IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
Case No. 2010-CA-01431

FREDDIE L. KNOX, *et al.* — APPELLANTS

V.

GEORGE MAHALITC — APPELLEE

On Appeal from the Circuit Court of
Washington County, Mississippi; Cause No. 2008-0055-CI

PRINCIPAL BRIEF OF APPELLEE, GEORGE MAHALITC
(ORAL ARGUMENT NOT REQUESTED)

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CERTIFICATE OF INTERESTED PERSONS

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

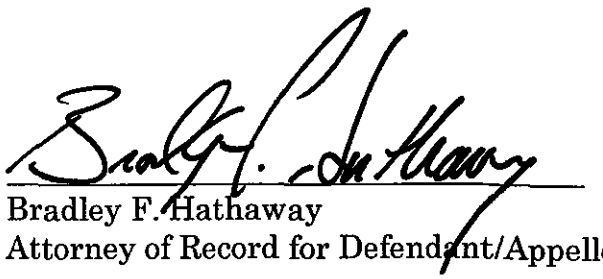
A. PARTIES:

Plaintiffs	Freddie L. Knox Fredrick Knox Jeremy Knox Kishun Knox Markeya Knox Natasha Knox Tyangela Knox Yolanda Knox Walter Watson
Decedents	Lakidra Ramone Knox Mary Knox Deliyah Watson
Defendants and related entities	George Mahalitc GM Farms David McCoy Russell Mahalitc Magnolia Plantation

B. ATTORNEYS:

For Plaintiffs/Appellants	Oby T. Rogers, Esq. OBY T. ROGERS, PLLC Thomas S. Moore, Esq. MOORE LAW GROUP, LLC Eddie J. Abdeen, Esq.

For Defendant/Appellee	Bradley F. Hathaway CAMPBELL DeLONG, LLP
C. TRIAL JUDGE:	Honorable Richard A. Smith



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Attorney of Record for Defendant/Appellee

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STATEMENT OF THE ISSUES

1. Whether this appeal should be dismissed for lack of appellate jurisdiction, where the order appealed from did not dispose of all parties or issues and final judgment was not certified in a definite, unmistakable manner as required by Rule 54(b) of the *Mississippi Rules of Civil Procedure.*

2. If, but only if, appellate jurisdiction exists – whether the plaintiffs' claims against the defendant are time-barred by the applicable statute of limitations where plaintiffs neither properly nor timely substituted the defendant pursuant to Rule 9(h) of the *Mississippi Rules of Civil Procedure.*

STATEMENT PERTAINING TO ORAL ARGUMENT

Because the record bears out that the order appealed from was not a final judgment under Rule 54(b), the Appellee/Defendant submits that appellate jurisdiction is lacking and this appeal should be dismissed, in which event oral argument is unnecessary.

STATEMENT OF THE CASE

A. Nature of the Case, Course of the Proceedings and Disposition in the Court Below

This appeal involves a significant threshold question of appellate jurisdiction, which must be resolved first. Since appellate jurisdiction is absent, the plaintiffs' appeal must be dismissed. Assuming appellate jurisdiction has vested, this appeal presents a secondary question of whether the plaintiffs' claims against defendant George Mahalitc (hereinafter referred to as "**GM Farms**")[1] are time-barred by Mississippi's three-year statute of limitations found in M.C.A. § 15-1-49.

This case originated with a motor vehicle collision which occurred on October 7, 2006, in Issaquena County, Mississippi, when a car being driven by Yolanda Knox rear-ended a tractor-trailer truck being driven by David McCoy. Three people died in the accident and this litigation was commenced by their death beneficiaries.

On March 4, 2008, the plaintiffs (collectively referred to as "**the Knoxes**") filed suit against David McCoy ("**McCoy**"), Russell Mahalitc d/b/a Magnolia Plantation ("**Magnolia**"), and 24 fictitious defendants. McCoy was sued as the driver of the tractor-trailer truck. Magnolia was sued as McCoy's employer and the owner of the truck. As to the 24 fictitious defendants, the Knoxes stated only generic, non-specific

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[1] The defendant in this case was sued as "George Mahalitc d/b/a GM Farms." Actually, George Mahaltic is a partner of GM Farms, a Mississippi partnership. Various iterations of this defendant's name appear in the record and were used interchangeably, such as "G. Mahaltic," "GM Farms," etc. The plaintiffs sued another defendant as "Russell Mahaltic d/b/a Magnolia Plantation." Russell Mahalitc is a partner of Magnolia Plantation, an unrelated Mississippi partnership. To promote clarity and to avoid confusion when referring to these separate defendants, these two parties will be referred to as "**GM Farms**" and "**Magnolia**," respectively, except where otherwise noted.

allegations that, pending further discovery, these defendants may exist and may have been negligent, but the Knoxes were unaware of who they were or what, if any, actionable conduct they may have committed.

On March 27, 2008, both McCoy and Magnolia responded to the suit, denying liability and specifically denying that McCoy was an employee of Magnolia. Instead, McCoy was employed by GM Farms (the Appellee), an unrelated farming entity. Through pleadings, affidavits and various forms of discovery, the Knoxes were repeatedly informed that GM Farms – not Magnolia – employed McCoy and that McCoy was acting in furtherance of GM Farms' business at the time of the accident. The trial court would later find that the Knoxes had full knowledge of these facts for nearly a year and a half before the statute of limitations ran on their action against GM Farms and that the Knoxes had even referred to GM Farms in their own filings with the court, but that they sat on their rights and elected not to include GM Farms as a defendant until it was too late.

The Knoxes pursued, instead, a particular employer-employee theory of liability against Magnolia. However, on December 9, 2008, nine months after suit was commenced, Magnolia moved for summary judgment on the Knoxes' claims. On March 27, 2009, the trial court granted Magnolia's motion, dismissing it with prejudice. Although GM Farms was expressly referred to in the trial court's order dismissing Magnolia, the Knoxes did not amend their claims to include GM Farms as a defendant, but persisted in their efforts to keep Magnolia in the suit by seeking reconsideration of the dismissal order. When that failed, the Knoxes appealed the dismissal of Magnolia. On March 29, 2011, the Mississippi Court of Appeals affirmed the trial

court's dismissal of Magnolia in *Knox v. Mahalitc* --- So.3d ----, 2011, WL 1122940 (Miss. App. 2011).

After Magnolia's dismissal, the Knoxes turned their focus on GM Farms. On October 6, 2009 – one day before the statutory limitation period expired – the Knoxes moved for leave to file an amended complaint against GM Farms.

McCoy, the only remaining defendant to the suit, opposed the motion to amend on the grounds that an amended complaint would be futile as it was time-barred. At that juncture, the trial court determined that McCoy lacked standing to assert a statute of limitations defense for the benefit of GM Farms, and the Knoxes were granted leave to file their amended complaint, with the trial court reserving for determination the question of whether the claims against GM Farms were stale.

On January 29, 2010 – more than three (3) months after the expiration of the statute of limitations – the Knoxes filed an amended complaint against GM Farms. In their amended complaint, the Knoxes re-asserted allegations of liability against McCoy, against Magnolia (even though it had already been dismissed), and against 27 fictitious defendants (whereas 24 fictitious defendants appeared in the original complaint).

