Serial: **191820**

IN THE SUPREME COURT OF MISSISSIPPI

No. 89-R-99001-SCT

IN RE: THE RULES OF CIVIL PROCEDURE

ORDER

This matter is before the en banc Court on the Motion for the Amendment of Comments to the Mississippi Rules of Civil Procedure filed by the Supreme Court Rules Advisory Committee. As created by order of this Court originally dated November 9, 1983, the Committee is composed of members who represent the bench, bar, and the law schools of this state. In keeping with its responsibilities and for the purpose of assisting the bench and bar, the Committee has promulgated the notes that follow the Court's rules. These notes, while not official comments of the Supreme Court, are the product of extensive research and review and have been vetted by the members of the Committee as well as other trial judges and practicing members of the bar. The Court expresses its sincere appreciation for the Committee's commitment, diligence, and hard work. Having carefully considered the motion and its attachments, the en banc Court finds that the motion should be granted to the extent provided in this order.

IT IS, THEREFORE, ORDERED that the current Comments to the Mississippi Rules of Civil Procedure are repealed effective July 1, 2014.

IT IS FURTHER ORDERED that the Advisory Committee Notes to the Mississippi Rules of Civil Procedure as contained in Exhibit "A" are approved for publication with the Mississippi Rules of Civil Procedure effective July 1, 2014.

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, Third Series (Mississippi Edition)* and in the next edition of *Mississippi Rules of Court.*

SO ORDERED, this the 9th day of June, 2014.

/s/ William L. Waller, Jr.

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

ADVISORY COMMITTEE NOTES

Rule 1. Scope of Rules

These rules are to be applied as liberally to civil actions as is judicially feasible, whether in actions at law or in equity. However, nothing in the rules should be interpreted as abridging or modifying the traditional separations of jurisdiction between the law courts and equity courts in Mississippi.

The salient provision of Rule 1 is the statement that "These rules shall be construed to secure the just, speedy, and inexpensive determination of every action." There probably is no provision in these rules more important than this mandate; it reflects the spirit in which the rules were conceived and written and in which they should be interpreted. The primary purpose of procedural rules is to promote the ends of justice; these rules reflect the view that this goal can best be accomplished by the establishment of a single form of action, known as a "civil action," thereby uniting the procedures in law and equity through a simplified procedure that minimizes technicalities and places considerable discretion in the trial judge for construing the rules in a manner that will secure their objectives.

Rule 2. One Form of Action

Rule 2 does not affect the various remedies that previously have been available in the courts of Mississippi. The abolition of the forms of action furnishes a single, uniform procedure by which a litigant may present a claim in an orderly manner to a court empowered to give whatever relief is appropriate and just; the substantive and remedial principles that applied prior to the advent of these rules are not changed. What was an action at law before these rules is still a civil action founded on legal principles and what was a bill in equity before these rules is still a civil action founded upon equitable principles.

Rule 3. Commencement of Action

Rule 3(a) establishes a precise date for fixing the commencement of a civil action. The first step in a civil action is the filing of the complaint with the clerk or judge. Service of process upon the defendant is not essential to commencement of the action, but Rule 4(h) does require service of the summons and complaint within 120 days after the filing of the complaint.

Ascertaining the precise date of commencement is important in determining whether an action has been brought prematurely; whether it is barred by a statute of limitations; and which of two or more courts in which actions involving the same parties and issues have been instituted should retain the case for disposition, absent special considerations.

The provisions in Rule 3 pertaining to costs are intended to make uniform the assessing, accounting for, and funding of costs.

Rule 3(c) allows indigents to sue without depositing security for costs; however, the indigent affiant may be examined as to affiant's financial condition and the court may, if the allegation of indigency is false, dismiss the action.

Rule 4. Summons

After a complaint is filed, the clerk is required to issue a separate summons for each defendant except in the case of summons by publication. The summons must contain the information required by Rule 4(b), which requires the summons to notify the defendant that, among other things, a failure to appear will result in a judgment by default. Although the "judgment by default will be rendered" language may be an overstatement, the strong language is intended to encourage defendants to appear to protect their interests. Forms 1A, 1AA, 1B, and 1C are provided as suggested forms for the various summonses.

The summons and a copy of the complaint must then be served on each defendant. This rule provides for personal service, residence service, first-class mail and acknowledgement service, certified mail service, and publication service.

Personal service is authorized by Rule 4(d)(1)(A) and requires delivery of a copy of the complaint and the summons to the person to be served.

Residence service is authorized by Rule 4(d)(1)(B) and requires that a copy of the complaint and the summons be left at the defendant's usual place of abode with the defendant's spouse or other family member who is above the age of sixteen and who is willing to accept service. Residence service further requires that a copy of the summons and complaint be thereafter mailed to the defendant at the location where the complaint and summons were left.

Personal service and residence service may be made by a process server or the sheriff in the county where the defendant resides or can be found. A party using a process server may pay such person any amount that is agreed upon but only that amount statutorily allowed as payment to the sheriff under Mississippi Code Annotated section 25-7-19 (Supp. 2013) may be taxed as recoverable costs in the action. Summonses served by process servers should be in substantial conformity with Form 1A and summonses served by sheriffs should be in substantial conformity with Form 1AA.

First-class mail and acknowledgement service is authorized by Rule 4(c)(3). The plaintiff must mail the defendant a copy of the summons and complaint, two copies of a notice and acknowledgement conforming substantially to Form 1B, and a postage paid envelope addressed to the sender. Upon receipt, the defendant may execute the acknowledgement of service under oath or by affirmation. If the defendant fails to execute and return the

acknowledgement of service in a timely fashion, the defendant may be ordered to pay the costs incurred by the plaintiff in serving the defendant by another method. This provision is intended to encourage a defendant to acknowledge service by first-class mail in order to avoid having to pay the costs that would otherwise be incurred by the plaintiff in serving that defendant. Execution and return of the acknowledgement of service does not operate as a waiver of objections to jurisdiction or venue. All jurisdictional and venue objections are preserved whether Form 1B is completed and returned from inside or outside the state. Although M.R.C.P. 4(c)(3) is modeled after Fed. R. Civ. P. 4(d), defendants who execute and return the acknowledgement of service under M.R.C.P. 4(c)(3) are acknowledging actual service, whereas defendants who execute and return the waiver under Fed. R. Civ. P. 4(d) are waiving service.

Publication service is authorized by Rule 4(c)(4) and is limited to defendants in chancery court proceedings and other proceedings where service by publication is authorized by statute. Service by publication is further limited to defendants who are nonresidents or who cannot be found within the state after diligent inquiry. The requirements for service by publication are detailed in the rule and must be strictly followed; otherwise service is ineffective. *See Caldwell v. Caldwell*, 533 So. 2d 413 (Miss. 1988).

