

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2008-CA-00782
(Consolidated with No. 2008-CA-00783)**

MARTHA VIA

APPELLANT

VS.

**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.,
MARCUS MARTIN, DAN MARTIN AND
JOE DOE #1 THROUGH JOHN DOE #25**

APPELLEES

**ON APPEAL FROM THE CIRCUIT COURT OF HINDS COUNTY
SECOND JUDICIAL DISTRICT**

**BRIEF OF APPELLEES
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.**

ORAL ARGUMENT IS NOT REQUESTED

**CHARLES G. COPELAND
DALE G. RUSSELL
ELLEN ROBB**

COPELAND, COOK, TAYLOR & BUSH, P.A.

Post Office Box 6020

Ridgeland, Mississippi 39158

Telephone: (601) 856-7200

ATTORNEYS FOR APPELLEES:

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.

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2008-CA-00782
(Consolidated with No. 2008-CA-00783)

MARTHA VIA

APPELLANT

VS.

**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.,
MARCUS MARTIN, DAN MARTIN 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 and/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 Rankin County Farm Bureau.
2. Ken Adcock, Attorney for Appellees Marcus Martin and Dan Martin.
3. Charles G. Copeland, Dale G. Russell, Ellen Patton Robb, and Copeland, Cook, Taylor & Bush, P.A., attorneys for Appellees Rural Insurance Agency, Inc., Southern Farm Bureau Life Insurance Company, Southern Farm Bureau Casualty Insurance Company, Mississippi Farm Bureau Casualty Insurance Company, and Mississippi Farm Bureau Mutual Insurance Company.
4. Mitchell H. Tyner and Mark T. McLeod, Attorneys for Appellant Martha Via.
5. Martha Via, Plaintiff/Appellant.
6. Mississippi Farm Bureau Federation, Defendant/Appellee.

7. Rankin County Farm Bureau, Defendant/Appellee.
8. Rural Insurance Agency, Inc., Defendant/Appellee.
9. Southern Farm Bureau Life Insurance Company, Defendant/Appellee.
10. Southern Farm Bureau Casualty Insurance Company, Defendant/Appellee.
11. Mississippi Farm Bureau Casualty Insurance Company, Defendant/Appellee.
12. Mississippi Farm Bureau Mutual Insurance Company, Defendant/Appellee.
13. Marcus Martin, Defendant/Appellee.
14. Dan Martin, Defendant/Appellee.
15. Honorable Bobby B. DeLaughter, Hinds County Circuit Court Judge.




ELLEN ROBB 
Attorney for Appellees:
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.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	ii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
STATEMENT OF THE ISSUES	1
INTRODUCTION	2
STATEMENT OF THE CASE	5
1. Nature of the case, course of proceedings, and disposition in the court below	5
2. Statement of the facts	7
SUMMARY OF THE ARGUMENT	11
ARGUMENT	14
ISSUE 1: Whether this appeal is procedurally barred pursuant to the Mississippi Rules of Appellate Procedure since the Notice of Appeal was not filed within 30 days of the Memorandum Opinion and Order Dismissing the Complaint?	14
I. Standard of Review	14
II. Via's Notice of Appeal was untimely and, according to the Mississippi Rules of Appellate Procedure, must be dismissed	14
ISSUE 2: Notwithstanding Issue 1, whether the trial court was correct in dismissing this action with prejudice as time barred by the three-year statute of limitations as provided in Mississippi Code Annotated §15-1-49?	16
I. Standard of Review	16
II. The trial court properly determined that the three year statute of limitations barred the claims asserted in Via's Complaint	18
A. The trial court's consideration of documents outside of the complaint to determine the agent contract termination date does not warrant a reversal of the dismissal order	19

B.	Via's allegations of failure to make commission payments after termination cannot support a complete reversal of the trial court.	22
1.	<i>The only agent contract at issue which provides for payments after termination prior to working for ten years is the contract with Southern Farm Bureau Life Insurance Company, so there can be no breach of contract claim based on alleged failure to make payments after termination against the other Farm Bureau Companies.</i>	24
2.	<i>All claims in the Complaint not arising out of the allegation of failure to make commission payments after termination accrued prior to the date of termination</i>	26
C.	Via's Complaint fails to plead fraudulent concealment as a basis for tolling the statute of limitations	28
D.	The savings statute was not improperly applied	31
CONCLUSION		32
CERTIFICATE OF SERVICE		33
APPENDIX		34

TABLE OF AUTHORITIES

Cases

<i>Bank of Edwards v. Cassity Auto Sales</i> , 599 So. 2d 579 (Miss. 1992)	14, 15
<i>Busby v. Anderson</i> , 978 So. 2d 637 (Miss. 2008)	14
<i>Carter v. Citigroup Inc.</i> , 938 So. 2d 809 (Miss. 2006)	28, 29
<i>Cook v. Brown</i> , 909 So. 2d 1075 (Miss. 2005)	16
<i>Champluvier v. Beck</i> , 909 So. 2d 1061 (Miss. 2004)	21
<i>Duncan v. St. Romain</i> , 569 So. 2d 687 (Miss. 1990)	14, 15
<i>Hardy v. Brock</i> , 826 So.2d 71 (Miss.2002)	26
<i>Jones v. Jackson Public Schools</i> , 760 So. 2d 730 (Miss. 2000)	22
<i>Jones v. Regency Toyota, Inc.</i> , 798 So. 2d 474 (Miss. 2001)	16
<i>Kennedy v. Gervais</i> , 345 So. 2d 1039 (Miss. 1977)	14
<i>Koestler v. Mississippi College</i> , 749 So. 2d 1122 (Miss. Ct. App. 1999)	21
<i>MacDonald v. Mississippi Dept. of Transp.</i> , 955 So. 2d 355 (Miss. Ct. App. 2006)	17
<i>McGuffie v. Herrington</i> , 966 So. 2d 1274 (Miss. Ct. App. 2007)	18, 28
<i>Medicomp, Inc. v. Marshall</i> , 878 So. 2d 193 (Miss. Ct. App. 2004)	29
<i>Meyers v. American States Ins. Co.</i> , 914 So. 2d 669 (Miss. 2005)	16
<i>Mississippi Farm Bureau Federation, et al. v. Roberts, et al.</i> , 927 So. 2d 739 (Miss. 2006)	3, 7
<i>Peden v. City of Gautier</i> , 870 So. 2d 1185 (Miss. 2004)	20
<i>Ralph Walker, Inc. v. Gallagher</i> , 926 So. 2d 890 (Miss. 2006)	16
<i>Robertson v. Moody</i> , 918 So. 2d 787 (Miss. Ct. App. 2005)	17
<i>Slaydon v. Hansford</i> , 830 So. 2d 686 (Miss. Ct. App. 2002)	18, 28

<i>Stephens v. Equitable Life Assurance Society</i> , 850 So. 2d 78 (Miss. 2003)	17
<i>Tandy Electronics, Inc. v. Fletcher</i> , 554 So. 2d 308 (Miss. 1989)	14, 15
<i>Ware v. Capers</i> , 573 So. 2d 773 (Miss. 1990)	14, 15
<i>Watters v. Stripling</i> , 675 So. 2d 1242 (Miss. 1996)	18
<i>Young v. Hooker</i> , 753 So. 2d 456 (Miss. Ct. App. 1999)	18

Statutes

MISS. CODE ANN. §15-1-49	1, 16, 17, 28, 31
MISS. CODE ANN. §15-1-69	32

Rules

MISSISSIPPI RULE OF APPELLATE PROCEDURE 2	14, 15
MISSISSIPPI RULE OF APPELLATE PROCEDURE 3	15
MISSISSIPPI RULE OF APPELLATE PROCEDURE 4	11, 14, 15, 31
MISSISSIPPI RULE OF CIVIL PROCEDURE 4	11, 18, 32
MISSISSIPPI RULE OF CIVIL PROCEDURE 12	16, 17, 20, 21, 22
MISSISSIPPI RULE OF CIVIL PROCEDURE 56	16, 19, 20, 21
MISSISSIPPI RULE OF EVIDENCE 201	20

STATEMENT OF THE ISSUES

The following issues are presented for appellate review:

1. Whether this appeal is procedurally barred pursuant to the Mississippi Rules of Appellate Procedure since the Notice of Appeal was not filed within 30 days of the Memorandum Opinion and Order Dismissing the Complaint?
2. Notwithstanding Issue 1, whether the trial court was correct in dismissing this action with prejudice as time barred by the three-year statute of limitations as provided in Mississippi Code Annotated §15-1-49?

