

IN THE SUPREME COURT OF MISSISSIPPI

NO. 89-R -99001 SCT

**IN RE: MISSISSIPPI RULES OF CIVIL PROCEDURE IN ALL
CHANCERY, CIRCUIT AND COUNTY COURTS OF THE STATE**

ORDER

This matter has come before the Court, en banc, upon petition of the Mississippi Supreme Court Rules Advisory Committee for amendment of certain rules, comments and historical notes to the Mississippi Rules of Civil Procedure. Having considered the proposal, the Court finds that such amendment will promote the fair and efficient administration of justice and that it should be adopted.

NOW, THEREFORE, IT IS ORDERED that Rule 4(f) to the Mississippi Rules of Civil Procedure and to the accompanying comment and historical note shall be and are hereby amended as set out in Appendix A to this order.

IT IS FURTHER ORDERED that Rule 15(c) to the Mississippi Rules of Civil Procedure and to the accompanying comment and historical notes shall be and are hereby amended as set out in Appendix B to this order.

IT IS FURTHER ORDERED that the historical note set forth in Appendix C hereto shall be and is hereby added to the historical notes for Rule 43 of the Mississippi Rules of Civil Procedure.

IT IS FURTHER ORDERED that Rule 45 of the Mississippi Rules of Civil Procedure and the accompanying comment shall be and are hereby amended as set forth in Appendix D to this order, with the addition of the historical note indicated therein.

IT IS FURTHER ORDERED that all such amendments shall be effective on July 1, 1998.

IT IS FURTHER ORDERED that the Clerk of this Court shall spread this order upon the minutes of the Court and shall forthwith forward a true certified copy hereof to West Publishing Company for publication as soon as practical in the advance sheets of *Southern Reporter, Second Series (Mississippi Edition)* and in the next edition of *Mississippi Rules of Court*.

SO ORDERED, this, the _____ day of May, 1998.

WILLIAM L. WALLER, JR., JUSTICE,
FOR THE COURT

PITTMAN, P.J. NOT PARTICIPATING

MCRAE, J. WOULD DENY THE PROPOSED AMENDMENT OF RULES 4(f) BECAUSE THE CONSEQUENCES MUST BE DEFINED.

MCRAE, J. WOULD DENY THE PROPOSED AMENDMENT OF RULE 15(c) BECAUSE IT IS RESTRICTIVE OF *Brown v. Winn Dixie*.

MCRAE, J. WOULD DENY THE PROPOSED AMENDMENT OF RULE 45.

APPENDIX A

RULE 4. SUMMONS

* * * * * (Intervening text unchanged)

(f) Return. The person serving the process shall make proof of service thereof to the court promptly ~~and in any event within the time during which the person served must respond to the process. . . .~~ Failure to make proof of service does not affect the validity of the service.

* * * * * (Intervening text unchanged)

[Amended effective May 1, 1982; March 1, 1985; February 1, 1990; July 1, 1998.]

Advisory Committee Historical Note

* * * * * (Intervening text unchanged.)

Effective July 1, 1998, Rule 4(f) was amended to state that the person serving process shall promptly make proof of service thereof to the court.

Comment

* * * * *(Intervening text unchanged.)

Rule 4(f) provides that the person serving the process shall *promptly* file a return of service with the court. Prior to revision in 1997, the rule sanctioned making the return at any time before the person served was required to respond. The failure to promptly file a return may precipitate a default or defeat a defendant's right to remove the case. The purpose of the requirement for prompt filing is to avoid these problems that may arise when a defendant is unable to verify the date of service by examining the return of service in the court records.

* * * * * (Intervening text unchanged.)

[Comment adopted effective March 1, 1986; amended effective February 1, 1990; July 1, 1998.]

APPENDIX B

RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS

* * * * * (Intervening text unchanged.)

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by ~~law for commencing the action against him~~ Rule 4(h) for service of the summons and complaint, the party to be brought in by amendment:

(1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits; and

(2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him. An amendment pursuant to Rule 9(h) is not an amendment changing the party against whom a claim is asserted and such amendment relates back to the date of the original pleading.

* * * * * (Intervening text unchanged.)

[Amended effective July 1, 1998.]

Advisory Committee Historical Note

Effective July 1, 1998, Rule 15(c) was amended to state that the relation back period includes the time permitted for service of process under Rule 4(h).

Comment

* * * * *(Intervening text unchanged.)

Prior to the Mississippi Rules of Civil Procedure, it was the law that amendments relate back to the date of the original pleading only when, generally, the amended bill stated no new cause of action and brought in no new parties. *Brown v. Goolsby*, 34 Miss. 437 (1857); *Potts v. Hines*, 57 Miss. 735 (1880); *V. Griffith*, supra, § 398.