Certified mail service is authorized by Rule 4(c)(5) and is limited to persons outside the state. The plaintiff must send a copy of the summons and complaint to the person to be served by certified mail, return receipt requested [and must thereafter mail by first-class mail, postage prepaid, a copy of the summons and complaint to the person to be served at the same address. The Proof of Service must indicate the date on which the summons and complaint were mailed by first-class mail and must also include as an attachment the signed return receipt or the return envelope marked "refused." Service upon a foreign corporation, partnership or unincorporated association is effective even if the certified mail is delivered to and signed for or refused by a person other than the addressee, if the person accepting delivery and signing or refusing delivery is an officer or employee of the defendant who is authorized to receive or who regularly receives certified mail. *See Flagstar Bank, FSB v. Danos,* 46 So. 3d 298 (Miss. 2010) (finding service by certified mail upon a foreign corporation effective where the plaintiff addressed the certified mail to the foreign corporation's registered agent for service of process and the certified mail was delivered to the proper address and signed for by the mail clerk rather than the registered agent). Service of process is not effective under Rule 4(c)(5) if the mailing is returned marked "unclaimed/refused", "unclaimed" or "undeliverable as addressed." *See Bloodgood v. Leatherwood,* 25 So. 3d 1047 (Miss. 2010).

Rule 4(d) identifies the person to be served with process when the defendant is: (i) a mentally competent married infant or a mentally competent adult; (ii) an unmarried infant; (iii) a mentally incompetent person who is not judicially confined to an institution for the mentally ill or mentally deficient; (iv) a mentally incompetent person who is judicially confined to an institution for the mentally ill or mentally deficient; (v) an individual confined to a penal institution of this state or a subdivision of this state; (vi) a domestic or foreign corporation, partnership or unincorporated association subject to a suit under a common name; (vii) the State of Mississippi or one of its departments,

officers or institutions; (viii) a county; (ix) a municipal corporation; or (x) any other governmental entity.

Rule 4(e) provides for waiver of service of the summons and complaint. A waiver must be executed after the day on which the action was commenced and thus may be executed without a summons having been issued.

Rule 4(f) provides that the person serving the process shall promptly file a return of service with the court. For first-class mail and acknowledgement service, proof of service is to be made by filing a copy of the executed acknowledgement of service. For certified mail service, proof of service is to be made by filing the return receipt or the envelope marked "Refused." The purpose of the requirement for prompt filing of the proof of service is to enable the defendant to verify the date of service by examining the proof of service in the court records.

Rule 4(h) provides that if service is not made upon a defendant within 120 days after the filing of the complaint, the claims against that defendant will be dismissed without prejudice absent good cause for the failure to timely serve the defendant. If service cannot be made within the 120-day period, it is clearly advisable to move the court within the original time period for an extension of time in which to serve the defendant. If the motion for extension of time is filed within the 120-day time period, the time period may be extended for "cause shown" pursuant to Rule 6(b)(1). If a motion for extension of time is filed outside of the original 120-day time period, the movant must show "good cause" for the failure to timely serve the defendant pursuant to Rule 4(h). *See Johnson v. Thomas,* 982 So. 2d 405 (Miss. 2008).

Rule 5. Service and Filing of Pleadings and Other Papers

Rule 5 provides an expedient method of exchanging written and electronic communications between parties and an efficient system of filing papers with the clerk. This rule presupposes that the court has already gained jurisdiction over the parties. A "pleading subsequent to the original complaint," which asserts a claim for relief against a person over whom the court has not at the time acquired jurisdiction, must be served upon such person along with a copy of a summons in the same manner as the copy of the summons and complaint is required to be served upon the original defendants.

A motion which may be heard ex parte is not required to be served, but should be filed; see also Rule 81(b). The enumeration of papers in Rule 5(a) which are required to be served is not exhaustive; also included are affidavits in support of or in opposition to a motion, Rule 6(d), and a motion for substitution of parties, Rule 25.

An electronic case management system and electronic filing system, known as the Mississippi Electronic Court System (MEC) is optional for the chancery, circuit and county courts; however, the procedures of the MEC must be followed where a court has adopted and implemented the MEC by local rule. Therefore, to the extent the MEC

procedures address service and filing of pleadings and other papers, the procedures should be followed to satisfy Rule 5(e) and Rule 5(b). For purposes of Rule 5(e), the MEC procedures provide reasonable exceptions to the requirement of electronic filing. See, Mississippi Supreme Court Website.

Although service must be made within the times prescribed, filing is permitted to be made within a reasonable time thereafter. Instances requiring the pleading to be filed before it is served include Rule 3 (complaint) and any other pleading stating a claim for relief which is necessary to serve with a summons. Pursuant to Rule 5(c) (numerous defendants) the filing of a pleading, coupled with service on the plaintiff, is notice to the parties. Rule 65(b) requires temporary restraining orders to be filed forthwith in the clerk's office.

To obtain immediate court action under Rule 5(e), a party may file papers with the judge, if the latter permits, and obtain such order as the judge deems proper. Rule 5(e) should be read in conjunction with Rules 77(a) (courts always open), 77(b) (trials and hearings; orders in chambers), and 77(c) (clerk's office and orders by clerk).

Rule 5(b) has no application to service of summons; that subject is completely covered by Rule 4 and Rule 81(d).

Rule 6. Time

It is not uncommon for clerks' offices and courthouses to be closed occasionally during what are normal working periods, whether by local custom or for a special purpose, such as attendance at a funeral. Rule 6(a) was drafted to obviate any harsh result that may otherwise ensue when an attorney, faced with an important filing deadline, discovers that the courthouse or the clerk's office is unexpectedly closed.

Rule 6(b) gives the court wide discretion to enlarge the various time periods both before and after the actual termination of the allotted time, certain enumerated cases being excepted. A court cannot extend the time: (1) for filing of a motion for judgment notwithstanding the verdict pursuant to Rule 50(b); (ii) for filing a motion to amend the court's findings pursuant to Rule 52(b); (iii) for filing a motion for new trial pursuant to Rule 59(b); (iv) for filing a motion to alter or amend the judgment pursuant to Rule 60(b); (vi) for filing a motion to reconsider a court order transferring a case to another court pursuant to Rule 60(c); or (vii) for entering a *sua sponte* order requiring a new trial pursuant to Rule 59(d).

Importantly, such enlargement is to be made only for cause shown. If the application for additional time is made before the period expires, the request may be made ex parte; if it is made after the expiration of the period, notice of the motion must be given to other parties and the only cause for which extra time can be allowed is "excusable neglect."

Rule 6(c) does not abolish court terms; it merely provides greater flexibility to the courts in attending the myriad functions they must perform, many of which were heretofore possible only during term time. The rule is also consistent with the provisions elsewhere herein that prescribe a specific number of days for taking certain actions rather than linking time expirations to the opening day, or final day, or any other day of a term of court; e.g., Rule 6(d) (motions and notices of hearings thereon to be served not less than five days before time fixed for hearing), and Rule 12(a) (defendant to answer within thirty days after service of summons and complaint).

