

IN THE SUPREME COURT OF MISSISSIPPI
No. 2009-IA-00869-SCT

BAPTIST MEMORIAL HOSPITAL-
GOLDEN TRIANGLE, INC.

PLAINTIFF-APPELLANT

v.

GEORGE V. SMITH, M.D.

DEFENDANT-APPELLEE

BRIEF OF APPELLANT
BAPTIST MEMORIAL HOSPITAL-GOLDEN TRIANGLE, INC.

Interlocutory appeal from the "Order Granting Defendant Leave to Amend to File Counterclaim" entered by the Circuit Court of Lowndes County, Mississippi, Hon. James T. Kitchens, Jr., presiding.

Respectfully submitted,

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DISCLOSURE 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. Baptist Memorial Hospital, Inc. ("BMHGT"), a Mississippi not-for-profit hospital corporation.
2. Michael F. Rafferty, of counsel with Harris Shelton Harnover Walsh, PLLC, counsel of record for BMHGT.
3. George V. Smith, M.D., an individual.
4. DeWitt T. Hicks, Jr., and P. Nelson Smith, Jr., counsel of record for Dr. Smith.

Respectfully submitted,



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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUES	iv
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	3
ARGUMENT	5
Summary of Argument	5
1. A defendant who files an answer and omits a compulsory counterclaim under Rule 13(a) of the Mississippi Rules of Civil Procedure should not be granted leave to file an omitted counterclaim four years after filing his answer and seven years after the alleged transaction or occurrence when he has made no showing as required by Rule 13(f).	7
2. A defendant's motion for leave to file a counterclaim which asserts a cause of action subject to the 3-year statute of limitations in Miss. Code Ann. § 15-1-49 should be denied because it would be futile when the motion is made seven years after the alleged conduct, transaction or occurrence.	15
CONCLUSION	16

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Bourn v. Tomlinson Interest, Inc.</i> , 456 So.2d 747 (Miss. 1984)	8
<i>Carroll v. Acme-Cleveland Corp.</i> , 955 F.2d 1107 (7 th Cir. 1992)	9
<i>Citifinancial Mortgage Co. v. Washington</i> , 967 So.2d 16 (Miss. 2007).	15
<i>Elema-Schonader, Inc. v. K.C.F. Medical Supply Co., Inc.</i> , 869 F.2d 1124 (8 th Cir. 1989)	9
<i>FDIC v. Staudinger</i> , 797 F.2d 908 (10 th Cir. 1986)	9
<i>Hartford Cas. Ins. Co. v. Halliburton Co.</i> , 826 So.2d 1206 (Miss. 2001)	8
<i>Imperial Enterprises, Inc. v. Fireman's Fund Ins. Co.</i> , 535 F.2d 287 (5 th Cir. 1976)	8
<i>Kansa Reinsurance Co., Ltd. v. Congressional Mortgage Corporation of Texas</i> , 20 F.3d 1362 (5 th Cir. 1994)	12
<i>Keyes v. Berry</i> , 995 So.2d 861 (Miss. Ct. App. 2008)	12-13
<i>Laitram Corp v. Deepsouth Packing Co.</i> , 279 F.Supp. 883 (E.D. La. 1968)	15
<i>McLemore v. Landry</i> , 898 F.2d 996 (5 th Cir. 1990)	8
<i>Merideth v. Merideth</i> , 987 So.2d 477 (Miss. Ct. App. 2008)	15
<i>Poindexter v. Southern United Fire Ins. Co.</i> , 938 So.2d 964 (Miss. 2003)	15
<i>Preferred Meal Systems v. Save More Foods, Inc.</i> , 129 F.R.D. 11 (D.D.C. 1990)	9
<i>Rankin v. American Gen. Fin., Inc.</i> , 912 So.2d 725 (Miss. 2005)	15
<i>Rohner, Gehrig & Co. v. Capital City Bank</i> , 655 F.2d 571 (5 th Cir. 1981)	9
<i>Unispec Development v. Harwood K. Smith & Partners</i> , 124 F.R.D. 211 (D. Ariz. 1988)	9
<i>US v. TDC Management Corp.</i> , 1991 WL 35528 (D.D.C. 1991)	10