INTRODUCTION

On February 12, 2008, Honorable Bobby B. DeLaughter signed a Memorandum Opinion and Order granting the Motion to Dismiss jointly filed by the Defendants herein. The Order was stamped "filed" and entered on the docket on February 13, 2008. Martha Via ("Via") filed a Notice of Appeal from this Order on May 5, 2008 which was more than thirty (30) days from the entry of the Order. As such, the appeal is out of time, and, procedurally, it must be dismissed.

Notwithstanding the fact that the appeal is untimely, the trial court correctly determined that Via's claims were barred by the three year statute of limitations. Via had written contracts with Southern Farm Bureau Life Insurance Company, Southern Farm Bureau Casualty Insurance Company, Mississippi Farm Bureau Casualty Insurance Company, and Mississippi Farm Bureau Mutual Insurance Company. Via became an independent contractor insurance agent for the respective insurance companies by virtue of the separate contracts.

On August 14, 1996, Via exercised her right to terminate the contracts via her letter of resignation stating that her resignation was effective August 31, 1996.¹ Via, a resident of Rankin County, along with four other independent contractor agents, filed suit against the various Defendants herein on August 30, 1999 in the Circuit Court of Claiborne County.² The August 30, 1999 Complaint ("Claiborne County Complaint") contained nine separate counts, all stemming from allegations of conduct which took place prior to the date of termination. Thus, when Via filed the

¹ An Appendix containing a timeline of events is included herein. SEE P. 34.

² The other Plaintiffs were Brenda Roberts, Barbara Rigdon, Becky Kirkland and Alinda White in the matter of *Roberts, et al. v. Mississippi Farm Bureau Federation, et al.*, In the Circuit Court of Claiborne County; Mississippi, Cause No. CV-99-0165. The other Plaintiffs' agency managers were also named as Defendants.

Claiborne County Complaint, it was timely filed, but there was only one day remaining on the three year statute of limitations as all of the claims alleged in this Complaint accrued prior to the date of termination.

On or about May 4, 2004 the Defendants filed a Motion to Sever in the Claiborne County action as only one of the named Plaintiffs was a resident of Claiborne County. This Motion followed then recent developments in Mississippi law concerning permissive joinder. The Circuit Court of Claiborne County denied the Motion to Sever on October 5, 2004, but additionally entered an Order granting a Petition for Interlocutory Appeal. The Mississippi Supreme Court granted the Petition for Interlocutory Appeal on December 9, 2004. On March 2, 2006, the Mississippi Supreme Court reversed and remanded the decision of the Circuit Court of Claiborne County with instructions to dismiss the non-Claiborne County resident Plaintiffs without prejudice. Those Plaintiffs, one of whom was Via, were to refile their complaints in an appropriate venue.³

On July 10, 2006, the Circuit Court of Claiborne County entered its Order dismissing Via's case without prejudice. On March 2, 2007, Via re-filed a Complaint in the Circuit Court of Hinds County ("Via I") merely adopting the allegations made in the Claiborne County Complaint. The 120 day period to serve process expired on July 2, 2007 without Via ever serving process. In fact, the Defendants were never served in Via I. The Defendants filed a Motion to Dismiss on August 21, 2007 on the basis that the statute of limitations had expired.

On August 25, 2007, Via filed a second Complaint in the Circuit Court of Hinds County ("Via II") against the Defendants herein which similarly adopted the allegations of the Claiborne County Complaint. The Complaint in Via II also contained a first-person narrative regarding Via's

³ *Mississippi Farm Bureau Federation, et al. v. Roberts, et al.*, 927 So. 2d 739 (Miss. 2006).

alleged experience as a Farm Bureau agent. On October 9, 2007, the Defendants filed a Motion to Dismiss Via II on the basis that the statute of limitations had expired.

On November 15, 2007 Via filed a response to the Defendants' Motion to Dismiss in Via I and Via II. On November 16, 2007 a hearing was held on the Motions to Dismiss.⁴ Almost three months after the hearing, on February 13, 2008, an Order was entered granting the Defendants' Motion to Dismiss. Eighty-two (82) days later, on May 5, 2008, Via untimely filed her Notice of Appeal. Via never moved for an extension of time to file her Notice of Appeal or never moved to reopen the time for appeal.

⁴ Similar Motions to Dismiss were filed regarding the Complaints Barbara Rigdon (another non-Claiborne County Plaintiff who, after she was dismissed from the August 1999 Complaint, filed two lawsuits in Hinds County). The hearing for all four cases was simultaneously conducted. Rigdon's Complaints were also dismissed and are now pending on appeal. *See Rigdon v. Mississippi Farm Bureau Federation, et al.*, In the Supreme Court of Mississippi, Case No. 2008-TS-00777 consolidated with *Rigdon v. Mississippi Farm Bureau Federation, et al.*, In the Supreme Court of Mississippi, Case No. 2008-TS-00780.

STATEMENT OF THE CASE

Appellant Martha Via seeks to overturn the trial court's Order granting the Defendants' Motion to Dismiss based on expiration of the statute of limitations. However, the issue of whether this Court has jurisdiction due to the untimely Notice of Appeal should be decided first.

1. Nature of the case, course of proceedings, and disposition in the court below.

March 2, 2007 Via Complaint ("Via I"):

With one day remaining on the statute of limitations, Via filed her original Complaint with four other Plaintiffs in Claiborne County on August 30, 1999. Following severance and dismissal of Via's claims in the Claiborne County action based on improper joinder, Via re-filed in Hinds County Circuit Court on March 2, 2007 ("Via I"). RECORD 2008-CA-783 AT 3.⁵ Via I merely incorporated the allegations of the Claiborne County Complaint. *Id.* The Claiborne County Complaint (and by incorporation, the Complaint in Via I) contained the following counts: Breach of Contract, Tortious "Bad Faith" Breach of Contract, Fraud, Conspiracy, Intentional Misrepresentation, Negligent Misrepresentation, Intentional Infliction of Emotional Distress, and Negligent Infliction of Emotional Distress. *Id.* at 13-19. The Farm Bureau Companies joined together with the other Defendants and filed a Motion to Dismiss in Via I on August 21, 2007 as service of process was not made within 120 days which caused the statute of limitations to start running again and ultimately expire. *Id.* at 23. On November 15, 2007, Via filed an Opposition to the Motion to Dismiss attaching various exhibits. *Id.* at 45. A hearing on the Motion to Dismiss was

⁵ Hereinafter, citations to the Record for Supreme Court Cause Number 2008-CA-783 will be denoted with "R1." Citations for Supreme Court Cause Number 2008-CA-782 will be denoted with "R2."

held on November 16, 2007. SEE HEARING TRANSCRIPT AT 1.⁶ The Farm Bureau Companies filed a Rebuttal to Plaintiff's Opposition on November 21, 2007. *Id.* at 72. The Circuit Court of Hinds County entered a Memorandum Opinion and Order on February 13, 2008 granting Defendants' Motion to Dismiss. *Id.* at 90. On May 5, 2008, eighty-two (82) days later, Via filed her Notice of Appeal from the Memorandum Opinion and Order entered in this case on February 13, 2008 in the Circuit Court of Hinds County. *Id.* at 100. The Notice was untimely and was filed without ever seeking more than the allowed thirty days to file such Notice. *Id.* at 1-2.