Rule 7. Pleadings Allowed; Form of Motions

Rule 8. General Rules of Pleading

Rule 8 allows claims and defenses to be stated in general terms so that the rights of the client are not lost by poor drafting skills of counsel. Under Rule 8(a), "it is only necessary that the pleadings provide sufficient notice to the defendant of the claims and grounds upon which relief is sought." *See DynaSteel Corp. v. Aztec Industries, Inc.,* 611 So. 2d 977 (Miss. 1992). A plaintiff must set forth direct or inferential fact allegations concerning all elements of a claim. *See Penn. Nat'l Gaming, Inc. v. Ratliff,* 954 So. 2d 427, 432 (Miss. 2005). Motions or pleadings seeking modification of child custody must include an allegation that a material change has occurred which adversely affects the child or children. It is not sufficient to allege that an adverse change will occur if the modification is not granted. *See, e.g., McMurry v. Sadler,* 846 So. 2d. 240, 244 (Miss. Ct. App. 2002). In cases involving the joinder of multiple plaintiffs, the complaint must contain the allegations identifying by name the defendant or defendants against whom each plaintiff asserts a claim, the alleged harm caused by specific defendants as to each plaintiff, and the location at which and time period during which the harm was caused. *See 3M Co. v. Glass,* 917 So. 2d 90, 92 (Miss. 2005); *Harold's Auto Parts, Inc. v. Mangialardi,* 889 So. 2d 493, 495 (Miss. 2004). Failure to provide this "core information" is a violation of Rules 8 and 11. Plaintiffs in such cases must also plead sufficient facts to support joinder. *Glass,* 917 So. 2d at 93; *Mangialardi,* 889 So. 2d at 495.

Rule 8(c)'s requirement that defendants plead affirmative defenses when answering is intended to give fair notice of such defenses to plaintiffs so that they may respond to such defenses. Just as Rule 8(a) requires only that the plaintiff give the defendant notice of the claims, Rule 8(c) requires only that the defendant give the plaintiff notice of the defense. "A defendant's failure to timely and reasonably raise and pursue the enforcement of any affirmative defense or other affirmative matter or right which would serve to terminate or stay the litigation, coupled with active participation in the litigation process, will ordinarily serve as a waiver." *Kimball Glassco Residential Ctr., Inc. v. Shanks,* 64 So. 3d 941, 945 (Miss. 2011) (citing *MS Credit Ctr., Inc. v. Horton,* 926 So. 2d 167, 180 (Miss. 2006)).

The list of affirmative defenses in Rule 8(c) is not intended to be exhaustive. A defense is an affirmative defense if the defendant bears the burden of proof. *See Natchez Elec. & Supply Co., Inc. v. Johnson,* 968 So. 2d 358, 361 (Miss. 2007). "A matter is an 'avoidance or affirmative defense' only if it assumes the plaintiff proves everything he alleges and asserts, even so, the defendant wins. Conversely, if, in order to succeed in the litigation, the defendant depends upon the plaintiff failing to prove all or part of his claim, the matter is not an avoidance or an affirmative defense. A defendant does not plead affirmatively when he merely denies what the plaintiff has alleged." *Hertz Commercial Leasing Div. v. Morrison,* 567 So. 2d 832, 835 (Miss. 1990).

Examples of some affirmative defenses or matters of avoidance that are not enumerated in Rule 8(c) but which have been recognized by the Supreme Court include: the failure of a foreign limited liability corporation transacting business in the state to register to do business as a prerequisite to maintaining an action in state court as required by Mississippi Code Annotated section 79-29-1007(1) (Supp. 2011) (*see Loggers, L.L.C. v. 1 Up Technologies, L.L.C.,* 50 So. 3d 992, 993 (Miss. 2011)); immunity under the Mississippi State Tort Claims Act (*see Price v. Clark,* 21 So. 3d 509, 524 (Miss. 2009)); failure to comply with the requirement of a certificate of expert consultation in medical malpractice cases as required by Mississippi Code Annotated section 11-1-58 (Supp. 2011) (*see Meadows v. Blake,* 36 So. 3d 1225, 1232-33 (Miss. 2010)); plaintiff's non-compliance with the 90-day notice requirement contained in Mississippi Code Annotated section 11-46-11(1) (Supp. 2011) (s*ee Stuart v. University of Miss. Med. Ctr.,* 21 So. 3d 544, 549-50 (Miss. 2009)); the assertion of the right to arbitrate (*see Ms. Credit Ctr., Inc. v Horton,* 926 So. 2d 167, 179 (Miss. 2006)); apportionment of fault pursuant to Mississippi Code Annotated section 85-5-7 (Supp. 2011) (*see Eckmann v. Moore,* 876 So. 2d 975, 989 (Miss. 2004)); argument that a contractual acceleration clause is an un-enforceable penalty (*see Hertz Comm'l Leasing Div. v. Morrison,* 567 So. 2d 832, 834 (Miss. 1990)); the failure of a foreign corporation transacting business in this state to obtain a certificate of authority as prerequisite to maintaining an action in this state as required by Mississippi Code Annotated section 79-4-15.02 (Supp. 2011) (*see Bailey v. Georgia Cotton Goods Co.,* 543 So. 2d 180, 182-83 (Miss. 1989)); election of remedies (s*ee O'Briant v. Hull,* 208 So. 2d 784, 785 (Miss. 1968)); adverse possession as a defense to neighboring landowner's actions (*see Charlot v. Henry,* 45 So. 3d 1237, 1243-44 (Miss. Ct. App. 2010)); the defense of condonation in a divorce case (*see Ashburn v. Ashburn,* 970 So. 2d 204, 212-13 (Miss. Ct. App. 2007)).

A party may be denied leave to amend its answer to include an affirmative defense if that affirmative defense has been waived. *See Hutzel v. City of Jackson,* 33 So. 3d 1116, 1122 (Miss. 2010).

Rule 9. Pleading Special Matters

A party desiring to raise an issue as to the legal existence, capacity, or authority of a party must assert such in the answer. If lack of capacity appears affirmatively on the face

of the complaint, the defense may be raised by a motion pursuant to Rule 12(b)(6) or Rule 12(c).

"Circumstances" in Rule 9(b) refers to matters such as the time, place and contents of the false representations, in addition to the identity of the person who made them and what the person obtained as a result.

Rule 9(g) requires a detailed pleading of special damages and only a general pleading of general damages. General damages are damages that are typically caused by, and flow naturally from, the injuries alleged. Special damages are damages that are unusual or atypical for the type of claim asserted. Special damages are required to be pled with specificity so as to give the defendant notice of the nature of the alleged damages. Special damages include, but are not limited to, consequential damages, damages for lost business profit, and punitive damages. *See Puckett Machinery Co. v. Edwards,* 641 So. 2d 29, 37-38 (Miss. 1994) (consequential damages must be plead with specificity); *Lynn v. Soterra, Inc.*, 802 So. 2d 162, 169 (Miss. Ct. App. 2001) (damages for lost business profit caused by defendant's blocking of a road are likely special damages). If claimant fails to plead special damages with specificity, an award for such damages may be reversed. The requirement that special damages must be stated with specificity will be waived if special damages are tried by the express or implied consent of the parties pursuant to Rule 15(b).