GM Farms, for its part, defended against the amended complaint on the grounds that it was time-barred and moved for dismissal. Following a hearing, the trial court found GM Farms' motion to be well-taken and, on July 28, 2010, the Circuit Court of Washington County, Mississippi, entered its order dismissing the amended complaint

against GM Farms.[2] While disposing of the Knoxes' claims against GM Farms, McCoy remained (and still remains) a defendant to the case, and thus the trial court's order did not dispose of all the parties or all the issues. Furthermore, the trial court did not certify final judgment as to GM Farms pursuant to MISS. R. CIV. PROC. 54(b), rendering the order interlocutory. Despite this, the Knoxes did not petition this Court for interlocutory review and wrongly filed a notice of appeal from final judgment under M.R.A.P. 4.

B. Statement of Facts Relevant to the Issues Presented for Review

The following is a brief narrative of the accident at issue as it appears in *Knox v. Mahalitc*, WL 1122940 at (¶ 3):

> On October 7, 2006, Yolanda Knox was driving a vehicle on Highway 16 in Issaquena County, Mississippi, when she rear-ended a tractor trailer driven by David McCoy. McCoy had initiated a turn off of the highway and had almost cleared the highway at the time of the accident. From the record, it appears that Yolanda did not see the trailer until immediately before she collided with it; therefore, she was going at a high rate of speed at the time of the impact and did not have time to brake before hitting McCoy's trailer. Yolanda's mother, sister, and daughter were killed in the accident.

In addition to these facts, McCoy was hauling a John Deere farm tractor with his tractor-trailer at the time of the accident. (R.E. 2 [3]; C.P.[4] 888).

On March 4, 2008, the Knoxes filed their original complaint against the following defendants:

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[2] Another order of dismissal was also granted in favor of Magnolia on the amended complaint.

[3] The designation "R.E." is used to refer to te record excerpts.

[4] The designation "C.P." is used to refer to the clerk's papers.

(a) David McCoy – identified as the driver of the tractor-trailer involved in the accident;

(b) Russell Mahalitc d/b/a Magnolia Plantation – identified as McCoy's employer and owner of the tractor-trailer; and

(c) 24 fictitious parties – as to the fictitious parties, the complaint alleged: "[t]here may be other entities whose true names and identities are unknown to the Plaintiffs at this time who may be legally responsible for the claim(s) set forth herein who may be added by amendment by the Plaintiffs when their true names and identities are accurately ascertained by further discovery."

(R.E. 2; C.P. 1-15 and 888-898).

What follows now is a chronology of the events which occurred between March 4, 2008 (the date the Knoxes commenced suit) and October 7, 2009 (the final day of the limitations period controlling the Knoxes' claims).

On March 27, 2008, McCoy and Magnolia answered the suit and, in particular, denied that McCoy was employed by Magnolia and denied that McCoy was acting in furtherance of Magnolia's business. (C.P. 25-48).

On April 1, 2008, Magnolia responded to a series of requests for admissions propounded by the Knoxes. Through these responses, Magnolia again denied that it employed McCoy and denied that the accident arose out of any employment relationship between the two. (C.P. 683-703).

On May 15, 2008, both Magnolia and McCoy responded to interrogatories which informed the Knoxes, among other things, that McCoy was employed by GM Farms;

that the accident at issue occurred while McCoy was acting in furtherance of the business of GM Farms; that GM Farms owned the John Deere farm tractor that was being hauled; and that McCoy was operating his truck exclusively for GM Farms' business. (C.P. 705-739).

On that same date, the Defendants served the following response to a request by the Knoxes for copies of insurance policies which may be applicable to their claims:

> At the time of the October 7, 2006 accident, the driver of the 1984 Mack truck was David McCoy who was employed by GM Farms. GM Farms, at that time, had a business auto policy with One Beacon Insurance Company, bearing Policy No. OG1E65718, which speaks for itself, and a copy of which has been produced. GM Farms also had a farm liability policy of insurance with One Beacon Insurance Company, bearing Policy No. QF58169, which speaks for itself, and a copy of which has been produced.

The cover page of the produced auto policy informed the Knoxes that the policy was issued to:

> GM Farms, A PARTNERSHIP
> 384 Mahalitc Road
> Rolling Fork, MS 39159-2342

The cover page of the produced farm policy informed the Knoxes it was issued to:

> GM FARMS, A PARTNERSHIP & GEORGE MAHALITC, INDIVIDUAL
> 384 Mahalitc Road - Grace
> Rolling Fork, MS 39159

(R.E. 2; C.P. 749-751 and 889).

On May 16, 2008, after these policies had been received and reviewed by the Knoxes' attorney, he wrote defense counsel and asked, "Did GM not have an umbrella?" (R.E. 2; C.P. 752 and 889).

On December 9, 2008, McCoy and Magnolia served supplemental responses to

discovery, which included more information concerning GM Farms and again informed the Knoxes of the address for GM Farms. (R.E. 2; C.P. 753-54 and 890).

All told, GM Farms was referenced some 15 times in the Defendants' discovery responses, during which time the statutory window for suing GM Farms remained open. (C.P. 791).

The Knoxes had other intentions. Magnolia (and presumably its insurance policy) was in their sights, so they eschewed a claim against GM Farms and pursued Magnolia instead. But, when the Knoxes were unable to develop any evidence on which to hold Magnolia responsible for the accident, Magnolia moved for summary judgment, supported by affidavit testimony. (C.P. 168-69). On March 5, 2009 – with six months still remaining on the statutory limitations period – the Knoxes submitted a response in opposition to Magnolia's motion. In their response, the Knoxes directly referred to GM Farms and acknowledged that Magnolia had taken the position that McCoy was about the business of GM Farms at the time of the accident. (C.P. 760). The Knoxes persisted, nonetheless, in trying to make Magnolia a so-called "statutory-employer" of McCoy, and it was that theory which they chose over pursuing a claim against GM Farms. (R.E. 2; C.P. 760 and 890).

Magnolia ultimately prevailed on its summary judgment motion and was dismissed from the suit. (R.E. 2; C.P. 890). After the order dismissing Magnolia was entered, the Knoxes challenged it through a Rule 59(e) motion to amend, which was denied. *Id.*[5]

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[5] The Mississippi Court of Appeals later affirmed the trial court's dismissal of Magnolia.

Then, on October 6, 2009, one day before the third anniversary of the accident, the Knoxes moved for leave to file an amended complaint on the grounds that "discovery has revealed that [GM Farms] was the owner of the farm tractor being hauled on the 1984 Mack truck and trailer; was in possession of and using the 1984 Mack truck and trailer at the time of the incident described herein; and was the employer of David McCoy on the occasion of the incident made the basis of this lawsuit." (C.P. 836). The Knoxes' motion continued, the "purpose of the first amended complaint is to properly substitute GM Farms as a party who had been previously identified as a fictitious party" under Rule 9(h) of the *Mississippi Rules of Civil Procedure.* (C.P. 836 and 890).

