

IN THE SUPREME COURT OF MISSISSIPPI  
NO. 2010-TS-01807

SWEET VALLEY MISSIONARY BAPTIST  
CHURCH a/k/a HUB COMMUNITY BAPTIST

APPELLANT

VS.

ALFA INSURANCE CORPORATION

APPELLEE

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On Appeal from the Circuit Court of Marion County, Mississippi  
Civil Action No. 2010-0042P

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**BRIEF OF APPELLEE**

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ORAL ARGUMENT REQUESTED

  
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**CERTIFICATE OF INTERESTED PERSONS**

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

- |    |                                                                                          |                                                |
|----|------------------------------------------------------------------------------------------|------------------------------------------------|
| 1. | Sweet Valley Missionary Baptist<br>Church a/k/a HUB Community<br>Baptist                 | <i>Appellant / Plaintiff</i>                   |
| 2. | Alfa Insurance Corporation                                                               | <i>Appellee / Defendant</i>                    |
| 3. | Toby J. Gammill, Esq.<br>Whitney Gladden, Esq.<br>WILKINS TIPTON, P.A.                   | <i>Counsel for Appellee / Defendant</i>        |
| 4. | Marc L. Frischhertz, Esq.<br>FRISCHHERTZ, POULLIARD,<br>FRISCHHERTZ, & IMPASTATO, L.L.C. | <i>Counsel for Appellant / Plaintiff</i>       |
| 5. | David L. Brewer, Esq.<br>BREWER LAW FIRM                                                 | <i>Counsel for Appellant / Plaintiff</i>       |
| 6. | Mississippi Farm Bureau Mutual<br>Insurance Company                                      | <i>Defendant</i>                               |
| 7. | Patrick H. Zachary, Esq.<br>ZACHARY LEGGETT, PLLC                                        | <i>Counsel for Mississippi Farm<br/>Bureau</i> |
| 8. | Honorable Anthony Mzingo                                                                 | <i>Circuit Court Judge, Marion County</i>      |

9. Honorable Prentiss Harrell

*Circuit Court Judge, Marion County*

SO CERTIFIED, this the 9 day of November, 2011.



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### **STATEMENT OF THE ISSUES**

1. Whether the Circuit Court erred in granting the Defendant's Motion to Dismiss; specifically, whether the Complaint was time-barred, and whether the Savings Statute applied.

## **STATEMENT OF THE CASE**

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

This case arises from damage to the property of Sweet Valley Missionary Baptist Church a/k/a HUB Community Baptist Church (hereinafter, "Sweet Valley"), which allegedly occurred as a result of Hurricane Katrina. In its Amended Complaint, filed May 18, 2010, the Plaintiff, Sweet Valley, alleges breach of contract against Alfa Insurance Corporation for denial of payment or failure to pay full benefits resulting from damage allegedly caused by Hurricane Katrina on August 29, 2005. (Appellee's R.E. 5, R. 10).

A three (3) year statute of limitations applies to this civil action. *Miss. Code Ann.* § 15-1-49. (Appellee's R.E. 68, R. 201). Alfa paid benefits as a result of the damage to Sweet Valley by Hurricane Katrina on October 14, 2005, in the amount of \$9,951.89. (Appellee's R.E. 13, R. 83).

This matter has a rather involved procedural history. The first Complaint based on this cause of action was filed August 29, 2008. (Appellee's R.E. 67, R. 200). A Summons was issued December 2, 2008 (Appellee's R.E. 14, R. 84), and an Answer was timely filed by Alfa on December 19, 2008 (Appellee's R.E. 14, R. 84). On December 17, 2008, Alfa propounded their First Set of Interrogatories and Requests for Production of Documents to counsel of record for Sweet Valley, David Brewer. (Appellee's R.E. 35, R. 165). No Responses were received, and a Motion to Compel Discovery Responses was filed February 20, 2009 and set for hearing April 17, 2009 (Appellee's R.E. 14, R. 84).

A second set of Interrogatories and Requests for Production was propounded to David Brewer, counsel of record for Sweet Valley by Alfa on January 20, 2009 (Appellee's R.E. 38, R. 168). Sweet Valley again failed to respond, and an Amended Motion to Compel was filed by Alfa on April 14, 2009 and set for the previously noticed hearing date of April 17, 2009 (Appellee's R.E.