Rule 10. Form of Pleadings

Failure to comply with the requirements of Rule 10(b) is not ground for dismissal of the complaint or striking the answer. Instead, the court, upon a motion or on its own, may order a party to amend the pleading so as to comply with the provisions of Rule 10(b). *See, e.g., 3M Co. v. Glass,* 917 So. 2d 90, 92-94 (Miss. 2005); *Harold's Auto Parts, Inc. v. Mangialardi,* 889 So. 2d 493, 494-95 (Miss. 2004).

Rule 11. Signing of Pleadings and Motions

Good faith and professional responsibility are the bases of Rule 11. Rule 8(b), for instance, authorizes the use of a general denial "subject to the obligations set forth in Rule 11," meaning only when counsel can in good faith fairly deny all the averments in the adverse pleading should he do so.

Verification will be the exception and not the rule to pleading in Mississippi. No pleading or petition need be verified or accompanied by affidavit unless there is a specific provision to that effect in a rule or statute. *See, e.g.,* M.R.C.P. 27(a) and 65.

The final sentence of Rule 11(b) is intended to ensure that the trial court has sufficient power to deal forcefully and effectively with parties or attorneys who may misuse the liberal, notice pleadings system effectuated by these rules. The Rule authorizes a court to

award a party reasonable attorneys' fees and expenses when an adverse party "files a motion or pleading which, in the opinion of the court, is frivolous or is filed for the purpose of harassment or delay." Thus, Rule 11 provides two alternative grounds for the imposition of sanctions—the filing of a frivolous motion or pleading, and the filing of a motion or pleading for the purpose of harassment or delay. *See Nationwide Mut. Ins. Co. v. Evans,* 553 So. 2d 1117, 1120 (Miss. 1989). Although a finding of bad faith is necessary to sustain the imposition of sanctions based on purposeful harassment or delay, a finding of bad faith is not necessary to sustain the imposition of sanctions based upon frivolous pleadings or motions. A pleading or motion is frivolous "only when, objectively speaking, the pleader or movant has no hope of success." *See In re Spencer,* 985 So. 2d 330, 339 (Miss. 2008). A pleading is "frivolous" if its "insufficiency…is so manifest upon a bare inspection of the pleadings, that the court or judge is able to determine its character without argument or research." *In re Estate of Smith,* 69 So. 3d 1, 6 (Miss. 2011). A defensive pleading is not frivolous unless "conceding it to be true does not, taken as a whole, contain any defense to any part of complainant's cause of action and its insufficiency as a defense is so glaring that the Court can determine it upon a bare inspection without argument." *In re Estate of Smith,* 69 So. 3d at 6.

Sanctions against a party are improper in cases where the party relied strictly on advice of counsel and could not be expected to know whether the complaint was supported by law, where the party relied on advice of counsel in filing the pleading and played no significant role in prosecution of the action; or where the party was unaware and lacked responsibility for any bad faith harassment or delay. *See Stevens v. Lake,* 615 So. 2d 1177, 1184 (Miss. 1993).

The Litigation Accountability Act also authorizes a court to impose sanctions upon attorneys and/or parties who assert "any claim or defense that is without substantial justification, or …was interposed for delay or harassment." Miss. Code Ann. §11-55-5 (Supp. 2011). "Without substantial justification" is defined as any claim that is "frivolous, groundless in fact or in law, or vexatious, as determined by the court." Miss. Code Ann. §11-55-3(a) (Supp. 2011). "Frivolous" as used in the Act means the same thing as "frivolous" as used in Rule 11: a claim or defense made 'without hope of success.'" *See In re Spencer,* 985 So. 2d 330, 338 (Miss. 2008).

Rule 12. Defenses and Objections—When and How Presented—by Pleading or Motion—Motion for Judgment on the Pleadings

The motion for a more definite statement requires merely that—a more definite statement—and not evidentiary details. The motion will lie only when a responsive pleading is required, and is one remedy for a vague or ambiguous pleading. A defendant may also file a Rule 12(b)(6) motion as a means of challenging a vague or ambiguous pleading.

Ordinarily, Rule 12(f) will require only the objectionable portion of the pleadings to be stricken, and not the entire pleading. Motions going to redundant or immaterial

allegations, or allegations of which there is doubt as to relevancy, should be denied, the issue to be decided being whether the allegation is prejudicial to the adverse party. Motions to strike a defense for insufficiency should, if granted, be granted with leave to amend.

Rule 12(g) provides that a party making a pre-answer motion pursuant to Rule 12 may join with such motion any other available Rule 12 pre-answer motions. If a party makes a Rule 12 pre-answer motion and omits an available Rule 12 defense or objection, the party may only raise such omitted defense or objection as allowed by Rule 12(h)(2). Rule 12(h)(2) allows a party to raise the defense of failure to state a claim and/or the defense of failure to join a party indispensable under Rule 19 by asserting such defenses in the answer, by raising such defenses in a motion for judgment on the pleadings, or by raising such defenses at the trial on the merits. Rule 12(g) encourages a party to consolidate all available Rule 12 motions so as to avoid successive motions.

Rule 12(h)(1) states that certain specified defenses which are available to a party when the party makes a pre-answer motion, but which are omitted from the pre-answer motion, are waived. The specified defenses include: (1) lack of personal jurisdiction; (2) improper venue; (3) insufficiency of process; and (4) insufficiency of service of process. In addition, Rule 12(h)(1) further provides that if a party answers rather than filing a pre-answer motion, the party must raise any of these specified defenses in the answer or an amended answer made as a matter of course pursuant to Rule 15(a) to avoid waiver of such defenses.

Under Rule 12(h)(3) a question of subject matter jurisdiction may be presented at any time, either by motion or answer. Further, it may be asserted as a motion for relief from a final judgment under Rule 60(b)(4) or may be presented for the first time on appeal. The provision directing a court lacking subject matter jurisdiction to transfer the action to a court having jurisdiction preserves the traditional Mississippi practice of transferring actions between the circuit and chancery courts, as provided by Miss. Const. §§157 (all causes that may be brought in the circuit court whereof the chancery court has jurisdiction shall be transferred to the chancery court) and 162 (all causes that may be brought in chancery court whereof the circuit court has exclusive jurisdiction shall be transferred to the circuit court), but not reversing for a court's improperly exercising its jurisdiction, Miss. Const. §147.

Rule 13. Counterclaim and Cross-Claim

The purpose of Rule 13 is to grant the court broad discretion to allow claims to be joined in order to expedite the resolution of all the controversies between the parties in one suit and to eliminate the inordinate expense occasioned by circuity of action and multiple litigation.

