2011-CA-00559

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CAROLYN CHILDRESS and
RODNEY CHILDRESS — **APPELLANTS**

V. — **CASE NO. 2011-CA-00559**

LARRY SPENCER and VIVIAN SPENCER
and STATE FARM INSURANCE COMPANY — **APPELLEES**

ON APPEAL FROM THE CIRCUIT COURT OF
DESOTO COUNTY, MISSISSIPPI

HONORABLE ROBERT P. CHAMBERLIN, CIRCUIT JUDGE

BRIEF OF APPELLEES

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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 possible disqualification or recusal.

a. Steven W. Pittman, Esq. - counsel for Appellants;

b. William A. Cohn, Esq. - counsel for Appellants;

c. Carolyn Childress and Rodney Childress, Appellants;

d. Marc A. Biggers, Esq. and Lonnie D. Bailey, Esq., Upshaw, Williams, Biggers & Beckham, LLP - counsel for Appellees;

e. Larry Spencer, Appellee;

f. W. E. Davis - Administrator of Estate of Vivian Spencer; and

g. State Farm Insurance Company.

Dated this the 20th day of December, 2011.

Lonnie D. Bailey

STATEMENT REGARDING ORAL ARGUMENT

Appellee submits that the facts and legal arguments are adequately presented in the briefs and record such that the decisional process would not be significantly aided by oral argument. If, however, the Court determines that oral argument will be helpful, Appellee welcomes the opportunity to attend and participate.

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BRIEF OF APPELLEE

I. INTRODUCTION

This automobile accident case arises from a collision between an automobile owned by Larry Spencer and driven by Vivian Spencer with another automobile occupied by Carolyn and Rodney Childress ("Childresses"). The accident occurred on April 25, 2007 on Hacks Cross Road in Olive Branch in DeSoto County.

The Childresses filed their initial Complaint in the Circuit Court of DeSoto County against Larry Spencer and Vivian Spencer on April 30, 2009. Unfortunately, Vivian Spencer had passed away in the interim on November 22, 2008, from causes unrelated to the auto accident. The Childresses made no attempt to serve process on the initial Complaint within the 120 days provided by M.R.C.P. 4(h). The Childresses subsequently served Larry Spencer with an Amended Complaint. In his answer to the Amended Complaint, Larry Spencer informed the Childresses that his wife Vivian had died on November 22, 2008, before the initial Complaint was filed.

After the three-year statute of limitations had run, the Childresses caused an Estate to be opened for Vivian Spencer, had W. E. Davis, DeSoto County Chancery Clerk appointed as administrator and moved to again amend the Complaint to bring the Estate into this case as a defendant.

This appeal presents a case of first impression for this Court. The trial court denied the motion to further amend the complaint, finding that the proposed Amendment would not relate back under M.R.C.P. 15(c) so as to bring the claims against the Estate within the statute of limitations. The trial court was correct and its order denying the motion to amend should be affirmed.

II. STATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion when it found that an amendment to the complaint to name the Estate of Vivian Spencer as a defendant, which was sought after the statute of limitations had run, would not relate back pursuant to M.R.C.P. 15(c).

III. STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Disposition Below and Statement of Relevant Facts.

The case below, filed by the Childresses, involved allegations of negligence against Vivian Spencer and Larry Spencer arising from a collision between an automobile driven by Vivian Spencer and an automobile driven by Carolyn Childress and occupied by Rodney Childress on Hacks Cross Road in DeSoto County. The accident occurred on April 25, 2007. The Childresses filed suit in the Circuit Court of DeSoto County on April 30, 2009 naming as defendants Larry Spencer, Vivian Spencer and State Farm Insurance Company, an uninsured motorist carrier[1]. Even though Vivian Spencer passed away on November 22, 2008, the Childresses attempted to name her as a defendant

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[1] State Farm is not a party to this appeal. The Agreed Order Granting Motion for Summary Judgment dismissed the Childresses' claims against Larry Spencer with prejudice and found "that there is no just reason for delay of the final judgment of the claims which were attempted to be made against Vivian Spencer and that this cause should be fully and finally dismissed except as to plaintiffs' claims against Defendant State Farm Insurance Company." R.E. 13-14, R. 289-90. The trial court entered a subsequent order staying all proceedings against State Farm pending the outcome of this appeal. R. 291-92.

in the original Complaint. The Childresses did not attempt service of process on the original Complaint within 120 days after filing as required by M.R.C.P. 4(h).