August 25, 2007 Via Complaint ("Via II"):

While leaving Via I pending on the Hinds County Circuit Court docket, Via filed a second Complaint in Hinds County on August 25, 2007 ("Via II"). R2. AT 3. On October 9, 2007, the Farm Bureau Companies joined together with the other Defendants and filed a Motion to Dismiss maintaining the statute of limitations had expired. *Id.* at 155. Via filed an Opposition on November 15, 2007, the day before the hearing on the Motion to Dismiss, attaching various exhibits. *Id.* at 164. A hearing on the Motion to Dismiss was held on November 16, 2007. SEE TR. AT 1. The Farm Bureau Companies filed a Rebuttal to Plaintiff's Opposition on December 8, 2007. *Id.* at 191. The Circuit Court of Hinds County entered a Memorandum Opinion and Order on February 13, 2008 granting Defendants' Motion to Dismiss. *Id.* at 209. On May 5, 2008, eighty-two (82) days later, Via filed her Notice of Appeal from the Memorandum Opinion and Order entered in this case on February 13, 2008 in the Circuit Court of Hinds County. *Id.* at 217. The Notice was untimely and was filed without ever seeking more than the allowed thirty days to file such Notice. *Id.* at 1-2.

⁶ Hereinafter, citations to the hearing transcript will be denoted with "Tr." As the hearing for Supreme Court Cause Number 2008-CA-783 and Supreme Court Cause Number 2008-CA-782 occurred simultaneously, only one hearing transcript will be referenced.

2. Statement of the facts.

On September 1, 1989, Via entered into a contract with Southern Farm Bureau Life Insurance Company whereby she was appointed as an agent for Rankin County, Mississippi. R2. AT 46. On September 1, 1989, Via entered into a contract with Southern Farm Bureau Casualty Insurance Company whereby she was appointed as an agent for Rankin County, Mississippi. *Id.* at 125. On February 1, 1991, and March 7, 1991, Via entered into an Agent's Contract with Mississippi Farm Bureau Mutual Insurance Company. *Id.* at 134; 140. On February 1, 1991, and March 7, 1991, Via entered into an Agent's Contract with Southern Farm Bureau Casualty Insurance Company and Mississippi Farm Bureau Casualty Insurance Company. *Id.* at 145; 151.⁷ The contracts were terminable at will by either party. *Id.* at 47; 127; 137; 148.

Via worked as a Farm Bureau agent pursuant to the above contracts until she resigned effective August 31, 1996. *Id.* at 161, 188. Via had worked as a Farm Bureau agent for less than ten years. On August 30, 1999, Via, along with four other agents, filed a Complaint in the Circuit Court of Claiborne County alleging breach of contract and other counts based on alleged conduct which occurred prior to her termination date. *Id.* at 29. On March 2, 2006, this Court held that the five agents were improperly joined and mandated that the non-Claiborne County Plaintiffs be voluntarily dismissed and file new Complaints in an appropriate venue. *See Mississippi Farm Bureau Federation, et al. v. Roberts, et al.*, 927 So. 2d 739, 744 (Miss. 2006). The Circuit Court of Claiborne County entered an Order dismissing the non-Claiborne County Defendants from the underlying *Roberts* lawsuit without prejudice on July 2, 2006. R1. AT 68; R2. AT 162; TR. AT 5, 19.

Via re-filed her Complaint in Hinds County on March 2, 2007 (Via I). R1. AT 3. Via failed

⁷ Via had no contract with Rural Insurance Agency, Inc.

to serve process on the Defendants within 120 days. *Id.* at 1-2. Subsequently, the Defendants filed a joint Motion to Dismiss on August 21, 2007 based on failure to serve process within 120 days and expiration of the applicable three-year statute of limitations. *Id.* at 23. For whatever reason, the Via I Complaint never references the effective date of termination even though she references her resignation. *Id.* at 3-22; 12 at ¶41 (stating “Plaintiffs each resigned their position upon undue pressure, harassment, discrimination, misdeeds and interference by the Defendants”). In an effort to clarify Via’s termination date only, Defendants attached Via’s letter of resignation as an exhibit to the Motion to Dismiss. *Id.* at 42. Also attached as exhibits to the Motion to Dismiss were the Claiborne County Complaint (which was already attached to the Complaint in Via I) and the July 2006 Order of Dismissal from Claiborne County. *Id.* at 27; 43.

On November 15, 2007, Via filed her Opposition to the Motion to Dismiss. *Id.* at 45. She claimed that she did not know that the Circuit Court of Claiborne County had entered an Order of Dismissal which would have triggered the one year saving statute.⁸ *Id.* She further claimed that the statute of limitations did not expire as the effective date of termination was not an appropriate date to start the running of the statute. *Id.* Although Via did not raise fraudulent concealment in her Complaint, she argued that the statute of limitations should be tolled under this theory. *Id.* at 48-49. Via attached as exhibits to her Opposition an Emergency Motion to Vacate Order of Dismissal filed in Claiborne County, two Affidavits of Martha Via, an Affidavit of Mitch Tyner, and the Claiborne County Order of Dismissal. *Id.* at 52; 63; 66; 68; 69.

After failing to serve any of the Defendants in Via I, Via filed another Complaint on August 25, 2007 (Via II). R2. AT 3. Like the Complaint in Via I, the Via II Complaint incorporated the

⁸ This argument by Via is irrelevant because Via I was in fact filed prior to expiration of the one year savings statute.

Claiborne County Complaint. *Id.* However, it included eighty-three paragraphs of Via's alleged experiences as a Farm Bureau agent. *Id.* at 4-28. The Via II Complaint also attached the agent contracts at issue. *Id.* at 45-154.

The Defendants filed a Motion to Dismiss on October 9, 2007 in Via II on the basis that the statute of limitations had expired. *Id.* at 155. On November 15, 2007, Via filed an identical Opposition to Defendants' Motion to Dismiss (including exhibits) to the one that was filed in Via I. *Id.* at 164.

A hearing was held the very next day before Honorable Judge Bobby DeLaughter. TR. AT 1. Both of the Via Motions to Dismiss (along with those filed concerning fellow severed Plaintiff Barbara Rigdon) were presented for hearing simultaneously. *Id.* at 3. During the hearing, counsel for Via declared that as all parties had attached exhibits to their pleadings, the Motions to Dismiss should be converted to Motions for Summary Judgement. *Id.* at 12. The issues presented during the hearing included whether the statute of limitations had expired, whether Via had notice of the July 2006 Order of Dismissal from the Claiborne County Court, and whether her allegations concerning fraudulent concealment tolled the statute of limitations. TR. AT 1-9.

With permission of the Court, the Farm Bureau Companies filed a Rebuttal to Plaintiff's Opposition to the Motion to Dismiss on November 21, 2007 for Via I and on December 8, 2007 for Via II. TR. AT 32; R1. AT 72; R2. AT 191. The Rebuttals detailed a chronology of the procedural history regarding the issue of the running of the statute of limitations. R1. AT 73-74; R2. AT 195-196. They further addressed the three arguments in Via's Opposition to the Motion to Dismiss including: (1) the limitations period was tolled due to alleged fraudulent concealment by the Defendants, (2) some commissions were not paid following her resignation which she contends were actions for breach of contract that did not accrue until after her termination, and (3) since she did not receive

notice of the July 2006 Order from Claiborne County dismissing her without prejudice, that is good cause for not serving process of the Via I Complaint within 120 days. R1. AT 74-75; R2. AT 196-197. Counsel for Via presented these arguments during the November 16, 2007 hearing. TR. AT 13-24.

