IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO.: 2011-CA-559

CAROLYN CHILDRESS and
RODNEY CHILDRESS
APPELLANTS

V.

LARRY SPENCER and VIVIAN SPENCER
and STATE FARM INSURANCE COMPANY
APPELLEES

ON APPEAL FROM THE CIRCUIT COURT OF
DESOTO COUNTY, MISSISSIPPI

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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 Judges of this Court may evaluate possible disqualification or recusal:

1. Carolyn and Rodney Childress, Appellant;
2. Steven W. Pittman, Attorney for Appellant;
3. Marc Biggers, Attorney for Appellee;
4. Larry and Spencer Appellee; and
5. The Estate of Vivian Spencer;
6. Judge Robert Chamberlin, Circuit Court Judge, Trial Judge;
7. Dawn Carson, Attorney for State Farm Insurance Company.

Steven W. Pittman,
Attorney for Appellant

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CERTIFICATE OF COMPLIANCE

COMES NOW, **Steven W. Pittman**, attorney of record for Appellants and certifies that this brief contains 7,270 words as determined by the word count of the word processing system.

SO CERTIFIED this the 27 day of October, 2011.

Steven W. Pittman
Attorney for Appellant

STATEMENT OF THE ISSUES

The issues are:

1. Whether the trial court erred in not granting the Appellant's Motion to Amend Complaint pursuant to Rule 15, M.R.C.P.

STATEMENT OF THE CASE

The accident in this matter occurred on April 25th, 2007 wherein the Plaintiffs, Carolyn and Rodney Childress, were injured in an automobile accident involving the Defendant, Vivian Spencer, who was driving a car owned by her husband, Larry Spencer. The Defendant, Vivian Spencer, died on November 22nd, 2008. The Complaint alleging negligence of the Spencer's was filed on April 30th, 2009 naming Larry Spencer and Vivian Spencer as Defendants. (Record p. 10). The Defendants were not served with process within 120 days of the filing of this original Complaint. On October 15, 2009 the defendant Uninsured Motorist carrier State Farm filed a Motion to Dismiss based on the lack of service upon the Defendant within the time provided by Rule 4(h). (Record p. 24). On November 19, 2009 the Appellants and Defendant State Farm filed a joint motion dismissing claims for extra contractual damages against State Farm. (Record p. 27). On November 23, 2009 an Order was entered by the trial judge granting the joint motion and an Amended Complaint was filed on November 25th, 2009. (Record pp. 29, 31). Appellee Larry Spencer was served with a copy of the Amended Complaint on November 29, 2009. (Record p. 39). Without knowing that she had passed away, Residence Service upon Vivian Spencer was made upon Larry Spencer her husband on November 29, 2009 however there is no proof that any letter was mailed within 5 days as required by the Mississippi Rules of Civil Procedure Rule 4(d). (Record p. 41). State Farm was served with the Amended Complaint December 11, 2009. (Record p. 46). On December 28th, 2009 an Answer was filed on behalf of Larry Spencer by attorney Marc Biggers. In paragraph number two of said Answer, Mr. Spencer states that his wife had died November 22nd, 2008. (Record p. 43).

As evidence by the Affidavit of William A. Cohen which was filed with the trial court on December 3, 2010 there have been extensive and ongoing negotiations between Plaintiff's

counsel and Nationwide Insurance Company who insured the Appellee and Vivian Spencer in this matter. (Record p. 101). Further, an offer of settlement for Vivian Spencer for policy limits of $100,000.00 was made in this case by Nationwide on November 11th, 2008 (Record p. 131).

One May 3rd, 2010 Mr. Biggers, apparently knowing that the statute of limitations had run, filed Request for Admissions for the apparent purpose of establishing that his client Larry Spencer would have no independent liability in this matter. (Record p. 57). On May 10th, 2010, still not realizing that Vivian Spencer had passed before the original Complaint was filed, Counsel for Appellant filed a Motion to Substitute Parties. (Record p. 59). This filing was flawed on its face in that the Defendant Vivian Spencer had died before the original Complaint had been filed.