On November 25, 2009, approximately three months after the 120 day period to serve the original Complaint had run, the Childresses filed an Amended Complaint which also attempted to name Vivian Spencer as a defendant. R. 30-37. Larry Spencer was served with a copy of the Amended Complaint and in his answer, filed on December 28, 2009, he informed the Childresses that Vivian Spencer had died on November 22, 2008. R. 42-44. Obviously, as she was deceased, there was no answer filed on behalf of Vivian Spencer and the Childresses did not attempt to take a default judgment against her. The three (3) year statute of limitations ran on April 25, 2010.

On May 10, 2010, nearly five (5) months after learning of her death and after the statute of limitations had run, the Childresses filed a motion for substitution of parties pursuant to Rule 25, M.R.C.P. seeking to substitute "either Vivian Spencer, Deceased; the Estate of Vivian Spencer; the heirs of Vivian Spencer or any other appropriate party as may be determined" in place of Vivian Spencer. R. 58-59. The trial court heard argument on the substitution motion on May 28, 2010 and ruled, from the bench, denying substitution under Rule 25 as Vivian Spencer had not been served with process and was not a party for whom substitution was proper. R.E. 11, R. 275 (order denying amendment at page 4).

On June 30, 2010, the Chancery Court of DeSoto County, on petition of the Childresses, entered an order appointing the Chancery Clerk of DeSoto County as administrator of the Estate of Vivian Spencer. R. 151-52. On July 13, 2010, seven and a half months after being advised of Vivian Spencer's death, the Childresses filed a one page motion to amend the complaint pursuant to Rule 15, M.R.C.P., seeking to "substitute or add either the Estate of Vivian Spencer, the heirs of Vivian Spencer or any other appropriate party as may be determined." R. 76-77.

The trial court heard oral argument on the Childresses' motion to amend on December 10, 2010. Tr. 1-24. On February 8, 2011, the trial court entered its Order Denying Motion to Amend Complaint Pursuant to M.R.C.P. 15 finding that the requested amendment would not relate back to the filing of the original complaint so as to avoid the bar of the statute of limitations. R.E. 8-12, R. 271-275. On March 24, 2011, the Court entered an Agreed Order Granting Motion for Summary Judgment which dismissed the Childresses' claims against Larry Spencer based on vicarious liability, particularly the "family purpose" doctrine. R.E. 13-14, R. 289-90. The Agreed Order also contained a Rule 54 certification that there is no just reason for delay of entry of final judgment as to the claims attempted to be brought against Vivian Spencer. *Id.*

On April 13, 2011, the Childresses filed a Notice of Appeal from the "Final Agreed Order Granting Motion for Summary Judgment which was entered... on March 24th, 2011." R. 293-94. The Notice of Appeal did not specify the trial court's Order Denying Motion to Amend Complaint Pursuant to M.R.C.P. Rule 15. *Id.*

IV. SUMMARY OF THE ARGUMENT

A trial court's ruling on a motion for leave to amend the complaint is subject to reversal only if the trial court abused its discretion. In the instant case, the Childresses filed suit against Larry Spencer and Vivian Spencer after Vivian Spencer had passed away. They did not attempt service of process on the original complaint within 120 days after filing. They eventually filed an Amended Complaint again naming Larry Spencer and Vivian Spencer as defendants. Larry Spencer, having finally been served with process, answered and informed the Childresses that Vivian Spencer had passed away prior to the filing of the original complaint. Despite having been advised of the death of Vivian Spencer, the Childresses waited until after the statute of limitations had run to make any effort to bring in the Estate of Vivian Spencer as a party defendant.

Against this factual backdrop, there is no basis to support a finding that the trial court abused its discretion in denying the motion for leave to amend which is the subject of this appeal. The trial court correctly determined that the Childresses' attempt to further amend the complaint to bring a new party, the Estate, into the lawsuit, should not relate back under M.R.C.P. 15(c) so as to make their claims against the Estate timely.

