after such termination, the balance of any First Year Commissions and Bonus Commissions which would have become payable to you if this contract had continued in force." [R.(780) at 40]. The Plaintiff alleges that the Defendants failed and refused to perform their obligations under the contracts, which would have included the Defendants ultimate failure to pay her what she was entitled to after she resigned. [R.(777) at 13, R.(780) at 28]. The Plaintiff alleges that the Defendants sought to convert all present and future commissions for their financial gain, thereby breaching their contracts and the implied covenants of good faith and fair dealing. [R.(777) at 14]. The claimed losses are substantial pecuniary loss, contract

compensatory damages, and punitive damages. [R.(777) at 13, 14, 20]. It appears that a great deal of the Defendants' failure to pay the Plaintiff what she was entitled to under the contracts had to do with improper or erroneous assignment of business to other agents or erroneous reports regarding the Plaintiff's sales activities. [R.(780) at 10, 12]. 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 Plaintiffs claims for monetary relief arising from contract are predicated upon this obligation. The Plaintiff explicitly requested payment of the monies owed to her after resignation in her resignation letter. [R.(780) at 122].

The Defendants submitted evidence extrinsic to matters presented in the Complaints in support of their motion in an effort to prove that the statute of limitations had run on the Plaintiff's claims. The Defendants declared in their motions that resignation must necessarily commence running of the statute, but never directed the trial court's attention to any authority showing that as a matter of law a date of resignation will trigger the running of statute. However, 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.

In response to the Defendant's motions and submissions, the Plaintiff filed an Opposition with an Affidavit attached. [R.(780) at 152]. The Plaintiff clarified in her Affidavit that at the time and subsequent to her resignation she requested commissions and statements on all new business submitted and renewals through September 13, 1996 be paid to her in the usual and customary manner, including commissions from Progressive and other policies she had procured that would accrue throughout 1997. [*Id.*]. She was paid the normal and customary manner in the

month following her resignation some commissions due to her, but many outstanding commissions remained to be paid throughout 1997. [*Id.*]. The Plaintiff was never affirmatively told orally, in writing or otherwise by any of the Defendants in this action that the companies had no intention of living up to their contractual obligations to pay all commission that were due to Plaintiff and claimed by her subsequent to her resignation. [*Id.*]. The Plaintiff did not learn of the Defendants' evident decision not to pay her commissions due after separation until she failed to receive payment of commissions accruing in 1997 by December 31, 1997. [*Id.* at 153]. She also did not learn of that fact until she failed to receive a tax form 1099 that would document such earned income. [*Id.*]. Regarding the fact that the Defendant insurance companies apparently fostered such activities as improper or erroneous assignment of business to other agents and misreporting of her business activities, the Plaintiff did not learn of the deliberate nature of such practices until she by exercise of due diligence met other persons who had experienced similar practices during their time with the Defendants in late August or early September, 1998. [*Id.*]. Because the malfeasance was surreptitious, the Plaintiff was lead to believe that the companies themselves intended to honor their obligations to pay her everything that was due to her under the contracts after separation. The Affidavit and the Plaintiff's letter of resignation clarify that the claims in both Complaints reached commissions that were contractually due in the months following the resignation; if fact, the Defendants, in the language of the contracts, could "pay...any monies earned and due you [Plaintiff] at the date of your termination and, out of premiums received by the Company after such termination, the balance of any First Year Commissions and Bonus Commissions which would have become payable to you if this contract had continued in force."

The trial court elected to author one Memorandum Opinion and Order concerning the motions to dismiss both actions. [*Id.* at 173]. In the first section, "Factual and Procedural History," the trial court identified the contracts, the right of elective termination of the contracts, and that the Plaintiff submitted her resignation on September 3, 1996, effective September 13, 1996. [*Id.* at 174]. The trial court therefore considered the extrinsic material submitted by the Defendants in their motions, because the dates pertaining to resignation were not presented in either one of the Complaints. The information was introduced by the Defendants to prove that the statute of limitations had run on the Plaintiff's claims. The Plaintiff, therefore, was entitled to be heard and present extrinsic matters, such as affidavits, to rebut the Defendants' assertions that mere identification of the exact date of effective resignation meant the statute began to run on September 14, 1996. The trial court, although it considered matters extrinsic to the pleadings, elected to decide the motions as if they were brought under Rule 12(b)(6). This failure resulted in the consideration by the trial court of extrinsic matters submitted by the Defendant in its motions to dismiss, but disregard for the Affidavit and any other matters the Plaintiff submitted in rebuttal.