STATUTES

Miss. Code Ann. § 15-1-49 iv, 6, 11, 15

RULES

Miss. R. Civ. P. 7. 13
Miss. R. Civ. P. 13. 5, 8, 12, 13
Miss. R. Civ. P. 13(a). 2, 5, 7, 8, 14
Miss. R. Civ. P. 13(f). 2, 5, 7, 8, 13, 14
Miss. R. Civ. P. 14. 13
Miss. R. Civ. P. 15(a). 11, 12
Miss. R. Civ. P. 15(c). 2, 11, 12, 14
Fed. R. Civ. P. 13(f). 8, 9

STATEMENT OF THE ISSUES

1. Whether a defendant who files an answer and omits a compulsory counterclaim under Rule 13(a) of the Mississippi Rules of Civil Procedure may be granted leave under Rule 13(f) to file an omitted counterclaim four years after filing his answer and seven years after the alleged transaction or occurrence when he has failed to make the showing required by Rule 13(f) to set up an omitted counterclaim.
2. Whether a defendant's motion for leave to file a counterclaim which asserts a cause of action subject to the 3-year statute of limitations in Miss. Code Ann. § 15-1-49 should be denied because it would be futile when the motion is made more than seven years after the alleged conduct, transaction or occurrence.

STATEMENT OF THE CASE

This is a breach of contract action that was commenced on March 26, 2004, with the filing of a complaint by the plaintiff Baptist Memorial Hospital-Golden Triangle, Inc., in which BMHGT sought to collect the sum of \$110,000¹ from the defendant George V. Smith, M.D., pursuant to a loan made to him under the terms of a "Settlement and Mutual Release Agreement" (the "Settlement Agreement") dated August 1, 2001. (Transcript of Clerk's Papers, Volume 1, page 4; Record Excerpts, page 6).²

On September 13, 2004, the defendant Dr. Smith filed an "Answer and Affirmative Defenses," but he did not assert a counterclaim. (R., Vol. 1, page 19; R.E., page 21).

On November 18, 2008 – more than four years after he filed his answer – Dr. Smith filed a "Motion for Leave to File Counterclaim to [*sic*] the Defendant," alleging without explanation that "justice and fairness necessitate the filing of a counterclaim." R., Vol. 1, page 22; R.E., page 24).

Dr. Smith's proposed counterclaim does not state an express cause of action, but he alleges in the last un-numbered paragraph of the counterclaim that "the conduct of the Counter-Defendant [BMHGT] constituted a breach of good faith and fair dealing," and he seeks an award of \$3,000,000 in compensatory damages and an award of \$25,000,000 in punitive damages. (R., Vol. 1, page 29; R.E., page 30).

Dr. Smith's proposed counterclaim is based upon transactions and occurrences that occurred more than seven years prior to the date that he sought leave to file the counterclaim, and it is clear that the proposed counterclaim is a compulsory counterclaim under Rule 13(a) of the Mississippi Rules of Civil Procedure.

Dr. Smith did not cite any facts to support the statement in his motion that "justice and fairness necessitate the filing of a counterclaim," and he did not ask for leave to *amend* any pleading.

¹BMHGT also sought an award of interest and attorneys' fees under the Settlement Agreement.

²The "Transcript of Clerk's Papers" will be referred to as "R., Vol. 1." The "Record Excerpts" will be referred to as "R.E."

BMHGT opposed Dr. Smith's motion on the grounds that the proposed counterclaim was a compulsory counterclaim under Rule 13(a) which Dr. Smith failed to assert when he filed his answer four years earlier on September 13, 2004. (R., Vol. 1, page 30; R.E., page 32). BMHGT pointed out that Dr. Smith failed to show that "justice required" that he be allowed to file his omitted counterclaim at this late date under Rule 13(f). BMHGT also argued that Rule 15(c), which provides that certain allegations will relate back to an "original pleading" is not applicable, because Dr. Smith's "original pleading" – his answer – did not include a counterclaim. Dr. Smith's proposed counterclaim was an original pleading that stands alone.