Under Mississippi law, a party must act with reasonable diligence when attempting to add a new party by amendment. The trial court cannot be said to have abused its discretion in finding that Rule 15(c) did not provide for relation back under the facts and circumstances of this case.

Mississippi law does not support the Childresses' argument that the notice requirement of Rule 15(c) can be satisfied by imputed notice. In the absence of actual notice of the pending litigation by the administrator of the Estate of Vivian Spencer within 120 days after the filing of the original complaint there can be no relation back pursuant to Rule 15(c). The trial court did not abuse its discretion in so finding.

V. ARGUMENT AND AUTHORITY

A. Standard of Review.

"A trial court's denial of a motion to amend will only be reversed by an appellate court if the refusal is an abuse of discretion." *Merideth v. Merideth*, 987 So.2d 477, 482 (Miss. App. 2008). *See also, Moeller v. Am. Guar. & Liab. Ins. Co.*, 812 So.2d 953, 961 (Miss. 2002); *Giles v. Stokes*, 988 So.2d 926, 927 (Miss. App. 2008) ("we will not reverse a trial judge's decision to deny a motion to amend under Mississippi Rule of Civil Procedure 15 unless the trial judge abused his or her discretion.")

The Childresses do not take issue with the trial court's dismissal of their claims against Larry Spencer by way of summary judgment. Instead, they are appealing only from Judge Chamberlain's

denial of their motion to amend the complaint to name the Estate of Vivian Spencer as a defendant. Thus, this Court may not reverse unless it can conclude that Judge Chamberlain abused his discretion in denying the motion to amend the complaint.

B. The Proposed Amendment Would Not Relate Back.

Where, as here, a plaintiff seeks an amendment to the complaint which changes the party against whom a claim is asserted, Rule 15(c), M.R.C.P., requires satisfaction of three requirements for the amendment, if allowed, to relate back in time to the original complaint for statute of limitations purposes. *Ralph Walker, Inc. v. Gallagher*, 926 So.2d 890, 894-95 (Miss. 2006). First, the claim in the amended complaint must arise out of the same occurrence set out in the initial complaint.[2] *Id.* Next, the party to be brought in through the amendment must have received notice of the action within the 120 days provided for service of the summons and original complaint under M.R.C.P. 4(h). *Id.* Finally, "the newly-named defendant must have or should have known that an action would be brought against him within the 120 days unless a mistake existed as to the parties' identities." *Id. See also, Wilner v. White*, 929 So.2d 315, 323-34 (Miss. 2006); *Curry v. Turner*, 832 So.2d 508, 513-14 (Miss. 2002).

Though this Court has never been asked to decide the issue in the context presented by these facts, the Supreme Court of Colorado's recent decision in *Currier v. Sutherland*, 218 P.3d 709 (Colo. 2009) is instructive. In *Currier* two bicyclists were injured in a car/bicycle collision. The bicyclists filed suit against the automobile driver four days before the expiration of Colorado's statute of limitations applicable to their claims against the driver. Unknown to plaintiffs, the driver had died between the date of the accident and the date suit was filed. Plaintiffs learned of the driver's death

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2 The first requirement is not at issue in this appeal.

when they were unable to serve him with process. As here, after the statute of limitations had run, plaintiffs opened an estate for the driver and filed two amended complaints; first naming the estate as the defendant and subsequently naming the special administrator of the estate as an additional defendant.

Considering whether the amended complaints were timely filed and thus not time-barred by the statute of limitations, the Colorado Supreme Court held:

> Because the two amended complaints were filed after the statute of limitations for the claims had expired, they can only be considered 'timely filed' if they relate back to the original complaint. We hold that the amended complaints do not relate back. The claims were not timely filed, and the trial court properly dismissed the case on statute of limitations grounds.

218 P.3d at 715.

The Colorado rule regarding relation back of amended pleadings is virtually identical to M.R.C.P. 15(c). The Court discussed the "notice" and "knowledge" requirements that must be met when an amendment changes the party against whom a claim is asserted and found them applicable to the situation where a plaintiff seeks to replace a deceased defendant with the estate and administrator through an amendment to the complaint. Affirming the trial court's finding that plaintiffs' claims were time-barred, the Colorado Supreme Court wrote:

> The notice requirements of C.R.C.P. 15(c) are not met in this case. The defendants named in the two amended complaints -- the Estate and Sutherland -- had no way of knowing that this suit would be brought against them until they were named as defendants, well after the statute of limitations had run. **The Estate did not exist at the time the statute of limitations ran, and Southerland had not been named special administrator of the non-existent estate.** As a result, neither new defendant received notice such that its defense on the merits could not be impaired by allowing the amended complaints to relate back. (emphasis added).