Subject to the exceptions stated in Rule 13(a), counterclaims are compulsory if they arise out of the same transaction or occurrence that is the subject matter of the opposing

party's claim. Compulsory counterclaims are so closely related to the claims already raised, that they can be adjudicated in the same action without creating confusion and should be adjudicated in the same action so as to avoid unnecessary expense and duplicative litigation. Rule 13 generally requires compulsory counterclaims to be asserted in the pending litigation to avoid waiver.

All other counterclaims are permissive and may be asserted by the defending party. If trying the permissive counterclaim in the same case as the original claim is tried will create confusion, prejudice, unnecessary delay or increased costs, the court has the discretion to order that the counterclaim be tried separately pursuant to Rule 42(b).

Pursuant to Rule 13(g), a party may assert a cross-claim against a co-party if the cross-claim arises out of the same transaction or occurrence that is the subject matter of the complaint or a counterclaim thereto or relates to any property that is the subject matter of the complaint. Cross-claims may be derivative claims that assert that the party against whom the cross-claim is asserted is or may be liable to the cross-claimant for all or part of the claim against the cross-claimant. Pursuant to Rule 13, cross-claims are permissive rather than compulsory.

A party asserting a counterclaim or cross-claim may join additional parties as defendants to the counterclaim or cross-claim pursuant to Rules 19 and 20.

Rule 14. Third-Party Practice

It is essential that the third-party claim be for some form of derivative or secondary liability of the third-party defendant to the third-party plaintiff. Impleader is not available for the assertion of an independent action by the defendant against a third party, even if the claim arose out of the same transaction or occurrence as the main claim. Once a third-party claim is properly asserted, however, the third-party plaintiff may assert whatever additional claims the third-party plaintiff has against the third-party defendant under Rule 18(a).

The requirement that the third-party claim be for derivative or secondary liability may be met by, for example, an allegation of a right of indemnity (contractual or otherwise), contribution, subrogation, or warranty. The rules does not, however create any such rights. It merely provides a procedure for expedited consideration of these rights where they are available under substantive law. An insured party has a derivative claim for indemnity against the insured party's liability insurer, and may implead the party's liability insurer, if the insured is being sued for damages allegedly covered by the liability policy and the insurer is disclaiming coverage pursuant to the liability policy.

A defendant who is subject to joint and several liability for a plaintiff's damages may have a claim against joint tortfeasors for contribution. Generally, in Mississippi, liability for damages imposed in civil cases based upon "fault" is several only and not joint and several, thereby obviating the need or basis for contribution claims. Mississippi Code

Annotated section 85-5-7(4), however, provides that '[j]oint and several liability shall be imposed on all who consciously and deliberately pursue a common plan or design to commit a tortuous act, or who actively take part in it." The statute further provides that "[a]ny person held jointly and severally liable under [such] section shall have a right of contribution from his fellow defendants acting in concert." Thus, Mississippi law grants a defendant who has been held jointly and severally liable for acting in concert a right of contribution against co-defendants who were also acting in concert.

A first-party insurer against loss, sued by its policyholder for such loss, has a derivative claim for subrogation against, and may implead the person who allegedly caused the loss, where a right of subrogation would arise from the insurer's payment of the insured plaintiff's claim.

Because the rule expressly allows third-party claims against one who "may be liable," it is not an objection to implead that the third party's liability is contingent on the original plaintiff's recovery against the defendant/third-party plaintiff.

M.R.C.P. 14 differs from Fed. R. Civ. P. 14 in that M.R.C.P. 14 requires a defending party to obtain authorization from the court based upon a showing of good cause before such defending party may serve a summons and third-party complaint upon a nonparty. Pursuant to Fed. R. Civ. P. 14, a defending party must obtain leave of court only if it is filing a third-party complaint more than 14 days after serving its original answer.

Rule 15. Amended and Supplemental Pleadings

Mississippi Rule 15(a) varies from Federal Rule 15(a) in that the federal rule permits a party to amend the pleading only once as a matter of course. The Mississippi rule places no limit on the number of such amendments.

Rule 16. Pre-Trial Procedure

Rule 16A. Motions for Recusal of Judges

Rule 17. Parties Plaintiff and Defendant, Capacity

Rule 18. Joinder of Claims and Remedies

Rule 18(a) eliminates any restrictions on claims that may be joined in actions in the courts of Mississippi. Rule 18(a) permits legal and equitable claims or any combination of them to be joined in one action; a party may also assert alternative claims for relief,

consistency among the claims not being necessary; consequently, an election of remedies or theories will not be required at the pleading stage of litigation.

Since Rule 18(a) deals only with the scope of joinder at the pleading stage and not with questions of trial convenience, jurisdiction, or venue, a party should be permitted to join all claims against an opponent as a matter of right. The rule proceeds on the theory that no inconvenience can result from the joinder of any two or more matters in the pleadings, but only from trying two or more matters together, if at all.

Rule 19. Joinder of Persons Needed for Just Adjudication

Compulsory joinder is an exception to the general practice of giving the plaintiff the right to decide who shall be parties to a law suit; although a court must take cognizance of this traditional prerogative in exercising its discretion under Rule 19, plaintiff's choice will have to be compromised when significant countervailing considerations make the joinder of particular absentees desirable.

There are at least four main questions to be considered under Rule 19: first, the plaintiff's interest in having a forum; second, the defendant's wish to avoid multiple litigation, inconsistent relief, or sole responsibility for a liability shared with another; third, the interest of an outsider whom it would have been desirable to join; fourth, the interest of the courts and the public in complete, consistent, and efficient settlement of controversies. This list is by no means exhaustive or exclusive; pragmatism controls.

There is no precise formula for determining whether a particular nonparty must be joined under Rule 19(b). The decision has to be made in terms of the general policies of avoiding multiple litigation, providing the parties with complete and effective relief in a single action, and protecting the absent persons from the possible prejudicial effect of deciding the case without them. Account also must be taken of whether other alternatives are available to the litigants. By its very nature Rule 19(b) calls for determinations that are heavily influenced by the facts and circumstances of individual cases.

Rule 20. Permissive Joinder of Parties

Rule 20(a) permits joinder in a single action of all persons asserting or defending against a joint, several or alternative right to relief that arises out of the same transaction or occurrence or series of transactions or occurrences and presents a common question of law or fact. The phrase "transaction or occurrence" requires that there be a distinct litigable event linking the parties. Rule 20(a) simply establishes a procedure under which several parties' demands arising out of the same litigable event may be tried together, thereby avoiding the unnecessary loss of time and money to the court and the parties that the duplicate presentation of the evidence relating to facts common to more than one demand for relief would entail.