A hearing on Dr. Smith's motion for leave to file a counterclaim was held on March 2, 2009, at which time the trial court directed the parties to submit proposed findings of fact and any additional case authorities to him. (R., Vol. 1, page 46; R.E., page 48). On May 11, 2009, the trial court granted Dr. Smith's motion pursuant to the "Order Granting Defendant Leave to Amend to File Counterclaim." (R., Vol. 1, page 47; R.E., page 4).

BMHGT filed a petition for interlocutory appeal on June 1, 2009, which this Court granted on July 9, 2009.

STATEMENT OF FACTS

The questions of law raised in this appeal are procedural. Consequently, there are no "facts," as such, that are pertinent to the issues raised in this appeal.

Nevertheless, as noted, this case is a breach of contract action in which BMHGT alleges that Dr. Smith failed to honor the terms of a Settlement Agreement dated August 1, 2001, between BMHGT and Dr. Smith. A copy of the Settlement Agreement is attached as Exhibit A to the complaint filed on March 26, 2004. (R., Vol. 1, page 9; R.E., page 11).

In the Settlement Agreement, the parties agreed that a prior contract between the parties (a Physician Agreement dated July 15, 2001) was terminated and, in consideration of the termination of the prior contract, BMHGT agreed to loan Dr. Smith the sum of \$110,000. The Settlement Agreement includes a provision in which Dr. Smith agreed to release and discharge any and all claims arising out of or related to the Physician Agreement or any other events or matters which occurred prior to Dr. Smith's execution of the Settlement Agreement. Specifically, Dr. Smith agreed to the following broad and comprehensive release provision:

. . . George Smith, M.D., does hereby completely release and forever discharge Baptist Memorial Hospital-Golden Triangle, Inc. and Baptist Memorial Health Care Corporation, and their respective officers, directors, attorneys, employees, heirs, executors, administrators, agents, assigns, affiliates, subsidiaries, predecessors, past, present, and future (the "Released Parties"), from any and all past, present, and future claims, demands, obligations, damages, actions, causes of action, rights, costs, expenses, losses, subrogation claims, and suits of every kind and nature whatsoever, both now existing or which may hereafter exist, both known and unknown, which the undersigned Physician now has or may hereafter have or acquire on account of, arising out of, or related to said Physician Agreement or said Note, and the performance or lack of performance by the Released Parties pursuant to said Physician Agreement, or any other events or matters which occurred as a result of or in connection with said Physician Agreement or said Note prior to the signing of this Settlement and Mutual Release Agreement.

(R., Vol. 1, page 9; R.E., page 11).

It is undisputed that BMHGT loaned Dr. Smith the sum of \$110,000 in accordance with the Settlement Agreement and that Dr. Smith did not repay the amount loaned to him. It is also undisputed that Dr. Smith did not "earn" forgiveness for the loan in accordance with the Settlement Agreement which provided that he could do so over a 4-year period with forgiveness to

be earned on an annual pro rata basis of 25% for each full year that Dr. Smith remained in full compliance with the representations and warranties he made in the Settlement Agreement, i.e., that he would relocate, establish and maintain a practice of medicine in the specialty of general surgery on a full-time basis in Lowndes County and that he would continue to be a member of the active medical staff of BMHGT.

ARGUMENT

Summary of Argument

This appeal arises from a defendant's attempt to set up a counterclaim for the first time four years after he filed an answer without alleging a counterclaim and seven years after the alleged transaction or occurrence. The plaintiff's position is that the defendant's untimely motion for leave to file the counterclaim should have been denied for two reasons: (1) The defendant failed to make any showing under Rule 13(f) of the Mississippi Rules of Civil Procedure, which governs omitted counterclaims, to explain why he waited four years after filing his answer to assert a counterclaim or explain why he should be allowed to set up a counterclaim at this late date; and (2) the defendant's counterclaim is based upon a transaction or occurrence that happened more than seven years ago and it would be futile to allow him to file a counterclaim that is barred by the three-year statute of limitation that is applicable to his claim.