On February 12, 2008, in its Memorandum Opinion and Order, the Circuit Court of Hinds County granted Defendants' Motions to Dismiss. R1. at 90; R2. at 209. The Court found that the allegation regarding lack of receipt of the July 2006 Order from the Circuit Court of Claiborne County would not affect the Court's analysis of the statute of limitations issue as Via had a responsibility to discover the entry of the Order. R1. AT 94; R2. AT 213. The Court found that the allegations of fraudulent concealment were bound by the discovery rule and Via had to show that there was some affirmative act by Defendants to prevent her from discovering her claim and that she performed due diligence to discover the claim. R1. AT 95; R2. AT 214. The Court found that Via did not sufficiently plead allegations of fraudulent concealment as to invoke the discovery rule. R1. AT 96; R2. AT 215. The Court found that the statute of limitations began to run again after 120 days for service of process expired in Via I - on July 2, 2007. *Id.* Because the Via II Complaint was filed after the statute had run, Via had no basis on which to state her claim. *Id.* The Court "Ordered and Adjudged, that defendants' motion to dismiss be, and the same is hereby, granted." R1. AT 97; R2. AT 216.

The Circuit Court Judge signed the Order on February 12, 2008 and it was stamped "filed" and entered on the docket on February 13, 2008. R1. AT 90, 97; R2. AT 209, 216. Via filed her Notice of Appeal on May 5, 2008, more than the thirty days allowable under the procedural rules to file such Notice. R1. AT 98; R2. AT 217. The respective certified dockets do not reflect that Via ever requested an extension of time to file her Notice of Appeal or that she ever moved to have the time for appeal reopened. R1. AT 1-2; R2. AT 1-2.

SUMMARY OF THE ARGUMENT

Mississippi Rule of Appellate Procedure 4(a) requires that notice of appeal be filed with the clerk of the trial court within thirty days after the date of entry of the order being appealed. The Order at the center of this appeal was stamped “filed” and entered on the docket on February 13, 2008. Via filed her Notice of Appeal on May 5, 2008, more than eighty (80) days following entry of the subject Order dismissing her claims. Via failed to move for an extension of time to file her appeal or to reopen the time for appeal pursuant to the provisions of Rules 4(g) or 4(h) of the Mississippi Rules of Appellate Procedure.

Because Via failed to timely file a Notice of Appeal, there should be no further analysis and her appeal should be dismissed. However, should this Court not dismiss the appeal, the Farm Bureau Companies herein maintain that the trial court correctly dismissed Via’s claims. As shown more fully herein, there was one day remaining on the statute of limitations when Via I was filed in Hinds County on March 2, 2007. However, Via failed to serve process on the Defendants in Via I within the 120 day period prescribed by Miss. R. Civ. P. 4(h), thereby allowing the statute of limitations to start running again and to expire on July 3, 2007. As for Via I, once the 120 day period expired, it was proper for the trial court to dismiss the Complaint in that action absent a showing of good cause by Via. In fact, Via has never served process in Via I. Instead, Via filed a second lawsuit in Hinds County on August 25, 2007 (“Via II”) after Defendants filed their Motion to Dismiss in Via I. However, the claims in Via II were time barred as the statute of limitations had expired on July 3, 2007. Therefore, the trial court was correct in dismissing Via’s claims in both Via I and Via II.

Via contends that the statute of limitations did not start running on her claims for breach of contract until sometime after the date of termination of her agent contracts. More specifically, Via claims that she was entitled to commission payments after termination pursuant to the terms of the

agent contracts. These contracts were incorporated into and attached to the Complaint in Via II. Via's contract with Southern Farm Bureau Life Insurance Company ("Life Company") is the only contract at issue which provides for payments after termination for those who had been agents for the company for less than ten years prior to termination of the contract. In other words, because Via had not been an agent with any of the Farm Bureau Companies for ten years prior to the termination of her agent contracts, there was no basis to receive payments after termination other than possible payments under the agent contract with the Life Company. Thus, there is no possibility of recovery in Via I or Via II for claims of breach of contract against the non-Life Company Defendants based on allegations of failure to make payments for commissions after termination, and Via cannot argue that her breach of contract claims against the non-Life Company Defendants accrued after the termination of the agent contracts.

Further, a review of the allegations of the Complaints in Via I and Via II reveals that Via did not allege failure to make commission payments after termination as a basis for her breach of contract claim. Instead, the factual allegations of Via I and Via II merely alleged conduct which took place prior to termination as a basis for her claim. For any claim arising out of conduct prior to termination of the agent contracts, there is no reasonable argument that those claims accrued after the date of termination. Therefore, any claims by Via not related to the allegation of failure to make payments after termination were properly dismissed by the trial court. Should this Court find that the Complaint in Via II did state a claim for breach of contract based on failure to pay commissions after termination, the only possible claim that could survive would be a claim of breach of contract against the Life Company for alleged failure to make payments after termination. All other claims would have been properly dismissed.

The Circuit Court correctly found Via did not sufficiently plead fraudulent concealment as

to invoke the discovery rule. Also, as Via had the responsibility to discover the Order of Dismissal in Claiborne County, the Court correctly determined that her alleged failure to receive notice of that Order would have no affect on the statute of limitations issue. In fact, since Via re-filed Via I within the one year period of the savings statue, this argument is irrelevant.

ARGUMENT

ISSUE 1: Whether this appeal is procedurally barred pursuant to the Mississippi Rules of Appellate Procedure since the notice of appeal was not filed within 30 days of entry of the memorandum opinion and order dismissing the complaint?

I. Standard of Review

Timely filing of a notice of appeal is jurisdictional, and jurisdictional issues are questions of law which the Mississippi Supreme Court reviews de novo. *Busby v. Anderson*, 978 So. 2d 637, 638-39 (Miss. 2008). Mississippi Rule of Appellate Procedure 4(a) requires the notice of appeal to be filed with the clerk of the trial court within thirty days after the date of the entry of the judgment or order being appealed. MISS. R. APP. P. 4(a). Regardless of whether the parties raise jurisdiction, a court is required to note its own lack of jurisdiction. *See Bank of Edwards v. Cassity Auto Sales, Inc.*, 599 So. 2d 579, 582 (Miss.1992); *Duncan v. St. Romain*, 569 So. 2d 687, 690 (Miss.1990); *Tandy Electronics, Inc. v. Fletcher*, 554 So. 2d 308, 310 (Miss.1989). If a notice of appeal is not timely filed, then the appellate court simply does not have jurisdiction. SEE MISS. R. APP. P. 2(a)(1) (stating “[a]n appeal **shall** be dismissed if the notice of appeal was not timely filed pursuant to Rules 4 or 5”). Rule 2(a) of the Mississippi Rules of Appellate Procedure, “**Mandatory Dismissal**”, reflects the long-standing rule in this state that the failure to file a timely appeal leaves this Court without jurisdiction to consider the case. *See Ware v. Capers*, 573 So. 2d 773, 774 (Miss. 1990); *Kennedy v. Gervais*, 345 So. 2d 1039, 1039 (Miss.1977). The rule is strictly enforced. *Ware*, 573 So. 2d at 775; *Duncan*, 569 at 688-89.

II. Via’s Notice of Appeal was not timely filed and according to the applicable procedural rules it must be dismissed.

On February 12, 2008, in its Memorandum Opinion and Order, the Circuit Court of Hinds County granted Defendants’ Motion to Dismiss. R1. AT 90; R2. AT 209. The next day, February 13,

2008, the Order was stamped “filed” and entered on the respective dockets for Via I and II. R1. AT 1-2, 90, 97; R2. AT 1-2, 209, 216. In order for Via to timely and properly appeal the trial court’s Order she was required to file a Notice of Appeal with the clerk of the trial court. SEE MISS. R. APP. P. 3(a). Via had thirty days from February 13, 2008, or until March 15, 2008, to file her Notice of Appeal. SEE MISS. R. APP. P. 4(a) (stating “the notice of appeal required by Rule 3 **shall** be filed with the clerk of the trial court **within 30 days** after the date of the entry of the judgment or order appealed from”); SEE ALSO *Bank of Edwards*, 599 So. 2d at 582 (appeal dismissed with 73-day delay in filing notice of appeal); *Duncan*, 569 So. 2d at 690 (appeal dismissed with 32-day delay in filing notice of appeal); *Tandy Electronics*, 554 So. 2d at 310.