McCoy, the sole remaining defendant to the suit, opposed the motion to amend on the grounds that the amendment would be futile since any action against GM Farms was now time-barred. (R.E. 1, C.P. 890). The Knoxes responded by arguing that the Defendants had "deliberately" given false information concerning the identity of McCoy's employer and that is why they had not joined GM Farms sooner. *Id.* At that point, the trial court held that GM Farms, not McCoy, owned the statute of limitations defense and that McCoy lacked standing to assert it. *Id.* Accordingly, the trial court permitted the filing of the amended complaint, reserving for later determination the question of whether the claims against GM Farms were time-barred. *Id.*

It was not until January 29, 2010, three months after the expiration of the statutory limitations period, that the Knoxes filed suit against GM Farms, alleging

that GM Farms was liable to them as McCoy's employer. (C.P. 585-604). Still, the Knoxes' amended complaint continued to name Magnolia as a defendant on the grounds that Magnolia was "the statutory employer of [McCoy] on the occasion of the incident made the basis of this lawsuit." *Id.* The amended complaint also contained new allegations against GM Farms; namely, that it was "the owner of the farm tractor being hauled on the 1984 Mack truck and trailer; was in possession of and using the 1984 Mack truck and trailer at the time of the accident described herein; and was the employer of [McCoy] on the occasion of the incident made the basis of this lawsuit." *Id.* The Knoxes' amended complaint also contained nine paragraphs which, for the first time, asserted allegations against GM Farms. *Id. A fortiori*, whereas the original complaint listed 24 fictitious defendants, the amended complaint listed 27 fictitious parties, thus adding instead of dropping fictitious parties. (C.P. 1-15; 585-604). In short, GM Farms did not assume the place of a previously named fictitious defendant.

When GM Farms moved to dismiss the amended complaint as being time-barred, the Knoxes accused the Defendants and their attorney of being "obstructive" in discovery by not clearly identifying McCoy's employer and where it was located as a ruse for laying "the groundwork for a statute of limitations defense." (C.P. 896). The trial court, in an 11-page opinion, found this argument to be incredible and sharply at odds with the facts. (R.E. 1, 888-898). In addition to noting that the Knoxes, prior to the running of the limitations period, had never so much as hinted at any discovery violations by the Defendants, the trial court carefully reviewed the Defendants' discovery responses and found they were neither "evasive nor incomplete" and that

they fully informed the Knoxes of all the information requested, uppermost including the name and address of GM Farms. *Id.* It also did not escape the trial court's attention that the Knoxes had identified GM Farms in its own filings while the limitations period was open, yet did nothing to bring GM Farms into the litigation until it was too late. *Id.* Additionally, the Knoxes served their amended complaint at the very address for GM Farms which they had obtained through discovery months before the statute of limitations expired, undermining their contention that they did not know where GM Farms was located. *Id.*

The Knoxes strictly relied on Rule 9(h), which governs substitution of parties, in asserting a right to sue GM Farms out of time. At the hearing on GM Farms' motion, counsel for the Knoxes stated:

> We are not seeking to add [GM Farms] as a defendant. The plaintiffs will stand or fall under Rule 9 in this Court's ruling on that issue of Rule 9. We are not adding – seeking to add [GM Farms] as a defendant in this case. So that issue can summarily be disposed of and we'll stand or fall under Rule 9(h).

(Transcript at p. 97).

In a well-reasoned opinion, the trial court reviewed Rule 9(h) and the cases interpreting it. Drawing from those sources, the trial court initially determined that the Knoxes had improperly included fictitious parties in their original complaint to "hedge their bets" against discovery later showing that there might be an entity who might have engaged in conduct which might be actionable. (R.E. 2; C.P. 895). Next, the trial court determined that the Knoxes' amended complaint changed the content and substance of the original complaint, whereas a Rule 9(h) substitution is reserved

for those instances where the only change is to substitute the defendant's true name for the fictitious name. (R.E. 2; C.P. 894). The trial court meticulously compared the amended complaint to the original, finding that the amended pleading added GM Farms without deleting any fictitious parties and, moreover, included three additional fictitious parties. (R.E. 2; C.P. 894-95). In addition to holding that the Knoxes' had failed to properly substitute under Rule 9(h), the trial court further determined that the Knoxes were armed with more than sufficient information concerning GM Farms to substitute within the statutory period but failed to exercise reasonable diligence in that regard. (R.E. 2; C.P. 896).

In the conclusion to its order dismissing GM Farms, the trial court quoted directly from GM Farms' brief, as follows:

> The Plaintiffs are attempting to amend their suit to add a new defendant, who they have known about for a year and a half, who they referred to multiple times in their own briefs with the Court and who they elected not to add as a party so that they could maintain a particular theory of liability against another Defendant. That the Plaintiffs have now decided to take a new tack is unavailing as the applicable statute of limitations bars them from bringing suit against GM Farms[.]

(R.E. 2; C.P. 897). The trial court agreed with this assessment, found the amended complaint against GM Farms to be time-barred and dismissed it, with prejudice. *Id.*

Significantly, the order of dismissal did not dispose of any of the claims against McCoy, who remains a defendant in the action pending below. (R.E. 1; C.P. 888-898). The trial court also did not certify final judgment as to GM Farms in a clear, unmistakable manner pursuant to Rule 54(b) so as to make it a final, appealable judgment. *Id.* For their part, the Knoxes, did not petition this court for interlocutory

review and instead filed a notice of appeal from final judgment. (R.E. 1; C.R. 909-910).

SUMMARY OF THE ARGUMENT

The order from which the Knoxes have taken an appeal was not an appealable judgment as it did not dispose of all parties to the case and final judgment was not certified in a definite, unmistakable manner as required by Rule 54(b) of the *Mississippi Rules of Civil Procedure.* The cases are legion which hold that, in the absence of a Rule 54(b) certification, this Court does not possess appellate jurisdiction to review the merits of an appeal, unless the Supreme Court grants permission for interlocutory review under Rule 5 of the *Mississippi Rules of Appellate Procedure.* Here, such permission was neither sought nor granted; rather, the Knoxes labored under the misapprehension that the trial court's order was a final judgment. Because this Court does not have jurisdiction over this appeal, it must be dismissed without reaching the merits of it.

As to the merits of the Knoxes' appeal, the trial court did not err in finding that the Knoxes failed to properly substitute GM Farms pursuant to Rule 9(h) of the *Mississippi Rules of Civil Procedure*, where the Knoxes improperly pled against fictitious parties and then failed to substitute GM Farms for any of the fictitiously named parties listed in the original complaint. Even had the Knoxes properly substituted GM Farms under Rule 9(h), their claims against it would still be time-barred on account of their failure to exercise reasonable diligence in timely bringing GM Farms into the suit when they had known of GM Farms for nearly a year and a half before the statute of limitations ran on their claims.

Because of the absence of appellate jurisdiction, this Court should not reach the merits of the Knoxes' appeal, but, even if appellate review is afforded, no error can be assigned to the trial court's dismissal of GM Farms.

ARGUMENT

A. Because the order appealed from did not dispose of all parties and final judgment was not certified in a definite, unmistakable manner, appellate jurisdiction is lacking.

Where a dismissal is as to some, but not all of the parties, Rule 54(b) of the *Mississippi Rules of Civil Procedure* controls. *Myatt v. Peco Foods in Miss., Inc.*, 22 So. 3d 334, (¶ 4) (Miss. App. 2009) (citing *Fairley v. George County*, 800 So. 2d 1159, (¶ 4) (Miss. 2001)). Rule 54(b) states:

> **Judgment Upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an expressed determination that there is no just reason for delay and upon an express direction for the entry of the judgment.