218 P.3d at 716. *See also, Parker v. Brecklin*, 620 A.2d 229, 231 (Del. 1993) (Executor of estate

of deceased defendant named as defendant in amended complaint had no notice of institution of action before expiration of statute of limitations); *Stanley v. Kenney*, 1998 WL 48240 (N.D. Ill. 1998); *Davis v. Cadwell*, 94 F.R.D. 306, 308 (D. Del. 1982) (Estate administrators appointed after expiration of limitations period; motion to amend to name administrator as defendant denied); *Radzewicz v. Neuberger*, 490 A.2d 588 (Del. Sup. 1985).

The Childresses' attempt to distinguish *Currier* is unavailing. In the instant case, as in *Currier*, no one was served or given notice of the lawsuit during the time allowed for service of the original Complaint. Rule 15(c)(1) requires specifically that the new party against whom a claim is asserted by an amendment must have received some notice of the institution of the action within the 120 day period following the filing of the initial Complaint for the amendment to relate back. As the Estate of Vivian Spencer did not exist during that time period and there is no evidence in the record that W. E. Davis, Administrator, had any notice, it is an impossibility for the amendment to relate back to the filing of the initial complaint so as to avoid the bar of the statute of limitations. The facts of *Currier* and the instant case are sufficiently similar that *Currier* stands as good persuasive authority for this Court to affirm the ruling of the trial court.

Here, just as in *Currier*, the administrator of the Estate of Vivian Spencer was not appointed until June 30, 2010, more than two months after the statute of limitations had run on any of the Childresses' claims against the Estate of Vivian Spencer on April 25, 2010. There is no evidence in the record before this Court that W. E. Davis, Administrator, had notice of the institution of this action before the statute of limitations ran. Thus, the Childresses cannot show that the "notice" requirement of M.R.C.P. 15(c)(1) can be satisfied. Moreover, there is no evidence in the record that W. E. Davis, Administrator, knew or should have known, before the statute of limitations had run, that he would have been named as a defendant in this action but for a mistake concerning the identity

of the proper defendant. The trial court found that "[t]here was no mistake concerning the identity of the proper party." R. E. 11, R. 275. Consequently, the Childresses likewise cannot show that the "knowledge" requirement of M.R.C.P. 15(c)(2) can be satisfied. Accordingly, the amendment requested below cannot relate back to the filing of the original complaint or the amended complaint so as to bring the Childresses' claims against the Estate of Vivian Spencer within the statute of limitations. There is no basis to find that the trial court abused its discretion in denying the motion to amend.

C. The Proposed Amendment Would be Futile.

It is now well settled that a motion to amend a pleading may be denied where the proposed amendment would be futile. *Merideth v. Merideth*, 987 So.2d 477, 482 (Miss. App. 2008). Where the proposed amendment, if allowed, would be time-barred by the statute of limitations, such amendment is futile and need not be granted. *Id.*; *see also*, *Jones v. Lovett*, 755 So.2d 1243, 1247-48 (Miss. App. 2000).

As the claims against the Estate of Vivian Spencer in any proposed amendment would not relate back and are, therefore, time-barred, allowing such an amendment would be futile. Accordingly, this Court should affirm the trial court's denial of the motion to amend.

D. The Brief of Appellant Does Not Demonstrate that the Trial Court Abused its Discretion in Denying the Motion to Amend.

The Childresses' effort to convince this Court to reverse the trial court's ruling is based on several misconceptions about controlling law in Mississippi and at least one argument that was not raised before the trial court. These arguments are unavailing. The Childresses have failed to demonstrate that the trial court abused its discretion in denying the motion to amend.

1. The Childresses are Procedurally Barred from Arguing that there was a Mistake as to the Identity of the Proper Party When They Filed the Original Complaint.