The trial court claimed to look only to the Complaints to determine the motions, yet made factual findings that could only have been made in reliance on the submissions presented by the Defendants. Further, the trial court erroneously determined that the Plaintiff did not seek contract claims for damages arising after the date of her termination. [*Id.* at 177]. Incredibly, the trial court actually found that the Plaintiff did not allege failure to receive ANY of the compensation she was entitled to under the subject contracts. [*Id.* at 177-78]. Basically, the trial court's reasoning construed the allegations of both Complaints to lack any claim for monetary

contract damages whatsoever. As previously presented, both Complaints made general and specific allegations that the Defendants did not meet contractual obligations owed to the Plaintiff, referenced the specific contracts wherein provisions for payment after separation were contained, and claimed damages for contractual compensatory damages for the post resignation breaches of these provisions. The claim for all commissions owed under the contracts, regardless of when they were due, is clearly brought in both actions. The Plaintiff sufficiently plead claims for contract damages owed after termination, and even if the Plaintiff had not made specific reference to exact contractual provisions, under Miss. R. Civ. P. 8, each Complaint provides adequate notice of the these claims. *See* Miss. R. Civ. P. 8 ((comments): "The rule allows the claims to be stated in general terms so that the rights of clients are not lost...."). Further, although the trial court had before it two different motions to dismiss pertaining to two different Complaints, it purported to analyze the contents of only the first Complaint in ruling on the motion pertaining to the other Complaint. There is no attempt to explain why the trial court chose to do this or why it would be proper to do so. Nonetheless, the trial court insinuated in its opinion that if the Complaints could be read to include claims for contract money damages (they did), some or all of which became contractually due after termination (the claims reached these), then the resignation date would not constitute the time from which the statute of limitations would begin to run.

SUMMARY OF THE ARGUMENT

In both matters at issue in this appeal, the Defendants erroneously sought to dismiss the actions by motion ostensibly brought under Miss. R. Civ. P. 12(b)(6). Similarly, the trial court erroneously construed the motion as brought under Rule 12(b)(6), thereby applying the wrong

rules of decision to decide the motions. In this case, the Defendants raised the affirmative defense of limitations expiration and introduced matters outside the Complaints in an attempt to prove that. The trial court did not exclude, and in fact, relied on the Defendants' submissions. By doing this, it considered the extrinsic matters raised by the Defendants, but ignored the Plaintiff's Affidavit and otherwise deprived her of a reasonable opportunity to present all material pertinent to the Defendant's affirmative defense. This was error and the trial court should be reversed.

The Defendants sought dismissal of the Plaintiff's Complaints with prejudice under Miss. R. Civ. P. 12(b)(6) on the contention that the statute of limitations governing the Plaintiff's claims had expired. The Plaintiff's allegations were to be taken as true and the Defendants were required to show beyond a reasonable doubt that the Plaintiff would be unable to prove *any* set of facts in support of the claims. Because the Defendants' sole basis for seeking dismissal of the Plaintiffs' claims was the supposition that the applicable statute of limitations had expired, the Defendants in fact asserted an affirmative defense that they had the burden of proving. The Defendants introduced no factual evidence demonstrating that the statute of limitations ran on any of the Plaintiff's claims. They submitted the letter of resignation to show the date on which they assert that the statute began to run.

The Plaintiff made claims that encompassed components of contracts that remained to be fulfilled after resignation, and the statute would not have begun to run until the Defendants failed to perform those components as agreed. The Defendants introduced nothing to disprove those contractual obligations, and did not establish what date the statute would have begun to run when those components were unfulfilled. The Complaints contained no allegations which would have

provided the trial court or the Defendants a means of ascertaining such matters. They would have had to introduce additional matters to justify their claim that resignation was the operative date without dispute, which exceeds the proper scope of a 12(b)(6) motion to dismiss. Accordingly, it was error for the trial court to consider their motion and grant them under Rule 12(b)(6).