Rule 13(a) addresses compulsory counterclaims, and it provides that a defendant must assert as a counterclaim any claim that "arises out of the transaction or occurrence that is the subject matter of" the plaintiff's claim. Rule 13(f) addresses omitted counterclaims and provides as follows: "When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment on such terms as the court deems just." Miss. R. Civ. P. 13(f).

The defendant Dr. Smith filed an answer on September 13, 2004, but he did not file a counterclaim at that time as he was required to do under Rule 13. Four years later, on November 18, 2008, Dr. Smith filed a motion requesting leave of court to file a counterclaim which was based on events that allegedly occurred in or about August or November 2001, seeking recovery of more than \$28,000,000 in compensatory and punitive damages. Dr. Smith's counterclaim is a compulsory counterclaim under Rule 13(a), and his proposed counterclaim is an omitted counterclaim that is governed by Rule 13(f).

Dr. Smith made the bald assertion that "justice requires" that he be granted leave to file the

counterclaim; he did not argue that the counterclaim was omitted by oversight, inadvertence or excusable neglect. Dr. Smith offered no explanation for his untimely motion. On the other hand, his counterclaim would completely alter the posture and complexion of this straightforward breach of contract claim into complex litigation and would vastly enlarge the scope of the issues in the lawsuit, which, consequently, cause significant prejudice to BMHGT.

Moreover, allowing Dr. Smith to set up a counterclaim in November 2008 for breach of the covenant of good faith and fair dealing based upon a transaction or occurrence in or about November 2001 would be futile, because it is clearly barred by the three-year statute of limitation, Miss. Code Ann. § 15-1-49, which is applicable to Dr. Smith's claim.

1. A defendant who files an answer and omits a compulsory counterclaim should not be granted leave to file an omitted counterclaim four years after filing his answer and seven years after the alleged transaction or occurrence when he has failed to make the showing required by Rule 13(f) of the Mississippi Rules of Civil Procedure.

Rule 13(a) of the Mississippi Rules of Civil Procedure requires a defendant to include as a compulsory counterclaim with his responsive pleading “any claim which at the time of serving the pleading the pleader has against any opposing party if it arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction.”

The “transaction or occurrence that is the subject matter of” Dr. Smith’s proposed counterclaim quite clearly arises out of the same transaction or occurrence that is the subject matter of BMHGT’s claim against him, and his counterclaim does not require the joinder of a third party for adjudication. Therefore, Dr. Smith’s proposed counterclaim is a compulsory counterclaim that he was required to assert when he filed his answer in September 2004.

Dr. Smith does not contend that his alleged cause of action was in any way concealed from him or that he did not discover the facts that he alleges in his proposed counterclaim so that the statute of limitations was tolled. Indeed, Dr. Smith has consistently refused to offer *any* explanation for his failure to assert a timely counterclaim or for his 4-year delay in seeking leave to file an omitted counterclaim. Apparently, Dr. Smith’s strategy is to remain silent, offer no explanation for his four-year delay and hope that he can continue to skirt the issue on appeal as he did in the trial court.

Rule 13(f) governs an “omitted counterclaim,” and it provides as follows: “When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment on such terms as the court deems just.” Miss. R. Civ. P. 13(f).

Dr. Smith does not argue that his failure to file his omitted counterclaim was “through oversight, inadvertence, or excusable neglect.” Dr. Smith argues that “justice requires” that he be

granted leave to file the counterclaim, but he does not state a basis for this conclusory statement. More important, Dr. Smith has never offered any explanation for his failure to assert a counterclaim when he filed his original answer approximately four years before he asked for leave to file a counterclaim. Instead, Dr. Smith attempted to shift to BMHGT his responsibility to explain *his* failure to comply with Rule 13(a) and 13(f), arguing that BMHGT was not prejudiced by his failure to assert a counterclaim in a timely manner in accordance with Rule 13(a) but, again, without offering any explanation for his failure, as required under Rule 13(f). Dr. Smith, as the moving party who failed to timely assert a counterclaim as a matter of right (and obligation), is required by Rule 13(f) to show some basis that he is entitled to the relief that he is seeking. Dr. Smith wholly failed to meet his obligations under Rule 13.