Here, Via did not file her Notice of Appeal from the February 13, 2008 Memorandum Opinion and Order until May 5, 2008. R1. AT 98; R2. AT 217. This was more than the thirty day time period for filing such notices allowed under Mississippi Rule of Appellate Procedure 4(a). According to Mississippi Rule of Appellate Procedure 2(a), “**Mandatory Dismissal**”, the appeal must be dismissed as it was not timely filed. MISS. R. APP. P. 2(a) (stating “[a]n appeal **shall** be dismissed if the notice of appeal was not timely filed pursuant to Rules 4 or 5”)⁹; *see also Ware*, 573 So. 2d at 775; *Duncan*, 569 at 688-89 (appeal dismissed where out-of-state lawyer relied in good faith on conflicting statutory appeal period of 45 days).

The respective certified dockets do not reflect that Via ever requested an extension of time to file her Notice of Appeal or that she ever moved to have the time for appeal be reopened. R1. AT 1-2; R2. AT 1-2; *see also* MISS. R. APP. P. 4(g) and 4(h). Since her Notice of Appeal in each case was untimely and since she failed to seek an extension of the appeal time or failed to move to reopen the

⁹ Mississippi Rule of Appellate Procedure 5 deals with Interlocutory Appeals.

appeal time, her appeal is improper. Consequently, the Supreme Court has no jurisdiction to hear the appeal, and it must be dismissed.

ISSUE 2: Notwithstanding Issue 1, whether the trial court was correct in dismissing this action with prejudice as time barred by the three-year statute of limitations as provided in Mississippi Code Annotated §15-1-49?

I. Standard of Review

A motion to dismiss under Rule 12(b)(6) of the Mississippi Rules of Civil procedure raises an issue of law, which is reviewed de novo. *Cook v. Brown*, 909 So. 2d 1075, 1077-78 (Miss. 2005). A Rule 12(b)(6) motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint. *Id.* The allegations in the complaint must be taken as true, and there must be no set of facts that would allow the plaintiff to prevail. *Ralph Walker, Inc. v. Gallagher*, 926 So. 2d 890, 893 (Miss. 2006). The Supreme Court must find that there is no set of facts that would entitle a plaintiff to relief under the law in order to affirm an order granting the dismissal of a claim on a Rule 12(b)(6) motion. *Id.*

“[M]otions to dismiss and motions for summary judgment have been by rule declared interchangeable.” *Jones v. Regency Toyota, Inc.*, 798 So. 2d 474, 475 (Miss. 2001) (stating “a party against whom a motion to dismiss under M.R.C.P. 12(b)(6) has been filed is thereby on actual notice that the motion to dismiss may be treated as a motion for summary judgment if the conditions prescribed in the rule are found, including the opportunity to present any relevant material”).

In determining whether the trial court properly granted or denied a motion for summary judgment, a de novo review of the record is conducted viewing the evidence in the light most favorable to the nonmoving party below. *Meyers v. American States Ins. Co.*, 914 So. 2d 669, 673 (Miss. 2005). “[A] circuit court may grant summary judgment ‘if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *MacDonald v. Mississippi Dept. of Transp.*, 955 So. 2d 355, 359-60 (Miss. Ct. App. 2006). A fact is material if it “tends to resolve any of the issues, properly raised by the parties.” *Id.* at 360.

“This Court uses a de novo standard of review when passing on questions of law including statute of limitations issues.” *Stephens v. Equitable Life Assurance Society*, 850 So.2d 78, 82 (Miss.2003). The evaluation of a statute of limitations defense may be brought via a motion for summary judgment. *Robertson v. Moody*, 918 So.2d 787, 789 (Miss. Ct. App. 2005). The general three-year statute of limitations is controlling in the instant case. MISS. CODE ANN. § 15-1-49 (REV.2003). This section provides in part: “[a]ll actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after.” *Id.*

Even if the Farm Bureau Companies’ joint Motions to Dismiss were converted into Motions for Summary Judgment under Mississippi Rule of Civil Procedure 12(b)(6) there is no genuine issue of material fact because the claims set forth by Via in her Complaint arise out of alleged conduct which took place prior to her termination and the three year statute of limitations as to those claims has expired. As such, the decision of the lower court should be affirmed.

II. The trial court properly determined that the three year statute of limitations barred the claims asserted in Via's Complaint.¹⁰

Via had 120 days to serve the Defendants after filing the Complaint in Via I on March 2, 2007. SEE MISS. R. CIV. P. 4(h) (stating "[i]f a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made . . . the action **shall** be dismissed"). It is undisputed that Via failed to serve process in Via I within 120 days as required by Mississippi Rule of Civil Procedure 4(h). Because Via failed to serve process within 120 days in Via I and failed to show good cause, that action was properly dismissed. Further, this allowed the statute of limitations to start running again, and it expired on July 3, 2007 (Via only had one day left on the statute of limitations when she originally filed suit in Claiborne County on August 30, 1999). See *Watters v. Stripling*, 675 So. 2d 1242, 1244 (Miss. 1996). Good cause does not exist where the plaintiff knows, should have known, or could easily have known the whereabouts of the defendants in order to serve process. *Young v. Hooker*, 753 So. 2d 456, 461-62 (Miss. Ct. App. 1999). The Complaint in Via II was filed on August 25, 2007 after the statute of limitations had expired on July 3, 2007.

¹⁰ In fact, Via has set forth counts in her Complaint for Intentional Infliction of Emotional Distress and Conspiracy which are governed by a one year statute of limitations. See e.g. *McGuffie v. Herrington*, 966 So. 2d 1274, 1278 (Miss. Ct. App. 2007); *Slaydon v. Hansford*, 830 So. 2d 686, 688 (Miss. Ct. App. 2002). Thus, the statute of limitations as to these claims would have expired even prior to the filing of the Claiborne County Complaint on August 30, 1999 and certainly would not be valid by the time Via II was filed.

A. The trial court's consideration of documents outside of the complaint in its determination of the date of resignation does not warrant a reversal of the trial court's decision.

In its evaluation of the Motion to Dismiss, the lower Court considered documents other than those attached to Via's Complaints. Via argues that this improperly converted the Motion to Dismiss to a Motion for Summary Judgment and deprived her of a reasonable opportunity to present all matters relevant to whether the statute of limitations expired. However, Via was not deprived of presenting material she considered relevant and in fact did present these materials to the trial court. Via herself attached exhibits to her Opposition to the Motion to Dismiss other than those exhibits attached to her Complaint. During the November 2007 hearing, counsel for Via repeatedly referred to the Motion at issue as a Motion to Summary Judgment. In fact, counsel for Via asserted that the Motion to Dismiss had been converted to a Motion for Summary Judgment:

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. TR. AT 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. *Id.* at 13

And so for that reason we're asking the Court to deny their motion for summary judgment a dismissal with prejudice. *Id.* at 18

So I would ask the Court to consider all those and deny their motion for summary judgment. *Id.* at 24.

Mississippi Rule of Civil Procedure 12(b) allows for a Motion to Dismiss be converted to a Motion for Summary Judgment:

If, on a motion 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 reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

MISS. R. CIV. P. 12(b)(6).