For a dismissal order to constitute a final, appealable judgment, this Court has invariably required a trial court to certify the order as being final in a "definite, unmistakable manner." *Miller v. Continental Mineral Processing*, 39 So. 3d 998, (¶ 8) (Miss. App. 2010) (quoting from Rule 54(b), cmt.). "A final, appealable judgment is one that 'adjudicates the merits of the controversy which settles all issues as to all the parties' and requires no further action by the lower court." *Walters v. Walters*, 956 So. 2d 1050, (¶ 8) (Miss. App. 2007). This is known as the final judgment rule and is explained by the following rationale:

> The . . . rule minimizes appellate court interference with trial court proceedings, reduces the ability of a litigant to wear down an opponent with a succession of time-consuming appeals, and enables the appellate court to view the case as a whole and avoid questions which may be mooted by the shifting fortunes of trial combat.

Id.

In the absence of a Rule 54(b) certification, an order granting dismissal of one, but not all parties, is interlocutory and not appealable unless the supreme court grants permission under MISS. R. APP. PROC. 5. See *Lloyd G. Oliphant & Sons Paint Co. v. Logan*, 12 So. 3d 614, (¶ 9) (Miss. App. 2009). Where no Rule 54(b) certification appears in the record, this Court is without jurisdiction to review the merits of an appeal. *Harris v. Walters*, 40 So. 3d 657, (¶ 11) (Miss. App. 2010); *Miller*, 39 So. 3d at (¶ 12); *Burnett v. State Farm Mutual Automobile Insurance Co.*, 30 So. 3d 1260, (¶ 18) (Miss. App. 2010). Even where no party asserts lack of the jurisdiction, this Court has recognized a duty to dismiss an appeal, on its own initiative, on account of the absence of Rule 54(b) certification. See, *e.g.*, *Harris*, 40 So. 2d at (¶ 12); *Williams v. DRMC*, 740 So. 2d 284, (¶ 5) (Miss. 1999).

Here, it is free from doubt that the trial court's order dismissing GM Farms does not "settle all issues as to all the parties"; it does not contain the requisite Rule 54(b) certification; and it is not a final, appealable judgment. Equally indisputable, the Knoxes did not petition for interlocutory review of the order under M.R.A.P. 5, but rather treated the order as a final judgment, albeit wrongfully so. The consequence is clear – this Court is not possessed of appellate jurisdiction to review the appeal and, respectfully, the Knoxes' appeal must be dismissed.

The rule of law is so unforgiving on this point that it would be improper to reach the merits of the issues assigned for appellate review. Needless to say, though, GM Farms is entitled to only one responsive brief, and so it will reply to the Knoxes' assignments of error, without waiver of its assertion that jurisdiction is lacking. To this last point, no citation is needed for the principle that jurisdiction can not be waived in any event.

B. The assertion that the trial court failed to treat GM Farms' motion to dismiss as one for summary judgment is not supported by the record.

It is bewildering for the Knoxes to claim that the trial court failed to give proper treatment to GM Farms' motion to dismiss on account of the fact that matters outside of the pleadings were considered. At the hearing on GM Farms' motion, the following colloquy took place between the trial judge and the Knoxes' counsel:

> **Mr. Abdeen**: Your Honor, the other point that I would like to raise, we didn't get any notification from the Court whether the Court intends to proceed under Rule 56 or Rule 12. Has the Court made a determination on that point yet?

(Transcript at p. 82). Following some back and forth on the issue, the trial judge stated:

> **The Court:** All right, I'm going to treat [the motion] as a Rule 56 motion because we are going to have things outside the record. I ask again, does the plaintiff wish to reset this at a later date to have the appropriate time notice under the rule of summary judgment motion?
>
> **Mr. Abdeen:** We are prepared to proceed today.
>
> **The Court:** Okay.

(Transcript at p. 88).

And so, the record establishes that the trial court determined it would treat GM

Farms' motion to dismiss as one for summary judgment; the trial court alerted the Knoxes to this fact; the trial court (repeatedly) gave the Knoxes the option of rescheduling the motion hearing in order to provide adequate notice of the court's election; and the Knoxes waived notice and said, "[w]e are prepared to proceed today."

The Knoxes' assignment of error on this issue is hollow. Not only did the Knoxes' counsel affirmatively stipulate to the trial court's procedure, there was no objection made to it, resulting in waiver. See, *e.g., Koestler v. Mississippi College*, 749 So. 2d 1122, (¶¶ 1, 13) (Miss. App. 1999) (holding, procedural defects may be waived by party's failure to object to procedure employed).

In any event, this Court's standard of review is the same regardless of the trial court's treatment of GM Farms' motion. See *Copiah County v. Oliver*, 51 So. 3d 205, (¶ 7) (Miss. 2011) (holding, standard of review for grant or denial of a motion for summary judgment or motion to dismiss is *de novo*). The standard of review is tempered, however, by the principle that "a trial judge may not be put in error on a matter which was not presented to him for decision." *Holland v. State*, 587 So. 2d 848, 868 (Miss. 1991). "This means that the matter must be presented to the trial court in such a form that the trial judge has the opportunity to consider it with full knowledge of the respective contentions of the parties." *House v. State*, 445 So. 2d 815, 819 (Miss. 1984).

C. The Knoxes' claims against GM Farms are time-barred.

The Knoxes' claims against GM Farms are governed by the three-year statute of limitations found in M.C.A. § 15-1-49(1). In *Mississippi Dept. Of Public Safety v.*

Stringer, this Court explained the purpose of having a statute of limitations, writing:

> The primary purpose of statutory time limitations is to compel the exercise of a right of action within a reasonable amount of time. These statutes are founded upon the general experience of society that valid claims will be promptly pursued and not allowed to remain neglected.

748 So. 2d 662, 665 (¶ 13) (Miss. 1999). Through this lens, GM Farms will address the Knoxes' arguments that their claims are saved from the effects of § 15-1-49(1).

The parties are in perfect agreement that the amended complaint was filed against GM Farms outside of the statute of limitations. There is also no dispute that the Knoxes' motion to amend, filed one day prior to the running of the statutory period but not ruled upon until after the period expired, did not save their suit from being time-barred. See *Wilner v. White*, 929 So. 2d 315, (¶ 4) (Miss. 2006); *Curry v. Turner*, 832 So. 2d 508, 514 (Miss. 2002). Instead, it is Rule 9(h) of the *Mississippi Rules of Civil Procedure* on which the Knoxes rely to preserve their claims.

Before the trial court, and now again on appeal, the Knoxes exclusively asserted they properly substituted GM Farms in the place of a fictitious defendant under Rule 9(h), and they affirmatively disclaimed any attempt to add GM Farms as a new party to the action. To again quote the Knoxes' counsel, "[w]e are not seeking to add [GM Farms] as a defendant. The plaintiffs will stand or fall under Rule 9 in this Court's ruling on that issue of Rule 9. We are not adding – seeking to add [GM Farms] as a defendant in this case. So that issue can summarily be disposed of and we'll stand or fall under Rule 9(h)." (Transcript at p. 97).

