IN THE SUPREME COURT OF MISSISSIPPI

DR. BERTIN C. CHEVIS — APPELLANT

VS — CASE NO.: 2010-CA-00861

MISSISSIPPI FARM BUREAU MUTUAL INSURANCE COMPANY — DEFENDANTS

APPELLEE'S BRIEF

ORAL ARGUMENT REQUESTED

APPEALED FROM:

THE CIRCUIT COURT OF HANCOCK COUNTY, MISSISSIPPI
(Cause No.: 08-0514)

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DR. BERTIN C. CHEVIS — **APPELLANT**

VS — **CASE NO.: 2010-CA-00861**

MISSISSIPPI FARM BUREAU MUTUAL INSURANCE COMPANY — **DEFENDANTS**

CERTIFICATE OF INTERESTED PERSONS

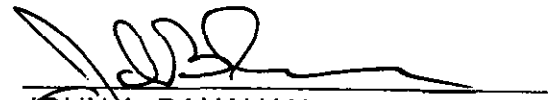
The undersigned counsel of record hereby certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1.	Dr. Bertin C. Chevis Belva Chevis 10030 Cain Road Bay St. Louis, MS 39520	Appellant
2.	John F. Ketcherside, Esq. P.O. Box 10574 Jackson, TN 38305	Attorney for Appellant
3.	Mississippi Farm Bureau Mutual Ins. Co. P.O. Box 1972 Jackson, MS 39215-1972	Appellee
4.	John A. Banahan, Esq. Ryan A. Frederic, Esq. Bryan, Nelson, Schroeder, Castigliola & Banahan, PLLC P.O. Drawer 1529 Pascagoula, MS 39568-1529	Attorneys for Appellee
5.	James H. Heidelberg, Esq. Heidelberg, Steinberger, Colmer & Burrow, P.A. P.O. Box 1407 Pascagoula, MS 39568-1407	Attorneys for Trial Court Defendants but not parties to Appeal - Audubon Insurance Company, AIG Claim Services, Inc., Mississippi Windstorm Underwriting Assn.

6. Hon. John C. Gargiulo
Hancock County Circuit Court Judge
P.O. Box 1461
Gulfport, MS 39502

Trial Judge

Respectfully submitted,



JOHN A. BANAHAN
RYAN A. FREDERIC
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STATEMENT OF THE ISSUE

The Appellee, MISSISSIPPI FARM BUREAU MUTUAL INSURANCE COMPANY (hereinafter "Farm Bureau"), submits this Statement of the Issue as a more concise version of the issue on appeal:

1. Whether the Circuit Court erred in granting Farm Bureau's Motion for Summary Judgment on March 8, 2010.

STATEMENT OF THE CASE

A.
Nature of the Case, Proceedings, and Disposition

On August 29, 2005, when Hurricane Katrina struck the Mississippi Gulf Coast the Plaintiff, DR. BERTIN C. CHEVIS (hereinafter "Chevis"), owned property located at 307 Ulman Avenue, Bay St. Louis, MS 39520, where Chevis conducted his medical practice. On that date, Chevis had two relevant insurance policies in force: (1) Farm Bureau Business Package Policy BP907600, which contained a windstorm and/or hail exclusion endorsement and excluded flood damage, and (2) Mississippi Windstorm Underwriting Association (hereinafter "MWUA") Policy CPF 0795057 to cover damages caused by wind and/or hailstorm. C.P. 53-73; 27-39.

Chevis filed his Complaint on August 28, 2008, against Farm Bureau, Farm Bureau Agents Keath Ladner and Theodore O'Neal Bilbo, Audubon Insurance Company, AIG Claim Services, Inc., and the MWUA. C.P. 5-39. The lawsuit arises from damage to Chevis' medical office building and its contents as a result of Hurricane Katrina. In his Complaint, filed on August 28, 2008, Chevis asserted claims of (1) breach of contract and (2) negligence against all Defendants. Chevis made no allegations of malicious or grossly negligent conduct against any of the Defendants. Chevis did not make any claims of "bad faith;" nor did he seek punitive damages. Id.

On February 17, 2009, Farm Bureau timely filed its Answer to the Complaint. C.P. 40-46. On July 1, 2009, Farm Bureau filed its Motion for Summary Judgment and Memorandum Brief in support thereof. C.P. 47-94. On August 19, 2009, Chevis filed his Hearing Memorandum: Motion to Dismiss Defendants Ladner and Bilbo; Motion for Summary Judgment by Mississippi Farm Bureau, and filed his Affidavit on August 20,

2009. C.P. 95-100; 101-103. On September 14, 2009, the Trial Court dismissed Farm Bureau Agents Keath Ladner and Theodore O'Neal Bilbo. C.P. 104.

On February 11, 2010, the Trial Court conducted a hearing regarding Farm Bureau's Motion for Summary Judgment. Tr. 1-24. After hearing argument from counsel for both Chevis and Farm Bureau and reviewing all submitted motions and responses, with supporting documentation, on March 8, 2010, the Trial Court granted Farm Bureau's Motion for Summary Judgment. C.P. 137-140. In the Judgment of the Trial Court, the Trial Court found that "the Farm Bureau policy clearly and unambiguously excluded damage caused by wind. Thus, Plaintiff has no coverage under said policy for his claim of damages resulting from Hurricane Katrina." C.P. 139.

On March 17, 2010, Farm Bureau filed its Motion to Amend Judgment and requested the Trial Court reissue the Judgment as a final judgment pursuant to Rule 54(b) of the Miss. R. Civ. P. C.P. 141-44. On April 22, 2010, the Trial Court entered an Agreed Final Judgment of Dismissal as to Defendant, Mississippi Farm Bureau Mutual Insurance Company. C.P. 256.

B.
Statement of Facts

In the early part of February 2005, the Plaintiff's wife, Ms. Belva Chevis, met with Farm Bureau's Agent, Theodore O'Neal Bilbo, in order to obtain insurance for her husband, Dr. Bertin C. Chevis' office building located at 307 Ulman Avenue, Bay St. Louis, MS 39520. C.P. 101. Farm Bureau Business Package Policy BP907600 (hereinafter "Farm Bureau Policy") was issued with an effective date of February 10, 2005, to February 10, 2006. C.P. 53-73. The Farm Bureau Policy is a "named perils" policy, and provided Two Hundred Sixty-Five Thousand One Hundred Dollars and

NO/100 ($265,100.00) coverage on the building (Coverage A), and Eighty Thousand Dollars and NO/100 ($80,000.00) coverage on the business personal property contained within his office building (Coverage B). Id.

SECTION I - PROPERTY COVERAGES

COVERAGE A - BUILDINGS

This policy covers the replacement cost of the building(s) at the premises described in the Declarations for which a limit of liability is shown.
DEBRIS REMOVAL: This policy covers expense incurred in the removal in the removal of the debris of the property covered occasioned by loss as insured against in this policy.

COVERAGE B - BUSINESS PERSONAL PROPERTY

This policy covers to the extent of actual cash value of the property at the time of the loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss of the Business Personal Property owned by the insured, usual to the occupancy of the insured, at the premises described in the Declarations for which a limit of liability is shown, while (1) in or on the building(s), or (2) in the open (including within vehicles) on or within 100 feet of the described premises.

DEBRIS REMOVAL: This policy covers expense incurred in the removal in the removal of the debris of the property covered occasioned by loss as insured against in this policy.

C.P. 55. The Farm Bureau Policy contained an exclusion for flood. C.P. 55; 57-58.

SECTION I - PERILS AND EXCLUSIONS

******

EXCLUSIONS

The Company shall not be liable for loss

******

(d) caused by, resulting from, contributed to, or aggravated by any of the following:

******

(2) flood, surface water, waves, tidal water or tidal waves, overflow of streams or other bodies of water, or spray from any of the foregoing, all whether driven by wind or not.

Id. The Farm Bureau Policy also contained an endorsement excluding damage caused by windstorm or hail. First unnumbered page after C.P. 54. The Windstorm or Hail Exclusion Endorsement (CAP-39), provides:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

WINDSTORM OR HAIL EXCLUSION

For a premium credit the following is added to the EXCLUSIONS section and is therefore not a Peril Insured Against:

WINDSTORM OR HAIL

We will not pay for loss or damage:

A. Caused directly or indirectly by Windstorm or Hail, regardless of any other cause or event that contributes concurrently or in any sequence to the loss or damage; or

B. Caused by rain, snow, sand or dust, whether driven by wind or not, if that loss or damage would not have occurred but for the Windstorm or Hail.

But if the Windstorm or Hail results in a cause of loss other than rain, snow, sand or dust, and that resulting cause of loss is a Peril Insured Against, we will pay for the loss or damage

> caused by such Peril Insured Against. For example, if the Windstorm or Hail damages a heating system and fire results, the loss or damage attributable to the fire is covered subject to any other applicable policy provisions.