On May 14th, 2010 Interrogatories were filed by the Plaintiffs upon Appellee to determine the heirs of Vivian Spencer. (Record p. 65). On May 28th, 2010 counsel for the Plaintiffs petitioned to open an Estate for Vivian Spencer which was filed in the Chancery Court of DeSoto County, Mississippi. On June 3rd, 2010 the Defendant Larry Spencer responded to Interrogatories wherein counsel for the Plaintiff learned the identity of the heirs of Vivian Spencer and that Vivian Spencer died without a Will. The Heirs are her Husband Larry Spencer and the two children of Larry and Vivian Spencer who at all times during this litigation lived with their parents in Olive Branch, Mississippi. (Record p. 67). On June 30th, 2010 the Estate of Vivian Spencer was opened and W.E. Davis, clerk of the Desoto County Chancery Court was named as the Administrator. The sole purpose of opening the Estate of Vivian Spencer, as was stated in the petition to open the estate, was to facilitate the ongoing personal injury lawsuit that is the basis of this motion. (Record p. 152). The Estate of Vivian Spencer is also represented by Attorney Marc Biggers. (Record pp. 81, 91).

A Death Certificate was supplied to the Plaintiffs on June 16th, 2010. On July 13th, 2010 the Plaintiffs filed their Motion to Amend the Complaint to include the Estate of Vivian Spencer as a party to the Complaint pursuant to Rule 15 M.R.C.P. (Record p. 77).

As evidence by the Affidavit of William A. Cohen that was filed with this court on December 3, 2010 there have been extensive and ongoing negotiations between Plaintiff's counsel and Nationwide Insurance Company who insured the Defendants in this matter and are represented by Attorney Marc Biggers. (Record pp. 101, 81, 91). Further, an offer of settlement was made by Nationwide for policy limits of $100,000.00 to settle Carolyn Childress' case on November 11th, 2008 which was prior to the death of Vivian Spencer. (Record p. 131).

The Plaintiff's Motion to Amend Complaint was heard on December 3, 2010. On February 8, 2011 the Circuit Court Judge issued an Order Denying Motion to Amend Complaint Pursuant to M.R.C.P. Rule 15. (Record p. 272). In order to facilitate the Appeals process as to all parties and all issues before the trial court, the parties entered into an Agreed Order Granting Motion for Summary Judgment on March 24, 2011 as to the remaining party, Larry Spencer. (Record p. 290). The Plaintiffs filed their Notice of Appeal on April 13, 2011. (Record p. 294).

SUMMARY OF THE ARGUMENT

1. The trial court's finding the Rule 15(c) doesn't apply because a suggestion of death was contained in the Appellee's Answer to the Complaint and therefore no mistake could exist as to the identity of the proper party ignores the fact that the mistake as to the identity of the proper party had already been made prior to the Answer by the Appellee.
2. The trial court's finding that because the suggestion of death was filed within the statute of limitations and therefore Appellant's counsel should have amended the Complaint within the statute of limitations applies a "reasonable diligence" standard to the application of Rule 15 (c) and therefore is error.
3. The trial court should have granted Appellant's Motion to Amend the Complaint pursuant to Rule 15(c) of the Mississippi Rules of Civil Procedure and any argument that the Estate did not exist within the time provided by Rule 4(h) and therefore could not have had the requisite notice places form over substance when the facts clearly establish that the Estate was only opened to facilitate the prosecution of the lawsuit by the Appellant and further considering that the Estate is made up of the Appellee Larry Spencer who was served within the time provided by Rule 4(h) and his two children who lived with the Appellee as well as the fact the Appellee and the Estate are represented by the same attorney.
4. Granting the Appellant's Motion to Amend the Complaint would not prejudice the parties in any way and it cannot be said that the party to be brought in would be caught unaware as the heirs to the Estate of Vivian Spencer had been given Notice within the time

provided by Rule 4(h), there had been extensive negotiations with the insurance company and the same attorney represents the Appellee and the Estate of Vivian Spencer.