Had the trial court properly considered the motions under Rule 56, it would have been compelled to determine that the Defendants did not meet their initial burden to demonstrate the absence of a genuine issue of material facts concerning their affirmative defense. The Defendants introduced nothing beyond the letter of resignation. They presented no other facts or authority compelling the conclusion that there was no genuine dispute concerning whether resignation was in fact the date the statute should have begun to run. There would have been a factual issue for the jury to resolve concerning the Defendants' affirmative defense. Further, the Plaintiff sufficiently plead fraud by the Defendants in the making of the contracts and performance of their obligations, and set forth specific facts of subterfuge indicating the Defendants prevented the Plaintiff from discovering her causes of action until December 31, 1997. Therefore, the trial court would have been required to find that there was a fact issue for the jury regarding when the statute trigger date would have been.

In the event the trial Court was otherwise correct in any respect in granting the Defendants' Motions to Dismiss, its decision to apply Miss. Code Ann. § 15-1-69 prior to the time the Plaintiff received notice required by law of entry of the order of dismissal from the original action, after she diligently inquired with state actors and was misinformed, was contrary to due process of law and a violation of her constitutional rights.

ARGUMENT

A. Standard of Review

Motions to dismiss under either Miss. R. Civ. P. 12(b)(6) or Rule 56 raise questions of law and are reviewed de novo. *Hartford Cas. Ins. Co. v. Halliburton Co.*, 826 So.2d 1206, 1209-10 (Miss. 2001). Rule 12(b)(6) tests the legal sufficiency of a complaint, and provides that dismissal shall be granted to the moving party where the plaintiff has failed to state a claim upon which relief can be granted. *Children's Med. Group, P.A. v. Phillips*, 940 So.2d 931, 934 (Miss. 2006). The scope of review of an M.R.C.P. 12(b)(6) motion is that the Plaintiff's allegations must be taken as true, and the motion should not be granted unless it appears beyond a reasonable doubt that the plaintiff will be unable to prove any set of facts in support of her claim. *Missala Marine Servs., Inc. v. Odom*, 861 So.2d 290, 294 (Miss. 2003); *Overstreet v. Merlos*, 570 So.2d 1196, 1197 (Miss.1990); *Grantham v. Mississippi Dep't of Corrections*, 522 So.2d 219, 220 (Miss.1988); *Lester Eng'g Co. v. Richland Water & Sewer Dist.*, 504 So.2d 1185, 1187 (Miss.1987); *Stanton & Assocs., Inc. v. Bryant Constr. Co.*, 464 So.2d 499, 505 (Miss.1985).

Motions to dismiss under Rule 12(b)(6) are considered on the face of the pleadings alone. *Hartford*, 826 So.2d at 1211. By contrast, Rule 56 tests the notion of well-pled facts and requires a party to present probative evidence demonstrating triable issues of fact. *Stuckey v. Provident Bank*, 912 So.2d 859, 865-66 (Miss. 2005). The burden of proving that no genuine issue of material fact exists is on the moving party. *McMichael v. Howell*, 919 So.2d 18, 21 (Miss. 2005). The Court will not grant summary judgment unless the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

McMichael, 919 So.2d at 21. The evidence is to be viewed in a light most favorable to the party opposing the motion. *Id.*

B. The Court Considered Matters Extrinsic to the Pleadings, but Failed to Convert the Defendants' Miss. R. Civ. P. 12(b)(6) Motion to a Rule 56 Motion for Summary Judgment and Deprived the Plaintiff of a Reasonable Opportunity to Present All Matters Relevant to the Issues Raised by the Defendants' Statute of Limitations Argument

In both matters at issue in this appeal, the Defendants erroneously sought to dismiss the actions by motion ostensibly brought under Miss. R. Civ. P. 12(b)(6). Similarly, the trial court erroneously construed the motions as brought under Rule 12(b)(6), thereby applying the wrong rules of decision to decide the motions. Rule 12(b) provides in relevant part as follows:

Every defense, in law or fact, to a claim for relief in any pleading...shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:...(6) failure to state a claim upon which relief can be granted....If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonably opportunity to present all material made pertinent to such a motion by Rule 56.