No doubt, this was by design since the Knoxes could not meet the requirements of Rule 15(c), which apply when a plaintiff is adding new parties. Further to that

point, the Knoxes made no mistake concerning the identity of GM Farms. In *Wilner v. White*, the Mississippi Supreme Court explained that the purpose of Rule 15(c)(2) is "to allow some leeway to a party who made a mistake, so long as the party does what is required within the time period under the rule." *Wilner*, 929 So. 2d at (¶ 9). But, as *Wilner* explains, where a plaintiff has identified a party in their own court filings (as the Knoxes did here) but does nothing to add them to the suit until it is too late (as the Knoxes did here), it cannot be said that a mistake occurred. *Id.* There was no mistake concerning GM Farms' existence or its role since nearly the inception of this suit but, until Magnolia was dismissed from the case, the Knoxes chose not to sue GM Farms. It was only after that strategy played out unfavorably for the Knoxes that they contrived an attempt to substitute GM Farms under Rule 9(h), and it is against that rule that we measure the Knoxes' untimely amended complaint.

1. The Knoxes' original complaint represents a classic example of improper pleading against fictitious parties.

Under Rule 9(h), it must first be determined whether "Fictitious Defendants A through X," who appear in the original complaint, were truly fictitious parties. This, in turn, requires scrutiny of whether GM Farms was legitimately substituted for a fictitious party listed in the original complaint.

The substance of the Knoxes' allegations against the original 24 fictitious parties reveals improper pleading in that they lodged the exact same allegation against all of the original 24 fictitious parties:

> There ***may*** be other entities whose true names and identities are unknown to the Plaintiffs at this time who ***may*** be legally responsible for the claims(s) set forth herein who ***may*** be added by amendment by the

> Plaintiffs when their true names and identities are actually ascertained by further discovery.

(C.P. 3). These non-specific allegations provided no indication that the Knoxes were aware of the existence of GM Farms when they commenced their suit. To the contrary, they alleged there "may" be other parties who "may" be responsible and the Knoxes commenced to list no less than 24 of those "parties," one after the other. This is a classic example of improper pleading against fictitious parties:

> Rule 9(h) is not intended to serve as an insurance policy to plaintiffs who wish to protect themselves in case they discover new defendants in the course of litigation. Rule 9(h) authorizes the plaintiff to deviate in only one respect from the requirements of the *Mississippi Rules of Civil Procedure* in bringing a claim. That is, the plaintiff is allowed to use a fictitious name rather than the true name of the defendant. In other words, the purpose of 9(h) is to allow a plaintiff to proceed with a lawsuit where the plaintiff knows and can articulate the wrongful conduct of, and claims against, the fictitious party but simply does not know that party's name.
>
> Rule 9(h) does not say that a plaintiff may include a fictitious party because the plaintiff suspects there ***might*** be someone out there who ***might*** have engaged in conduct which ***might*** be actionable.
>
> * * * *
>
> [W]here a plaintiff suspects there might have been others involved in the procedure who might have been negligent, but is, at the time suit is filed, unaware of who they are or what negligent act they are alleged to have committed, ***a plaintiff may not include a fictitious party in the complaint.*** This court has previously stated that "the purpose of Rule 9(h) is to provide a mechanism to bring in responsible parties ***known***, but unidentified, who can only be ascertained through the use of judicial mechanism such as discovery.

Veal v. J.P. Morgan, 955 So. 2d 843, (¶¶ 9-11) (citing *Ralph Walker, Inc. v. Gallagher*, 926 So. 2d 890, 896-97 (Miss. 2006)) (emphasis in original).

Here, the Knoxes' allegations against the 24 fictitious parties in the original

complaint amounted to nothing more than the forbidden attempt to protect themselves against the possibility that they might discover a new defendant in the course of the litigation.

The Knoxes make the feckless argument that because their original complaint sought to hold McCoy's employer liable for his actions at the time of the accident, they were not using Rule 9(h) to ensure against discovery revealing other possible defendants. Not only does the sheer number of fictitious parties listed run counter to this argument, but the Knoxes' pleadings and their subsequent course of action contradict this assertion.

First, as already noted, the wording of the Knoxes' allegations against the fictitious parties plainly indicate they were being named as a hedge against the possibility that there *may* be others who *may* bear legal responsibility and who *may* be added to the suit. Secondly, the Knoxes, as the master of their complaint, specifically sought to hold Magnolia, the owner of the truck, vicariously liable for McCoy's actions. Lest this be considered a case of mistaken identity, when Magnolia refuted this contention and sought dismissal (supported by affidavit testimony), the Knoxes did not amend their complaint to name GM Farms but vehemently resisted Magnolia's efforts, arguing that "in accordance with federal leasing regulations and case law, Magnolia is responsible for the driver, David McCoy's actions as his *statutory employer*." It was only after this proved to be a losing strategy that the Knoxes rationalized that they always meant to hold GM Farms – not Magnolia – vicariously liable for McCoy. The inconsistency between the Knoxes' current position with their

earlier position is indefensible. See *King v. Bunton,* --- So. 3d ----, 2010 WL 1077442 (Miss. 2010), *citing Banes v. Thompson,* 352 So. 2d 812, 815 (Miss. 1977), ("Judicial estoppel normally arises from the taking of a position by a party that is inconsistent with a position previously asserted.").

In sum, under the crucible of controlling law, the trial court's finding that the Knoxes improperly utilized fictitious parties in their pleadings withstands the Knoxes' assignment of error.

2. The Knoxes did not substitute GM Farms in the place of any of the fictitious parties listed in their original complaint.

Next, Rule 9(h) required that the Knoxes actually substitute GM Farms in the place of one of the original 24 fictitious parties. That was not done. The Knoxes paddle upstream against overwhelming authority by arguing that their adding of fictitious parties, without dropping any, in their amended complaint is immaterial. They reason that since their original complaint carved out a fictitious defendant for McCoy's employer or principal, that is self-proving of a proper substitution. In contrast, though, the Knoxes' amended complaint continues to name the exact same fictitious defendants – plus three more.

In their original complaint, the Knoxes identified "Defendant D" as the "entity or entities who or which was the employer of the person who was the operator of the commercial vehicle involved in the occurrence made the basis of Plaintiffs' claims"; and they identified "Defendant E" as "that entity or entities for whom David McCoy was acting as an agent, servant, or employee on the occasion of the incident made the basis of Plaintiffs' claims." (C.P. 4). However, original "Defendant D" re-appears in the

Knoxes' amended complaint as "Defendant G," while original "Defendant E" re-appears in the amended complaint as "Defendant H." (C.P. 586). No fictitious parties were deleted.

In *Doe v. Mississippi Blood Services,* this Court rejected a claim of substitution of parties where the plaintiff added new defendants "***without deleting any fictitious name that was included in the original petition.***" 704 So. 2d 1016, (¶ 10) (Miss. 1997) (emphasis added). This holding was reaffirmed in *Wilner v. White,* 925 So. 2d 315, (¶ 6) (Miss. 2006) (rejecting claim of substitution of parties where same "John Doe" defendants appeared in both original and amended complaints). Notwithstanding the Knoxes' dismissive treatment of these cases, they represent the authoritative rule of law of this state and the trial court was bound to follow them, just as it did. GM Farms took the place of no previously identified fictitious party and, whereas the original complaint listed 24 such defendants, the amended complaint listed 27.