ARGUMENT

I. THE TRIAL COURT'S RULING THAT BECAUSE A SUGGESTION OF DEATH WAS CONTAINED IN THE APPELLEE'S ANSWER THAT THERE COULD BE NO MISTAKE AS TO THE IDENTITY OF THE PROPER PARTY IGNORES THE FACT THAT THE MISTAKE AS TO THE IDENTITY OF THE PROPER PARTY HAD BEEN MADE PRIOR TO THE ANSWER FILED BE THE APPELLEE.

The original Complaint was filed in this case on April 30, 2009 naming Vivian Spencer as a Defendant. (Record p. 10). The naming of Vivian Spencer as a Defendant was a mistake as to the identity of the proper party as Vivian Spencer died on November 22, 2008. (Record p. 43). According to the affidavit of Attorney Bill Cohn (Record at p. 101), counsel for Appellant was unaware of the fact of Vivian Spencer's death at the time of the filing of the Complaint despite extensive settlement negotiations between the parties. In fact, no mention was made of Vivian Spencer's death until December 21, 2009, over a year after her passing, when a non-conspicuous one line sentence was inserted in the Answer of Appellee Larry Spencer's Answer stating the she was dead. (Record p. 43). Clearly, the Appellant, at the time of the filing of the Complaint and Amended Complaint, was mistaken as to the identity of the proper party.

The present case differs significantly from that on Wilner v. White, 929 So.2d 315 (Miss. 2006). In Wilner, the patient's amended medical malpractice complaint adding physician and a clinic as defendants, leave for which was sought before statute of limitations expired, did not relate back to date of original complaint and, thus, was time-barred, where physician's name actually appeared in the body of the original complaint itself, and patient admitted months before she filed her motion to amend that she was well aware to the possibility of a claim she might have against physician and clinic; there was no mistake as to identity of newly named defendants. Although Wilner is essentially a Rule 9(h) case, the rationale is the same as to mistake of identity of the proper party under Rule 15(c). Wilner fails to meet the test in Miss. R.

Civ. P. 15(c)(2) because the identity of a proper party was known to the Plaintiff at the time of filing. The opposite fact scenario occurred in the present case as the Appellant did not know and was mistaken as to the identity of the proper party when the Complaint and the Amended Complaint was filed in this matter.

II. THE TRIAL COURT'S RULING THAT BECAUSE A SUGGESTION OF DEATH WAS FILED THAT APPELLANT'S COUNSEL SHOULD HAVE AMENDED THE COMPLAINT WITHIN THE STATUTE OF LIMITATIONS APPLIES A "REASONABLE DILIGENCE" STANDARD TO THE APPLICATION OF RULE 15 (c) AND IS THEREFORE ERROR.

The Mississippi case of Estes v. Starnes 732 So.2d 251 (Miss. 1999) clearly establishes that reasonable diligence is not applied to the application of Rule 15(c). In Estes the Plaintiffs sued the wrong Defendant. After the running of the Statute of Limitations they realized the error and were allowed to relate back and amend their Complaint pursuant to Rule 15(c). In citing Estes, "Rule 15(a) allows for the liberal amendment of pleadings and Rule 15(c) has been construed as allowing the relation back of additional parties when a newly-named party was aware of the proceedings during the statutory time limit for bringing suit, knew or should have known that but for a mistake of identity he would have been named, and would not be prejudice in his defense of his case. Under these standards, amendment should have been allowed despite the apparent lack of diligence of Estes attorney." at p. 254. Thus, the focus of Rule 15(c) as established by the Mississippi Court is upon the three prong test established under that Rule and not upon any dilatory motive, undue delay or mistake by the parties or counsel.