The Defendants attached the following exhibits to the Motion to Dismiss: (1) Via's letter of resignation, (2) the Claiborne County Complaint; and (3) the July 2006 Order of Dismissal from Claiborne County.¹¹ R1. AT 42, 43, 45; R2. AT 161, 162, 164. The day before the hearing, Via filed Oppositions to the Motions to Dismiss. Via attached as exhibits an Emergency Motion to Vacate Order of Dismissal filed in Claiborne County, two Affidavits of Martha Via¹², an Affidavit of Mitch Tyner, and the Claiborne County Order of Dismissal. R1. AT 52; 63; 66; 68; 69; R2. AT 171, 182, 185, 187, 188.

¹¹ The lower court could take judicial notice of the dates certain orders and pleadings were filed in this case and the Claiborne County action which establish the relevant procedural timeline for calculating the expiration of the statute of limitations. MISS. R. EVID. 201; *See also, Peden v. City of Gautier*, 870 So. 2d 1185, 1187 (Miss. 2004) (holding it was proper for Court to take judicial notice of matters in court file).

¹² Via's affidavit dated November 13, 2007 even states "I submitted my resignation from my position as an agent for the Farm Bureau Insurance Companies effective August 31, 1996." R1. AT 69, ¶5; R2 AT 188, ¶5.

Just because the Court may have considered Via's own letter of resignation in determining the effective date of termination, it does not mean that Via was deprived of an opportunity to present material relevant to the issue of whether the statute of limitations expired. Via had plenty of opportunity to present material regarding the statute of limitations. The Motions to Dismiss were filed on August 21, 2007 and October 9, 2007. R1 AT 1; R2 AT 1. The hearing was not until November 16, 2007, more than a month after the latter Motion to Dismiss was filed. *Id.*

The Mississippi Supreme Court has held that where a party does not object to the trial court considering matters outside the pleadings the argument is 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 1122 (Miss. Ct. App. 1999):

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.

Via did not object to the trial court considering matters outside the pleadings and in fact offered her own documents for it to consider. The Court's concern in considering Rule 12 motions that are converted to a Rule 56 motion for summary judgment 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 Via had notice of it here is incontrovertible. She submitted documents outside the pleadings to the trial court. Further, at the hearing on the Motions, counsel for Via acknowledged he was treating the Defendants' Motion as a Motion for Summary Judgment.

Over two months passed between the hearing and the Court's February 13, 2008 Order. Via made no motion to file a supplemental response to the Motion to Dismiss. She made no request at the hearing for leave to present additional material to the court. Via personally wrote the letter of resignation considered by the trial Court which she contends deprived her of an opportunity to present material regarding the statute of limitations. As Via made no objection to the trial court's consideration of documents outside the pleadings and in fact encouraged it by submitting her own documents, she has waived any objection. Even if the Motion to Dismiss was converted to a Motion for Summary Judgment, Via has not been deprived of her opportunity to present materials for the trial court to consider. Thus, the trial court should not be reversed on this basis.

B. Via's allegations of failure to make commission payments after termination cannot support a complete reversal of the trial court.

Via contends that the statute of limitations did not start running on her claims for breach of contract until sometime after the date of termination of her agent contracts. More specifically, Via claims that she was entitled to commission payments after termination pursuant to the terms of the agent contracts. However, out of all the contracts at issue here with the various Farm Bureau Companies, Via's contract with Southern Farm Bureau Life Insurance Company ("Life Company") is the only contract which would have possibly provided for payments after Via's termination. The agent contracts with the non-Life Company Defendants each required Via to have been an agent for at least ten (10) years before any payments after termination were possible. Via began working as

a Farm Bureau agent in September 1989 and resigned from her position in August 1996. Thus, she had only been a Farm Bureau agent for approximately seven years and had no possibility of payments after termination under the non-Life Company contracts. It follows that there is no possibility of recovery in Via I or Via II for claims of breach of contract against the non-Life Company Defendants based on allegations of failure to make payments after termination, and Via cannot argue that her breach of contract claims against the non-Life Company Defendants accrued after the termination of the agent contracts. Thus, at a minimum, the trial court's dismissal of the claims against the non-Life Company Defendants should be affirmed as there is no reasonable argument that the statute of limitations as to those Defendants accrued after Via's termination.

Further, a review of the allegations of the Complaints in Via I and Via II reveals that Via did not allege failure to make commission payments after termination as a basis for her breach of contract claim. Instead, the factual allegations of Via I and Via II merely alleged conduct which took place prior to termination as a basis for her claim. For any claim arising out of conduct prior to termination of the agent contracts, there is no reasonable argument that those claims accrued after the date of termination. Therefore, any claims by Via not related to the allegation of failure to make payments after termination were properly dismissed by the trial court. Should this Court find that Via's Complaint states a claim for breach of contract based on failure to pay commissions after termination, the only possible claim that could survive would be a claim of breach of contract against the Life Company for alleged failure to make payments after termination. All other claims would have been properly dismissed. However, as previously stated, the Defendants reject the idea that Via has stated a valid claim for breach of contract based on allegations of commission payments due after termination.

1. *The only agent contract at issue which possibly provides for payments after termination to Via is the contract with Southern Farm Bureau Life Insurance Company, so there can be no breach of contract claim based on alleged failure to make payments after termination against the other Farm Bureau Companies*

Via claims that Defendants failed to pay her the full amount of commissions she earned through the date of termination. SEE BRIEF OF APPELLANT AT p. 21 (stating “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”). She claims that the statute of limitations on this claim could not have started running until she realized she had not been paid which would have allegedly been after her termination. In other words, she states that a claim for breach of contract based on alleged failure to pay commissions after termination would not have accrued until sometime after the termination of her relationship with the Farm Bureau Insurance Companies.¹³

A review of the pleadings establishes that Via in fact fails to state what commissions were owed, in what amount, and when they were allegedly owed. Via only vaguely claims in her Brief, without reference to any contractual provision, that there were “many outstanding commissions remained to be paid throughout 1997.” BRIEF OF APPELLANT AT P. 10. This breach of contract theory is nothing but an afterthought which reared its head in an effort to avoid complete dismissal following the Motion to Dismiss, despite the fact that suit was originally filed in 1999.

The Mississippi Farm Bureau Mutual Insurance Company, February 1991 Southern Farm

¹³ As for Rural Insurance Agency, Inc., Via had no contract with it. Via was never eligible to receive any commission payments from it and has no commission-based claim against it. She can have no breach of contract claim against this entity because no contract exists.

Bureau Casualty Insurance Company¹⁴, and Mississippi Farm Bureau Casualty Insurance Company contracts contain the following identical provision concerning payment after termination: **“You must have been an agent for the Company for at least ten (10) years prior to the termination of your contract.”** R2. AT 138, 149. Via was not an agent for at least ten years for any of the Farm Bureau Companies. Her earliest contract with these three companies was with Southern Farm Bureau Casualty Insurance Company and it was dated September 1, 1989. *Id.* at 125. As she resigned on August 31, 1996, she spent only seven years as an agent. She simply was not eligible to receive any payment after termination from these three companies. Given this clear contract language, there is no possibility that Via was entitled to receive commission payments after termination from Defendants, Mississippi Farm Bureau Mutual Insurance Company, Southern Farm Bureau Casualty Insurance Company, and Mississippi Farm Bureau Casualty Insurance Company. As such, the trial court’s dismissal of the claims against these Defendants was proper. Clearly, Via’s allegation that her breach of contract claim accrued after her termination is without merit as to these Defendants as they owed her no payments after termination.