Id. Attached to the Windstorm or Hail Exclusion Endorsement (CAP-39), was a Notice, which, inter alia, provides:

> **IMPORTANT NOTICE**
>
> **WINDSTORM OR HAIL EXCLUSION (ALL PROPERTY POLICIES)**
>
> **PLEASE READ CAREFULLY.** The enclosed Windstorm or Hail Exclusion Endorsement is being added to your policy. This means your property policy through Mississippi Farm Bureau Casualty Insurance Company or Southern Farm Bureau Casualty Insurance Company will not provide windstorm or hail coverage.
>
> The Mississippi Windstorm Underwriting Association provides windstorm and hail policies to match with property policies where the windstorm and hail perils have been excluded. . . . Your local Farm Bureau agent can procure a Mississippi Underwriting Association Windstorm and Hail Policy for you to insure you against these perils that are being excluded from your Mississippi Farm Bureau Casualty Insurance Company or Southern Farm Bureau Casualty Insurance Company property policy.
>
> *****
>
> Effective the date the Windstorm or Hail Exclusion Endorsement is added to your property policy, we will no longer pay for loss caused directly or indirectly by windstorm or hail regardless of any other cause or event that contributes concurrently or in any sequence to the loss. Direct loss by fire or explosion resulting from windstorm or hail is covered.

C.P. 21.

As stated in the above referenced Notice, the MWUA issued Policy CPF

0795057 to Chevis to cover wind and/or hailstorm and had an effective date of February 10, 2005 to February 10, 2006. C.P. 27-39. MWUA Policy CPF 0795057 provided coverage matching the Farm Bureau Policy of Two Hundred Sixty-Five Thousand One Hundred Dollars and NO/100 ($265,100.00) on the building and Eighty Thousand Dollars and NO/100 ($80,000.00) for contents. Id.

On August 29, 2005, Chevis' office building located at 307 Ulman Avenue was subjected to the forces of Hurricane Katrina resulting in damage to the building and its contents. Following Hurricane Katrina, Chevis filed claims with both Farm Bureau and the MWUA. Contrary to the assertions of Chevis, Farm Bureau did not pay anything to him for the Thirteen Thousand Dollars and NO/100 ($13,000.00) in costs incurred regarding debris removal as these losses were not covered under the Farm Bureau Policy. However, as asserted in the Complaint, Chevis was compensated by the MWUA for damages of Fifty-Six Thousand Five Hundred Sixty-Three Dollars and 32/100 ($56,563.32) for his building and Eighty Thousand Dollars and NO/100 ($80,000.00) for contents. C.P. 9. To date, Chevis continues to pursue in the underlying cause additional claims for coverage with the MWUA.

As noted supra, on August 28, 2008, Chevis filed his Complaint against the Defendants, and Farm Bureau timely filed its Answer to the Complaint on February 17, 2009. C.P. 5-39; 40-46. Additionally, on or about June 7, 2009, in response to Farm Bureau's Interrogatories, Chevis answered Interrogatories No. 18 and No. 21, as follows:

> INTERROGATORY NO. 18: Have you ever applied for insurance with the National Flood Insurance Program for the property located at 307 Ulman Avenue, Bay St. Louis, MS 39520, or any other property in which you held an ownership

interest. If so, for each such property, please list the address, policy number, dates of application(s) and the agent(s) involved in such transactions.

ANSWER: Object; this request is not reasonable limited in scope, and clearly not reasonably calculated to lead to the discovery of admissible evidence. The property was of an altitude above sea level which did not require flood insurance, and **the property was not destroyed by flood.**

******

INTERROGATORY NO. 21: Please describe in specific detail all damage to your property located at 307 Ulman Avenue, Bay St. Louis, MS 39520, and include in your description what you believe to be the source of such damage, whether wind or water or a combination of both, and why you believe that to be the source.

ANSWER: My medical office was a total loss. **Hurricane Katrina blew out windows and blew off much of the roof.** The building just started to crumble, and had to be removed by a hazardous waste specialist.

C.P. 74-82 (emphasis by author).

Thereafter, Farm Bureau filed its Motion for Summary Judgment and Memorandum Brief in support thereof, and for the reasons noted herein above, on March 8, 2010, the Trial Court granted Farm Bureau's Motion for Summary Judgment. C.P. 47-94; 137-140.

SUMMARY OF THE ARGUMENT

Chevis seeks indemnification from Farm Bureau for losses arising from wind damage sustained during Hurricane Katrina. However, the Farm Bureau Policy issued to him clearly and unambiguously excluded coverage for loss or damage caused by windstorm. Thus, the Trial Court properly granted Farm Bureau's Motion for Summary Judgment.

Chevis' assertion that representations were made to him when obtaining his insurance policy that "everything except flood" was covered is without merit. Even assuming such a representation was made, Mississippi law is clear that a policyholder is bound by the terms of his insurance policy; whether or not he actually read the policy. The Farm Bureau Policy issued to Chevis excluded coverage for loss or damage caused by windstorm and was issued contemporaneously with a MWUA policy which did cover windstorm, and as such, the Trial Court properly granted Farm Bureau's Motion for Summary Judgment.

Chevis is correct that his Farm Bureau Policy is a "named perils" policy. Mississippi law places the burden of proof on him to prove the damages sustained (wind damage) were covered under his policy with Farm Bureau. However, by his own admission, Chevis seeks indemnification from Farm Bureau for losses arising from wind damage sustained during Hurricane Katrina which are excluded under his Farm Bureau Policy. Thus, the Trial Court properly granted Farm Bureau's Motion for Summary Judgment.

Chevis is correct that Farm Bureau Policy is a "business package" policy of insurance. However, the Farm Bureau Policy issued to him clearly and unambiguously

excluded coverage for loss or damage caused by windstorm, and as such, the Trial Court properly granted Farm Bureau's Motion for Summary Judgment.

Chevis' argument that the Defendants are jointly and severally liable to him for his loss must fail. First, Chevis fails to cite any authority for this assertion, and as such, the Mississippi Rules of Appellate Procedure bar this Court from considering this argument. Second, the concept of "joint and several liability" only applies to claims of negligence. Chevis' claim asserted against Farm Bureau is for breach of contract, and as such, this argument must fail.

ARGUMENT AND CITATION OF AUTHORITY

In determining whether the trial court properly granted a Motion for Summary Judgment, the Appellate Court employs a *de novo* review of the record. *See*, Presswood v. Cook, 658 So. 2d 859, 862 (Miss. 1995) (citing Owen v. Pringle, 621 So. 2d 668, 670 (Miss. 1993)); Daniel v. G&B Inc., 629 So. 2d 595, 599 (Miss. 1993); Mentachie Natural Gas District v. Mississippi Valley Gas Co., 694 So. 2d 1170, 1172 (Miss. 1992). A grant of summary judgment is appropriate when, viewed in the light most favorable to the non-moving party, "[t]he 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." Miss. R. Civ. P. 56(c).

Once the moving party has shown no genuine issue of material fact exists, the non-moving party bears the burden of rebuttal and is obligated to produce specific facts showing that a genuine material issue for trial exists. Cong Vo Van v. Grand Casinos of Miss., Inc., 767 So. 2d 1014, 1018 (Miss. 2000). "The non-moving party's claim must be supported by more than a mere scintilla of colorable evidence; it must be evidence upon which a fair-minded jury could return a favorable verdict." Wilbourn v. Stennett, Wilkinson & Ward, 687 So. 2d 1205, 1214 (Miss. 1996) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986)). Finally, "when a party, opposing summary judgment on a claim or defense as to which that party will bear the burden of proof at trial, fails to make a showing sufficient to establish an essential element of the claim or defense, then all other facts are immaterial, and the moving party is entitled to judgment as a matter of law."

Galloway v. Travelers Ins. Co., 515 So. 2d 678, 684 (Miss. 1987).

I.
The Trial Court Properly Granted Farm Bureau's Motion for Summary Judgment as Farm Bureau Business Package Policy BP907600 Issued to Chevis Clearly and Unambiguously Excluded Coverage for Loss or Damage Caused by Windstorm

A. Mississippi law regarding a court's interpretation of an insurance policy

In Mississippi, the interpretation of terms existing within a policy of insurance present questions of law, not fact. U.S. Fid. & Guar. Co. v. Omnibank, 812 So. 2d 196, 198 (Miss. 2004). As such, the Appellate Court must apply a *de novo* standard of review. Delashmit v. State, 991 So. 2d 1215, 1218 (Miss. 2008).

When interpreting an insurance policy, the Appellate Court "should look at the policy as a whole, consider all relevant portions together and, whenever possible, give operative effect to every provision in order to reach a reasonable overall result." J&W Foods Corp. v. State Farm Mut. Auto. Ins. Co., 723 So. 2d 550, 552 (Miss. 1998) (citing Continental Casualty Co. v. Hester, 360 So. 2d 695, 697 (Miss. 1978)). "[I]f the language in an insurance contract is clear and unambiguous, then the court should construe it as written." Jackson ex rel. Heirs of Jackson v. Daley, 739 So. 2d 1031, 1041 (Miss. 1999) (citing Lowery v. Guaranty Bank & Trust Co., 592 So. 2d 79, 82 (Miss. 1991)). Also, if a contract is unambiguous, the "parties are bound by the language of the instrument." Delta Pride Catfish, Inc. v. Home Ins. Co., 697 So. 2d 400, 404 (Miss. 1997) (quoting Cherry v. Anthony, Gibbs, and Sage, 501 So.2d 416, 419 (Miss. 1987)).