14, R. 84). Alfa moved the Court for a Scheduling Order which was granted April 7, 2009. (Appellee's R.E. 14, R. 84)

On the eve of the hearing date for Alfa's *Motion to Compel*, counsel for Sweet Valley called undersigned counsel for Alfa and agreed to submit to an Agreed Order Compelling Discovery by May 15, 2009. (Appellee's R.E. 14, R. 84) Sweet Valley submitted discovery responses to Alfa dated May 15, 2009 that were signed by an attorney, Mark Frischhertz, who is a Louisiana attorney not licensed to practice in Mississippi, nor was he admitted *pro hac vice* at the time the Responses were served. Further, the responses were not signed by the Plaintiff or a representative thereof as required by the *Mississippi Rules of Civil Procedure*.

Alfa subsequently filed a *Motion to Preclude Evidence* to strike the discovery responses on May 15, 2009. (Appellee's R.E. 14, R. 84). Sweet Valley then filed their Expert Designations on May 7, 2009, in response to which Alfa filed a Motion to Strike based on untimely filing, and based on the unauthorized signature of Marc Frischhertz, who was still not licensed by the State of Mississippi to practice law therein. (Appellee's R.E. 14, R. 84).

The hearing of Alfa's *Motion to Preclude Evidence* and *Motion to Strike Expert Designation* were set for June 26, 2009. (Appellee's R.E. 15, R. 85). Plaintiff nor its counsel appeared for said hearing. Based on the Plaintiff's failure to cooperate in discovery, failure to adhere to the Scheduling Order and failure to appear at the hearing, the Court entered its Order of Dismissal on June 29, 2009. (Appellee's R.E. 47, R. 177) On July 8, 2009, Sweet Valley filed a Motion to Set Aside Judgment, or in the Alternative, Motion for New Trial. Sweet Valley noticed its Hearing for the Motion to Set Aside Judgment for November 2, 2009. (Appellee's R.E. 16, R. 86) The hearing was then re-noticed for January 29, 2010. (Appellee's R.E. 48, R. 178)

The Court entered an Order denying the Plaintiff's Motion to Set Aside Judgment or in the

Alternative, Motion for New Trial on January 29, 2010. (Appellee's R.E. 63-65, R. 193-95). Sweet Valley filed a new Complaint the same day, then filed an Amended Complaint on May 18, 2010, effectuating service on Alfa on May 21, 2010. Alfa filed its Motion to Dismiss based on the statute of limitations having expired by the time Sweet Valley filed its new Complaint on January 29, 2010. The Court granted the Motion to Dismiss (Appellee's R.E. 67, R. 200), and it is from that Order that Sweet Valley appeals.

#### **B. Statement of Facts**

This case arises from damage to the property of Sweet Valley Missionary Baptist Church a/k/a Hub Community Baptist, which allegedly occurred as a result of Hurricane Katrina. (Appellee's R.E. 5, R. 10). The original Complaint resulting from that incident was filed August 28, 2008. (Appellee's R.E. 13, R. 83). Thereafter, Marc Frischhertz, Esq., licensed to practice law in Louisiana, filed his Application for Admission Pro Hac Vice on January 16, 2009, in order to represent Sweet Valley in that lawsuit. (Appellee's R.E. 41, R. 96, 171).

Mr. Frischhertz failed to serve all involved parties with his Application for Admission, making his Application for Admission Pro Hac Vice deficient. A deficiency notice was mailed to him on the same date it was filed. (Appellee's R.E. 41, R. 96, 171). Because Mr. Frischhertz was not counsel of record, all discovery originating from Alfa Insurance Corporation was served on David Brewer, counsel of record for Sweet Valley. (Appellee's R.E. 35-40, R. 165-70). Mr. Brewer failed to respond to discovery, and a Motion to Compel was filed by Alfa Insurance Corporation. Two pieces of correspondence were sent to Mr. Frischhertz from the undersigned counsel regarding this case. One advised him that discovery was over sixty days overdue, Mr. Brewer would not respond, and there was a Motion to Compel filed against Sweet Valley. (Appellee's R.E. 42-43, R. 172-73) The second letter advised that he take the necessary steps to become counsel of record, and

pointed him to the applicable *Mississippi Rules of Appellate Procedure*. (Appellee's R.E. 45-46, R. 175-76) At the hearing of the Motion to Compel, no counsel for Sweet Valley appeared, and an Order of Dismissal Without Prejudice was entered. (Appellee's R.E. 47, R. 177).

Sweet Valley subsequently filed a Motion to Set Aside Judgement or in the Alternative, Motion for New Trial. This Motion was denied (Appellee's R.E. 48-65, R. 178-95) and a new Complaint was filed by the Plaintiffs on the same day, January 29, 2010. (Appellee's R.E. 1, R. 6) Alfa then filed its Motion to Dismiss based on the running of the statute of limitations. (Appellee's R.E. 13, R. 83). The Motion was granted. (Appellee's R.E. 67-73, R. 200-206).