The case of Rainey v. Grand Casinos, Inc. et. al., 2009-CA-01577-COA (Miss. 2010) further establishes the law as it relates to Rule 9(H) which requires the Movant to be reasonably diligent in trying to ascertain the identity of the proper defendants and Rule 15(c) which does not contain a reasonable diligence standard. In citing Rainey, "Moreover, the reasonable diligence

standard does not apply since this is a Rule 15(c) case where Rainey is changing a party, not substituting a fictitious party." Rainey at . The Wilner v. White case states "Reasonable diligence is a standard only for determining the efforts made to discover the true identity of a named fictitious party under Rule 9(h)." Wilner v. White, 929 So.2d at 323.

The Estes v. Starnes, 732 So.2d 251 (Miss. 1999) decision also further establishes that reasonable diligence is not a consideration with regard to applying the relation back doctrine under Rule 15(c).

III. THE TRIAL COURT ERRED IN ITS DENIAL OF APPELLANT'S MOTION TO AMEND BY FINDING THAT THE STATUTE OF LIMITATIONS HAD RUN PRIOR TO THE OPENING OF THE ESTATE.

It is well established law in the State of Mississippi that the statute of limitations does not preclude filing suit against a party after the limitations period has expired if the provisions of Rule 15(c) are met.

In Womble v. Singing River Hospital, 618 So.2d 1252 (Miss. 1993), this Court looked at the application of Rule 15(c) in the context of a medical malpractice case in which certain doctors had originally been sued as "John Does" in concluding that summary judgment had been improper on the basis of the statute of limitations, this Court stated:

"On these facts the conclusion that, within the statutory period provided by law for commencing this action, Longmire and Weatherall had notice of this suit and knew or should have known of this suit and knew or should have known that but for a mistake concerning their identities, they would have been included in this suit when it was originally filed on March 28, 1993, is virtually compelled. It is also obvious beyond peradventure that they will not be prejudiced in maintaining a defense on the merits. The record shows that they were already

preparing with retained counsel to defend themselves in this action on April 21, 1988. That date is approximately three weeks after the original complaint was filed. Therefore, we find that the provisions of Rule 15(c) have been satisfied by the facts of this case, and consequently, we rule that summary judgment was improperly entered for Doctor Weatherall and Dr. Longmire in the basis of the time bar." 618 So.2d at 1268.

Drs. Longmire and Weatherall were not added to the suit until approximately two years and eight months after the death of Helen Womble and "[u]nder any reasonable interpretation of the statute § 15-1-36's two-year period had passed before the joinder of Dr. Weatherall, Dr. Longmire, and Emergency Room Group." Id. at 1266. Despite this, the court found that the newly added defendants would suffer no prejudice. The opinion places emphasis on the fact that the added defendants were represented by counsel retained by the insurance company within the time period allowed by Rule 4(h). The fact scenario in Womble is similar to that of the present case as Mr. Biggers represented the Appellee, filed an Answer within the time allowed by Rule 4(h) and also represents the Estate of Vivian Spencer. (Record pp. 81, 91).

In Brown v. Winn-Dixie Montgomery, Inc. 669 So.2d 92 (Miss.1996) this Court cited Womble again in ruling that Rule 15(c) applied allowing a new defendant to be brought into the original suit that had been filed on the last day for filing under the statute of limitations and named the wrong defendant. In following Womble, this Court stated that it will look "more to the element of whether the party defendant would be caught unaware by the amendment to the complaint". Id at 96. In supporting its ruling, this Court further stated "In the present case, Winn-Dixie's insurance adjuster investigated the claim soon after the occurrence and the same attorneys represented both Winn-Dixie corporate entities." Id at 96. Again, the facts are similar to the facts presented here on appeal. It cannot be said that the Estate of Vivian Spencer would

be caught unaware especially given the relationship of Vivian Spencer and Appellee, the fact that the only other heirs, their children, lived with the Appellee as well as the fact of dual representation by Mr. Biggers.