On the other hand, "[i]f a contract contains ambiguous or unclear language, then ambiguities must be resolved in favor of the non-drafting party." U.S. Fid. & Guar. Co. v. Martin, 998 So. 2d 956, 963 (Miss. 2008) (citing J&W Foods Corp., 723 So. 2d at 552). Ambiguity shall exist where a provision is susceptible to two or more reasonable meanings. Farmland Mut. Ins. Co. v. Scruggs, 886 So. 2d 714, 718 (Miss. 2004). Ambiguity must be apparent on the face of the contract. Burton v. Choctaw County, 730 So. 2d 1, 8 (Miss. 1997). However, the "mere fact that the parties disagree about the meaning of a provision of a contract does not make the contract ambiguous as a matter of law." Delta Pride Catfish, Inc., 697 So. 2d at 404.

B. Mississippi court decisions regarding policyholder claims arising from hurricane related losses

As the Court is well aware, as a result of the damage caused by Hurricane Katrina, many Mississippi policyholders filed suit against their respective insurers. Although the term "windstorm" is not defined in the Farm Bureau policy at issue, in response to Hurricane Katrina related litigation, the United States District Court for the Southern District Court of Mississippi has stated that "Hurricane Katrina was a windstorm by any definition. Indeed, the definition of a hurricane is based on the strength of the winds it generates." Penthouse Owners Ass'n v. Certain Underwriters at Lloyd's, London, 2008 U.S. Dist. LEXIS 91866, 8-9 (S.D. Miss. July 2, 2008) (quoting Broussard v. State Farm Fire & Casualty Co., 2007 U.S. Dist. LEXIS 2611, *9 (S.D. Miss. Jan. 11, 2007)). Furthermore, the United States Court of Appeals for the Fifth Circuit has held where a insurance policy does not define the term "windstorm:"

> . . . the fairest and best definition of a 'windstorm' is that force of natural air which is: ' . . . . capable of damaging the

> insured property either by its own unaided action or by projecting some object against it.' . . . ' . . . it would seem that any wind that is of such extraordinary force and violence as to thereby injuriously disturb the ordinary condition of things insured is tumultuous in character, and is to be deemed a windstorm.'

Kemp v. American Universal Ins. Co., 391 F.2d 533, 535 (5th Cir. Miss. 1968) (internal citations omitted).

Mississippi law is clear that the role of interpreting an insurance policy is reserved for the Court, not a jury, and in doing so, the Court "should look at the policy as a whole, consider all relevant portions together and, whenever possible, give operative effect to every provision in order to reach a reasonable overall result." J&W Foods Corp., 723 So. 2d at 552 (citing Continental Casualty Co., 360 So. 2d at 697. In the present matter, on its face, the Windstorm or Hail Exclusion Endorsement to the Farm Bureau Policy clearly and unambiguously excludes loss or damage caused by wind. As noted supra, the Exclusion Endorsement provides:

> **THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**
>
> **WINDSTORM OR HAIL EXCLUSION**
>
> For a premium credit the following is added to the EXCLUSIONS section and is therefore not a Peril Insured Against:
>
> **WINDSTORM OR HAIL**
>
> We will not pay for loss or damage:
>
> A. Caused directly or indirectly by Windstorm or Hail, regardless of any other cause or event that contributes concurrently or in any sequence to the loss or damage; or

B. Caused by rain, snow, sand or dust, whether driven by wind or not, if that loss or damage would not have occurred but for the Windstorm or Hail.

But if the Windstorm or Hail results in a cause of loss other than rain, snow, sand or dust, and that resulting cause of loss is a Peril Insured Against, we will pay for the loss or damage caused by such Peril Insured Against. For example, if the Windstorm or Hail damages a heating system and fire results, the loss or damage attributable to the fire is covered subject to any other applicable policy provisions.

First unnumbered page after C.P. 54. Since the Farm Bureau Policy and its exclusion endorsement are not ambiguous, in accordance with Mississippi law, the Trial Court enforced the policy as written and found that Chevis had no coverage for wind related damages.

Farm Bureau does not dispute that the term "windstorm" is not defined in the Farm Bureau Policy, and the exclusion endorsement attached thereto. However, the Trial Court did not err in relying on legal precedent to aid in its interpretation of the term "windstorm" as it appears in the Farm Bureau Policy. The Trial Court utilized all tools at its disposal to ensure that it properly interpreted the Farm Bureau Policy. Additionally, the Trial Court's interpretation was not improper, as when the policy is read as a whole, it is clear that the Farm Bureau Policy clearly intended to exclude "windstorm" damage as the Notice issued with the policy to Chevis clearly and unambiguously provided:

IMPORTANT NOTICE

WINDSTORM OR HAIL EXCLUSION
(ALL PROPERTY POLICIES)

> **PLEASE READ CAREFULLY.** The enclosed Windstorm or Hail Exclusion Endorsement is being added to your policy. This means your property policy through Mississippi Farm Bureau Casualty Insurance Company or Southern Farm Bureau Casualty Insurance Company will not provide windstorm or hail coverage.

C.P. 21.

Finally, Chevis in his Answers to Farm Bureau's Interrogatories, under oath, stated:

> INTERROGATORY NO. 21: Please describe in specific detail all damage to your property located at 307 Ulman Avenue, Bay St. Louis, MS 39520, and include in your description what you believe to be the source of such damage, whether wind or water or a combination of both, and why you believe that to be the source.
>
> **ANSWER:** My medical office was a total loss. **Hurricane Katrina blew out windows and blew off much of the roof.** The building just started to crumble, and had to be removed by a hazardous waste specialist.

C.P. 74-82 (emphasis by author).

Thus, after properly determining that the Windstorm or Hail Exclusion Endorsement to the Farm Bureau Policy clearly and unambiguously excludes loss or damage caused by wind, and armed with Chevis' sworn Interrogatory answers that wind damage was his sole cause of loss and the knowledge that Chevis wrote a check to the MWUA and was issued a separate policy which specifically covered his property for wind related damage, the Trial Court correctly decided that no genuine issue of material fact existed regarding Chevis' claim for wind damage against Farm Bureau and properly entered summary judgment in favor of Farm Bureau.

II.
Chevis is Bound by the Terms of Farm Bureau Business Package Policy BP907600

Chevis' assertion that representations were made to him when obtaining his insurance policy that "everything except flood" was covered is without merit. Even assuming such a representation was made, which Farm Bureau denies, the Mississippi Supreme Court stated in Cherry v. Anthony, Gibbs, and Sage, that policyholders are bound as a matter of law by the knowledge of the contents of a contract into which they entered regardless of whether or not they have actually read the contract. Cherry, 501 So.2d 416 at 419. *See also*, Stephens v. Equitable Life Assurance Society of U. S., 850 So. 2d 78, 83, ¶15 (Miss. 2003) ("[I]nsureds are bound as a matter of law by the knowledge of the contents of a contract in which they entered notwithstanding whether they actually read the contract.")

Assuming arguendo, that such a representation was made, which in fact would be a claim for misrepresentation that Chevis has never asserted, this argument is inconsequential and does not create any genuine issue of material fact as the Farm Bureau Policy and its Windstorm or Hail Exclusion Endorsement clearly and unambiguously excluded loss or damage caused by wind. Thus, any assertion in that regard must fail.

III.
Farm Bureau Business Package Policy BP907600 is a "Named Perils" Policy which Unambiguously Excludes Coverage for Wind Damage

A. Chevis improperly attached documents to his brief pursuant to M.R.A.P. 10(b)(5)

Rule 10(b)(5) of the Mississippi Rules of Appellate Procedure provides:

> (5) *Attorney's Examination and Proposed Corrections.* For fourteen (14) days after service of the clerk's notice of completion under Rule 11(d)(2), the appellant shall have the use of the record for examination. On or before the expiration of that period, appellant's counsel shall deliver or mail the record to one firm or attorney representing the appellee, and shall append to the record (i) a written statement of any proposed corrections to the record, (ii) a certificate that the attorney has carefully examined the record and that with the proposed corrections, if any, it is correct and complete, and (iii) a certificate of service. Corrections as to which counsel for all parties agree in writing shall be deemed made by stipulation. If the parties propose corrections to the record but do not agree on the corrections, the trial court clerk shall forthwith deliver the record with proposed corrections to the trial judge. The trial judge shall promptly determine which corrections, if any, are proper, enter and order under Rule 10(e), and return the record to the court reporter or the trial court clerk who shall within seven (7) days make corrections directed by the order.

M.R.A.P. 10.

Farm Bureau does not dispute the assertion of Chevis that, at least initially, the parties disagreed as to what documents were to be designated and included in the Appellate Record. However, at the time Chevis filed his Certificate of Service of the Record, the exhibits to the hearing transcript that he now attaches to his Brief were absent from the Appellate Record. It was the responsibility of Chevis to ensure that the hearing transcript exhibits were included in the Appellate Record prior to his certification. In Miller v. R.B. Wall Oil Co., the Mississippi Supreme Court served a warning to all appellate counsel that failure to comply with M.R.A.P. 10(b)(5) is at the attorney's own peril. Miller, 970 So. 2d 127, 131 (Miss. 2007). However, even if the Court considers the hearing transcript exhibits, the documents provide no genuine issue of material fact; nor do the documents provide any basis for this Court to reverse the

Trial Court's granting of summary judgment in favor of Farm Bureau.

B. Chevis' argument that "The Policy In Question Covered 'Named Storms' and Applied to Hurricane Katrina" fails as a matter of law

Chevis is correct that his Farm Bureau Policy is a "named perils" policy; however, he fails to acknowledge, nor is he capable of satisfying his burden of proof that his claim for wind damage is covered under the Farm Bureau Policy.