Now the first test for whether an amendment relates back, under Rule 15(c), is merely whether the amended claim or defense arose from the same "conduct, transaction, or occurrence" as the original. The remaining tests are whether the new party to be added by the amendment (if any) is served before ~~the applicable statute of limitations has run, whether he has been prejudiced in his defense by the delay, and whether he knew or should have known that, but for mistaken identities, he would have been joined originally.~~ expiration of the period provided by Rule 4(h) for service of the

summons and complaint. An intended defendant who is notified of an action within the period allowed by Rule 4(h) for service of a summons and complaint may not defeat the action on account of a defect in the pleading with respect to the defendant's name, provided that the requirements of clauses (1) and (2) have been met. If the notice requirement is met within the Rule 4(h) period, a complaint may be amended at any time to correct a formal defect such as a misnomer or misidentification. In allowing a name-correcting amendment within the time allowed by Rule 4(h), this rule allows not only the 120 days specified in that rule, but also any additional time resulting from any extension ordered by the court pursuant to that rule, as may be granted, for example, if the defendant is a fugitive from service of the summons.

Amendments pursuant to Rule (h) (fictitious parties) are not considered as changing parties and do relate back.

* * * * * (Intervening text unchanged.)

[Comment amended effective September 1, 1987; amended August 21, 1996; amended July 1, 1998.]

APPENDIX C

RULE 43. TAKING OF TESTIMONY

* * * * * (Text of the rule unchanged.)

Advisory Committee Historical Note

* * * * * (Intervening text unchanged.)

Effective July 1, 1998, Rule 43(f) was amended in regard to compliance with the Americans with Disabilities Act, 42 U.S.C. § 12131, et seq.

APPENDIX D

RULE 45. SUBPOENA

(a) Form; Issuance.

(1) Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony, or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified. The clerk shall issue a subpoena signed and sealed, but otherwise in blank, to a party requesting it, who shall fill it in before service. A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately.

* * * * * (Intervening text unchanged)

(b) Place of Examination. A resident of the State of Mississippi may be required to attend ~~an examination~~ a deposition, production or inspection only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of the court. A non-resident of this state subpoenaed within this state may be required to attend only in the county wherein he is served, or at such other convenient place as is fixed by an order of the court.

(c) Service.

* * * * * (Intervening text unchanged.)

(2) Proof of service shall be made by filing with the clerk of the court from which the subpoena was issued a statement, certified by the person who made the service, setting forth the date and manner of service, the county in which it was served, ~~and the names of the persons served, and the name,~~ address and telephone number of the person making the service.

(d) Protection of Persons Subject to Subpoenas.

* * * * * (Intervening text unchanged.)

(2) Subpoenas for Production or Inspection.

(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or to permit inspection of premises need not appear in person at the place of production or inspection unless commanded by the subpoena to appear for deposition, hearing or trial. Unless for good cause shown the court ~~enlarges or shortens~~ the time, a subpoena for production or inspection shall allow not less than ten days for the person upon whom it is served to comply with the subpoena. A copy of all such subpoenas shall be served immediately upon each party in accordance with Rule 5. A subpoena commanding production or inspection will be subject to the

provisions of Rule 26(d).

* * * * * (Intervening text unchanged.)

(C) The court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (i) quash or modify the subpoena if it is unreasonable ~~and~~ or oppressive, or (ii) condition the denial of the motion upon the advance by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

* * * * * (Intervening text unchanged.)

[Amended March 13, 1991; July 1, 1997; July 1, 1998.]

Comment

* * * * * (Intervening text unchanged.)

Under Rule 45(a)(2), all subpoenas (except ~~in~~ those pertaining to foreign litigation) shall be issued from the court in which the action is pending and may be served anywhere in the State. Subpoenas for depositions in foreign litigation must be issued by a clerk of a court for the county in which the deposition is to be taken. However, a Mississippi resident may be subpoenaed to attend an examination only in a county where he resides, or is employed or transacts business in person, unless the court fixes another convenient place. A nonresident subpoenaed within the State may be required to attend only in the county where he is served, unless the court fixes another convenient place. Rule 45(b).

* * * * * (Intervening text unchanged.)

Paragraph (d)(2)(A) requires that the party serving a subpoena for production or inspection must serve a copy of the subpoena upon all parties to the action immediately after it is served on the person to whom it is directed. Thus, the rule does not contemplate that the party serving a subpoena may delay serving a copy of the subpoena on the other parties to the action until 10 days before the date designated for the production or inspection. A failure to immediately serve a copy of the subpoena on the other parties ~~to the action~~ may be grounds for extending the time for compliance with the subpoena ~~under paragraph (f) of the rule~~. Service must be made in accordance with Rule 5.

A subpoena for production or inspection is also subject to the provisions of Rule 26(d).

Paragraph 45(d)(2)(C), provides that upon motion the court may (1) quash or modify the subpoena if it is unreasonable ~~and~~ or oppressive, or (2) condition the denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things. A subpoena duces tecum is subject to a motion, as just described, and is also subject to the provision for protective orders in Rule 26(c).

* * * * * (Intervening text unchanged.)

The court is authorized by Rule 45(f) to impose an appropriate sanction on a party who is shown to have exercised the subpoena power in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the party or the person upon whom the subpoena is served, which ordinarily will include attorney's fees and costs, and may also include compensation for wages lost ~~be~~ by a witness in objecting to the subpoena.

* * * * * (Remaining text unchanged.)

{Comment amended effective March 13, 1991; amended April 18,1995; amended effective July 1, 1997; July 1, 1998.}