The trial court's holding that the Knoxes failed to make a proper substitution on this account was the legally correct decision, and it is respectfully submitted that this Court should affirm the trial court's determination that the claims against GM Farms are time-barred.

3. Even if it were assumed that GM Farms was properly substituted, the Knoxes failed to exercise reasonable diligence in amending their complaint.

Even where rule 9(h) has been properly utilized for an unknown party, a reasonable diligence test must still be employed to determine whether a proper substitution has occurred in a timely manner. *Wilner,* 929 So. 2d at ¶ 7. Though the

trial court held that the Knoxes failed to properly utilize Rule 9(h) and their claims were barred on those grounds, the trial court went ahead and measured the Knoxes' amended complaint against the reasonable diligence test, finding that they had failed to act in a timely manner. For this additional reason, the Knoxes claims were determined to be time-barred.

The Knoxes take issue with this holding on two principal grounds. First, they claim that the trial court "overlooked" the fact that McCoy and Magnolia had not identified the individual partners constituting GM Farms and, therefore, the Knoxes "had no way of serving process on GM Farms." Secondly, they assert that Defendants' counsel had assured the Knoxes' counsel that the proper defendants to the case could be "worked out" between the parties.

The starting place for evaluating these contentions is the language of Rule 9(h), which provides:

> When a party is ignorant of the name of an opposing party and so alleges in his pleading, the opposing party may be designated by any name, and ***when his true name is discovered*** the process and all pleadings and proceedings in the action may be amended by substituting the true name and giving proper notice to the opposing party.

(Emphasis added.) In *Anderson v. Alps Automotive, Inc.*, 51 So. 3d 929, (¶ 13) (Miss. 2010), this Court interpreted the phrase "when his true name is discovered," to mean that "***an immediate amendment*** of the complaint is required properly and timely to substitute a true defendant for the fictitiously named defendant." (Emphasis added). Thus, when the *Anderson* plaintiff waited more than nine months after learning the true name of a defendant before attempting a substitution, this Court held that the

plaintiff had failed to exercise reasonable diligence to bring the party into the suit in a timely manner. *Id.* at ¶ 20. In keeping with *Anderson*, the trial court in this case correctly found that the Knoxes discovered GM Farms identity as McCoy's employer at least as early as May 15, 2008 – 17 months before the statutory period expired – if not earlier, yet failed to act in a timely manner.

The Knoxes retort that because they did not know the names of the individual partners constituting of GM Farms, they should be excused from timely suing GM Farms.[6] Respectfully, this is nonsensical.

The identity of the individual partners of GM Farms was disclosed during the briefing of GM Farms' motion to dismiss so as to satisfy the trial court's question of whether Russell Mahalitc, a named defendant in the original complaint, was also partner of GM Farms. GM Farms provided the trial court with the partnership agreement merely to show that Russell Mahaltic was not a partner of GM Farms.

But, before the Knoxes ever learned who the individual partners of GM Farms were, they had already alleged in their amended complaint that "GM Farms . . . was the employer of David McCoy on the occasion of the incident made the basis of this lawsuit." (C.P. 589). Likewise, before the Knoxes ever learned who the individual partners of GM Farms were, they served GM Farms with process at the very same address which they had been obtained through discovery months before the statutory period expired. Thus, the Knoxes had the correct name of McCoy's employer, they had the correct address for McCoy's employer, they recognized that Mississippi law

[6] It bears mention that the Knoxes never sought the identity of the individual partners constituting GM Farms through any discovery mechanism, including depositions.

permitted suit against GM Farms in its name, and they sued GM Farms, albeit untimely. The Knoxes' protests aside, the problem with their amended complaint was not who they did not sue. *i.e.*, the individual partners. The fundamental problem with the amended complaint against GM Farms was, quite simply, it was untimely.

This is not a case of GM Farms seeking to be dismissed because it is not who the Knoxes allege it to be or because necessary parties were not joined. If the Knoxes sincerely encountered or expected to encounter difficulties in serving their suit – which they never directly claimed – there were mechanisms available to them for obtaining more time for service. Timely *filing* suit and timely obtaining *service* are separate issues.

As the trial court found, the Defendants answered all of the Knoxes' discovery requests concerning the identity of McCoy's employer and its address in a timely and direct manner, fully equipping them with more than adequate information to file suit within the statutory period if that is what they intended to do. The trial court also rejected the Knoxes' charges against the Defendants and their attorney for lack of candor, which materialized only after the statute of limitations had run on their claim, finding them to be unjustified, incredible and unsupported by any facts. *Res ipsa indicat* ("the facts speak for themselves").

The record bears out that the Knoxes' decision on what sort of claims to bring and which parties to sue (and which not to sue) was driven by "strategic reasons" which they attributed to having "to do a little bit with insurance." (C.P. 17). It was only after this calculated strategy resulted in Magnolia being dismissed, that accusations

of sharp practices and deceptive dealings were directed at the Defendants and their attorney, such as the Knoxes' claim that they did not attempt to include GM Farms in the suit prior to the running of the statutory period because their attorney believed an agreed order could be "worked out" with opposing counsel regarding a substitution of parties. The Knoxes went from attributing their tardiness to not being told who McCoy's employer was (when, in fact they, were); to not being told where they could serve GM Farms (when, in fact, they were); to not knowing the identities of the individual partners constituting GM Farms (when, in fact, they conducted no discovery on this issue); to believing that they could "work out" an agreed order on GM Farms' substitution.

In their appellate brief, the Knoxes point to an affidavit of their attorney in support of their so-called belief that an agreed order substituting GM Farms could be "worked out" with opposing counsel. The Knoxes claim they offered this affidavit in opposition to GM Farms' motion to dismiss to demonstrate their "reasonable diligence" in substituting GM Farms and that the affidavit went uncontested. The Knoxes' contentions on this point are erroneous.

In reality, the attorney affidavit was offered in support of the Knoxes' *reply* brief in support of their *motion to amend* the complaint (C.P. 476), and thus, McCoy, who was the only defendant in the case at that time, was left to address the affidavit at the hearing held on the motion to amend. At the hearing, McCoy disputed the allegations of lack of candor as being "disappointing," "false," and "offering no excuse" to the Knoxes' calculated decision as to the parties they elected to sue. In addition, McCoy

presented evidence at that hearing which demonstrated that the attorney affidavit afforded no credible defense to the Knoxes' failure to timely sue GM Farms in the nearly year-and-a-half after discovering its identity, particularly considering that Rule 9(h) requires "immediate" substitution after learning the true name of an unknown defendant. (Transcript 56-65). Although the trial court held at that juncture that McCoy lacked standing to challenge the timeliness of the amended complaint against GM Farms, the attorney affidavit did not go undisputed.

Now, the Knoxes argue that they also offered their attorney's affidavit in opposition to GM Farms' motion to dismiss. Actually, what they claim is that they "*incorporated* the affidavit of [their attorney] in response to [GM Farms'] motion to dismiss pursuant to Rule 10(c)." However, the Knoxes response to GM Farms' motion to dismiss does not reference their attorney's affidavit a single time. A review of the Knoxes' response in opposition to GM Farms' motion to dismiss discloses only the following paragraph:

> In response to any and all of the other arguments advanced by [GM Farms] related to Rule 9(h) and/or 15(c) not specifically addressed herein, Plaintiffs incorporate by reference pursuant to M.R.C.P. 10 Plaintiff's Substitution Reply, including any and all attachments thereto.