This case appears to present a case of first impression under the Mississippi Rules of Civil Procedure with regard to a defendant who seeks leave to file an omitted compulsory counterclaim without making any showing required under Rule 13(f). Several federal courts have ruled on the issue, however, and the Supreme Court of Mississippi has held that it is appropriate to look to rulings by the federal courts in the absence of controlling precedent in Mississippi because the Mississippi Rules of Civil Procedure were patterned after the Federal Rules of Civil Procedure. *See Bourn v. Tomlinson Interest, Inc.*, 456 So.2d 747, 749 (Miss. 1984); *Hartford Cas. Ins. Co. v. Halliburton Co.*, 826 So.2d 1206, 1215 (Miss. 2001)(recognizing federal cases as persuasive authority).

The federal courts have, on multiple occasions, held that a defendant who fails to make a showing required by Rule 13(f) of the Federal Rules of Civil Procedure is not entitled to file an untimely counterclaim. *See Imperial Enterprises, Inc. v. Fireman's Fund Ins. Co.*, 535 F.2d 287, 293 (5th Cir. 1976), *rehearing en banc denied*, 540 1085 (1976)(“In view of the untimeliness of the attempted amendment [and that] Fireman's Fund was aware of the facts under underlying its alleged counterclaim for almost a year before it made its motion[,] we are unable to conclude that the district court abused its discretion in denying the motion to amend with respect to the counterclaim.”); *McLemore v. Landry*, 898 F.2d 996 (5th Cir. 1990)(Affirming district court's denial of defendant's

motion for leave to file compulsory counterclaim on the ground that it was untimely because it was filed 3 years after the lawsuit was commenced and 6 weeks after the trial court had ruled on a motion for summary judgment); *Carroll v. Acme-Cleveland Corp.*, 955 F.2d 1107 (7th Cir. 1992)(Motion to amend counterclaim was inexcusably late and therefore denied when it was made 3 years after answer were filed and 6 years after the transaction); *FDIC v. Staudinger*, 797 F.2d 908, 911 (10th Cir. 1986)(Motion for leave to amend denied after un-excused delay of 16 months); *Rohner, Gehrig & Co. v. Capital City Bank*, 655 F.2d 571, 576 (5th Cir. 1981)(“[T]he trial judge did not abuse his discretion in holding that the Rule 13(f) motion for leave to add an omitted counterclaim [filed 3 years after the answer] was inexcusably untimely. . . Rule 13(f) does not give a party the privilege of totally neglecting its case and ignoring time limitations imposed by the Federal Rules of Civil Procedure even absent bad faith or dilatory motive on its part.”); *Preferred Meal Systems v. Save More Foods, Inc.*, 129 F.R.D. 11, 12-13 (D.D.C. 1990)(Defendant’s motion to assert counterclaim made 29 months after the filing of the lawsuit was denied when defendant provided no explanation for his failure to proffer the amendment earlier, stating: “Rule 13(f) is interpreted liberally, but ‘it should not be construed as an open-ended mechanism for avoiding the timely filing of counterclaims arising out of a single transaction.’”), citing *Unispec Development v. Harwood K. Smith & Partners*, 124 F.R.D. 211, 213 (D. Ariz. 1988); see also *Elema-Schonader, Inc. v. K.C.F. Medical Supply Co., Inc.*, 869 F.2d 1124, 1126 (8th Cir. 1989)(District court did not abuse its discretion in denying defendant’s motion to assert an omitted counterclaim seeking \$10,000,000 in damages based upon multiple claims, including claims of breach of good faith and fair dealing, when motion was made more than six months after the plaintiff had filed a breach of contract claim seeking \$159,192.29, noting that the proposed amendment ““would completely alter the posture and complexion of this case, would prejudice the plaintiff and would require additional discovery which would undoubtedly delay the case,”” and stating: “In essence, this is a case where [the defendant] did nothing until the last minute, when in response to a straightforward contract claim it attempted to assert for the first

time a complex counterclaim, which, if allowed, would vastly enlarge the scope of issues relevant to the suit.”).