The motions to dismiss initially raised multiple matters outside the pleadings, such as the Plaintiff's letter of resignation attached as an Exhibit to the motions and the contracts the Defendants made reference to. It is clear the Court relied on either the letter of resignation or Rigdon's affidavit attached to her Opposition to the motion to dismiss in its ruling, because, while the Complaint makes no reference to what date the Plaintiff resigned her position with the Defendants, the Court found the limitation period must have begun to run on September 14,

1996. [R.(780), pgs. 122-24 (Exhibit "A" to Defendants' motion to dismiss), 152 (Affidavit of Barbara Rigdon (attached as Exhibit "B" to her Opposition), 161 (Defendants' reliance upon and argument to the Court about averments contained in Rigdon's Affidavit)].

In considering a dismissal for the failure of the complaint to state a claim upon which relief can be granted, the trial court is limited to a review of the complaint and should grant the motion only when it appears beyond doubt that the plaintiff will be unable to prove any set of facts in support of the claims. *Brewer v. Burdette*, 768 So.2d 920, 922 (Miss. 2000). If matters outside the pleadings are presented and accepted by the trial 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.*

While the object of Rule 12(b)(6) and Rule 56 motions is the same, which is to test legal sufficiency of claims brought by a Plaintiff, the analysis and emphasis of scrutiny for each are vastly distinguishable. 12(b)(6) motions test the statement of a claim in the Complaint and are confined to the determination of whether the Complaint states a claim upon which the Plaintiff might be able to prove any set of facts in support. If the Plaintiff makes claims encompassing contractual breaches and damages that occur after the date of resignation, as this Plaintiff does, then the mere fact of resignation does nothing to establish the statute of limitations. More facts are required and there is certainly a cognizable fact scenario under the 12(b)(6) analysis that would push the statute of limitations trigger date past the date of resignation. That is why the

trial court was constrained to read, in error, both Complaints as excluding any claims for contract monetary damages; its ruling was unjustified otherwise under the 12(b)(6) analysis. Rule 56 is the appropriate avenue if the Defendants raise issues outside the pleadings and desire the trial court determine whether or not there is a genuine issue of material fact on some dispositive issue.

In this case, the Defendants raised the affirmative defense of limitations expiration and introduced matters outside the Complaints in an attempt to prove that. The trial court did not exclude, and in fact, relied on the Defendant's submissions. By doing this, it considered the extrinsic matters raised by the Defendants, but ignored the Plaintiff's Affidavit and otherwise deprived her of a reasonable opportunity to present all material pertinent to the Defendants' affirmative defense. This was error and the trial court should be reversed.

C. The Plaintiff's Claims Were Sufficiently Plead and Supported to Survive the Defendants' Motion to Dismiss under either Rule 12(b)(6) or Rule 56, Because the Complaints Clearly Stated Claims for Breaches and Damages that Occurred after the Resignation and the Defendants Failed to Affirmatively Establish There was no Genuine Issue of Material Fact Regarding Their Statute of Limitations Defense

The Defendants sought dismissal of the Plaintiff's Complaints with prejudice under Miss. R. Civ. P. 12(b)(6) on the contention that the statute of limitations governing the Plaintiff's claims had expired. The Plaintiff's allegations were to be taken as true and the Defendants' were required to show beyond a reasonable doubt that the Plaintiff would be unable to prove *any* set of facts in support of the claims. Because the Defendants' sole basis for seeking dismissal of the Plaintiff's claims was the supposition that the applicable statute of limitations had expired, the Defendants in fact asserted an affirmative defense that they had the burden of proving. Therefore, unless the Complaints unequivocally provides that resignation was necessarily related

as a matter of law to the Plaintiff's claims for contractual monetary relief, the Defendant had to delve into extrinsic matters to show the date of resignation and establish it as the date the Plaintiff's claims arose.