In Estes v. Starnes, 732 So.2d 251 (Miss. 1999) this Court allowed the application of Rule 15(c) after the running of the statute of limitations where a close relationship existed between the named defendant and the proper defendant. In Estes, the Plaintiff sued the actual tortfeasor's father instead of the actual tortfeasor who shared the same name as the father. The statute of limitations ran out and the Plaintiff moved to amend the complaint to name the son as the proper defendant. The trial court denied the Motion to Amend. This Court reversed and remanded. In doing so, this Court cited the fact that defendants were immediate family, father and son, and therefore the son knew or should have known that but for some error in identity, he was the proper party. Id at 253. Further, this Court cited the fact that the father and the son had notice of Estes' claim within the statute of limitations by virtue of Estes' negotiations with the Starnes' insurance company. Id at 253. The facts are similar to those on appeal as the actual tortfeasor, Vivian Spencer, and the Appellee, Larry Spencer, were husband and wife and there were extensive negotiations between Appellants and the Spencer's insurance company.

Finally, in allowing relation back in Estes, this Court points out that the spirit of Rule 15 allows for liberal amendment of the pleadings in order to give a party their day in court and to allow cases to be determined on their merits if at all possible.

IV. THE ESTATE OF VIVIAN SPENCER RECEIVED NOTICE OF THE INSTITUTION OF THE ACTION IN THIS CASE WITHIN THE TIME PROVIDED BY RULE 4(b) AND THE ESTATE KNEW OR SHOULD HAVE KNOWN THAT, BUT FOR MISTAKE CONCERNING THE IDENTITY OF THE PROPER PARTY, THE ACTION WOULD HAVE BEEN BROUGHT AGAINST THE ESTATE.

The Appellants have met all three requirements of Rule 15(c) M.R.C.P. First, as stated in the trail court order denying Appellant's Motion to Amend the Complaint, the first prong of Rule 15(c) is not in question. (Record p. 272). The application of the remaining two prongs of Rule 15(c) appears to present a case of first impression in the State of Mississippi. As set out fully in the Statement of The Case above, Vivian Spencer was involved in an accident wherein the Appellants were seriously injured. Vivian Spencer then died. Without knowing that she had died, counsel for Appellants then filed a lawsuit. (Record p. 101). Appellee Larry Spencer then filed an Answer stating that Vivian Spencer had died. Then, after the running of the applicable statute of limitations, an estate was opened for Vivian Spencer (Record p. 152) and a Motion to Amend was filed seeking permission to name the Estate of Vivian Spencer as the proper party to the lawsuit. (Record p. 77). During arguments on Appellant's Motion to Amend, counsel for both parties, unable to cite any Mississippi caselaw applicable to an estate in this posture, relied upon cases from other jurisdictions as did the trial court in reaching its decision.

The Appellees have cited primarily the case of Currier v. Southerland 218 P.3d 709 (Colo.2009). Appellants submit that reliance upon this Colorado case is misguided. In Currier, the Plaintiff sought to open an estate and amend the Complaint after the statute of limitations had run. The primary difference between the Currier case and the present case is that NO ONE was served or given notice of the claim during the time allowed for service or prior to the running of statute of limitations in Currier. In the present case not only were there ongoing and continuous negotiations between the parties, Appellee Spencer in fact received notice of the claim at the

latest following the filing of the Amended Complaint on November 25th, 2009, well within the time for provided by Rule 4(h) and the applicable statute of limitations. Larry Spencer and Vivian Spencer were husband and wife and further, Mr. Biggers who represents the Appellee also represents the Estate of Vivian Spencer (Record pp. 81, 91).

Counsel for the Plaintiffs, would submit that the Washington state case of Perrin v. Stensland, 63539-5-I (WACA) is more analogous to the case at bar. The facts of the Perrin case are nearly identical to the present case. The widow of the Perrin case was served with the Complaint PRIOR to the expiration of the statute of limitations and within the time fixed for service of process. After the statute of limitations ran, an estate was opened and application was made to amend the Complaint to name the estate. The court in Perrin found that notice was imputed to the Estate because of the fact that the husband of the deceased was served with process in a timely fashion. In the present case, Mr. Spencer was clearly served with process following the filing of the Amended Complaint, within the time provided pursuant to Rule 4(h) and well prior to the running of the Statute of Limitations. Any argument that the Estate did not exist within the time provided by Rule 4(h) and therefore could not have had the requisite notice places form over substance considering that the Estate is made up of the Appellee Larry Spencer who was served within the time provided by Rule 4(h) and his two children who lived with the Appellee. (Record p. 207) Further, the facts clearly establish that the Estate was opened by the Appellant and its only purpose is to facilitate the prosecution of the lawsuit by the Appellant. (Record p. 152)