In *US v. TDC Management Corp.*, 1991 WL 35528 (D.D.C. 1991), the United States District Court for the District of Columbia addressed a similar argument made by the defendant Dr. Smith in the present case, i.e., that the defendants be allowed to set up an omitted counterclaim because “justice requires” but without citation to any facts to support the argument. After citing some of the preceding cases, the District Court in *TDC Management* denied the defendants’ motion for leave to file an omitted counterclaim, stating as follows:

In sum, defendants’ reliance on the bald assertion that “justice requires” that their motion for leave to amend should be granted is unpersuasive. Defendants have not offered the Court an adequate justification upon which the Court could reasonably exercise its discretion to grant the motion, especially in view of their undue delay in filing the instant motion and the prejudice to plaintiff if the motion were granted.

1991 WL 35528 at page 2.

In the present case, the allowance of Dr. Smith’s untimely counterclaim for \$28,000,000 in compensatory and punitive damages would completely alter the posture and complexion of this breach of contract claim into complex litigation that would vastly enlarge the scope of the issues in the lawsuit and cause significant prejudice to BMHGT. Dr. Smith’s untimely motion for leave to file an omitted counterclaim should have been denied, and the trial court’s order allowing him to file the counterclaim should be vacated.

In the “Order Granting Defendant Leave to Amend to File Counterclaim” entered in this cause on May 11, 2009, the trial court made the following findings which are the only stated bases for its ruling:

1. Amendments should be freely given when justice can be served.
2. There has been no discovery depositions taken, no trial date has been set, and there is no prejudice to the plaintiff.
3. Accordingly, the leave to file a Counterclaim should be allowed.

IT IS THEREFORE CONSIDERED AND ORDERED that the defendant is given

10 days from this date within which to file a Counterclaim.

(R., Vol. 1, page 47; R.E. page 4).

The language of the trial court's order, including its title, is noteworthy. First, the title of the trial court's order states that it is granting leave to the defendant to "amend" to file a counterclaim, but the defendant Dr. Smith did not have a pleading on file to amend, other than his answer. When Dr. Smith filed his motion for leave to file a counterclaim in November 2008, the only pleading that he had on file in the trial court was his answer.

Second, the first statement in the trial court's order that "Amendments should be freely given when justice can be served" appears to be a reference to the provision of Rule 15(a) that "leave to amend shall be granted when justice so requires." As discussed below, it would be futile to allow Dr. Smith to file his counterclaim seven years after the transaction or occurrence because his claim would be barred by the 3-year statute of limitation, Miss. Code Ann. § 15-1-49. Thus, in order for Dr. Smith to proceed with prosecuting his proposed counterclaim, even as an omitted counterclaim, it would also be necessary for the allegations of the proposed counterclaim to "relate back" to Dr. Smith's original "Answer and Affirmative Defenses" for purposes of Rule 15(c) of the Mississippi Rules of Civil Procedure. This is an insurmountable hurdle for Dr. Smith, because he does not have a pleading on file for his proposed amendment to relate back.

Rule 15(a) provides that if a party has filed a pleading, as Dr. Smith did in the present case when he filed his answer, then he may amend the pleading "only by leave of court or upon written consent of the adverse party" and "leave shall be freely given when justice so requires."

Rule 15(c) provides: "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." Thus, a counterclaim, such as Dr. Smith's proposed counterclaim, will relate back to the "original pleading" if it arises out of the same "conduct, transaction or occurrence."

As noted repeatedly, Dr. Smith did not include a counterclaim in the answer that he filed on

September 13, 2004. Therefore, Dr. Smith does not have an “original pleading” on file to amend for purposes of Rule 15(c).