The only contract language Via even references in her brief is strangely not included in the record.¹⁵ Via claims in her brief that the contract with Southern Farm Bureau Life Insurance

¹⁴ The 1989 Southern Farm Bureau Casualty Insurance Company contract states as follows: “No payments shall be made after termination except as expressly provided herein.” R2. AT 128, ¶F. Under the contract, only agency managers were eligible to receive post-termination payment. *Id.* at ¶H (providing for post-termination commission “[I]n the event of your promotion to agency manager). As alleged in the 1999 Complaint, Marcus Martin and Dan Martin - not Via - were the agency co-managers. *Id.* at 32, ¶¶18-19. Given this clear contract language, it is impossible for Via to receive any post-termination commissions from Southern Farm Bureau Casualty Insurance Company.

¹⁵ The only language concerning payment after termination included in this record is “No payments of any kind arising under this contract will be paid after the

Company ("Life Company") contains the following provision concerning payment after termination: "the Company will pay you an[y] monies earned and due you at the date of 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." BRIEF OF APPELLANT AT p. 8. However, this language is not contained in the record and it should not be considered by this Court. *See Hardy v. Brock*, 826 So.2d 71, 76 (Miss.2002) (stating an appellate court may not consider information outside the record).

If the Court concludes that this appeal is not procedurally barred and that Via's allegations of failure to make payments after termination create a genuine issue of material fact as to when her breach of contract cause of action accrued, the only claim which can survive is possibly a breach of contract claim against Southern Farm Bureau Life Insurance Company. Any other claims not based on the allegation of failure to make payments after termination were properly dismissed as they clearly would have accrued prior to the date of Via's resignation and the termination of the agent contracts. Further, such allegations cannot support a claim for breach of contract against the non-Life Company Defendants as those contracts did not provide for payments after termination in Via's situation since she had not worked as an agent for at least ten years prior to termination.

2. *All claims in the Complaint not arising out of the allegation of failure to make commission payments after termination accrued prior to the date of termination.*

Under Count One - Breach of Contract, paragraphs 45-50 in the Claiborne County Complaint which was incorporated for purposes of setting forth the counts in Via I and II, Via alleges facts she

termination of this contract except as expressly provided for in this Paragraph 7." R2. AT 47, ¶7. This language does not allow for payment of commissions post-termination.

claims constitute a breach of her agent contracts including the following:

- ¶ 45. Defendants failed to provide the Plaintiffs with the assistance and support necessary to develop and maintain their business as promised in their contract.
- ¶ 46. Defendants refused to allow Plaintiffs to operate as independent agents as promised in their contract.
- ¶ 47. Defendants failed and refused to perform their obligations under the contracts and prevented Plaintiffs from performing their duties as assigned under the various contracts between the parties.
- ¶ 48. Throughout their tenure as agents for the Defendants, Plaintiffs were subjected to repeated instances of verbal and emotional abuse. The Defendants' malicious, willful deceitful acts violated the implied covenant of good faith and fair dealing.
- ¶ 49. Defendants acted in such a way as to thwart the Plaintiffs' efforts to produce and operate their business as obligated under the contract.
- ¶ 50. The Plaintiffs at all times acted and performed their responsibilities in good faith and were forced to resign only after the Defendants' actions became so egregious as to effect a constructive discharge and breach of the relationship and contracts between the parties. Plaintiffs attempted to perform all the stipulations, conditions and agreements required of them under the terms of the contract.

(See ¶¶ 45-50 of the August 30, 1999 Claiborne County Complaint - R1. AT 13; R2 AT 37). A close inspection of the above factual allegations concerning Via's breach of contract claim reveals that the conduct Via claims amounted to a breach of contract occurred prior to the August 31, 1996 termination of the agent contracts. It is clear that Via's Complaint has only asserted a claim for breach of contract based on alleged breaches which occurred prior to her termination on August 31, 1996. Therefore, contrary to Via's Brief, any claim for breach of contract accrued no later than August 31, 1996. Further, any claim for breach of contract other than the new theory of failure pay commissions after termination (such as those set forth above in paragraphs 45-50 of the Complaint) were properly dismissed. If any claim is remanded to the trial court, it should only be for breach of

contract claims related to the allegation that commissions were not paid following termination.

In addition to the breach of contract claims discussed above, Via has set forth claims of tortious “bad faith” breach of contract, fraud, conspiracy¹⁶, intentional misrepresentation, negligent misrepresentation, intentional infliction of emotional distress¹⁷, and negligent infliction of emotional distress. The factual allegations as to these counts involve alleged conduct which would have necessarily occurred prior to termination of Via’s agent contracts. *See* Complaints in Via I and II, R1. AT 14-19; R2. AT 38-43. Accordingly, the trial court’s dismissal of these claims was proper.

C. Via’s Complaint fails to plead fraudulent concealment as a basis for tolling the statute of limitations.

In her Brief, Via alleges that the Defendants exhibited fraudulent activity that prevented her from “discovering her cause of action against the Defendants until they failed to pay what was owed to her.” BRIEF OF APPELLANT AT p. 21. She claims that the statute of limitations is tolled because the Defendants fraudulently concealed the cause of action from her. This Court has applied a three-year statute of limitations for fraudulent concealment. *Carter v. Citigroup Inc.*, 938 So. 2d 809, 819 (Miss. 2006); SEE ALSO MISS. CODE ANN. § 15-1-49. Miss. Code Ann. § 15-1-49 states as follows:

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.

¹⁶ A one-year statute of limitations applies to Via’s claim of civil conspiracy. *See e.g. McGuffie v. Herrington*, 966 So. 2d 1274, 1278 (Miss. Ct. App. 2007).

¹⁷ Via’s claim of intentional infliction of emotional distress is actually governed by a one-year statute of limitations. *See Slaydon v. Hansford*, 830 So. 2d 686, 688 (Miss. Ct. App. 2002).

To meet her obligation to establish that the statute of limitations is tolled due to fraudulent concealment, Via must prove (1) some affirmative act or conduct by the Defendants prevented the discovery of her claim, and (2) due diligence was performed on her part to discover the claim. *Carter*, 938 So. 2d at 819-20 (Miss. 2006). Unsupported allegations by a plaintiff in her pleadings claiming that pertinent facts were fraudulently concealed is insufficient to allow tolling of the statute of limitations. *Medicomp, Inc. v. Marshall*, 878 So. 2d 193, 197-98 (Miss. Ct. App. 2004).

In *Carter* the Mississippi Supreme Court affirmed this Court's dismissal of plaintiffs' claims due to expiration of the statute of limitations where plaintiffs alleged tolling due to fraudulent concealment but failed to show evidence of an affirmative act designed to prevent discovery of the plaintiffs' claims. *Id.* The trial court was correct in determining that the same reasoning applies here. R2. AT 215 (finding complaint alleges causes of action arising from fraudulent actions, all transpiring prior to Via's resignation).

In her Brief, Via changes the focus of the alleged fraudulent concealment from the one that was presented to the trial court. It changes from an "unwritten and concealed policy of harassing and intimidating agents" not discoverable by her without access to company policy to "fraudulent activity such as the mis-coding of business resulting in the Defendant's failure to pay her everything she was entitled to after resignation." R2. AT 168; BRIEF OF APPELLANT AT p. 22. This is just another example of a last-minute change in strategy once Via realized that the prior focus would not work. Regardless, both arguments fail as both sets of alleged conduct occurred prior to Via's resignation, and could not support any argument that a cause of action accrued after the agent contracts were terminated. Her Complaint contains allegation after allegation regarding mis-coding of business, all of which occurred during her time as a Farm Bureau agent. The following are just some examples of her allegations regarding coding of business:

- “I would spend money advertising, and this would generate walk-in or call-in business, but the business would often be coded to Dan or Marcus Martin. At one time, the coding of my clients to Dan and Marcus Martin became so prolific that I decided I would have my own telephone installed.” R2. AT 12, ¶36.
- “On more than 20 occasions, of which I am aware, this occurred (the recoding of business where I had already sold insurance to the client).” *Id.* at ¶42.
- “While the improper coding of clients’ business was something that happened most of the time I was an independent contractor with the Farm Bureau companies, I noticed a substantial increase beginning in 1994. The frequency of the improper coding increased dramatically from then and escalated until the time I tendered my resignation.” *Id.* at ¶43.
- “I was forced to spend my time and resources to try to keep up with my customers that were being recoded surreptitiously. . . . **When I would find improperly coded clients, I would approach Dan and Marcus Martin who would always promise to get them straightened out. Sometimes they would get them recoded back to me, but others they would not.**” *Id.* at 15, ¶46.
- “Even when business was coded back to me, there was never a reallocation of the first year commission . . . I never once received the first year commission after a client was recoded properly to my credit.” *Id.* at ¶47
- “After catching them recoding my accounts on a number of occasions, the Farm Bureau companies would work to straighten out and have me properly credited for commissions to be earned in the future. However, they would never go back and credit my account for the first year commissions which are always higher than the renewal commissions. Dan and Marcus Martin kept these commissions of mine even though the Farm Bureau companies would straighten out the coding with regard to renewals.” *Id.* at 18, ¶55.