Specifically, the Perrin case establishes that the requirements of Rule 15(c) in Washington are three pronged; the same as in Mississippi. Further, there is not a reasonable diligence provision associated with Rule 15(c) in Washington State. It appears that

Washington's law is the same as Mississippi's in that they analyze and apply a reasonable diligence standard under Rule 9(h) but they do not do so in analyzing cases under Rule 15(c). The focus of Rule 15(c) is on whether or not the three prong test has been met and the purpose of the relationship back rule is to balance the interest of the Defendant being protected by the statute of limitations with the preference embodied in the Civil Rules of resolving disputes on their merits. The same is so in Mississippi.

From Perrin, "The focus under CR 15 (c) is upon what the new defendant knew or should have known before the limitations period expired, not upon the diligence of the plaintiff in amending the complaint. The driver's estate had notice of the pending action by way of timely service upon the driver's widow, who had insurance coverage under the same policy as the driver. The estate was not prejudiced in its defense and should have known that the action would have been brought against the estate had the plaintiff not mistakenly believed the driver was still alive. Under these circumstances, where all the prerequisites for relation back were met, the trial court should have denied the motion to dismiss." (Perrin at).

The Perrin case rejects, as should Mississippi, the presumption that an estate cannot have knowledge of an event that occurred prior to the technical opening of said estate when the individuals who would necessarily be concerned with the estate and the defense of claims against it were notified of said claim in a timely fashion. Such a presumption contravenes the liberal policy of construction of Rule 15.

The case of Pargman v. Vickers, 96 P.3d 57 (Ariz. 2004) is another example of States allowing the application of Rule 15(c) under certain circumstance where notice and knowledge may be imputed from an original defendant to a new defendant. This may happen when there is an "identity of interest" between the two. Also see Ellman Land Corp. v. Maricopa County, 180

Ariz. 331, 338, 884 P.2d 217, 224 (App. 1994), timely service on an original defendant may provide timely, imputed, or constructive notice on a new defendant. Courts are particularly amenable to imputing notice when the new and original defendants share an identity of interest, such that they "are so closely related in their business operations or other activities that the institution of an action against one serves to provide notice of the litigation to the other." Id. at 338, 884 P.2d at 225, n.9. Notice may also be imputed when the new and original defendants share the same attorney. Id.

The relationship needed to establish identity of interest for notice and knowledge under Rule 15 (c) varies depending on the underlying facts. 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1499, at 147 (1990).

Other jurisdictions impute notice through the insurance carrier. In Smith v. TW Services, Inc., 142 F.R.D. 144 (M.D.Tenn.1991) the plaintiff filed a slip and fall action against a restaurant licensor when the party she should have sued was the owner and operator of the restaurant, licensee, Id. at 145. Before filing the case, the plaintiff submitted her claim to the licensee's insurance carrier. Id. After the limitation period had expired, the plaintiff moved to add the licensee as a defendant. Id. at 146. The court held that the insurer's notice of the action and knowledge of the plaintiff's mistake could be imputed to the licensee, Id. at 149. Discussing the notice requirement of Rule 15(c) of the Federal Rules of Civil Procedure which is identical to the notice requirement under our Rule 15(c), the court stated:

[T]he second... requirement clearly obligates the plaintiff to provide only such notice sufficient to prevent prejudice in the maintenance of a defense. Intuitively, there is little prejudice to a defendant when his own liability insurer, who will likely be heavily involved in the defense, has notice of a suit within the limitations. [The carrier] had full authority to

investigate and settle the claim and would play a key role in the impending litigation. This is not a so-called "identity of interest" case, but there is still a substantial unity of interest between [in insurer] and [the insured] with respect to this litigation. Finally, [the insured] has neither alleged nor established any prejudice it might suffer in defending this suit.