Joinder of parties under Rule 20(a) is not unlimited as is joinder of claims under Rule 18(a). Rule 20(a) imposes two specific requisites to the joinder of parties: (1) a right to relief must be asserted by or against each plaintiff or defendant relating to or arising out of the same transaction, occurrence, or the same series of transactions or occurrences; and (2) some question of law or fact common to all the parties will arise in the action. Both of these requirements must be satisfied in order to sustain party joinder under Rule 20(a). *See American Bankers, Inc. of Florida v. Alexander,* 818 So. 2d 1073, 1078 (Miss. 2001). However, even if the transaction requirement cannot be satisfied, there always is a possibility that, under the proper circumstances, separate actions can be instituted and then consolidated for trial under Rule 42(a) if there is a question of law or fact common to all the parties. *See Stoner v. Colvin,* 236 Miss. 736, 748, 110 So. 2d 920, 924 (1959) (courts of general jurisdiction have inherent power to consolidate actions when called for by the circumstances). If the criteria of Rule 20 are otherwise met, the court should consider whether different injuries, different damages, different defensive postures and other individualized factors will be so dissimilar as to make management of cases consolidated under Rule 20 impractical. *See Demboski v. CSX Transp., Inc.,* 157 F.R.D. 28 (S.D. Miss. 1994) cited with approval in *Illinois Cen. R.R. Co. v. Travis*, 808 So. 2d 928, 934 (Miss. 2002).

In order to allow the court to make a prompt determination of whether joinder is proper, the factual basis for joinder should be fully disclosed as early as practicable, and motions questioning joinder should be filed, where possible, sufficiently early to avoid delays in the proceedings.

Rule 21. Misjoinder and Nonjoinder of Parties

Rule 21 applies, for example, when: (1) the joined parties do not meet the requisites of Rule 20; (2) no relief has been demanded from one or more of the parties joined as defendants; (3) no claim for relief is stated against one or more of the defendants; (4) one of several plaintiffs does not seek any relief against the defendant and is without any real interest in the controversy.

Rules 17 and 19 should be used as reference points for what is meant by nonjoinder in Rule 21. Thus, Rule 21 simply describes the procedural consequences of failing to join a party as required in Rules 17 and 19.

Rule 22. Interpleader

The protection afforded by interpleader takes several forms. Most significantly, it prevents a stakeholder from being obligated to determine at his peril which claimant has the better claim and, when the stakeholder himself has no interest in the fund, forces the claimants to contest what essentially is a controversy between them without embroiling the stakeholder in the litigation over the merits of the respective claims. Even if the stakeholder denies liability, either in whole or in part to one or more of the claimants,

interpleader still protects him from the vexation of multiple suits and the possibility of multiple liability that could result from adverse determinations in different courts. Thus, interpleader can be employed to reach an early and effective determination of disputed questions with a consequent saving of trouble and expense for the parties. As is true of the other liberal joinder provisions in these rules, interpleader also benefits the judicial system by condensing numerous potential individual actions into a single comprehensive unit, with a resulting savings in court time and energy.

Interpleader also can be used to protect the claimants by bringing them together in one action and reaching an equitable division of a limited fund. This situation frequently arises when the insurer of an alleged tortfeasor is faced with claims aggregating more than its liability under the policy. Were an insurance company required to await reduction of claims to judgment, the first claimant to obtain such judgment or to negotiate a settlement might appropriate all or a disproportionate share of the fund before his fellow claimants were able to establish their claim. The difficulties such a race to judgment poses for the insurer, and the unfairness which may result to some claimants, are among the principal evils the interpleader device is intended to remedy.

An additional advantage of interpleader to the claimant is that it normally involves a deposit of the disputed funds or property in court, thereby eliminating much of the delay and expense that often attends the enforcement of a money judgment.

The primary test for determining the propriety of interpleading the adverse claimants and discharging the stakeholder is whether the stakeholder legitimately fears multiple vexations directed against a single fund.

Ordinarily, interpleader is conducted in two "stages." In the first, the court hears evidence to determine whether the plaintiff is entitled to interplead the defendants. In the second stage, a determination is made on the merits of the adverse claims and, if appropriate, on the rights of an interested stakeholder.

After the stakeholder has paid the disputed funds into court, or given bond therefor, and the claimants have had notice and an opportunity to be heard, the court determines whether the stakeholder is entitled to interpleader relief. If so, the court will enter an order requiring the claimants to interplead and, if the stakeholder is disinterested, discharging the stakeholder from the proceeding and from further liability with regard to the interpleader fund. The court may also permanently enjoin the claimants from further harassing the stakeholder with the claims or judicial proceedings.

There is, however, no inflexible rule that the proceeding must be divided into two stages. The entire action may be disposed of at one time in cases where, for example, the stakeholder has not moved to be discharged or has remained in the action by reason of an interest therein. There may even be a third stage, in the event that the second stage determination leaves unresolved some further dispute, either between the stakeholder and the prevailing claimant or among the prevailing claimants.

Trial during stages later than the first is also appropriate for counterclaims raised by the claimants, such as those alleging an independent liability, and for cross-claims between claimants which are held appropriate for resolution in the course of the interpleader proceedings.

Rule 23. Class Actions [Omitted]

Rule 23.1 Derivative Actions by Shareholders [Omitted]

Rule 23.2 Actions Relating to Unincorporated Associations [Omitted]

Rule 24. Intervention

Rule 24 requires the court to balance the interests of the would-be intervenor against the burdens such intervention might pose on those already parties or on the judicial system's economic and efficient disposition of the case. If one of the criteria for intervention as a matter of right is met and the would-be intervenor files a timely application for intervention, intervention shall be allowed. *See Dare v. Stoke*, 62 So. 3d 958, 959 (Miss. 2011). A trial court has discretion when ruling on a timely motion to permissively intervene and "may permissively grant or deny a motion to intervene, provided there is a common question of law or fact and the motion was timely filed." *See Madison HMA, Inc. v. St. Dominic-Jackson Mem'l Hosp.,* 35 So. 3d 1209, 1215 (Miss. 2010).

Applications to intervene as of right pursuant to Rule 24(a) or to permissively intervene pursuant to Rule 24(b) must be timely. The rule does not set out any specific time limits. Instead, trial courts are to weigh the following four factors when determining timeliness: "(1) the length of time during which the would-be intervenor actually knew or should have known of his interest in the case before he petitioned for leave to intervene; (2) the extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case; (3) the extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied; and (4) the existence of unusual circumstances mitigating either for or against a determination that the application is timely." *See Hood ex rel. State Tobacco Litigation,* 958 So. 2d 790, 806 (Miss. 2007). The determination of whether an application to intervene is timely is committed to the discretion of the trial court and will not be overturned on appeal absent an abuse of discretion.

Rule 25. Substitution of Parties

The suggestion of death does not have to identify the decedent's successors or representatives to be substituted as the real party in interest. *See Clark v. Knesal,* 113 So. 3d 531, 536 (Miss. 2013). Although the rule requires that service of the suggestion of death upon non-parties be accomplished in accordance with Rule 4, the rule does not indicate which non-parties must be served with the suggestion of death so as to trigger the ninety-day time period. Interested non-parties whose rights may be cut off by the ninety-day limits must be served. *See Hurst v. SW Miss. Legal Servs.,* 610 So. 2d 374, 386 (1992) (defendant's failure to serve the named executrix of the deceased plaintiff's estate with the suggestion of death rendered the suggestion of death ineffective even though the executrix may have had actual notice of the suggestion of death); *Knesal,* 113 So. 3d at 537 (defendant/counter-plaintiff who was properly served with the suggestion of death could not argue that the failure to serve the plaintiff/counter-defendant's non-party successors rendered the suggestion invalid because: (i) the failure to serve the plaintiff/counter-defendant's non-party successors did not affect the defendant/counter-plaintiff's opportunity to file a motion to substitute; and (ii) service upon the decedent's successor was impossible because there was no existing estate or personal representative upon whom the suggestion of death could have been served). The rule contains no restriction on who may file and serve the suggestion of death; the decedent's lawyer may file and serve it. *Id.* at 538.