A "named perils" policy only provides coverage "for the specific risks enumerated in the policy and excludes all other risks." Lee R. Russ & Thomas F. Segalla, 7 Couch on Insurance § 101:7 (3d ed. 2007). Under "named perils" coverage, the insured has the burden of proof "to prove that the damages sustained were covered by the peril insured against . . . ." Corban v. United Servs. Auto. Ass'n, 20 So. 3d 601, 619 (Miss. 2009) (quoting Lunday v. Lititz Mut. Ins. Co., 276 So. 2d 696, 699 (Miss. 1973); *See also* Appleman on Insurance § 192.09 (2009) (under "named peril" coverage, "the insured has the burden of proving that any losses were caused by a peril covered by the policy -- indemnity is not available unless the loss falls under one of the specifically enumerated coverages.")

As noted herein, Chevis seeks indemnification for wind damage resulting from Hurricane Katrina. However, the Farm Bureau Policy and its Windstorm or Hail Exclusion Endorsement clearly and unambiguously excluded loss or damage caused by wind. In turn, Chevis is incapable of satisfying his burden of proof that wind damage was a peril covered under his Farm Bureau Policy. As such, this Court should affirm the summary judgment in favor of Farm Bureau.

C. Chevis' argument that "Mississippi Farm Bureau Sold and Brokered their 'Business Package of Insurance' and is Liable for All Coverages Therein" fails as a matter of law

Farm Bureau does not dispute that the Farm Bureau Policy, with its exclusion endorsement, is in fact a "business package" policy of insurance. The term "business package" only refers to the coverage provided under the policy, which speaks for itself, and the policy clearly and unambiguously excluded loss or damage caused by wind. As noted supra, Chevis is bound by the terms of his insurance policy, whether or not he read the policy, and the terms of the Farm Bureau Policy are clear as to the coverage provided.

Chevis asserts in his Brief that "all of the coverage Dr. Chevis bought to cover his office were bought through the Farm Bureau office in Hancock County, from Farm Bureau agents Keath Ladner and Theodore Bilbo." Brief of Appellant at pg. 13. Farm Bureau does not dispute that Farm Bureau agents obtained for Chevis Farm Bureau Business Package Policy BP907600, submitted the MWUA application for Chevis, and accepted the initial premium payments for each policy. However, Chevis turns a blind eye to the terms of his Farm Bureau Policy which clearly excludes wind damage, and fails to acknowledge that his checks written on February 8, 2005, for his MWUA policy were made payable to "MWUA;" not Farm Bureau. C.P. 14; 16. Thus, Chevis was fully aware that all coverage was not provided by Farm Bureau, but rather Farm Bureau was providing specified coverage pursuant to Business Package Policy BP907600 and that the MWUA was providing wind-and-hail coverage through Policy CPF 0795057.

In further support of this argument, Chevis cites two cases: (1) Miller v. R.B. Wall Oil Co., 970 So. 2d 127 (Miss. 2007) and (2) Fonte v. Audubon Ins. Co., 8 So. 3d 161

(Miss. 2009). It warrants noting Chevis merely provides the citation to both cases and makes no attempt to state the rule of law provided by either case, nor applies the law or facts of either case to the present matter. Both cases simply provide the standard for determining whether or not an agency relationship exists; however, neither case provides any guidance regarding the Trial Court's entry of summary judgment in favor of Farm Bureau.

The case of Miller v. R.B. Wall Oil Co., arose from a slip-and-fall incident at a truck stop. Miller, 970 So. 2d at 129. The injured party filed suit against the operator/lessee of the truck stop, the corporation/lessor of the truck stop, and the distributor of gasoline products. The Court of Appeals affirmed summary judgment in favor of the distributor. On appeal this Court reversed and found genuine issues of material fact as to whether or not an agency relationship existed and regarding notice of the alleged dangerous condition. Id. at 131-32. No factual similarity exists between Miller and the present matter, nor is Miller authority for the present matter as there is no proof of any agency relationship between Farm Bureau and any co-defendant.

In Fonte v. Audubon Ins. Co., the plaintiffs/homeowners filed suit against Audubon Insurance Company, the MWUA, State Farm Fire and Cas. Co., and State Farm's agent to recover insurance proceeds for Hurricane Katrina damage. Fonte, 8 So. 3d at 163-64. At the time of Hurricane Katrina, the homeowners had a federal flood policy, a wind-and-hail policy through the MWUA, and a homeowner's policy through State Farm. Id. at 163. From March 2005 through 2007, Audubon entered into a Servicing Insurer Agreement with the MWUA wherein Audubon agreed to provide services for MWUA policies, including issuing policies on behalf of MWUA, adjusting

claims, and providing full-claim supervision. Audubon, in turn, contracted with an adjustment firm to assist in the adjusting process. Following the storm, plaintiffs were paid the limits of their federal flood policy. Id. at 164. MWUA paid partial limits prior to plaintiffs filing suit, and then tendered the remaining policy limits after suit was filed. In turn, plaintiffs dismissed all claims against MWUA and Audubon for recovery of insurance proceeds but did not dismiss their claim against Audubon for negligent and arbitrary adjusting tactics. Id.

Audubon filed a motion for summary judgment and denied liability for it's adjustment of the plaintiffs' wind claim because it was acting as an agent of a disclosed principal and immune from claims of negligent claims handling or breach of contract, and asserted that it's conduct did not rise to the level of an independent tort. Plaintiffs moved for summary judgment alleging that Audubon and MWUA were co-principals based on Audubon's contractual assumption of MWUA obligations regarding the wind-and-hail policy, making Audubon susceptible to a simple negligence claim, and that Audubon had absolute control over the scope and methodology of the independent adjustor's investigation, which was grossly negligent and designed to provide arbitrary results. The trial court granted Audubon's motion for summary judgment. On appeal, this Court ran through the required factors to determine whether or not an agency relationship between Audubon and MWUA. Id. at 165-66. This Court found that, through the Servicing Insurer Agreement with the MWUA, Audubon was "given a great deal of autonomy in performing its duties," creating a fact question for the jury and thus, reversed summary judgment in favor of Audubon. Id. at 166.

At the outset, it bears noting that the Fonte opinion is silent as to the fate of

State Farm, who essentially was in the same position of Farm Bureau in the present matter. Nevertheless, the Fonte opinion does not provide precedent for this matter regarding the Trial Court's entry of summary judgment in favor of Farm Bureau. In the present matter, Farm Bureau never entered into any type of Servicing Insurer Agreement with the MWUA or Audubon. At no time was Farm Bureau responsible for adjusting MWUA claims, or providing any claim supervision regarding the MWUA claims; rather, just as in Fonte, Audubon is charged with performing such services for the MWUA in the present matter. In fact, Audubon and MWUA are remaining co-defendants in the underlying matter. Chevis has been compensated by MWUA for his wind claim and he continues to pursue that claim. Fonte provides no precedential authority for the present matter as to the claims against Farm Bureau and suggests no genuine issue of material fact requiring reversal of the summary judgment in favor of Farm Bureau.

IV.
The Trial Court Properly Determined No Genuine Issue of Material Fact Existed and that Summary Judgment was Proper

Regarding the Windstorm or Hail Exclusion Endorsement to the Farm Bureau policy at issue, Chevis vaguely asserts in his Brief that:

> ... Farm Bureau states that a covered loss that would not have occurred but for the excluded hazard is itself covered. The example is windstorm or hail that damages a heating system causing a fire. Here, Plaintiff alleged later negligence that would not have damaged the property but for storm damage.

Brief of Appellant at pg. 15.

At no point in time has Chevis alleged or provided any evidence that Farm

Bureau acted negligently. The only allegations in his Complaint regarding negligence are contained in Count II, which is directed to Defendant, AIG Claim Services, Inc. C.P. 11. In response to Interrogatories requesting details as to all damage to his property, Chevis stated under oath that "Hurricane Katrina blew out windows and blew off much of the roof." C.P. 74-82. Therefore, this argument on page 15 of his Brief is without merit.

Finally, Chevis attempts to couch his "negligence" argument on Corban v. United Servs. Auto. Ass'n, 20 So. 3d 601, 619 (Miss. 2009). However, as this Court is well aware, in Corban the Court interpreted and addressed the applicability of the Anticoncurrent Causation Clause in light of a homeowner's policy claim regarding loss resulting from water and/or wind because of Hurricane Katrina. In Corban, the Court stated that:

> The ACC clause applies only if and when covered and excluded perils contemporaneously converge, operating in conjunction, to cause damage resulting in loss to the insured property. If the insured property is separately damaged by a covered or excluded peril, the ACC clause is inapplicable. If damage is caused by a covered peril, the insured is entitled to indemnification for the covered loss, as the insured's right to recover for the loss has vested.

Id. at 616. In the present matter, Chevis has provided sworn Interrogatory answers that his property was only damaged by wind, and as such, Corban is inapplicable to the present matter. Therefore, this argument must also fail.

V.
Farm Bureau and the Trial Court Co-Defendants are Not Jointly and Severally Liable to Chevis for his Losses

Chevis' argument that the "Defendants are Jointly and Severally Liable to

Plaintiff for his Losses" are procedurally barred by M.R.A.P. 28(a)(6). Rule 28(a)(6) provides "*Argument.* The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons for those contentions, with citations to authorities, statutes and parts of the record relied on." Furthermore, the Mississippi Court of Appeals has held that the "[f]ailure to comply with M.R.A.P. 28(a)(6) renders an argument procedurally barred." Sorey v. Crosby, 989 So. 2d 485, 487 (Miss. Ct. App. 2008) (quoting Birrages v. Ill. Cent. R.R., 950 So. 2d 188, 194 (Miss. Ct. App. 2006)).