A similar situation was presented in Lagana v. Toyofuki Kaiun, K.K., 124 F.R.D. 555 (S.D.N.Y 1989). The plainffs, all longshoremen, were injured unloading a ship. Id at 556. At the time of the accident, the original defendant was the registered owner of the ship, however, the registered owner had chartered the ship to another entity and that entity became the owner "pro hac vice" of the ship and responsible for her operations. Id. The plaintiffs failed to sue the pro hac vice owner of the ship within the limitation period. Id. The liability insurer for the original defendant was also the liability insurer for the pro hac vice owner and had received notice of the litigation with the period prescribed under Federal Rule 15(c).

See also Korn v. Royal Caribbean Cruise Line, Inc., 724 F.2d 1397 (9th Cir. 1984) timely notice to the insurer of new defendant inadvertently omitted from the complaint was with sufficient notice to new defendant that it would not be prejudiced in defending action on the merits; and Red Arrow Stables, Ltd. v. Velasquez, 725 N.E.2d 110 (Ind.Ct.App.2000) timely notice of lawsuit to insurer was constructive notice to insured for relation back; insurer was entitled to investigate claim and had right and duty to defend.

Courts have held that an amendment to add an estate as a new party may relate back to the date of the original complaint when the assets of the estate are liability insurance proceeds and the insurer had notice of the action and knowledge of the plaintiff's mistake in suing the insured decedent within the time prescribed by the relation back rule. These courts have recognized that, as a practical matter, the insurer is the real party in interest and unless it or the

estate is prejudiced by the amendment, there is no unfairness in allowing relation back. In Hamilton v. Blackman, 915 P.2d 1210 (Alaska 1996), the plaintiffs were entitled to petition the probate court for the appointment of a personal representative and to move to amend their complaint to add the estate. Explaining that the "touchstone" of the relation back doctrine was fairness, the court noted that it appeared that the driver's insurer had actual notice and knowledge of the lawsuit and that, consequently, the relation back requirements were met:

"It is the Estate of William Blackmon, not State Farm, that [plaintiffs] will seek to bring into the case when they sue the estate's personal representative, as the estate has not yet been opened it could not have notice of the claim against it; it would therefore be impossible to satisfy the literal terms of Civil Rule 15(c). However, State Farm is the only entity with exposure for damages liability as a result of [plaintiff'] action. Under these circumstances, actual notice to State Farm suffices to meet the notice requirements of Civil Rule 15(c)." Id. at 1218 n. 12.

Other jurisdictions have also recognized that an amended complaint adding or substituting the decedent's estate for the decedent will relate back where the plaintiffs were seeking insurance proceeds and the insurer had actual notice and knowledge of the suit with in the required time frame. See Ind. Farmers Mutual Ins. Co. v. Richie, 707 N.E.2d 992 (Ind.1999); Macias v. Jaramillo, 129 N.M. 578, 11 P.3d 153 (Ct.App.2000).

Counsel for Appellant goes to length to cite all of the above cases to support the position of the Appellant that the requirements of Rule 15(c) have been met with regard to the Estate of Vivian Spencer. This may not be necessary, however, as the Mississippi cases cited above, Womble v. Singing River Hospital, Estes v. Starnes, and Brown v. Winn-Dixie Montgomery all make reference to negotiations with an insurance company as an element in establishing Notice to the proper defendant pursuant to Mississippi Rule 15(c). While Mississippi may not impute

notice simply based on insurance negotiations alone, and Appellant is not arguing that this should be the case, it has done so when there are such negotiations coupled with something more such as a close relationship between the parties, or where the parties share the same attorney. Clearly the present case meets these requirements under Mississippi law and as such the Appellant's Motion to Amend should have been granted.