The general provisions of Rule 6(b) apply to motions to substitute; accordingly, the court may extend the period for substitution if timely requested. Similarly, the court may allow substitution to be made after expiration of the ninety-day period on a showing that the failure to act earlier was the result of excusable neglect. *See Knesal,* 113 So. 3d at 539.

If the named plaintiff was deceased at the time the original complaint was filed, then the original complaint is null and void and the real party in interest cannot be substituted as the proper plaintiff because a valid action was never commenced.

Rule 26. General Provisions Governing Discovery

Rule 27. Depositions Before Action or Pending Appeal

Rule 28. Persons Before whom Depositions May Be Taken

Rule 29. Stipulations Regarding Discovery Procedure

Rule 30. Depositions Upon Oral Examination

Rule 31. Depositions Upon Written Questions

Rule 32. Use of Depositions in Court Proceedings

M.R.E. 801(d)(1)(A) defines a prior inconsistent statement given under oath as non-hearsay. M.R.E. 801(d)(1)(A) applies when a witness testifies at trial in a manner that is inconsistent with a previous sworn statement. The previous sworn statement, which may have been made during a deposition, is non-hearsay, and is admissible at trial, assuming no other evidentiary rule bars its introduction. *See Craft v. State,* 656 So. 2d 1156, 1164 (Miss. 1995).

M.R.E. 804(b)(1) permits the introduction of deposition testimony by a witness who is unavailable at trial. Though the deposition of the unavailable witness need not have been taken in the same proceeding as that in which it is offered, the party against whom the deposition testimony is being offered, must have had an opportunity and similar motive to develop the testimony. *See Naylor v. State,* 759 So. 2d 406, 410-11 (Miss. 2000).

If a deposition is offered into evidence at trial, the offering party's attorney is responsible for providing the court with a written transcript of the deposition. In addition, if an audio or video recording of the deposition is played for the jury at trial, the offering party must also provide the court with a true and correct copy of such audio or video recording. If the entire deposition is not admitted into evidence, the attorneys for both parties should ensure that the court reporter is given an accurate record indicating the specific portions of the deposition that are introduced into evidence at trial. Such record should refer to the page and line numbers of the written transcript of the deposition. In addition, the attorneys for both parties should ensure that the court reporter complies with M.R.A.P. Appendix III, governing the manner in which trial transcripts are to be prepared and filed.

Rule 32(a) is not consistent with M.R.E. 804(a) because Rule 32(a) authorizes the use of certain witness depositions at trial for any purpose even though not all such witnesses are defined as "unavailable witnesses" pursuant to M.R.E. 804(a). Pursuant to M.R.E. 804(b), former testimony of a witness is not excluded as hearsay if the witness is unavailable. M.R.E. 1103 provides that any court rule that is inconsistent with the Mississippi Rules of Evidence is repealed. Generally, deposition testimony may be excluded if the witness is not "unavailable" pursuant to M.R.E. 804(a). *See, e.g.*., *Parmenter v. J & B Enterprises, Inc.,* 99 So. 3d 207, 219 (Ms. Ct. App. 2012) (court affirmed trial court's exclusion of deposition testimony by the plaintiff's clinical psychologist because plaintiff failed to demonstrate the witness was unavailable as required by M.R.E. 804(b)(1)).

Rule 33. Interrogatories to Parties

The thirty interrogatories permitted as a matter of right are to be computed by counting each distinct question as one of the thirty, even if labeled a sub-part, subsection, threshold question, or the like. In areas well suited to non-abusive exploration by interrogatory, such as inquiries into the names and locations of witnesses, or the existence, location, and custodians of documents or physical evidence, greater leniency may be appropriate in construing several questions as one interrogatory.

Rule 33(b)(4) requires that the grounds for any objection be stated with specificity. "'General objections' applicable to each and every interrogatory…are clearly outside the bounds of this rule." *See Ford Motor Co. v. Tennin*, 960 So. 2d 379 (Miss. 2007). If an interrogatory is only partially objectionable, the responding party shall clearly indicate the extent to which the interrogatory is objectionable and the basis for the partial objection. The responding party must also fully respond to the extent the interrogatory is not objectionable. If, for example, an interrogatory seeking information about 30 facilities is deemed objectionable, but an interrogatory seeking information about 10 facilities would not have been objectionable, the interrogatory should be answered with respect to the 10 facilities, and the grounds for the objection to providing the information with respect to the remaining facilities should be stated specifically.

Rule 34. Production of Documents and Things

Rule 35. Physical and Mental Examination of Persons

Rule 36. Requests for Admission

The purpose of Rule 36 is to identify and establish facts that are not in dispute. *DeBlanc v. Stancil,* 814 So. 2d 796, 802 (Miss. 2002). "[T]he requests must be reasonable and must be unambiguous. A request is ambiguous if the request is subject to more than one reasonable interpretation. The purpose of requests for admissions is to narrow and define issues for trial." *See Haley v. Harbin,* 933 So. 2d 261, 262-63 (Miss. 2005). "Requests for admissions 'should not be of such great number and broad scope as to cover all the issues [even] of a complex case, and [o]bviously…should not be sought in an attempt to harass an opposing party.'" *See Haley,* 933 So. 2d at 263.

Rule 36 will be enforced according to its terms; matters admitted or deemed admitted upon the responding party's failure to timely respond are conclusively established unless the court, within its discretion, grants a motion to amend or withdraw the admission. "Any admission that is not amended or withdrawn cannot be rebutted by contrary testimony or ignored by the court even if the party against whom it is directed offers more credible evidence." *DeBlanc*, 814 So. 2d at 801 (citing 7 James W. Moore, et al., Moore's Federal Practice ¶36.03[2], at 36 (3d ed. 2001)). However, in the matter of child

custody, the trial court may, as justice requires, allow the withdrawal of the issue admitted. *Gilcrease v. Gilcrease,* 918 So. 2d 854 (Miss. Ct. App. 2005).

The rule sets out a two-pronged test that trial courts may use when determining whether to grant a motion to withdraw or amend an admission. Courts may consider whether "presentation of the merits…will be subserved [by amendment or withdrawal] and whether the party who obtained the admission has satisfied the court that withdrawal or amendment would prejudice him or her…. [A] trial court 'may,' but is not required to, consider the two-pronged test in denying a motion to withdraw or amend." *See Young v. Smith,* 67 So. 3d 732, 740 (Miss. 2011).