The federal courts, particularly the United States Court of Appeals for the Fifth Circuit, have held that it is not an abuse of discretion to deny a defendant’s motion to file a cross-claim, asserted for the first time as an amendment, because the cross-claim could not relate back to the filing of the original answer if the answer did not include a cross-claim. See *Kansa Reinsurance Co., Ltd. v. Congressional Mortgage Corporation of Texas*, 20 F.3d 1362, 1367-1368 (5th Cir. 1994)(“The necessary implication of the rule is that in order for an amended pleading to relate back for statute of limitations purposes, *there must be a previous pleading to which the amendment dates back.*” 20 F.3d at 1367 (emphasis added). The *Kansa* case involved an attempt to amend a cross-claim instead of a counterclaim, but Rule 15(c) makes no distinction between these two pleadings. As the Fifth Circuit in *Kansa* noted, the proposed cross-claim was an original pleading that stands alone; it was *not* an amendment of a previously filed pleading. 20 F.3d at 1367. The fundamental logic of this simple reality is inescapable and irrefutable.

In the present case, Dr. Smith did not ask for leave to *amend* his *answer*, although his argument in the trial court attempted to blur the distinction between amending a compulsory counterclaim that was already on file (which is undeniably *not* the situation in the present case) by relying on the liberal allowance for amending pleadings set forth in Rule 15(a). Dr. Smith seeks to assert, for the first time, a counterclaim that arises out of the conduct, transaction or occurrence that is undeniably the identical subject matter of BMHGT’s claim. As noted above, the issue raised in this case is controlled by Rule 13; Rule 15(c) may not be used to ratify all pleadings which would otherwise be time-barred so long as the party who seeks to invoke the rule has an operative pleading on file.

Recently, the Court of Appeals of Mississippi, in *Keyes v. Berry*, 995 So.2d 861 (Miss. Ct. App. 2008), held that a counterclaim filed by a defendant who had not filed an answer could not be deemed to be the defendant’s answer, because Rule 7 of the Mississippi Rules of Civil Procedure

identifies the pleadings that are allowed, and a counterclaim is not a responsive pleading under the Rules.

The *Keyes* case arose out of the opposite procedural situation of the present case. Here, Dr. Smith filed an answer without filing a counterclaim. In *Keyes*, the defendant filed a counterclaim without filing an answer. The trial court in *Keyes* held that the defendant's filing was so irregular under the Mississippi Rules of Civil Procedure that it was subject to dismissal. Unlike *Keyes*, the present case is quite plainly governed by a specific rule, Rule 13(f), as discussed above. The *Keyes* case is nevertheless instructive with regard to the analysis of the present case.

In *Keyes*, the driver of an automobile owned by his employer, Simpson County, was involved in an automobile accident with another person who was operating a vehicle in the course and scope of his employment. The driver of the second vehicle sued Simpson County and the employee-driver, and, two years after Simpson County had filed an answer on its behalf only, the employee-driver filed a "counter complaint" against the second driver and his employer.³ The Simpson County employee-driver, who was one of the defendants in *Keyes*, was not properly served with process, and his first appearance in the case was two years after the commencement of the action when he filed his counter complaint. The trial court in *Keyes* dismissed the defendant's counter complaint because it was filed "in circumvention" of Rules 13 and 14 of the Mississippi Rules of Civil Procedure and because allowance of the counterclaim would prejudice the parties by prolonging the litigation and result in additional expense. 995 So.2d at 863. The Court of Appeals affirmed the trial court's dismissal in *Keyes*, noting that Rule 7 expressly prohibits any pleadings that are not identified in the Rule, stating as follows: "Merely setting forth an independent claim or cause of action against the other party falls short of sufficiency for answer, particularly in a comparative negligence state." 995 So.2d at 865.

In the present case, Dr. Smith did not file a counterclaim when he filed his answer on September 13, 2004. Four years after the fact, Dr. Smith's answer cannot now be deemed to have

³The Simpson County employee's "counter complaint" also purported to join a new party to the lawsuit, the employer of the original plaintiff. 995 So.2 at 863.

been a counterclaim under the applicable Rules, and the proposed counterclaim does not amend in any way the answer that is currently on file. Since Dr. Smith has not asserted a counterclaim, he does not have a pleading on file to amend.