### **STANDARD OF REVIEW**

The Standard of Review was not included in the Appellant's Brief. As a courtesy to the Court, it is provided here. The review of motions to dismiss for the violation of the statute of limitations is de novo. *Ralph Walker, Inc., v. Gallagher*, 926 So. 2d 890 (Miss. 2006). "A motion for dismissal under Miss. R. Civ. P. 12(b)(6) raises an issue of law, and we unquestionably review question of law under a de novo standard of review." *Id.* at 893 (citing *Lowe v. Lowndes County Bldg. Inspection Dept.*, 760 So. 2d 711, 712 (Miss. 2000)(other citations omitted).

## **SUMMARY OF THE ARGUMENT**

This action was time-barred under the three-year statute of limitations applicable in this case, and the statute of limitations was not tolled either by the filing of the Plaintiff's Motion to Reconsider, nor was it extended by the Savings Statute. The statute of limitations began to run at the time Alfa paid on the claim at issue, which was October 14, 2005. Sweet Valley filed its Complaint based on breach of contract on August 29, 2008, forty-six days prior to the deadline imposed by Mississippi Code Annotated §15-1-49. The filing of the initial complaint tolled the statute of limitations until the cause was finally dismissed without prejudice on June 29, 2009 as a sanction for discovery violations. This made the statutory deadline to file a new Complaint in the matter fall on or about August 14, 2009.

On July 8, 2009, Sweet Valley filed a Motion to Set Aside Judgment, or in the Alternative, Motion for New Trial. This Motion was denied on January 29, 2010, and a new Complaint filed the same day. Alfa Insurance Corporation filed its Answer asserting the affirmative defense that the Complaint was filed outside of the statute of limitations, as the deadline for filing a new Complaint ran on or about August 14, 2009, and the new Complaint was not filed until January 29, 2010.

Sweet Valley's contention that the filing of its Motion to Set Aside Judgment tolled the statute of limitations in this matter is without merit. There is no authority under which they can properly make such an assertion; a Rule 59(e) motion, as here, can toll the thirty day deadline for appeal, but does not toll the applicable statute of limitations. Each case authority upon which Sweet Valley relies to support this contention addresses the extension of time for appeal. Those cases do not pose any support for an argument that the statute of limitations was somehow tolled or extended by the filing of their Motion.

Sweet Valley argues in the alternative that the Savings Statute applies to this matter, submitting that the first Sweet Valley action was dismissed as a matter of form, thereby placing it within the class of cases provided relief by the Savings Statute. However, Sweet Valley is incorrect in this assertion. The first Sweet Valley case was dismissed as a sanction for discovery violations. A dismissal for discovery violations has been held to be on the merits and not a dismissal as a matter of form. *Marshall v. Burger King*, 2 So. 3d 702 (Miss. App. 2008). Because this matter was dismissed on the merits and not as a matter of form, the Savings Statute does not apply. *Miss. Code Ann.* §15-1-69.

Alfa submits that the statute of limitations ran in this matter on or about August 14, 2009. Because a new Complaint was not filed until January 29, 2010, the statute of limitations ran against Sweet Valley and the action which is the subject of this appeal was time-barred. The Savings Statute does not apply because the dismissal of the initial action was on the merits rather than a matter of form. Alfa Insurance Corporation respectfully requests that this Court affirm the ruling of the Circuit Court of Marion County.

## **ARGUMENT**

### **1. Whether the trial court erred in granting the Defendant's Motion to Dismiss.**

#### **a. The new Complaint filed by Sweet Valley on January 29, 2010 was time-barred.**

Alfa submits that the statute of limitations ran 168 days prior to the filing of the Complaint, which was ultimately dismissed as untimely and the subject of this appeal. The damage at the subject of this lawsuit allegedly occurred during Hurricane Katrina on August 29, 2005. Under Mississippi law, there are two possible dates on which the statute of limitations may have run in this matter: three (3) years from the date of injury, making the statute of limitations run on August 29, 2008, (*See Miss. Code Ann. § 15-1-49*) or three (3) years from the date of last payment, which occurred October 14, 2005, meaning the statute of limitations would have run on October 14, 2008. *See Ross v. Gulf Group, Inc.*, 823 So. 2d 1204 (Miss. App. 2002)(holding that a cause of action for breach of contract arises upon the event of the breach); *Johnson v. Crisler*, 125 So. 724 (Miss. 1930)(a cause of action for breach of contract generally accrues at time of breach, regardless of when damages occurred). The lower court ruled, and Alfa concedes, that the statute of limitations began to run on October 14, 2005.