The Childresses' first argument for reversal is that it was a "mistake" to name Vivian Spencer as a defendant in the original Complaint. Brief of Appellant at 13. This argument fails for two (2) reasons. First, the Childresses are procedurally barred from raising this argument on appeal because they failed to raise it in the trial court. Second, even if the argument was properly preserved, it fails because the focus of M.R.C.P. 15(c)(2) is on what the newly added party knew or should have known, not whether plaintiff or plaintiff's counsel made a mistake.

(a) Procedural Bar

The Childresses did not claim in the trial court that they had made a "mistake concerning the identity of the proper party" so as to implicate Rule 15(c)(2), M.R.C.P. In Plaintiffs' Memorandum in Support of Motion to Amend Complaint submitted to the trial court, the Childresses did not claim that they were mistaken as to the identity of the proper party when they filed the original Complaint. R. 201-268. Nor did they make that argument before the trial court when it heard oral argument on the motion to amend. Tr. 1-24.

It is settled, beyond room for argument, that a party is precluded from raising an issue for the first time on appeal. *Gale v. Thomas*, 759 So.2d 1150, 1159 (Miss. 1999). "As this Court has stated, time and again, an issue not raised before the lower court is deemed waived and is procedurally barred." *Id.*

(b) Counsels' Purported Mistake

Rule 15(c)(2) is concerned not with whether plaintiffs' counsel made a mistake as to the identity of the proper party, but with whether the party sought to be belatedly brought into the lawsuit knew or should have known that he would have been named in the original complaint but for such

a mistake.[3] *Ralph Walker, Inc. v. Gallagher*, 926 So.2d 890, 896 (Miss. 2006) ("This part of the rule essentially asks whether, because of the existence of a mistake as to the parties' identities on the part of the movant or complainant, **the newly-named defendant did not know that an action would be brought against him within the 120 days.**) (emphasis added). Even if the Childresses could establish the requirements of Rule 15(c)(1) for relation back -- which they cannot -- they cannot establish that the Administrator of the Estate of Vivian Spencer knew or should have know within 120 days of filing of the original Complaint, that he would be brought into the lawsuit because of a mistake in identity of the proper party.

2. The Trial Court Did Not Abuse its Discretion When It Found that the Childresses had Ample Time to Request an Amendment of the Complaint Before the Statute of Limitations had Run.

Relying on prior decisions that are factually and legally distinguishable from the case at bar, the Childresses argue that Mississippi law imposes no duty of diligence on a plaintiff that seeks to bring in a new defendant by amendment to the complaint. In making that argument, the Childresses turn a blind eye to this Court's most recent pronouncement on the issue -- *Anderson v. ALPS Automotive, Inc.*, 51 So.2d 929 (Miss. 2011).

The Childresses rely on the decision in *Estes v. Starnes*, 732 So.2d 251 (Miss. 1999) for the proposition that it "clearly establishes that reasonable diligence is not applied to the application of Rule 15(c)." Brief of Appellant at 14. *Estes* does not, however, hold that a plaintiff can cast diligence to the wind unless they have sued a fictional defendant under Rule 9(h). Rather, the Court in *Estes* determined that the plaintiff there, unlike the Childresses here, had met the standards of Rule

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3 Of course this presupposes that the party to be brought in had notice of the institution of the action within 120 days after the original complaint was filed -- Rule 15(c)(1) -- a point for which there is no evidentiary support in the record.

15(c) and should have been allowed to amend "despite the apparent lack of diligence of Estes' attorney." 732 So.2d at 254. *Estes* involved a newly-named party, David C. Starnes, that was in existence and ostensibly aware that the original Complaint had been filed naming the wrong person, his father, prior to the statute of limitations having run. Here, on the other hand, the newly-named party did not exist until after the statute of limitations had run.

The Childresses also rely on *Rainey v. Grand Casinos, Inc.*, 47 So.2d 1199 (Miss. App. 2010) to argue that they had no legal obligation to be diligent in attempting to amend their complaint to name the administrator of the estate of Vivian Spencer as a defendant in this case. *Rainey* provides no support for their position primarily because the Court of Appeals did not rule on the merits of whether the trial court should have allowed the requested amendment in that case. *Id.* at 1205 (record insufficient to determine propriety of motion to amend).