This Court has stated that "[t]he plea of statute of limitations is an affirmative defense and, as such, the party asserting it has the burden of proving it." *Graham v. Pugh*, 417 So.2d 536, 540-41 (Miss.1982); *Gulfport Fertilizer v. McMurphy*, 114 Miss. 250, 75 So. 113 (1917); Miss. R. Civ. P. 8(c). When there is a factual dispute about whether the applicable statute of limitations bars a claim, then it will be a question of fact for the jury to determine. *Gulfport Fertilizer Co.*, So. at 113-14.

The Defendants introduced no factual evidence demonstrating that the statute of limitations ran on any of the Plaintiff's claims. They submitted the letter of resignation to show the date on which they asserted that the statute began to run. However, given the Plaintiff's claims for monies due under contract after the time of resignation, the Defendants presented no evidence or cited any authority indicating resignation was the date, as opposed to some other date. Concerning the contract claims, it is clear the law holds that when "a component of the contract remains to be fulfilled, the statute of limitations has not begun." *Bailey v. Estate of Kemp*, 955 So.2d 777, 785 (Miss. 2007). This was the only authority bearing on the question before the trial court. The Plaintiff made claims that encompassed components of contracts that remained to be fulfilled after resignation, and the statute would not have begun to run until the Defendants failed to perform those components as agreed. The Defendants introduced nothing to disprove those contractual obligations, and did not establish what date the statute would have begun to run when those components were unfulfilled. The Complaints contained no allegations

which would have provided the trial court or the Defendants a means of ascertaining such matters. Therefore, the Defendants were required to delve into extrinsic matters just to throw out a date, in error, that they baldly asserted began the running of the statute. They would have had to introduce additional matters to justify their claim that this was the operative date without dispute, which exceeds the proper scope of a 12(b)(6) motion to dismiss. Accordingly, it was error for the trial court to consider their motion and grant under Rule 12(b)(6).

Had the trial court properly considered the motions under Rule 56, it would have been compelled to determine that the Defendants did not meet their initial burden to demonstrate the absence of a genuine issue of material facts concerning their affirmative defense. The Defendants introduced nothing beyond the letter of resignation. They presented no other facts or authority compelling the conclusion that there was no genuine dispute concerning whether resignation was in fact the date the statute should have begun to run. The Defendants wholly failed to show that the Plaintiff's claims, encompassing post resignation contractual obligations and damages, hinged on the date of resignation. As previously noted, the Plaintiff alleged in both of her Complaints and explained in her Affidavit sufficient facts indicating that she was not paid all the financial benefits and commissions that were due her under the contracts with the Defendant insurance companies. In fact, payment of all commissions due under the contracts was explicitly provided for under the subject contracts. Accordingly, the trial court would have been required to find that the Defendants did not meet their burden under Rule 56. There would have been a factual issue for the jury to resolve concerning the Defendants' affirmative defense.

Even if the Defendants had met their initial burden, it is clear the Plaintiff alleged fraudulent activity in both Complaints that would have prevented her from discovering her cause

of action against the Defendants until they failed to pay what was owed to her in 1997. Miss.Code Ann. § 15-1-67 provides that “if a person liable to any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered.” Miss. Code Ann. § 15-1-67. As such, fraudulent concealment applies to any cause of action and will toll its statute of limitations. *Stephens v. Equitable Life Assurance Society of the United States*, 850 So.2d 78, 84 (Miss. 2003). This theory is available if the Plaintiff can show some affirmative act or conduct by the Defendants to prevent discovery of the claim. *Stephens*, 850 So.2d at 84.