In his Brief, Chevis fails to provide **any** authority for his argument that Farm Bureau and the co-defendants are jointly and severally liable him for his losses, and as such, this argument must fail.

Even if Chevis would had provided authority for his joint and several liability argument, the argument would fail as joint and several liability is inapplicable to his claim of breach of contract against Farm Bureau. The application of the concept of joint and several liability is controlled by Miss. Code Ann. § 85-5-7. The joint and several liability apportionment provision of Miss. Code Ann. § 85-5-7 does not apply to a breach of contract; rather, the statute **only** applies to damages incurred due to negligence. Cooper Indus., Inc. v. Tarmac Roofing Sys., 276 F.3d 704 (5th Cir. 2002) (emphasis by author).

As noted supra, the only claims of negligence alleged by Chevis in his Complaint are asserted against AIG Claim Services, Inc. C.P. 11. Thus, the assertion of joint and several liability is not applicable to the claim of breach of contract against Farm Bureau, and as such, this argument must fail.

CONCLUSION

Dr. Bertin C. Chevis requests this Court to reverse the Circuit Court's entry of summary judgment in favor of Farm Bureau; however, he has failed to provide any evidence of a genuine issue of material of fact requiring reversal.

On August 29, 2005, when Hurricane Katrina struck the Mississippi Gulf Coast, Chevis maintained two separate policies with two different insurers: (1) Farm Bureau Business Package Policy BP907600, which contained a windstorm and/or hail exclusion endorsement and excluded flood damage, and (2) Mississippi Windstorm Underwriting Association Policy CPF 0795057 to cover damages caused by the wind and/or hailstorm. It is clear that following Hurricane Katrina, Chevis sought indemnification from both Farm Bureau and the MWUA for losses resulting from Hurricane Katrina.

Based on Answers to Farm Bureau's Interrogatories, wind was the sole cause of Chevis' damages. Farm Bureau Business Package Policy BP907600, with its Windstorm or Hail Exclusion Endorsement (CAP-39), issued to Chevis clearly and unambiguously excluded coverage for loss or damage caused by wind. Chevis simply had no coverage under his Farm Bureau Policy for his wind loss/damage, and thus, the Trial Court properly granted Farm Bureau's Motion for Summary Judgment.

Mississippi law charges Chevis with knowledge of his Farm Bureau Policy, whether or not he read the policy, and the Farm Bureau Policy unambiguously provided that Farm Bureau would not cover loss or damage cause by wind. The policy issued by the MWUA to Chevis did cover him for wind damage and he is currently pursuing his claims under the MWUA policy.

The Farm Bureau Policy is a "named perils" policy and in order for Chevis to survive summary judgment, he must meet his burden of proving a loss covered by his policy. Chevis only provided evidence that his property was damaged solely by wind. There is no evidence of coverage for wind damage under the Farm Bureau Policy, which unambiguously excludes coverage for loss or damage caused by wind.

The argument that Farm Bureau and the co-defendants in the underlying matter are jointly and severally liable for the claimed losses is both procedurally and substantively deficient, and as such, this argument must fail.

Based on the foregoing, no genuine issue of material fact exists warranting reversal of summary judgment in favor of Farm Bureau. There was simply no coverage for the losses for which Chevis seeks indemnification from Farm Bureau. Therefore, for the reasons provided herein, Farm Bureau respectfully requests that this Court affirm the summary judgment in favor of Farm Bureau.

DATED: April 29, 2011.

Respectfully submitted,

BRYAN, NELSON, SCHROEDER,
CASTIGLIOLA & BANAHAN, PLLC
Attorneys for Appellee

BY: _____
JOHN A. BANAHAN
RYAN A. FREDERIC

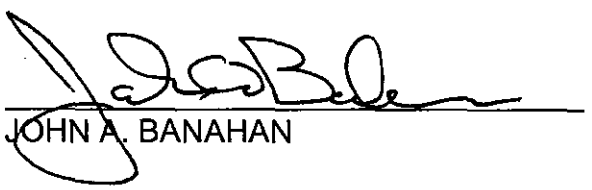
CERTIFICATE OF SERVICE

I, JOHN A. BANAHAN, one of the attorneys for the Appellee, **MISSISSIPPI FARM BUREAU MUTUAL INSURANCE COMPANY**, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the foregoing Appellee's Brief to:

John F. Ketcherside, Esq.
14 Braewood Cove
P.O. Box 10574
Jackson, TN 38305

Hon. John C. Gargiulo
Hancock County Circuit Court Judge
P.O. Box 1461
Gulfport, MS 39502

DATED: April 29, 2011.



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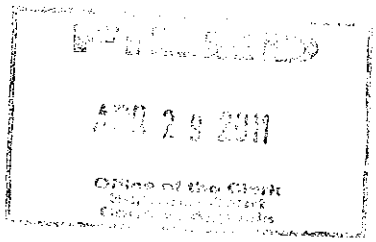
IN THE SUPREME COURT OF MISSISSIPPI

DR. BERTIN C. CHEVIS — APPELLANT

VS — CASE NO.: 2010-CA-00861

MISSISSIPPI FARM BUREAU MUTUAL INSURANCE COMPANY — DEFENDANTS



ADDENDUM TO APPELLEE'S BRIEF

ORAL ARGUMENT REQUESTED

APPEALED FROM:

THE CIRCUIT COURT OF HANCOCK COUNTY, MISSISSIPPI
(Cause No.: 08-0514)

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MISSISSIPPI CODE of 1972 ANNOTATED

*** Current through the 2010 2nd Extraordinary Session ***
*** State Court Annotations current through July 1, 2010 ***

TITLE 85. DEBTOR-CREDITOR RELATIONSHIP
CHAPTER 5. JOINT AND SEVERAL DEBTORS

GO TO MISSISSIPPI STATUTES ARCHIVE DIRECTORY

Miss. Code Ann. § 85-5-7 (2010)

§ 85-5-7. Limitation of joint and several liability for damages caused by two or more persons; contribution between joint tortfeasors; determination of percentage of fault; liability of medical defendants for economic and noneconomic damages

(1) As used in this section, "fault" means an act or omission of a person which is a proximate cause of injury or death to another person or persons, damages to property, tangible or intangible, or economic injury, including, but not limited to, negligence, malpractice, strict liability, absolute liability or failure to warn. "Fault" shall not include any tort which results from an act or omission committed with a specific wrongful intent.

(2) Except as otherwise provided in subsection (4) of this section, in any civil action based on fault, the liability for damages caused by two (2) or more persons shall be several only, and not joint and several and a joint tort-feasor shall be liable only for the amount of damages allocated to him in direct proportion to his percentage of fault. In assessing percentages of fault an employer and the employer's employee or a principal and the principal's agent shall be considered as one (1) defendant when the liability of such employer or principal has been caused by the wrongful or negligent act or omission of the employee or agent.

(3) Nothing in this section shall eliminate or diminish any defenses or immunities which currently exist, except as expressly noted herein.

(4) Joint and several liability shall be imposed on all who consciously and deliberately pursue a common plan or design to commit a tortious act, or actively take part in it. Any person held jointly and severally liable under this section shall have a right of contribution from his fellow defendants acting in concert.

(5) In actions involving joint tort-feasors, the trier of fact shall determine the percentage of fault for each party alleged to be at fault without regard to whether the joint tort-feasor is immune from damages. Fault allocated under this subsection to an immune tort-feasor or a tort-feasor whose liability is limited by law shall not be reallocated to any other tort-feasor.

(6) Nothing in this section shall be construed to create a cause of action. Nothing in this section shall be construed, in any way, to alter the immunity of any person.

HISTORY: SOURCES: Laws, 1989, ch. 311, § 1; Laws, 2002, 3rd Ex Sess, ch. 2, § 4; Laws, 2002, 3rd Ex Sess, ch. 4, § 3; Laws, 2004, 1st Ex Sess, ch. 1, § 6, eff from and after September 1, 2004, and applicable to all causes of action filed on or after September 1, 2004.

NOTES: EDITOR'S NOTE. --Section 7 of ch. 311, Laws, 1989, effective from and after July 1, 1989, provides as follows:

"SECTION 7. The provisions of this act shall apply only to causes of action accruing on or after July 1, 1989."

AMENDMENT NOTES. --The first 2002 amendment, 3rd Ex Sess ch. 2, effective January 1, 2003, substituted "in subsections (6) and (8) of this section" for "in subsection (6) of this section" in (2); added present (8) and redesignated former (8), as present (9).

The second 2002 amendment, 3rd Ex Sess ch. 4, effective January 1, 2003, substituted "subsections (2), (6) and (8)" for "subsections (2) and (6)" in the first sentence of (3); and substituted "in any action involving joint tort-feasor" for "in any action against a licensed physician, psychologist, osteopath, dentist, nurse, nurse practitioner, physician assistant, pharmacist, podiatrist, optometrist, chiropractor, hospital, institution for the aged or infirm, or licensed pharmacy, including any legal entity which may be liable for their acts or omissions, for malpractice, negligence, error, omission, mistake or the unauthorized rendering of professional services which involve joint tort-feasors" in (8).