The argument proffered by the Childresses is belied by this Court's recent decision in *Anderson v. ALPS Automotive, Inc.*, 51 So.2d 929 (Miss. 2011). In *Anderson*, the widow of a driver who was killed when his airbag failed to deploy in an accident filed suit against General Motors, the retailer of the Chevrolet van involved in the accident and two fictitious defendants. She eventually learned that ALPS Automotive had manufactured an integral part of the airbag deployment system. Nine-and-a-half months later she moved to amend her complaint to name ALPS as a defendant. The trial court granted ALPS's motion for summary judgment, finding that the statute of limitations had run against ALPS before the complaint was amended to name it as a defendant and that the amendment did not relate back to the timely-filed original complaint, despite the fact that ALPS was brought in to replace one of the fictitious parties.

On motion to reconsider the "trial court further held that once ALPS had admitted being the manufacturer of the clockspring, ALPS was no longer a fictitious party under Mississippi Rule of

Civil Procedure 9(h), the mistake under Rule 15(c) had been resolved, and that a nine-month period of delay in adding ALPS as a defendant was unreasonable." *Id.* at 931. On appeal, this Court agreed with the trial court's reasoning:

> In the motion to reconsider, Anderson asked the trial court to reconsider her second amended complaint under Rule 15(c) of the Mississippi Rules of Civil Procedure instead of Rule 9(h). In denying her motion to reconsider, the trial court reasoned that Anderson had acted with due diligence in ascertaining the true identity of the fictitious party under Rule 9(h) **but that she had failed to act with due diligence in amending her complaint under Rule 15(c).**
>
> **In the absence of any reasonable explanation by Anderson of why she waited more than nine months after learning ALPS's identity to seek the trial court's leave to include it as a defendant in her lawsuit, we agree that plaintiff failed to exercise reasonable diligence to bring this party into the litigation in a timely manner.**" (Emphasis added.)

Id. at 933-34.

In light of this Court's teaching in *Anderson*, that a plaintiff must be diligent in bringing a newly-named party into a lawsuit under Rule 15(c) after the statute of limitations has run, it cannot be credibly argued that the trial court below abused its discretion in denying the motion to amend. The Childresses waited nearly seven months after learning that Vivian Spencer had died before seeking leave to bring in the administrator of her estate. This does not equate to reasonable or due diligence, as required by *Anderson.*

The citation to *Womble v. Singing River Hosp.*, 618 So.2d 1252 (Miss. 1993) does not aid the Childresses. While in *Womble* summary judgment in favor of Dr. Longmire, Dr. Weatherall and Emergency Room Group, Ltd. had to be reversed because there was evidence from which the trier of fact could find that these defendants had notice of the suit and knew or should have known that they might have been included in it, the same does not apply in the instant case. Unlike in *Womble* where the physicians and the Emergency Room Group were beings in existence when the original

complaint was filed, here the Estate of Vivian Spencer did not come into being and Mr. Davis was not appointed as administrator until after the statute of limitations had run on the Childresses' claims against Vivian Spencer. Indeed, the Estate and its administrator Mr. Davis are more similarly situated to Dr. Calhoun in *Womble* for whom summary judgment was affirmed on the basis that there was no evidence that he "possessed an awareness that, but for a mistake, he would have been included in this suit when it was originally filed." 618 So.2d at 1268.

The Childresses' reliance on *Brown v. Winn-Dixie Montgomery, Inc.*, 669 So.2d 92 (Miss. 1996) is equally misplaced. In *Brown* plaintiff filed suit against the wrong corporate defendant based on erroneous information from the Secretary of State. Suit was filed on the last day before the statute of limitations was to run. Eight weeks later the plaintiff amended her complaint to name the correct corporate entity. The trial court granted summary judgment based on the statute of limitations having passed. The Court of Appeals affirmed relying on *Schiavone v. Fortune*, 477 U.S. 21, 106 S.Ct. 2379, 91 L.Ed.2d 18 (1986), which in turn was interpreting a since-amended version of the Federal Rule of Civil Procedure 15 which differs significantly from the version of Mississippi's Rule 15 applicable here. As the Rule interpreted by this Court in *Brown* is not the Rule applicable in this case, *Brown* does not support a finding that the trial court abused its discretion.

3. The Court Should Not Impute Notice of the Pending Action to an Estate that was not in Existence at the Time the Action was Commenced.