The Plaintiff alleged in the Complaints fraud on the part of all Defendants in the making and performance of contractual duties, and as previously noted, the Plaintiff specifically alleged fraudulent activity such as the erroneous assignment and reporting of business resulting in the Defendant’s failure to pay her everything she was entitled to after resignation. Further, the Plaintiff alleged in her Complaint that the Defendants would engage in these activities surreptitiously. As the Plaintiff indicated in her Affidavit, she did not realize such dishonest activity was designed to mislead her and assist the Defendants in avoiding contractual obligations until they failed to pay her in 1997. Further, after resignation the Plaintiff met and discussed her work experience with other former agents in late August or early September, 1998, and learned at the meeting with these other agents that Defendants pursued such policies of subterfuge towards other agents to breach contracts. The Plaintiff reasonably investigated the circumstances of her employment, but she did not know the Defendants were being dishonest about the manner in which they redirected business and misreported her

activities due to be paid on in the months following her resignation. Therefore, there is certainly a jury issue regarding whether the Plaintiff's causes of action were concealed by the Defendants' fraudulent concealment, such that the applicable statutes of limitation were tolled until August of 1998.

D. In the Event the Trial Court was Otherwise Correct in Any Respect in Granting the Defendants' Motions to Dismiss, Its Decision to Apply Miss. Code Ann. § 15-1-69 Prior to the Time the Plaintiff Received Notice Required by Law of Entry of the Order of Dismissal from the Original Action, after She Diligent Inquired with State Actors and Was Misinformed, Was Contrary to Due Process of Law and a Violation of Her Constitutional Rights

Attached as Exhibit "A" to Plaintiff's Oppositions is a Memorandum submitted to the trial court in support of Plaintiff's argument that, even if it were proper to accept the Defendants' arguments regarding the statute of limitations, to accept them in this case would deprive the Plaintiff of due process of law. [R.(780) at 135].

The Plaintiff was originally one of five Plaintiffs who filed action on August 30, 1999 in Claiborne County, Mississippi. The Complaint in that action was filed against the Defendants setting forth the claims of Plaintiffs Barbara Rigdon ("Rigdon"), Martha Via ("Via"), Becky Kirkland ("Kirkland"), and Alinda White ("White"). This Court rendered a decision on May 11, 2006 conclusively reversing this the trial court's denial of the Defendants' various motions to sever and dispensing with Plaintiffs' motion for rehearing. The Supreme Court issued a mandate on that same date setting forth an order that the trial court take action in conformity with the Supreme Court's ruling.

As set forth in the sworn statements, the Plaintiff (through counsel) made several inquiries between May 19, 2006 and February 2, 2007, to the Claiborne County Circuit Clerk's

office to inquire about obtaining trial dates in that case for the remaining Plaintiff Brenda Roberts and to find out whether an order had come down by the Court dismissing Via, Rigdon, Kirkland, and White without prejudice in accord with the Supreme Court mandate issued May 18, 2006. [*Id.* at 135-73]. The Plaintiff also made inquiries during this time period to a woman who identified herself as "Brenda", and who the Plaintiff understood to be employed in the Circuit Clerk's office or Circuit Court of Warren County, Mississippi. Among other dates, the Plaintiff made such inquiries by telephone between May 19, 2006 and July 10, 2006. [*Id.*]. Further, the Plaintiff made further inquiries between May 19, 2006 and February 2, 2007, including August 25, August 29, November 10, December 14 and late January, 2007. [*Id.*]. On each occasion, the Plaintiff was told that no order had come down on the Supreme Court mandate. [*Id.*].

According to the Affidavits, at all relevant times, mail that reached the Plaintiff's counsel was opened, date-stamped, recorded, scanned for electronic storage and disseminated to all attorneys regardless of the case each morning. [*Id.*]. All attorneys and staff were aware from May 18, 2006 forward that the Plaintiff was awaiting the order of dismissal carrying out the mandate, and the mail was checked each day to see whether such order or notice of entry thereof had been sent to Plaintiff's counsel. [*Id.*] Plaintiff's counsel did not ever receive any indication or copy of the signed order of dismissal from either the clerk's office in Claiborne County or Warren County, the Judge, or opposing counsel. [*Id.*]. Further, even after inquiries with the Court, neither the Plaintiff's counsel nor their attorneys learned of the rendition or entry of an order of dismissal until the Defendants filed motions to dismiss the newly filed actions concerning Via and Rigdon with a copy of an order attached as an exhibit. The docket entries in the original action did not reflect that the clerk's office ever made any attempt to send notice of

entry of the order to any of the parties as required by Rule 77 or make diligent efforts as required under Uniform Circuit and County Court Rule 11.05 to assure that notice had been given to the parties.