The 2004 amendment, 1st Ex Sess, ch. 1, deleted former (2), (4), and (8), and renumbered the remaining subsections accordingly; in (2), substituted "subsection (4) of this section" for "subsections (2), (6) and (8) of this section"; and rewrote (5).

JUDICIAL DECISIONS

I. Under § 85-5-7

1. In general

1.5. Burden of proof

2. Instructions to jury

3. Parties

5. [Reserved for future use]

4. Joint and several damages.

5. Miscellaneous.

II. Under former § 85-5-5

6. In general

8. Right to indemnification

9. Miscellaneous

I. UNDER § 85-5-7.

Trial court properly applied a credit against judgment for amount received in settlement from entities not party to the

MISSISSIPPI RULES OF APPELLATE PROCEDURE
APPLICABILITY OF RULES

M.R.A.P. Rule 10 (2011)

Review Court Orders which may amend this Rule

Rule 10. Content of the record on appeal.

(a) Content of the record. -- The parties shall designate the content of the record pursuant to this rule, and the record shall consist of designated papers and exhibits filed in the trial court, the transcript of proceedings, if any, and in all cases a certified copy of the docket entries prepared by the clerk of the trial court.

(b) Determining the content of the record.

(1) Designation of Record. Within seven (7) days after filing the notice of appeal, the appellant shall file with the clerk of the trial court and serve both on the court reporter or reporters and on the appellee a written designation describing those parts of the record necessary for the appeal.

(2) Inclusion of Relevant Evidence. In cases where the defendant has received the death sentence, the entire record shall be designated. In any other case, if the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.

(3) Matters Excluded Absent Designation. In any case other than a case where the defendant has received a death sentence, the record shall not include, unless specifically designated,

i. subpoenas or summonses for any witness or defendant when there is an appearance for such person:

ii. papers relating to discovery, including depositions, interrogatories, requests for admission, and all related notices, motions or orders;

iii. any motion and order of continuance or extension of time;

iv. documents concerning the organization of the grand jury or any list from which grand or petit jurors are selected;

v. pleadings subsequently replaced by amended pleadings;

vi. jury voir dire.

(4) Statement of Issues. Unless the entire record, except for those matters identified in (b)(3) of this Rule, is to be included, the appellant shall, within the seven (7) days time provided in (b)(1) of this Rule, file a statement of the issues the appellant intends to present on the appeal and shall serve on the appellee a copy of the designation and of the statement. Each issue in the statement shall be separately numbered. If the appellee deems inclusion of other parts of the proceedings to be necessary, the appellee shall, within 14 days after the service of the designation and the statement of the appellant, file with the clerk and serve on the appellant and the court reporter a designation of additional parts to be included. The clerk and reporter shall prepare the additional parts at the expense of the appellant unless the appellant obtains from the trial court an order requiring the appellee to pay the expense.

(5) Attorney's Examination and Proposed Corrections. For fourteen (14) days after service of the clerk's notice of completion under Rule 11(d)(2), the appellant shall have the use of the record for examination. On or before the expiration of that period, appellant's counsel shall deliver or mail the record to one firm or attorney representing the appellee, and shall append to the record (i) a written statement of any proposed corrections to the record, (ii) a certificate that the attorney has carefully examined the record and that with the proposed corrections, if any, it is correct and complete, and (iii) a certificate of service. Corrections as to which counsel for all parties agree in writing shall be deemed made by stipulation. If the parties propose corrections to the record but do not agree on the corrections, the trial court clerk shall forthwith deliver the record with proposed corrections to the trial judge. The trial judge shall promptly determine which corrections, if any, are proper, enter and order under Rule 10(e), and return the record to the court reporter or the trial court clerk who shall within seven (7) days make corrections directed by the order.

(c) Statement of the evidence when no report, recital, or transcript is available. -- If no stenographic report or transcript of all or part of the evidence or proceedings is available, the appellant may prepare a statement of the evidence or proceedings from the best available means, including recollection. The statement should convey a fair, accurate, and complete account of what transpired with respect to those issues that are the bases of appeal. The statement, certified by the appellant or his counsel as an accurate account of the proceedings, shall be filed with the clerk of the trial court within 60 days after filing the notice of appeal. Upon filing the statement, the appellant shall simultaneously serve notice of the filing on the appellee, accompanied by a short and plain declaration of the issues the appellant intends to present on appeal. If the appellee objects to the statement as filed, the appellee shall file objections with the clerk of the trial court within 14 days after service of the notice of the filing of the statement. Any differences regarding the statement shall be settled as set forth in subdivision (e) of this Rule.

(d) Agreed statement as the record on appeal. -- In lieu of a record on appeal designated pursuant to subdivisions (b) or (c) of this Rule, the parties may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the trial court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the issues raised by the appeal, shall be approved by the trial court and shall then be certified to the Supreme Court as the record on appeal.

(e) Correction or modification of the record. -- If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated in the record, the parties by stipulation, or the trial court, either before or after the record is transmitted to the Supreme Court

or the Court of Appeals, or either appellate court on proper motion or of its own initiative, may order that the omission or misstatement be corrected, and, if necessary, that a supplemental record be filed. Such order shall state the date by which the correction or supplemental record must be filed and shall designate the party or parties who shall pay the cost thereof. Any document submitted to either appellate court for inclusion in the record must be certified by the clerk of the trial court. All other questions as to the form and content of the record shall be presented to the appropriate appellate court.

(f) Limit on authority to add to or subtract from the record. -- Nothing in this rule shall be construed as empowering the parties or any court to add to or subtract from the record except insofar as may be necessary to convey a fair, accurate, and complete account of what transpired in the trial court with respect to those issues that are the bases of appeal.

HISTORY: Amended effective January 1, 1999; amended July 1, 1999

NOTES:
ADVISORY COMMITTEE HISTORICAL NOTE -- Effective January 1, 1995, Miss.R.App.P. 10 replaced Miss.Sup.Ct.R. 10, embracing proceedings in the Court of Appeals. 644-647 So.2d XXXVIII-XLI (West Miss.Cases 1994).

Effective July 1, 1994, the Comment to Miss.Sup.Ct.R. 10 was amended to delete references to repealed statutes and material concerning the transition from statutory procedures to Rule practice. 632-635 So.2d LI (West Miss.Cases 1994).

[Adopted August 21, 1996.]

COMMENT -- Rule 10 is based on Fed. R. App. P. 10, taking into account modifications suggested by the more recent Ala. R. App. P. 10 and Tenn. R. App. P. 24.

The purpose of the Rule is to permit and encourage parties to include in the record on appeal only those matters material to the issues on appeal. While subdivision (b) will govern most appeals, subdivisions (c) and (d) provide alternate methods of preparing the record, either when no transcript is available, or when the parties can agree on a "statement of the case" that will adequately present the issues on appeal.

Subdivision (b) eliminates the confusion that followed *City of Mound Bayou v. Roy Collins Const. Co., 457 So. 2d 337 (Miss. 1984).* That case directed court reporters to record everything transpiring at trial, including voir dire and bench and chambers conferences. It also, however, ended the jurisdictional requirement of designating the record pursuant to Miss. Code Ann. § 9-13-33(1) to (4) (Supp. 1986). In doing so, it inadvertently encouraged use of the entire record, a practice the Court then condemned in *Byrd v. F-S Prestress, Inc., 464 So. 2d 63, 69 (Miss. 1985).* This rule reinstates the express requirement that the appellant designate those parts of the record to be included on appeal. Form 2 in the Appendix of Forms is a form for designation of the record. This requirement is no longer jurisdictional, but a failure to comply with it could lead to dismissal pursuant to Rule 2(a)(2). This is consistent with federal practice.

Pursuant to subdivision (b)(3), a general designation will not be construed to include certain papers normally irrelevant to the issues on appeal. The rule thus encourages the omission of these nonessential matters. Because counsel customarily do not file trial court briefs with the clerk, briefs are not included in the (b)(3) list. Briefs do not normally belong in a record on appeal, unless necessary to show that an issue was presented to the trial court.

A designation of certain issues under subdivision (b)(4) does not preclude a party from stating other issues in its brief under Rule 28(a)(3). However, a party asserting other issues in its brief will bear responsibility for the cost of preparing any additional portions of the record subsequently designated by any other party in response to the statement of additional issues. As a result, accurate designation under (b)(4) is advisable.

Subdivision (f) clearly states that the flexible procedures of this rule are not intended to permit a party to augment the record with matters entered ex parte.

Incomplete record

Jury instruction

Motion to strike granted

Request for designation of the record denied

Statement of the case

Supplementation of the record

Transfer of record

Voluminous record

INCOMPLETE RECORD.