Notwithstanding that the Estate of Vivian Spencer was not opened and an administrator appointed until after the statute of limitations had run, the Childresses ask this Court to impute notice of the institution of the action to the Estate and/or administrator on the basis that the Spencer's insurance company had engaged in settlement negotiations with the Childresses and that the same counsel had been retained by that insurer for Mr. Spencer and the Estate. There is no basis in Rule

15 or the decisional law of this state for such imputed knowledge.

First, under Mississippi law, in the absence of evidence of misrepresentations, the fact that the Childresses had engaged in settlement negotiations with the Spencer's insurance company is of no moment. In *Patrick v. Shields*, 912 So.2d 1114 (Miss. 2005), the parties had engaged in pre-suit settlement negotiations, but plaintiff filed suit after the one-year statute of limitations of the Mississippi Tort Claims Act had run. This Court affirmed the trial court's grant of summary judgment for the defendants, noting:

> Although there was ongoing settlement negotiations between the parties, there was never a representation by MMSC that the statute of limitations was tolled. **'Though statutes of limitation may sometimes have harsh effects, it is not the responsibility of the state, nor any other potential defendant, to inform adverse claimants that they must comply with the law.'** (Emphasis added.)

Id. at 1117-18, quoting *Mississippi Dep't. of Pub. Safety v. Stringer*, 748 So.2d 662, 665 (Miss. 1999).

Here, there is no evidence that the Spencer's insurance carrier or counsel for Larry Spencer and the Estate prevented the Childresses from learning that Vivian Spencer had passed away. In fact, once the Childresses attempted service of process of the Amended Complaint, Larry Spencer advised them of her death in his Answer which was filed approximately five (5) months before the statute of limitations ran. There was no answer filed or entry of appearance by or on behalf of Vivian Spencer, which should have alerted a diligent litigant to investigate whether proper service had been made or the defendant no longer living. Yet, the Childresses did nothing in response to the knowledge that Vivian Spencer had passed away. They did not attempt to take a default judgment. They did not seek to open an estate until after the statute of limitations had run. On this state of the facts, the Court should not allow them to "impute" knowledge of the lawsuit to the estate for the

purpose of the relation back rule under Rule 15(c).

Moreover, in *Ralph Walker, Inc. v. Gallagher*, 926 So.2d 890 (Miss. 2006), the plaintiff Gallagher requested this Court to impute knowledge of the commencement of the lawsuit to Ralph Walker, Inc. based on (a) damage to Walker's trailer from the accident, (b) delay in delivery of the load to Walker because of the accident, (c) the possibility of insurance claims by Walker for damage to his trailer, and (d) business relationships between Walker and three timely named defendants. *Id.* at 896. This Court refused to impute knowledge of the commencement of the lawsuit to Walker based on these theories for application of the relation back doctrine of Rule 15(c). *Id.*

This Court also rejected the concept of imputed or constructive notice of the commencement of a lawsuit to two nursing home administrators in *Bedford Health Properties, LLC v. Estate of Williams*, 946 So.2d 335, 353 (Miss. 2006). Citing *Walker*, this Court made it clear that Rule 15(c)(1) requires some actual notice, not constructive or imputed notice.

> As to Robert Perry and Gina Simonetti, there is no proof that these individuals would have known of the lawsuit within 120 days of filing the complaint. The record provides no proof that Perry and Simonetti were notified by any of the other original or Amended Defendants that the lawsuit existed. While it is highly likely that a current administrator like Perry would be informed of litigation concerning a former resident, there is absolutely no proof in the record to demonstrate notice beyond pure speculation and assumption. As a former administrator, Simonetti may have been informed of the litigation. However, there also is no proof of notice in the record beyond speculation. Again, to determine that these newly added Amended Defendants had notice within 120 days of the filing of the complaint would amount to pure speculation on the part of this Court. This is in line with the logic of *Walker.*
>
> * * * *
>
> In addition, Rule 15(c)(1) and (2) does not address the notice requirement in terms of constructive notice.

Id. at 353.