The net impact of this inadvertent failure to provide notice was to deprive the Plaintiff of her due process rights and the full benefit of their rights under Miss. Code Ann. § 15-1-69. Further, the Defendants have attempted to use this deprivation against the Plaintiff.

There is no doubt that the Plaintiff was entitled to proper notice of the order of dismissal and that lack of notice was an improper, prejudicial violation of her rights under Mississippi law. The Plaintiff not only failed to receive timely notice from any source, including the Defendants (who were fully empowered to provide notice under Miss. R. Civ. P. 77), she was also incorrectly informed on a number of occasions during and after entry of the dismissal order by the clerk's office that no order had been entered pursuant the Mississippi Supreme Court mandate.

The Plaintiff had a due process right to receiving proper notice as protected under Mississippi and Federal law. Rule 77(d) provides as follows:

Immediately upon entry of an order of judgment the clerk shall serve a notice of the entry in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the service. Any party may in addition serve a notice of such entry in the manner provided in Rule 5(b) for the service of papers. Miss. R. Civ. P. 77(d).

Rule 77(d) was amended in 1997 to provide that parties may serve notice of the entry of the judgment or order on all other parties. *See Comments* to Rule 77. This amendment coincided with the addition of subsection (h) to Rule 4 of the Mississippi Rules of Appellate Procedure, wherein the trial court is empowered to reopen the time for appeal if the proponent shows

entitlement to notice of entry of the order of judgment and lack of notice from either the clerk or any party. Miss. R. Civ. P. 77(d) and Miss. R. App. P. 4(h) combine to place the burden the burden on prevailing parties to take the initiative to assure that their adversaries receive effective notice. *See Comments* to Rule 77. However, this burden does not diminish the clerk's duty to give notice of entry of judgments and orders. *Id.* The clerk notice procedure is also mandated in Uniform Circuit and County Court Rule 11.05, entitled "Entry of Order and Duty of Clerk", which provides "[i]mmediately upon entry of an order or judgment of the court, the clerk of court shall make a diligent effort to assure that all attorneys of record have received notice of the entry of the order."

The Plaintiff had a justifiable reason for relief from the trial court regarding the Defendants' motions to dismiss because the deprivation of her due process right to proper notice prejudiced her rights under Miss. Code Ann. 15-1-69. The request was justified because the Plaintiff did not receive proper notice of the entry of the dismissal order. Rather, the Plaintiff received incorrect information from the clerk's office when she diligently inquired prior to, during and after the time the order was entered to protect her rights. The clerk's mandated duty to send notice of entry of an order in the manner provided for in Rule 5, coupled with the duty to make a diligent effort to assure that all attorneys of record receive notice of entry of the order, establishes a state procedure that is intended to protect the fundamental notice due process rights of both Plaintiffs and Defendants. Further, the Defendants were empowered under Rule 77 to ensure that the Plaintiff received effective notice so that any time limit to exercise rights under law would begin to run. Instead, the Defendants neglected to send notice to the Plaintiff, anticipating she would not have received it, and are now trying to benefit from the deprivation of the Plaintiff's rights to notice.

This Court has observed that “[n]otice...is the essence of due process.” *Johnson v. Weston Lumber & Bldg. Supply Co.*, 566 So.2d 466, 469 (Miss. 1990). When a party does not receive proper notice, “[w]e need test no further. There can be no balance to a test when there is no notice.” *Id.* at 468 (granting motion under Rule 60(b)(6) to vacate judgment entered after a trial of which the party did not receive notice); *McClain v. White*, 738 So.2d 306, 307-08 (Miss. App. 1999). When a procedural due process basis is raised in the case challenging some official action, it must be evaluated using a two step process. *Bowie v. City of Jackson Police Department*, 816 So.2d 1012, 1015 (Miss. App. 2002); *Nichols v. City of Jackson*, 848 F.Supp. 718, 720 (S.D. Miss. 1994). The first step requires the court to determine whether a protected life, liberty or property interest exists. *Bowie*, 816 So.2d at 1015. The second step requires the court to determine what process is required in a given situation. *Id.*