The three-year statute of limitations outlined in Mississippi Code Annotated §15-1-49 applies to Sweet Valley's claim at issue. (Appellee's R.E. 67, R. 200). Sweet Valley's first Complaint for this cause of action was filed August 29, 2008, forty-six (46) days prior to the expiration of the October 14, 2008 deadline. (Appellee's R.E. 67, R. 200). The filing of the initial Complaint tolled the statute of limitations until the case was dismissed without prejudice on June 29, 2009. (Appellee's R.E. 47, R. 177).

When a suit, whose filing tolled the statute of limitations, is dismissed, the statute begins

running again upon dismissal. *Deposit Guar. Nat'l Bank v. Roberts*, 483 So. 2d 348 (Miss. 1986). Once the Order of Dismissal was filed, the statute of limitations began to run again, with a new expiration date of August 14, 2009 (forty-six days after the Order of Dismissal was entered by the lower Court). On July 8, 2009, Sweet Valley filed a Motion to Set Aside Judgment, or in the Alternative, Motion for New Trial. (Appellee's R.E. 67, R. 200). However, Sweet Valley failed to state a valid reason under the Mississippi Rules of Civil Procedure why it was entitled to relief under either theory, as there was no new evidence, and no showing of fraud, accident or mistake. (Appellee's R.E. 68-69, R. 201-02).

Further, Sweet Valley failed to set its Motion to Set Aside Judgment for hearing until four months after filing, neglecting to file a Notice of Hearing until November 2, 2009. The hearing on this Motion was then re-noticed for January 29, 2010, approximately one hundred sixty-eight (168) days past the expiration of the statute of limitations. (Appellee's R.E. 48, R. 178). The Court entered an Order denying the Plaintiff's Motion to Set Aside Judgment or in the Alternative, Motion for New Trial on January 29, 2010. (Appellee's R.E. 48-65, R. 178-195). Sweet Valley filed a new Complaint the same day, then filed an Amended Complaint on May 18, 2010, effecting service on Alfa on May 21, 2010. The new Complaint was filed approximately one hundred sixty-eight days (168) days past the expired statute of limitations date of August 14, 2009, and an Amended Complaint was filed approximately two hundred seventy-seven (277) days past the date of expiration.

Sweet Valley contends that the filing of its Motion to Set Aside Judgment tolled the statute of limitations until a judgment was rendered on that motion. (Appellee's R.E. 23, R. 53). The Circuit Court of Marion County recognized that the Motion to Set Aside Judgment was a Rule 59(e) Motion, even though Sweet Valley did not cite any authority under which it filed the Motion.

(Appellee's R.E. 68, R. 201). Sweet Valley cites *Bruce v. Bruce*, 587 So. 2d 898 (Miss. 1991) as the basis for its assertion that the filing of this Motion tolls the statute of limitations. (R. 145; see also *Appellant's Brief*, p. 5). The Appellant's reliance on *Bruce* is misplaced, as *Bruce* discusses that a Rule 59 motion tolls the time for appeal, *not* the statute of limitations. See *Bruce*, 587 So. 2d at 903. *Bruce* held that if the motion were classified (regardless of the style of the motion) as one questioning the correctness of all or any part of the judgment, then the 30 days to file the notice of appeal would have been tolled, and any notice of appeal filed before or during that time would be premature. See *Bruce*, 587 So. 2d at 904. *Bruce* does not address the running of the statute of limitations and is not applicable to these facts.

In its Argument, Sweet Valley relies on *Laurel Oil and Fertilizer Co. v. McGraw*, 172 So. 503 (Miss. 1937), *State Mortgage Investment Co. v. Barnes*, 340 So. 2d 14 (Miss. 1976), *Coleman v. Mallory*, 944 So. 2d 72 (Miss. App. 2006), *Davidson v. Hunsicker*, 79 So. 2d 839 (Miss. 1955), *Moore v. Montgomery Ward & Co.*, 156 So. 875 (Miss. 1934) and *Shaw v. Bula Cannon Shops*, 38 So. 2d 916 (Miss. 1949) as authority for its contention that the statute of limitations was tolled in the lower court case by its filing of a Rule 59 motion. Without belaboring the holdings of these cases, just like in *Bruce*, each of the cases cited by Sweet Valley deals with the time to file appeal, not the statute of limitations, and is therefore not applicable to the present case. In fact, most of the cases erroneously relied upon by Sweet Valley are the same cases the *Bruce* court relied upon for its holding regarding the stay of the time to appeal, which is inapplicable to the present case. As noted by the Circuit Court of Marion County, "the running of the time for filing an appeal under Rule 4(a) of the Mississippi Rules of Appellate Procedure was stayed by the Plaintiff's timely filing of its Motion to Set Aside Judgment. However, that stay does not overlap into the separate and independent period of limitation during which a cause of action may be brought." (Appellee's R.E.