Rules 13(f) and 15(c) simply do not allow a defendant, like Dr. Smith, to wait seven years after the fact to assert, for the first time and without any explanation whatsoever for his delay in asserting, a claim that is compulsory under Rule 13(a).

The trial court abused its discretion in granting Dr. Smith's motion for leave to file an omitted counterclaim. The "Order Granting Defendant Leave to Amend to File Counterclaim" filed on May 11, 2009, should be vacated.

2. A defendant's motion for leave to file a counterclaim which asserts a cause of action subject to the 3-year statute of limitations in Miss. Code Ann. § 15-1-49 should be denied because it would be futile when the motion is made more than seven years after the alleged conduct, transaction or occurrence.

Dr. Smith alleges in the counterclaim that the Settlement Agreement dated August 1, 2001, is "unconscionable" and unenforceable. Dr. Smith's proposed counterclaim includes allegations arising from his practice as a physician in the hospital's emergency room which he alleges began in November 2001. Thus, if Dr. Smith did in fact have a claim against BMHGT, it would have arisen from transactions or occurrences which occurred by November 2001, seven years before he first sought leave to file a counterclaim and assert a cause of action of any kind.

Although Dr. Smith's proposed counterclaim is vague and does not explicitly identify an express cause of action, it is nevertheless clear that his claim is subject to the three-year statute of limitations for "actions without prescribed period of limitation," Miss. Code Ann. § 15-1-49. *See Citifinancial Mortgage Co. v. Washington*, 967 So.2d 16, 19 (Miss. 2007)(holding that a claim of breach of implied covenant of good faith and fair dealing is subject to the general 3-year statute of limitation and, on interlocutory appeal, the defendant's motion for summary judgment should have been granted because the claim was filed 6 years after the alleged events occurred); *Rankin v. American Gen. Fin., Inc.*, 912 So.2d 725, 726 (Miss. 2005)(breach of implied covenant of good faith and fair dealing is subject to 3-year statute of limitation of Miss. Code Ann. § 15-1-49).

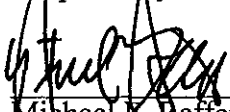
A motion to amend a complaint should not be granted when it would be futile because the claim in the proposed amendment would be barred by the statute of limitations. *Merideth v. Merideth*, 987 So.2d 477, 482 (Miss. Ct. App. 2008); *see also Poindexter v. Southern United Fire Ins. Co.*, 938 So.2d 964 (Miss. 2003)(recognizing in dicta that it would be proper to deny a motion to amend on the ground that the amendment would be futile); *see also Laitram Corp v. Deepsouth Packing Co.*, 279 F.Supp. 883, 891 (E.D. La. 1968)(motion to amend counterclaim to allege violation of Clayton Act filed 4 years after the case was commenced was denied because the counterclaim was barred by the Act's 4-year statute of limitations).

Dr. Smith's allegation in his proposed counterclaim, first made in November 2008, "that the conduct [in November 2001] of the Counter-Defendant [BMH-GT] constituted a breach of good faith and fair dealing" is unquestionably barred by the 3-year statute of limitations, and the trial court abused its discretion in granting Dr. Smith's motion for leave to "amend" to assert a counterclaim because the amendment would be futile.

CONCLUSION

The "Order Granting Defendant Leave to Amend to File Counterclaim" entered by the trial court in this case on May 11, 2009, should be vacated, and this case should be remanded to the trial court with instructions to deny the defendant Dr. Smith's motion for leave to file a counterclaim.

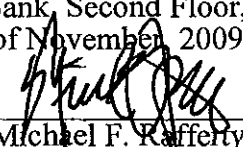
Respectfully submitted,


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CERTIFICATE OF SERVICE

A copy of the foregoing was mailed, U.S. mail, postage prepaid, to Mr. DeWitt T. Hicks, Jr., and Mr. P. Nelson Smith, Jr., Hicks & Smith, AMSOUTH Bank, Second Floor, 710 Main Street, P. O. Box 1111, Columbus, MS 39703-1111, this 24th day of November, 2009.


Michael F. Rafferty