Both the Mississippi and the United State Constitution guarantee that no person shall be deprived of life, liberty or property except by due process of law. Miss. Const. Art. 3, § 14 (1890, as amended); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 102 S.Ct. 1148, 1153-54, 71 L.Ed.2d 265 (1982); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The Defendant’s motions seeking complete eradication of all rights of action of the Plaintiff and the Court Order granting such request, when there was a lack of due process notice to the Plaintiff in order for her to fully enjoy her rights under Miss. Code Ann. § 15-1-69, resulted in termination of the Plaintiff’s right to further pursue her causes of action (including her post-resignation claims) by virtue of an improper deprivation of due process. A cause of action is a species of property protected by the guarantee of due process. *Logan*, 455 U.S. at 428-29. Constitutional due process guarantees protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs

attempting to redress grievances. *Id.* at 429; *Societe Internationale v. Rogers*, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958).

The 5th Circuit Court of Appeals reversed a trial court's denial of a motion under Fed. R. Civ. P. 60(b) to vacate an order when the court clerk failed to provide notice of entry in a manner consistent with due process of law. *New York Life Insurance Company v. Brown*, 84 F.3d 137, 143 (5th Cir. 1996). In similar fashion as the *Brown* court, the Mississippi Supreme Court recently upheld vacation of an entry of final judgment by the trial court under Rule 60(b)(6). *Hartford Underwriters Insurance Company v. Williams*, 936 So.2d 888, 893 (Miss. 2006). As in the instant case, the evidence showed in *Hartford Underwriters* that one of the parties did not receive notice of judgment entry and that when the party made inquiries with the clerk on various occasions they were not properly informed that the judgment had been entered. *Hartford Underwriters Insurance Company*, 936 So.2d at 894. Further, the Mississippi Supreme Court determined that the trial court acted "well within its discretion" to find that the lack of written notice as required under Miss. R. Civ. P. 77(d) and the misinformation upon verbal inquiry with the clerk's office required vacation of the judgment under Rule 60(b)(6). *Id.* at 894. Importantly, this was the remedy afforded so that the party could establish a new date from which the jurisdictional time limit of 10 days provided in Miss. R. Civ. P. 50 and 59 to file post-trial motions would begin to run. *Id.* Accordingly, the post-trial motions were timely filed, and based upon the various assignments of error that were thereby preserved, the Mississippi Supreme Court reversed the findings of the trial jury, reversed judgment and remanded the case for a new trial. *Id.* at 898.

As implicated in *Hartford Underwriters Ins. Co.* and *New York Life Ins. Co.*, the Plaintiff was denied due process because she lost her rights to file new actions because state actors'

failures prejudiced her in timely exercising her rights, assuming the trial court was correct in its belief that the date of resignation began the running of the statute. This circumstance therefore would have arisen because the clerk's office failed to notify the Plaintiff of the entry of the dismissal order and even responded to inquiries with an incorrect indication that no order had come down on the mandate. In the event the trial court's reasoning is otherwise proper regarding the motions to dismiss and the statute of limitations, its decision must nonetheless be overturned because the Plaintiff was not accorded due process to exercise her right under Miss. Code Ann. § 15-1-69. The Court found that it was the Plaintiff's responsibility to determine when the order of dismissal was entered, even when she undertook diligent efforts to discover the same and was misinformed. This reasoning basically holds that a diligent party that engages in multiple efforts to discover entry of such an order will suffer prejudice because of the mistakes and misinformation of state actors who have a positive duty in law to provide prompt and accurate notice of entry of such orders. This is a violation of due process and must be overturned, should the trial court otherwise be correct in its reasoning concerning the motions to dismiss.

CONCLUSION

In consideration of all the reasons set forth in this Brief, the Plaintiff respectfully request that that the Trial Court's Memorandum Opinion and Order be reversed on all grounds/

This the 27th day of October, 2008.

Respectfully Submitted,

Barbara Rigdon, Plaintiff

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CERTIFICATE OF SERVICE

I, the undersigned counsel for Barbara Rigdon, 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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