69, R. 202).

While the undersigned counsel argues that the statute of limitations ran in this case on August 14, 2009, and the Circuit Court opined that it ran on August 16, 2009, it is clear that the statute of limitations ran in this matter well before the new Complaint was filed on January 29, 2010. Sweet Valley's filing of the Motion to Reconsider did not toll the statute of limitations under Mississippi Rule of Civil Procedure 59. Therefore, Alfa requests that this Court affirm the ruling of the Marion County Circuit Court dismissing Sweet Valley's cause of action as time-barred.

**b. The Savings Statute does not apply to Sweet Valley in this matter.**

The general rule is that once a statute of limitations has begun to run, courts will not allow tolling without express statutory language. *54 CJS Limitations of Actions § 114* (West 2008). Sweet Valley argues that the Savings Statute, *Miss. Code Ann. § 15-1-69* applies to this matter. That statute reads as follows:

If in any action, duly commenced within the time allowed, the writ shall be abated, or the action otherwise avoided or defeated, by the death of any party thereto, or for any matter of form, or if, after verdict for the plaintiff, the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed on appeal, the plaintiff may commence a new action for the same cause, at any time within one year after the abatement or other determination of the original suit, or after reversal of the judgment therein, and his executor or administrator may, in case of the plaintiff's death, commence such new action, within the said one year.

*Miss. Code Ann. § 15-1-69.* The only provision within this statute which could possibly apply to Sweet Valley would be the dismissal as a "matter of form." However, the dismissal of Sweet Valley's prior lawsuit was not for any matter of form, but rather was a sanction for failure to respond to discovery, failure to appear for hearing, and failure to comply with the Court's scheduling order. (Appellee's R.E. 47, R. 177).

The Mississippi Supreme Court has held that the one-year savings statute permitting a

plaintiff to commence a new action for the same cause if the action, duly commenced within the time allowed, is otherwise avoided or defeated for any matter of form is highly remedial and ought to be liberally construed. *Marshall v. Kansas City Southern Railways Co.*, 7 So. 3d 210, 214 (Miss. 2009)(citations omitted). In *Kansas City*, the Court found that a voluntary dismissal for lack of subject matter jurisdiction was a matter of form. *Id.* at 216.

The Mississippi Supreme Court has also held that a dismissal was a matter of form when it was due to the Plaintiff's failure to file the required pre-suit notice under the Mississippi Tort Claims Act. *Arceo v. Tolliver*, 19 So. 3d 67, 70 (Miss. 2009). This Court, however, refused to apply the savings statute when a case was dismissed as stale. *Jackpot Mississippi Riverboat, Inc. v. Smith*, 847 So. 2d 959 (Miss. 2004). The Court found that dismissal of a stale case was not dismissal as a "matter of form," within the meaning of *Miss. Code Ann.* § 15-1-69. A dismissal for discovery sanctions was held by the Court of Appeals to be a dismissal on the merits. *Marshall v. Burger King*, 2 So. 3d 702 (Miss. App. 2008). The present case, like *Marshall v. Burger King*, was dismissed as a result of discovery sanctions, which has been held under Mississippi law to be a dismissal on the merits and cannot, therefore, be a dismissal as a matter of form; therefore the savings statute would not apply.

The Circuit Court noted in its Order of Dismissal: "Judge Harrell's Order of Dismissal was clearly intended as a sanction for discovery violations, and did not specify that the dismissal was not to operate as an adjudication on the merits." (Appellee's R.E. 72, R. 205).


### CONCLUSION

Alfa submits that the statute of limitations ran in this matter between August 14, 2009 and August 16, 2009. Because a new complaint on this action was not filed until January 29, 2010, Sweet Valley has filed their Complaint outside of the statute of limitations. The Savings Statute does not apply to this matter as the initial dismissal was on the merits rather than a matter of form. Alfa Insurance Corporation respectfully requests that this Court affirm the ruling of the Circuit Court of Marion County, dismissing Sweet Valley's claim as time-barred.

Respectfully submitted, this the 9 day of November, 2011.

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**CERTIFICATE OF SERVICE**

I, Whitney Gladden, attorney for Petitioner, Alfa Insurance Corporation, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing *Argument* to:

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This the 9 day of November, 2011.

  
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