Record was insufficient to allow an appellate court to examine the issue of whether there was probable cause for a police officer to order a blood draw on defendant following a vehicle accident, because defendant failed to include a transcript of the evidence as required by Miss. R. App. P. 10. *Scott v. State, 24 So. 3d 1039, 2010 Miss. App. LEXIS 13 (Miss. Ct. App. 2010).*

In a case in which the trial court sentenced defendant as a habitual offender pursuant to Miss. Code Ann. § 99-19-81, defendant successfully argued on appeal that the State failed to prove that he had two prior felony offenses and had received a sentence of at least one year for each conviction. The State acknowledged that the exhibits submitted to the appellate court did not include a copy, certified or non-certified, of a 1992 felony conviction for defendant. *Williams v. State, 32 So. 3d 1222, 2009 Miss. App. LEXIS 855 (Miss. Ct. App. 2009).*

Chancery court did not err in granting a divorce on the ground of desertion even though the proceedings were not heard in open court as required by Miss. Code Ann. § 93-5-17(1); there was nothing in the record to contradict the chancellor's finding regarding the wife's grounds for divorce, and the husband, who failed to answer or appear, failed to follow Miss. R. App. P. 10(c), which might have created a record on appeal. *Luse v. Luse, 992 So. 2d 659, 2008 Miss. App. LEXIS 391 (Miss. Ct. App. 2008).*

Under the express language of Miss. R. App. P. 10(b)(3), any summonses issued in a case, and returns thereon, should have been included in the record, even absent designation, because the record was devoid of any appearance made by a father in youth court proceedings. In the *Interest of N.W., 978 So. 2d 649, 2008 Miss. LEXIS 170 (Miss. 2008).*

Grant of summary judgment in favor of the doctor in a medical malpractice action was appropriate under Miss. R. App. P. 10(b)(3)(iii) because the appellate court was unable to consider the contents of depositions taken that were not attached as exhibits to motions since they were not specifically designated as part of the record for appeal. *Hubbard v. Wansley, 954 So. 2d 951, 2007 Miss. LEXIS 233 (Miss. 2007).*

Defendant's conviction and sentence for possession of controlled dangerous substance, cocaine, in violation of

MISSISSIPPI RULES OF APPELLATE PROCEDURE
GENERAL PROVISIONS

M.R.A.P. Rule 28 (2011)

Review Court Orders which may amend this Rule

Rule 28. Briefs.

(a) Brief of the appellant. -- The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(1) Certificate of Interested Persons. This certificate shall list all persons, associations of persons, firms, partnerships, or corporations which have an interest in the outcome of the particular case.

If a large group of persons or firms can be specified by a generic description, individual listing is not necessary.

The certificate shall be in the following form:

Number and Style of Case.

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.

(Here list names of all such persons and identify their connection and interest.)

Attorney of record for

Governmental parties need not supply this certificate.

(2) Tables. -- There shall follow a table of contents, with page references, and a table of cases (alphabetically arranged), statutes, and other authorities cited, with references to the pages of the brief where they are cited.

(3) Statement of Issues. -- A statement shall identify the issues presented for review. No separate assignment of errors shall be filed. Each issue presented for review shall be separately numbered in the statement. No issue not distinctly identified shall be argued by counsel, except upon request of the court, but the court may, at its option, notice a plain error not identified or distinctly specified.

(4) Statement of the Case. -- This statement shall first indicate briefly the nature of the case, the course of the proceedings, and its disposition in the court below. There shall follow the statement of facts relevant to the issues presented for review, with appropriate references to the record.

(5) Summary of the Argument. -- The summary, suitably paragraphed, should be a succinct, but accurate and clear, condensation of the argument actually made in the body of the brief. It should not be a mere repetition of the headings under which the argument is arranged. It should seldom exceed two (2) and never five (5) pages.

(6) Argument. -- The argument shall contain the contentions of appellant with respect to the issues presented, and the reasons for those contentions, with citations to the authorities, statutes, and parts of the record relied on.

(7) Conclusion. -- There shall be a short conclusion stating the precise relief sought.

(b) Brief of the appellee. -- The brief of the appellee shall conform to the requirements of Rule 28(a) except that a statement of the issues or of the case need not be made unless the appellee is dissatisfied with the statement of the appellant.

(c) Reply brief. -- The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. No further briefs may be filed except with leave of the Court. All reply briefs shall contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes, and other authorities cited, with references to the pages of the reply brief where they are cited.

(d) References in briefs to parties. -- Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of the parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," or "plaintiff."

(e) References in briefs to the record and citations. -- All briefs shall be keyed by reference to page numbers (1) to the record excerpts filed pursuant to Rule 30 of these Rules, and (2) to the record itself.

(1) The Supreme Court and the Court of Appeals shall assign paragraph numbers to the paragraphs in all published opinions. The paragraph numbers shall begin at the first paragraph of the text of the majority opinion and shall continue sequentially throughout the majority opinion and any concurring or dissenting opinions in the order that the opinions are

arranged by the Court.

(2) All Mississippi cases shall be cited to either:

(i) the Southern Reporter and, in cases decided prior to 1967, the official Mississippi Reports (e.g., *Smith v. Jones, 699 So.2d 100 (Miss. 1997); Thompson v. Clark, 251 Miss. 555, 170 So. 2d 225 (1965));* or

(ii) for cases decided from and after July 1, 1997, the case numbers as assigned by the Clerk's Office (e.g., Smith v. Jones, 95-KA-01234-SCT (Miss. 1997)).

(3) Quotations from cases and authorities appearing in the text of the brief shall be cited in one of the following ways:

(i) preceded or followed by a reference to the book and page in the Southern Reporter and/or the Mississippi Reports where the quotation appears (e.g., *Smith v. Jones, 699 So.2d 100, 102 (Miss. 1997));* or

(ii) in cases decided from and after July 1, 1997, preceded or followed by a reference to the case number assigned by the Clerk's Office and paragraph number where the quotation appears (e.g., Smith v. Jones, 95-KA-01234-SCT (Para.1) (Miss. 1997)); or

(iii) in cases decided from and after July 1, 1997, preceded or followed by a reference to the book and paragraph number in the Southern Reporter where the quotation appears (e.g., *Smith v. Jones, 699 So.2d 100* (Para.1) (Miss. 1997)); or

(iv) in cases decided prior to July 1, 1997, preceded or followed by a reference to the case number assigned by the Clerk's Office and paragraph number where the quotation appears when the case is added to the Court's Internet web site in the new format, i.e., with paragraph numbers (e.g., Smith v. Jones, 93-CA-05678-SCT (Para.1) (Miss. 1995)); or

(v) preceded or followed by a parallel citation using both the book citation and the case number citation.

(f) Reproduction of statutes, rules, regulations, etc. -- If determination of the issues presented requires the study of statutes, rules, or regulations, etc., they shall be reproduced in the brief or in an addendum at the end and they may be supplied to the court in pamphlet form.

(g) Length of briefs. -- Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the statement with respect to oral argument, any certificates of counsel, the table of contents, tables of citations, and any addendum containing statutes, rules, or regulations.

(h) Briefs in cases involving cross-appeals. -- If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant for the purposes of this rule and Rules 30 and 31, unless the parties otherwise agree or the court otherwise orders. The brief for appellee shall contain the issues involved in the appellee's appeal as well as the answer to the brief for appellant.

(i) Briefs in cases involving multiple appellants or appellees. -- In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(j) Citation of supplemental authorities. -- When pertinent and significant authorities come to the attention of counsel after the party's brief has been filed, or after oral argument or decision, the party may promptly advise the clerk of the Supreme Court, by letter with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall, without argument, state

the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.

(k) Disrespectful language stricken. -- Any brief containing language showing disrespect or contempt for the trial court will be stricken from the files, and the appropriate appellate court will take such further action as it may deem proper.

(*l*) Other briefs. -- Any brief submitted other than those listed in Rule 28(a), (b) and (c) shall conform to Rules 28 (d), (e), (g), and (k). Any brief filed prior to the filing of the brief of the appellant shall contain a certificate of interested persons as required by Rule 28(a)(1). Any brief exceeding 10 pages in length shall contain tables of contents and authorities in compliance with Rule 28(a)(2).

(m) Filing of briefs on electronic media. -- All parties filing a brief on the merits of any case with the Clerk of the Supreme Court shall file with that brief a copy thereof in an electronically formatted medium (such as USB Flash Drive or CD-ROM), and the Clerk shall receive and file such with the papers of that case. All electronic media and electronic files stored thereon must be in an industrial standardized format with the electronic brief stored in the Adobe Portable Document Format (PDF). All electronic media shall be labeled to include the following information:

(1) the style of the case,

(2) the number of CD-ROMs, i.e., "1 of 2, 2 of 2, etc."

HISTORY: Amended December 28, 1995; December 22, 1997; amended effective May 27, 2004, to make filing of briefs on electronic disks mandatory; amended effective August 18, 2007; amended effective July 1, 2009

NOTES:

ADVISORY COMMITTEE HISTORICAL NOTE -- Effective December 11, 1997, Rule 28 was amended to delete various requirements regarding the form of citations. 702-705 So. 2d XLI-XLIII (West. Miss. Cases 1997).

Effective December 11, 1997, Rule 28 was amended to delete various requirements regarding the form of citations. 702-705 So. 2d XLI-XLIII (West. Miss. Cases 1997).

Effective December 28, 1995, Rule 28(m) and a new final paragraph to the Comment were added to encourage the filing of disk copies of briefs. 663-667 So.2d XXVII (West Miss.Cases 1995).

[Adopted April 17, 1997]

Effective January 1, 1995, Miss.R.App.P. 28 replaced Miss.Sup.Ct.R. 28, embracing proceedings in the Court of Appeals. 644-647 So.2d LXIV-LXVII (West Miss.Cases 1994).

Effective July 1, 1994, the Comment to Miss.Sup.Ct.R. 28 was amended to delete material concerning the transition from statutory procedures to Rule practice. 632-635 So.2d LII (West Miss.Cases 1994).

[Adopted August 21, 1996; amended effective July 1, 1997; amended March 31, 1999.]