(C.P. 777). Presumably, the Knoxes rely on this paragraph as the basis for their contention that they offered and relied on the attorney affidavit in support of their opposition to GM Farms' dismissal. As a matter of law, this is insufficient pleading by reference as it lacks the clarity and specificity required by Rule 10(c).

This Court follows the view that it is appropriate to look at federal law when interpreting the *Mississippi Rules of Civil Procedure* as they were patterned after the

Federal Rules of Civil Procedure." See *Hood ex rel. State Tobacco Litigation,* 958 So. 2d 790, n.16 (Miss. 2007); *Owens v. Thomae,* 759 So. 2d 1117, 1121, n.2 (Miss.1999); *Bourn v. Tomlinson Interest, Inc.*, 456 So. 2d 747, 749 (Miss.1984).

While Rule 10(c) permits adoption by reference in a later pleading matter contained in previous pleadings, "it must be done with a degree of clarity which enables the responding party to ascertain the nature and extent of the incorporation." 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1326 at 759 (2d ed.1990); *Wolfe v. Charter Forest Behavioral Health Systems, Inc.*, 185 F.R.D. 225, 229 (W.D. La.1999); *Heintz & Co. v. Provident Tradesmens Bank and Trust Co.*, 29 F.R.D. 144, 145 (E.D. Pa.1961) (finding that Rule 10(c) requires "a degree of clarity which enables the responding party to ascertain the nature and extent of the incorporation"); *Federal National Mortg. Ass'n. v. Cobb*, 738 F. Supp. 1220, 1227 (N.D. Ind.1990) (finding that Rule 10(c) requires a later pleading to specifically identify which portions of a prior pleading are adopted); and *Lowden v. William M. Mercer, Inc.*, 903 F. Supp. 212, 216 (D. Mass.1995) (finding Rule 10(c) requires a later pleading to specifically identify portions of a prior pleading). Where a plaintiff's adoption by reference clause merely refers to "all allegations and prayers" contained within a prior pleading, this is a defective pleading under Rule 10(c). *Wolfe,* 185 F.R.D. at 229.

Here, not only did the Knoxes not identify with clarity that they were relying on the prior affidavit of their attorney in opposition to the motion to dismiss, the word "affidavit" appears nowhere in their brief with the trial court. Their opposition brief

was almost exclusively dedicated to arguing that their amended complaint against GM Farms should not be time-barred on account of their not knowing the names of the individual partners constituting the partnership. Accordingly, the Knoxes' generic adoption of "any and all of [their other] arguments" previously made is insufficient as a matter of law to lend any credence to their assertion that the attorney affidavit went uncontested.

CONCLUSION

Foremost, this Court lacks appellate jurisdiction to consider the merits of this appeal and, accordingly, it should be dismissed.

As to the merits, the trial court was not in error in holding that the Knoxes failed to properly substitute GM Farms under Rule 9(h) of the *Mississippi Rules of Civil Procedure* and that, even had a proper substitution been made, the Knoxes failed to exercise reasonable diligence in timely amending their complaint. The resulting effect is that the Knoxes' claims against GM Farms are time-barred by the applicable statute of limitations.

It is respectfully submitted that the order of the Circuit Court of Washington County, Mississippi, dismissing the Knoxes' claims against GM Farms, with prejudice, should be affirmed.

RESPECTFULLY SUBMITTED, this, the 27th day of June, 2011.

GEORGE MAHALTIC, Appellee

By: _____

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CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on the **27th day of June, 2011**, he filed and served ***Via Federal Express*** the original and three (3) copies of the foregoing Principal Brief of Appellee Russell Mahalitc on the Clerk of Court and has served a copy of same ***Via U.S. Mail*** on the below-named Circuit Court Judge and counsel, and further certifies that all persons required to be served have been served:

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THIS, the 27th day of June, 2011.

BRADLEY F. HATHAWAY

APPENDIX

TAB

M.C.A. § 15-1-49 1

M.R.A.P. 4 2

M.R.A.P. 5 3

Miss. R. Civ. Proc. Rule 9(h) 4

Miss. R. Civ. Proc. Rule 54(b) 5

C

West's Annotated Mississippi Code Currentness

Title 15. Limitations of Actions and Prevention of Frauds
Chapter 1. Limitation of Actions (Refs & Annos)
§ 15-1-49. Actions without prescribed period of limitation; actions involving latent injury or disease

(1) All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after.

(2) In actions for which no other period of limitation is prescribed and which involve latent injury or disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury.

(3) The provisions of subsection (2) of this section shall apply to all pending and subsequently filed actions.

CREDIT(S)

Laws 1989, Ch. 311, § 3; Laws 1990, Ch. 348, § 1, eff. from and after passage (approved March 12, 1990).

Current through the 2010 Regular and 1st and 2nd Extraordinary Sessions

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C

West's Annotated Mississippi Code Currentness

Mississippi Rules of Court State
Mississippi Rules of Appellate Procedure (Refs & Annos)
Appeals from Trial Courts
→ **Rule 4. Appeal as of Right--When Taken**

(a) Appeal and Cross-Appeals in Civil and Criminal Cases. Except as provided in **Rules 4**(d) and 4(e), in a civil or criminal case in which an appeal or cross-appeal is permitted by law as of right from a trial court to the Supreme Court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. If a notice of appeal is mistakenly filed in the Supreme Court, the clerk of the Supreme Court shall note on it the date on which it was received and transmit it to the clerk of the trial court and it shall be deemed filed in the trial court on the date so noted.

(b) Notice Before Entry of Judgment. A notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day of the entry.

(c) Notice by Another Party. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires.

(d) Post-trial Motions in Civil Cases. If any party files a timely motion of a type specified immediately below the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Mississippi Rules of Civil Procedure (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional findings of facts, whether or not granting the motion would alter the judgment; (3) under Rule 59 to alter or amend the judgment; (4) under Rule 59 for a new trial; or (5) for relief under Rule 60 if the motion is filed no later than 10 days after the entry of judgment. A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding. Notwithstanding the provisions of AppellateRule 3(c), a valid notice of appeal is effective to appeal from an order disposing of any of the above motions.

(e) Post-trial Motions in Criminal Cases. If a defendant makes a timely motion under the Uniform Rules of Circuit and County Court Practice (1) for judgment of acquittal notwithstanding the verdict of the jury, or (2) for a new trial under Rule 10.05, the time for appeal for all parties shall run from the entry of the order denying such motion. Notwithstanding anything in this rule to the contrary, in criminal cases the 30 day period shall run from the date of the denial of any motion contemplated by this subparagraph, or from the date of imposition of sentence, whichever occurs later. A notice of appeal filed after the court announces a decision sentence, or order but before it disposes of any of the above motions, is ineffective until the date of the entry of the order disposing of the last such motion outstanding, or until the date of the entry of the judgment of conviction, whichever is later. Notwithstanding the provisions of Appellate Rule 3(c), a valid notice of appeal is effective to appeal from an order disposing of any of the above motions.