V. NO PREJUDICE WILL RESULT TO APPELLEE FROM THE GRANTING OF APPELLANT'S MOTION TO AMEND.

Finally, there will be no prejudice to the Estate of Vivian Spencer or to Appellant Larry Spencer in allowing the amendment under Rule 15(c). Conversely there would be a manifest injustice done to the Plaintiffs in this case especially considering that policy limits have been offered previously. The offer of policy limits was made in this case on November 11, 2008 before Mrs. Spencer passed away. (Record p. 131). The offer was made during extensive settlement negotiations between the Appellants and Appellee's insurance company. (Record p. 101).

The same insurance company insured Appellee as well as Vivian Spencer and the same insurance company hired Mr. Biggers to represent the Appellee as well as the Estate of Vivian Spencer (Record pp. 81, 91). Appellee has had ample notice of the Complaint and the facts that support same within the time provided by Rule 4(h). Vivian Spencer left no will and the heirs of her estate are Larry and their two children who live at the same address as Mr. Spencer. (Record p. 207). The Estate of Vivian Spencer was opened for the sole purpose of effectuating the lawsuit in this matter and there are no other assets in the Estate of Vivian Spencer. (Record at p. 152). As such, no prejudice will flow from the granting of Appellant's Motion to Amend and

more so it is difficult to see how the Estate of Vivian Spencer could be caught unaware of the pending lawsuit.

CONCLUSION

Appellant's Motion to Amend the Complaint to include the Estate of Vivian Spencer should have been granted pursuant to Rule 15(c). Appellant urges this Court to find that, under the specific circumstances of this case, the Estate of Vivian Spencer had Notice of the Complaint within the time provided by Rule 4(h). The Appellant is not arguing that the doctrine of Imputed Notice be adopted by mere correspondence or negotiations with an insurance company. The Appellant argues that there is actual notice, or at the least imputed notice, by virtue of the extensive negotiations with the insurance company both prior to the death of Vivian Spencer and afterwards wherein policy limits were offered to settle the case, coupled with actual service upon the Appellee husband of Vivian Spencer, coupled with the fact that the same attorney represents the Appellee as well as the Estate of Vivian Spencer, coupled with the fact that the only other heirs of the Estate are the children whom resided with the Appellee and Vivian Spencer and the fact that the only role of the Estate is to facilitate the prosecution of the underlying lawsuit. As such, it cannot be said that the party to be brought in by amendment will be prejudiced or caught unawares by said amendment.

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CONCLUSION

Appellant's Motion to Amend the Complaint to include the Estate of Vivian Spencer should have been granted pursuant to Rule 15(c). Appellant urges this Court to find that, under the specific circumstances of this case, the Estate of Vivian Spencer had Notice of the Complaint within the time provided by Rule 4(h). The Appellant is not arguing that the doctrine of Imputed Notice be adopted by mere correspondence or negotiations with an insurance company. The Appellant argues that there is actual notice, or at the least imputed notice, by virtue of the extensive negotiations with the insurance company both prior to the death of Vivian Spencer and afterwards wherein policy limits were offered to settle the case, coupled with actual service upon the Appellee husband of Vivian Spencer, coupled with the fact that the same attorney represents the Appellee as well as the Estate of Vivian Spencer, coupled with the fact that the only other heirs of the Estate are the children whom resided with the Appellee and Vivian Spencer and the fact that the only role of the Estate is to facilitate the prosecution of the underlying lawsuit. As such, it cannot be said that the party to be brought in by amendment will be prejudiced or caught unawares by said amendment.

CERTIFICATE OF FILING AND SERVICE

I, Steven W. Pittman, attorney for the Appellant, do hereby certify that I have this day mailed, postage prepaid, one original and 3 copies and one electronic copy of the above and foregoing **APPELLANT'S BRIEF** addressed to those below listed. The original motion and copies will be deposited in the United States Mail, addressed to the Clerk of the Supreme Court on Thurs, October 27, 2011 by Steven W. Pittman.

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SO CERTIFIED, this the 27 day of October, 2011.

Steven W. Pittman
Certifying Attorney