These specific allegations concerning mis-coding of business fly in the face of the argument in her Brief that the Defendants were fraudulently concealing her cause of action. Giving Via the benefit of the doubt and assuming the above factual allegations are true, no reasonable argument can be made that there was a cover-up. These are allegations of overt acts by the Defendants which Via claims were taken in order to force her resignation and which she had notice of prior to leaving her agent position. The alleged conduct took place prior to the self-termination of her position as a Farm Bureau agent which means the latest possible date the statute started to run would have been the date

the agent contracts were terminated. No matter what her latest argument is, Via's Complaint in this action still fails to plead fraudulent concealment as a basis for tolling the statute of limitations. The trial court was correct to find that the statute of limitations did not toll under Miss. Code Ann. § 15-1-49 but that it resumed at the expiration of the 120 day notice period on July 2, 2007 and expired on July 3, 2007. R1. AT 96; R2. AT 215.

D. The savings statute was not improperly applied

Via's final argument is mostly an out of place appeal of the Circuit Court of Claiborne County's denial of her Emergency Motion to Vacate Order of Dismissal. Since that Order was not the Order that is the basis of the appeal, the relief sought in this argument cannot be granted. SEE MISS. R. APP. P. 4(a) (stating appeal must be noticed within 30 days of **order appealed from**).

In any event, alleged lack of notice of the Claiborne County Circuit Court's July 10, 2006 Order of Dismissal is not good cause justifying the failure of Via to serve process of the Complaint in Via I within 120 days. Via claims that the alleged failure to receive notice of this Order prevented her from filing her claims within the one-year tolling provision of Miss. Code Ann. § 15-1-69. Contrary to this argument, Via did in fact re-file her claims in Hinds County within the one-year period provided for by the savings statute, Miss. Code Ann. §15-1-69. (See March 2, 2007 Complaint - Via I). R1. AT 3. Instead, Via's statute of limitations problem is directly related to her failure to serve process within 120 days under M.R.C.P. 4(h) and her failure to show good cause for this neglect. The trial court was correct in determining that her alleged failure to receive the Order of Dismissal from Claiborne County would not affect its analysis of whether the statute of limitations expired, and its decision should be affirmed.

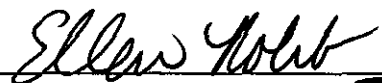
CONCLUSION

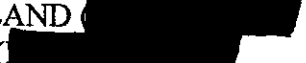

This appeal should be dismissed as the Notice of Appeal was not timely filed and thus is procedurally barred. In the alternative only, it is clear from the record that the statute of limitations as to all claims made in the complaint has expired. Thus, the trial court was correct to order that Via's claims be dismissed. The decision of the trial court should be affirmed.

Respectfully submitted this the 29th day of December 2008.

**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.**

By:



CHARLES G. COPELAND
DALE G. RUSSELL, ()
ELLEN ROBB ()
COPELAND, COOK, TAYLOR & BUSH, P.A.
Post Office Box 6020
Ridgeland, MS 39158-6020
Telephone: 601/856-7200
Facsimile: 601/856-7626

CERTIFICATE OF SERVICE

I, Ellen Robb, do hereby certify that I have this day caused to be mailed via United States Mail, first class, postage prepaid, a true and correct copy of the above and foregoing instrument to the following judge and counsel of record herein:

Honorable Bobby B. DeLaughter
Circuit Court Judge
P.O. Box 327
Jackson, MS 39205-0327

Mitchell H. Tyner, Esquire
Tyner Law Firm, P.A.
5750 I-55 North
Jackson, Mississippi, 39211
ATTORNEY FOR MARTHA VIA

Ken R. Adcock, Esquire
Post Office Box 2900
Ridgeland, Mississippi 39157
ATTORNEY FOR MARCUS MARTIN AND DAN MARTIN

Samuel E. Scott, Esquire
P O Drawer 22949
Jackson, MS 39225
ATTORNEY FOR MISSISSIPPI FARM BUREAU FEDERATION,
CLAIBORNE COUNTY FARM BUREAU (A.A.L.),
RANKIN COUNTY FARM BUREAU (A.A.L.),
AMITE COUNTY FARM BUREAU (A.A.L.), AND
LAUDERDALE COUNTY FARM BUREAU (A.A.L.)

This the 29th day of December 2008.


ELLEN ROBB

APPENDIX

DATE:	EVENT:	COMMENTS:
08/14/96	Via sends resignation letter seeking termination of her agent contracts effective 08/31/96	SEE R2. AT 161.
08/31/96	Undisputed date of termination of Via's agent contracts	Three-year statute of limitations started to run on Via's claims after this day.
08/30/99	Via files her original Complaint in Circuit Court of Claiborne County, Mississippi	As of 08/30/1999, Via had 1 day remaining on the three-year statute of limitations. Any claims subject to the one-year statute of limitations had expired.
03/02/06	Supreme Court Opinion reversing denial of Defendants' Motion to Sever and Transfer Venue	Supreme Court held that Via's claims should be severed and transferred to proper venue. <i>See Mississippi Farm Bureau Federation, et al. vs. Brenda Roberts, et al.</i> , 927 So. 2d 739 (Miss. 2006).
07/05/06	Order of Dismissal Without Prejudice entered by Circuit Court of Claiborne County, Mississippi	Pursuant to Miss. Code. Ann. § 15-1-69, Via had one year from the date of this Order to re-file her claims in an appropriate venue, which she did by re-filing her claims in the Complaint herein on 03/02/2007.
03/02/07	Via re-files her claims in Hinds County, Second Judicial District	At this point, the three-year statute of limitations has not run as to Via's claims - there is still one day left on three-year statute of limitations and the period is tolled for 120 days under Rule 4(h).
07/02/07	120-day deadline expires pursuant to Rule 4(h) M.R.C.P.	At this point, the statute of limitations started running again as to Via's claims.
07/03/07	Statute of limitations expires as to Via's claims	At time of original filing of her claims on 08/30/1996, Via only had one day remaining on the statute of limitations.
08/21/07	Motion to Dismiss March 2007 Complaint filed by Defendants	n/a

08/25/07	Via files second civil action in Hinds County with same claims as her Complaint in this action	See Cause Number 2007-26.
10/29/07	Motion to Dismiss August 2007 Complaint filed by Defendants	n/a
11/15/07	Plaintiff filed Opposition to Motions to Dismiss	Pleading included several exhibits, including two affidavits from Via. One of the affidavits included her date of termination.
11/16/07	Hearing on Motion to Dismiss	n/a
2/13/08	Order granting Motions to Dismiss entered on the respective dockets	Via had 30 days to file Notice of Appeal.
5/5/08	Notice of Appeal filed in each of Via's pending cases	The notice was not timely as it was not filed within 30 days of the entry of the Order of Dismissal.