(f) Parties Under Disability. In the case of parties under a disability of infancy or unsoundness of mind, the various periods of time for which provision is made in this rule and within which periods of time action must be taken shall not begin to run until the date on which the disability of any such party shall have been removed. However, in cases

where the appellant infant or person of unsound mind was a plaintiff or complainant, and in cases where such a person was a party defendant and there had been appointed for him or her a guardian ad litem, appeals to the Supreme Court shall be taken in the manner prescribed in this rule within two years of the entry of the judgment or order which would cause to commence the running of the 30 day time period for all other appellants as provided in this rule.

(g) Extensions. The trial court may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time otherwise prescribed by this rule. Any such motion which is filed before expiration of the prescribed time may be granted for good cause and may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to other parties, and the motion shall be granted only upon a showing of excusable neglect. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(h) Reopening Time for Appeal. The trial court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(i) Taxpayer Appeals. If the board of supervisors of any county, or the mayor and board of aldermen of any city, town or village, or any other board, commission or other officer of any county, or municipality, or district, sued in an official capacity, fails to file a notice of appeal under **Rule** 4(a) within 20 days after the date of entry of an adverse judgment or order, or within 7 days after filing of a notice by another party pursuant to**Rule** 4(c), any taxpayer of the county, municipality or district shall have the right at the taxpayer's own expense to employ private counsel to prosecute the appeal in compliance with these rules. If the governmental entity files a notice of appeal, the appeal shall not be dismissed if any such taxpayer objects and prosecutes the appeal at the taxpayer's own expense.

CREDIT(S)

[Adopted to govern matters filed on or after January 1, 1995; amended effective July 1, 1997; July 1, 1998; July 30, 2009.]

Current with amendments received through 6/8/2011

END OF DOCUMENT

C

West's Annotated Mississippi Code Currentness

Mississippi Rules of Court State
Mississippi Rules of Appellate Procedure (Refs & Annos)
Appeals from Trial Courts
→ **Rule 5. Interlocutory Appeal by Permission**

(a) Petition for Permission to Appeal. An appeal from an interlocutory order may be sought if a substantial basis exists for a difference of opinion on a question of law as to which appellate resolution may:

(1) Materially advance the termination of the litigation and avoid exceptional expense to the parties; or

(2) Protect a party from substantial and irreparable injury; or

(3) Resolve an issue of general importance in the administration of justice.

Appeal from such an order may be sought by filing a petition for permission to appeal with the clerk of the Supreme Court within 21 days after the entry of such order in the trial court with proof of service on the trial judge and all other parties to the action in the trial court.

(b) Content of Petition; Answer. The petition shall contain a statement of the facts necessary to an understanding of the question of law determined by the order of the trial court; a statement of the question itself; a statement of the current status of the case; and a statement as to why the petition for interlocutory appeal is timely. The petition shall further identify all other cases or petitions for interlocutory appeal pending before the appellate court and known to the petitioner which are related to the matter for which interlocutory review is sought. The petition shall include or have annexed a copy of the order from which appeal is sought and of any related findings of fact, conclusions of law or opinion. Within 14 days after service of the petition, the trial judge may file a statement informing the appellate court of any reasons why that judge believes that the petition should or should not be granted, and any adverse party may file an answer in opposition with the clerk of the Supreme Court, with proof of service on the trial judge and all other parties to the action in the trial court. The petition with any statement by the trial judge and answers of all parties responding shall be submitted without oral argument unless otherwise ordered.

(c) Form of Papers; Number of Copies. Four (4) copies of the petition and answer, if any, shall be filed with the original, but the Court may require that additional copies be furnished. The provisions of Rule 27 concerning motions shall govern the filing and consideration of the petition and answer, except that no petition or answer, including its supporting brief, shall exceed 15 pages in length.

(d) Grant of Permission; Prepayment of Costs; Filing of Record. If permission to appeal is granted by the Supreme Court, the appellant shall pay the docket fee as required by Rule 3(e) within 14 days after entry of the order granting permission to appeal, and the record on appeal shall be transmitted and filed and the appeal docketed in accordance with Rules 10, 11, and 13. The time fixed by those rules for transmitting the record and docketing the appeal shall run from the date of entry of the order granting permission to appeal. A notice of appeal need not be filed.

(e) Expedited Proceedings. The Court may in its discretion expedite the appeal and give it preference over ordinary civil cases. If the Court determines that the issues presented can be fairly decided on the petition, response and

exhibits presented, the Court may decide those issues simultaneously with the granting of the petition, without awaiting preparation of a record or further briefing.

(f) Effect on Trial Court Proceedings. The petition for appeal shall not stay proceedings in the trial court unless the trial judge or the Supreme Court shall so order.

CREDIT(S)

[Adopted to govern matters filed on or after January 1, 1995. Amended effective July 29, 2004 to add paragraph (e) regarding expedited proceedings when the petition is granted. Effective December 9, 2004, as to trial court orders entered from and after March 1, 2005, paragraph (a) and (b) are amended to eliminate provision for seeking certification of the issue by the trial judge and provide the trial judge an opportunity to file a statement regarding the issue.]

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West's Annotated Mississippi Code Currentness

Mississippi Rules of Court State
Mississippi Rules of Civil Procedure
Chapter III. Pleadings and Motions
→ **Rule 9. Pleading Special Matters**

(a) Capacity. The capacity in which one sues or is sued must be stated in one's initial pleading.

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally.

(c) Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) Official Document or Act: Ordinance or Special Statute. In pleading an official document or official act it is sufficient to aver that the document was issued or the act was done in compliance with the law. In pleading an ordinance of a municipality or a county, or a special, local, or private statute or any right derived therefrom, it is sufficient to identify specifically the ordinance or statute by its title or by the date of its approval, or otherwise.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(f) Time and Place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) Special Damage. When items of special damage are claimed, they shall be specifically stated.

(h) Fictitious Parties. When a party is ignorant of the name of an opposing party and so alleges in his pleading, the opposing party may be designated by any name, and when his true name is discovered the process and all pleadings and proceedings in the action may be amended by substituting the true name and giving proper notice to the opposing party.

(i) Unknown Parties in Interest. In an action where unknown proper parties are interested in the subject matter of the action, they may be designated as unknown parties in interest.

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West's Annotated Mississippi Code Currentness

Mississippi Rules of Court State
Mississippi Rules of Civil Procedure
Chapter VII. Judgment
→ **Rule 54. Judgments; Costs**

(a) Definitions. "Judgment" as used in these rules includes a final decree and any order from which an appeal lies.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an expressed determination that there is no just reason for delay and upon an expressed direction for the entry of the judgment. In the absence of such determination and direction, any order or other form of decision, however designated which adjudicates fewer than all of the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled by the proof and which is within the jurisdiction of the court to grant, even if the party has not demanded such relief in his pleadings; however, final judgment shall not be entered for a monetary amount greater than that demanded in the pleadings or amended pleadings.

(d) Costs. Except when express provision therefor is made in a statute, costs shall be allowed as of course to the prevailing party unless the court otherwise directs, and this provision is applicable in all cases in which the State of Mississippi is a party plaintiff in civil actions as in cases of individual suitors. In all cases where costs are adjudged against any party who has given security for costs, execution may be ordered to issue against such security. Costs may be taxed by the clerk on one day's notice. On motions served within five days of the receipt of notice of such taxation, the action of the clerk may be reviewed by the court.

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