Walker and *Bedford Health Properties* demonstrate that this Court should follow the lead of Colorado Supreme Court in *Currier v. Sutherland*, 218 P.3d 709 (Colo. 2009) rather than the collection of trial court and intermediate appellate court decisions cited by the Childresses in Section IV of the Brief of Appellant which would allow imputed or constructive notice to satisfy the notice requirement of Rule 15(c). The extra-jurisdictional citations relied on by the Childresses conflict starkly with this Court's decisions which require at least some actual notice by a newly added defendant of the commencement of the lawsuit.

4. There is No Separate Prejudice Factor Under Rule 15(c).

As noted *infra*, under Mississippi law, there are three factors which must be shown if an amendment which changes the party against whom a claim is asserted is to relate back to the filing of the original complaint. See *Ralph Walker, Inc. v. Gallagher*, 926 So.2d 890, 894-95 (Miss. 2006). First the claim in the amended complaint must arise out of the same occurrence. *Id.* Next, within the 120 days provided by Rule 4(h) for service of the summons and complaint the to-be-added party must have received notice of the institution of the action so that he will not be prejudiced in maintaining his defense on the merits. Finally, the newly-added party knew or should have known that but for a mistaken identity he would have been named in the action. *Id.* There is no separate prejudice factor.

The second factor -- timely notice of the institution of the action -- presumes that untimely notice will result in prejudice to the party sought to be added. This point was succinctly explained by this Court in *Curry v. Turner*, 832 So.2d 508, 513-14 (Miss. 2002). In *Curry*, just as here:

> There is no indiction in the record the Turners were served with the original complaint or the motion to amend with the amended complaint attached within 120 days after the statute of limitations elapsed. **They have suffered no prejudice save the expiration of the time to file suit in the statute of limitations**. Furthermore,

> Trent, Dent and LaDonna Turner were not being substituted for fictitious parties in the original complaint. **The trial court found these facts to be fatal to the Curry's claims against them. The trial court's analysis is correct and the amended complaint does not relate back to the original filing of the complaint under Rule 15(c).**

Id.[4] This Court also found that the premises owner "suffered no prejudice save the expiration of the time allowed to bring suit against him under the statute of limitations." *Id.* at 514. The Court likewise found that the trial court correctly found that the amended complaint did not relate back as to the premises owner. *Id.*

VI. CONCLUSION

The Childresses made no proper effort to bring the Estate of Vivian Spencer in as a defendant in this lawsuit until nearly three (3) months after the statute of limitations ran out, despite having been informed of her death some seven (7) months earlier with four (4) months left before the statute ran. Under this Court's ruling in *Anderson v. ALPS Automotive, Inc.*, 51 So.2d 929, 933-34 (Miss. 2011) it is clear that the Childresses "failed to exercise reasonable diligence to bring this party into the litigation in a timely manner." The trial court did not abuse its discretion when it denied the Childresses' motion for leave to amend the complaint. The Court should affirm the trial court's dismissal of all claims except the remaining claims against Defendant State Farm Insurance Company which are not at issue on this appeal.

4

Curry dispels the Childresses' recurrent theme that because Larry Spencer received notice of the amended complaint and Larry and Vivian were husband and wife, notice should be imputed to the Estate of Vivian Spencer because of the familial relationship. However in *Curry*, Trent, Dent and LaDonna Turner (newly-added defendants) were all family members of Hart Turner (original defendant), yet the Court did not impute notice from Hart Turner to his family members.

Respectfully submitted, this the 20th day of December, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lonnie D. Bailey, Attorney for Appellees, do hereby certify that I have this day mailed via U.S. Mail, postage prepaid, true and correct copies of the above and foregoing document to the following:

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Honorable Robert P. Chamberlin
Circuit Judge, 17th Judicial District
P.O. Box 280
Hernando, MS 38632

This the 20th day of December, 2011.

Lonnie D. Bailey

CERTIFICATE OF FILING

I, Lisa Roberts, legal secretary to Lonnie D. Bailey, one of the counsel for the Appellees, do hereby certify that, pursuant to Rule 25(a), M.R.A.P., I have filed the original and three copies of Brief of Appellee by depositing them in the United States Mail, first class, postage prepaid, on this the 20th day of December, 2011, addressed as follows:

Ms. Kathy Gillis, Clerk
Supreme Court of Mississippi
Post Office Box 249
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This the 20th day of December, 2011.

Lisa Roberts

Lisa Roberts