COMMENT -- Rule 28 is based upon Fed. R. App. P. 28 and 5th Cir. R. 28.2.1, 28.2.2. If a party states issues under Rule 28(a)(3) not included in a statement required by Rule 10(b)(4), that party will bear responsibility for the cost of preparing any additional portions of the record subsequently designated by any other party in response to the statement of additional issues.

In cross-appeals, the response of the appellant to the cross-appeal is to be combined with the appellant's reply. The combined brief is treated as a principal brief under Rule 28(g) which governs page lengths.

Rule 28(e) requires parallel citations prior to 1967 because the Southern Reporter is the official reporter only for

decisions published since 1966. Any party filing a brief citing an unreported decision from another court should also file a copy of the decision with the clerk of the Supreme Court.

Rule 28(e) adopts a citation standard which is in the public domain. The new citation standard is both vendor neutral and media neutral. A vendor neutral citation is one which does not contain vendor-specific information, and a media neutral citation is one which is not tied to a particular format. The citation *Smith v. Jones, 699 So.2d 100 (Miss. 1997),* for example, is neither vendor neutral nor media neutral. However, the citation Smith v. Jones, 95-KA-01234-SCT (Miss. 1997) is both vendor neutral and media neutral. The basis for the adoption of a new citation standard is to allow citation of cases which appear in electronic format in addition to citation of cases which appear in print.

An original Rule 28(j) letter should be submitted with three copies. Rule 28(l) governs briefs other than briefs on the merits controlled by Rules 28(a), (b), and (c).

The provisions of Rule 28(m) apply only to briefs on the merits of an appeal and not to memoranda and briefs filed in support of or in opposition to motions and petitions seeking less than relief on the merits of appeals.

[Amended December 28, 1995; December 22, 1997; amended effective May 27, 2004; amended effective July 1, 2009.]

Argument

Failure to cite authority

Failure to preserve error

Indigent defendant

Insufficient record

Plain error

Statement of issues

Supplemental filings

ARGUMENT.

Defendant's murder conviction and life sentence were appropriate because his appellate counsel filed a Lindsey brief and met the requirements of Miss. R. App. P. 28(a)(1)-(4), (7) and defendant made no effort to file an appellate brief with the court. Having reviewed the record, the appellate court agreed with defendant's counsel that there were no arguable issues for appeal. *McBride v. State, 44 So. 3d 368, 2010 Miss. App. LEXIS 20 (Miss. Ct. App. 2010),* writ of certiorari denied by *2010 Miss. LEXIS 502* (Miss. Sept. 23, 2010).

In an eminent domain case, a property owner cited many instances in which she believed the trial court erred, but the owner never asked for any specific relief regarding the errors the trial court may have committed; since no specific argument was made stating what relief the owner sought, the owner's cross-appeal was procedurally barred. *Gulf South Pipeline Co., LP v. Pitre, 35 So. 3d 519, 2009 Miss. App. LEXIS 127 (Miss. Ct. App. 2009),* reversed by, remanded by *35 So. 3d 494, 2010 Miss. LEXIS 199 (Miss. 2010).*

1 of 1 DOCUMENT

*** Court Rules current through February 1, 2011 ***
*** Mississippi Supreme Court and the Court of Appeals with ***
*** decision dates up to July 1, 2010 and decisions of the ***
*** appropriate Federal Courts with decision dates up to May 27, 2010 ***

MISSISSIPPI RULES OF CIVIL PROCEDURE
CHAPTER VII. JUDGMENT

M.R.C.P. Rule 56 (2011)

Review Court Orders which may amend this Rule

Rule 56. Summary judgment.

(a) For claimant. -- A party seeking to recover upon a claim, counter-claim, or cross-claim, or to obtain a declaratory judgment may, at any time after the expiration of thirty days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For defending party. -- A party against whom a claim, counter-claim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and proceedings thereon. -- The motion shall be served at least ten days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith 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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion. -- If on motion under this rule judgment is not rendered on the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the

trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required. -- Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When affidavits are unavailable. -- Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

(g) Affidavits made in bad faith. -- Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) Costs to prevailing party when summary judgment denied. -- If summary judgment is denied the court shall award to the prevailing party the reasonable expenses incurred in attending the hearing of the motion and may, if it finds that the motion is without reasonable cause, award attorneys' fees.

NOTES:

COMMENT -- The purpose of Rule 56 is to expedite the determination of actions on their merits and eliminate unmeritorious claims or defenses without the necessity of a full trial.

Rule 56 permits any party to a civil action to move for a summary judgment on a claim, counter-claim, or cross-claim when he believes that there is no genuine issue of material fact and that he is entitled to prevail as a matter of law. The motion may be directed toward all or part of a claim or defense and it may be made on the basis of the pleadings or other portions of the record, or it may be supported by affidavits and other outside material. Thus, the motion for a summary judgment challenges the very existence or legal sufficiency of the claim or defense to which it is addressed; in effect, the moving party takes the position that he is entitled to prevail as a matter of law because his opponent has no valid claim for relief or defense to the action, as the case may be.

Rule 56 provides the means by which a party may pierce the allegations in the pleadings and obtain relief by introducing outside evidence showing that there are no fact issues that need to be tried. The rule should operate to prevent the system of extremely simple pleadings from shielding claimants without real claims or defendants without real defenses; in addition to providing an effective means of summary action in clear cases, it serves as an instrument of discovery in calling forth quickly the disclosure on the merits of either a claim or defense on pain of loss of the case for failure to do so. In this connection the rule may be utilized to separate formal from substantial issues, eliminate improper assertions, determine what, if any, issues of fact are present for the jury to determine, and make it possible for the court to render a judgment on the law when no disputed facts are found to exist.

A motion for summary judgment lies only when there is no genuine issue of material fact; summary judgment is not a substitute for the trial of disputed fact issues. Accordingly, the court cannot try issues of fact on a Rule 56 motion; it may only determine whether there are issues to be tried. Given this function, the court examines the affidavits or other

evidence introduced on a Rule 56 motion simply to determine whether a triable issue exists, rather than for the purpose of resolving that issue. Similarly, although the summary judgment procedure is well adapted to expose sham claims and defenses, it cannot be used to deprive a litigant of a full trial of genuine fact issues.

Rule 56 is not a dilatory or technical procedure; it affects the substantive rights of litigants. A summary judgment motion goes to the merits of the case and, because it does not simply raise a matter in abatement, a granted motion operates to merge or bar the cause of action for purposes of res judicata. A litigant cannot amend as a matter of right under Rule 15(a) after a summary judgment has been rendered against him.

It is important to distinguish the motion for summary judgment under Rule 56 from the motion to dismiss under Rule 12(b), the motion for a judgment on the pleadings under Rule 12(c), or motion for a directed verdict permitted by Rule 50.

A motion under Rule 12(b) usually raises a matter of abatement and a dismissal for any of the reasons listed in that rule will not prevent the claim from being reasserted once the defect is remedied. Thus a motion to dismiss for lack of subject matter or personal jurisdiction, improper venue, insufficiency of process or service of process, or failure to join a party under Rule 19, only contemplates dismissal of that proceeding and is not a judgment on the merits for either party. Similarly, although a motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted is addressed to the claim itself, the movant merely is asserting that the pleading to which the motion is directed does not sufficiently state a claim for relief; unless the motion is converted into one for summary judgment as permitted by the last sentence of Rule 12(b), it does not challenge the actual existence of a meritorious claim.

A motion for judgment on the pleadings, Rule 12(c), is an assertion that the moving party is entitled to a judgment on the face of all the pleadings; consideration of the motion only entails an examination of the sufficiency of the pleadings.

In contrast, a summary judgment motion is based on the pleadings and any affidavits, depositions, and other forms of evidence relative to the merits of the challenged claim or defense that are available at the time the motion is made. The movant under Rule 56 is asserting that on the basis of the record as it then exists, there is no genuine issue as to any material fact and that he is entitled to a judgment on the merits as a matter of law. The directed verdict motion, which rests on the same theory as a Rule 56 motion, is made either after plaintiff has presented his evidence at trial or after both parties have completed their evidence; it claims that there is no question of fact worthy of being sent to the jury and that the moving party is entitled, as a matter of law, to have a judgment on the merits entered in his favor.

A Rule 12(c) motion can be made only after the pleadings are closed, whereas a Rule 56 motion always may be made by defendant before answering and under certain circumstances may be made by plaintiff before the responsive pleading is interposed. Second, a motion for judgment on the pleadings is restricted to the content of the pleading, so that simply by denying one or more of the factual allegations in the complaint or interposing an affirmative defense, defendant may prevent a judgment from being entered under Rule 12(c), since a genuine issue will appear to exist and the case cannot be resolved as a matter of law on the pleadings.

Subsections (b) and (h) are intended to deter abuses of the summary judgment practice. Thus, the trial court may impose sanctions for improper use of summary judgment and shall, in all cases, award expenses to the party who successfully defends against a motion for summary judgment.

For detailed discussions of Federal Rule 56, after which MRCP 56 is patterned, *See* 10 Wright & Miller, *Federal Practice and Procedure*, Civil §§ 2711-2742 (1973); 6 Moore's Federal Practice Para.Para. 56.01-.26 (1970); C. Wright, Federal Courts § 99 (3d ed. 1976); *See* also *Comment, Procedural Reform in Mississippi: A Current Analysis, 47 Miss.L.J. 33, 63 (1976).*