Generally, a party has no knowledge concerning the authenticity or admissibility of the opposing party's medical records and, therefore, has no obligation to admit the authenticity or admissibility of such documents absent proper authentication of such records in accordance with M.R.E. 901 or 902 and proper demonstration that such records are records of regularly conducted activity pursuant to M.R.E. 803(6). *See Rhoda v. Weathers,* 87 So. 3d 1036 (Miss. 2012).

Rule 37. Failure to Make or Cooperate in Discovery: Sanctions

Rule 38. Jury Trial of Right

Rule 39. Trial by Jury or by The Court [Omitted]

Rule 40. Assignment of Cases for Trial

The twenty-day waiting period is inapplicable to hearings conducted by the court in connection with default judgments under Rule 55.

Rule 41. Dismissal of Actions

After the court clerk has given notice pursuant to Rule 41(d), a party seeking to avoid dismissal for lack of prosecution must either take some "action of record" or apply in writing to the court and demonstrate good cause for continuing the case. Rule 41(d) does not define what constitutes "an action of record." *See Ill. Central R.R. Co. v. Moore,* 99 So. 2d 723, 726 (Miss. 2008). Pleadings, discovery requests, and deposition notices are "actions of record." *Id.* at 728. An *ex parte* letter to the court clerk simply requesting that the case remain on the court's active docket is not an application in writing that demonstrates good cause. *Id.* at 729-730. Rather than writing a letter to the clerk, a party should file a written motion with the court that complies with Rule 7(b)(1) and that demonstrates good cause, and should serve such motion in accordance with M.R.C.P. 5.

Id. at 727-730. *But see Cucos, Inc. v. McDaniel,* 938 So. 2d 238, 247 (Miss. 2006) (finding that the trial court did not abuse its discretion in considering the plaintiff's attorney's letter to the clerk requesting that the case remain on the court's active docket as sufficient to prevent dismissal where:…(i) the court held a hearing and the plaintiff's lawyer also represented he was trying to schedule conferences so that defense counsel could talk to plaintiff's expert witnesses in an effort to facilitate settlement; (ii) local practice was to treat such letters as sufficient; and (iii) the plaintiff was not served with a proper copy of the order of dismissal). Generally, compliance with local practice that is inconsistent with the Mississippi Rules of Civil Procedure will not, standing alone, be sufficient to prevent dismissal. *See Ill. Central R.R. Co. v. Moore,* 994 So. 2d 723, 728 (Miss. 2008).

Rule 42. Consolidation: Separate Trials

Rule 43. Taking of Testimony

The admission of telephonic testimony in lieu of a personal appearance in open court by the witness is within the sound discretion of the trial court. *See Byrd v. Nix,* 548 So. 2d 1317 (Miss. 1989) (interpreting M.R.C.P. 43(a) and M.R.E. 611(a)).

Rule 44. Proof of Documents

Even though a document has been authenticated as required by this rule, it may still be excluded from evidence if, for example, it is irrelevant, or is hearsay, or is otherwise objectionable. For additional evidentiary rules concerning authentication, see M.R.E. 901-903.

The methods of authentication authorized by Rule 44 are additional and supplementary; they are not exclusive of other methods made available by Mississippi law. A party desiring to introduce an official record in evidence has the option of proceeding under Rule 44 or under any other applicable provision of law.

Rule 44(a)(1) deals with two types of official documents; those kept within the state and those kept without the state. A copy of the document need only be attested in the former case, certified under oath in the latter.

Rule 44.1 Determination of Foreign Law [Omitted]

Mississippi Code Annotated §13-1-149 (1972) provides that courts shall take judicial notice of all foreign law.

Rule 45. Subpoena

A "foreign subpoena" means a subpoena issued under authority of a court of record of a foreign jurisdiction. "Foreign jurisdiction" means a state other than this state. Litigants in a foreign jurisdiction who desire to obtain a subpoena to depose a Mississippi resident, to obtain records within Mississippi, or to inspect premises within Mississippi should follow the procedure established in Mississippi Code Annotated section 11-59-1 et. seq. See the exclusion in M.R.A.P. 46(b)(11)(i) for Admission of Foreign Attorneys Pro Hac Vice.

Rule 45(c)(1) regarding advance payment to non-parties of statutory witness fees and mileage is complementary to Mississippi Code Annotated §§25-7-47 through 25-7-59 (1972).

Rule 45(d)(2) is intended to ensure that there be no confusion as to whether a person not a party in control, custody, or possession of discoverable evidence may be compelled to produce such evidence without being sworn as a witness and deposed. The force of a subpoena for production of documentary evidence generally reaches all documents under the control of the person ordered to produce, saving questions of privilege or unreasonableness.

Rule 46. Exceptions Unnecessary

Rule 47. Jurors

Rule 47(c) provides that each side may exercise peremptory challenges to prospective jurors. Under the liberal provisions of these rules for joinder of claims and parties, problems may arise where there are multiple parties comprising a side. In such cases, it is implicit that the court may apportion the challenges among the parties comprising that side when they cannot agree on the apportionment themselves.

For additional guidelines concerning the method by which peremptory challenges shall be exercised, see the Uniform Rules of Circuit and County Court Practice.

Rule 48. Juries and Jury Verdicts

Rule 49. General Verdicts and Special Verdicts

Rule 49 authorizes three types of verdicts—a general verdict, a special verdict, and a general verdict accompanied by answers to interrogatories. Trial judges have broad discretion to use special verdicts or general verdicts accompanied by answers to interrogatories. *W.J. Runyon & Son, Inc. v. Davis,* 605 So. 2d 38, 49 (Miss. 1992).

A general verdict is a single determination that disposes of the entire case, whereas a special verdict requires the jury to decide specific factual issues. Special verdicts are appropriate in complicated cases where their use might assist in focusing the jury's attention on the specific relevant factual issues or cases in which jury bias or prejudice might arise. *Thompson v. Dung Thi Hoang Nguyen,* 86 So. 3d 232, 240 (Miss. 2012). If the special verdict submitted to the jury omits a fact issue raised by the pleadings or evidence, the parties will be deemed to have waived their right to jury trial on such issue unless jury trial on such issue is demanded before the case is submitted to the jury. In the absence of such a demand, the trial court may make the requisite factual findings.

A court may also submit a general verdict with written interrogatories about specific factual issues to the jury. If the general verdict and interrogatory answers are consistent, the court shall enter judgment reflecting the verdict and answers. If the interrogatory answers are internally consistent but one or more answers is inconsistent with the general verdict, the court may enter judgment based upon the answers despite their inconsistency with the general verdict, instruct the jury to further consider its verdict and answers, or order a new trial. When one of the interrogatory answers is inconsistent with another answer and also inconsistent with the general verdict, the court shall instruct the jury to further consider its verdict and answers or order a new trial.

A special verdict or general verdict with interrogatories directing the jury to separate economic and non-economic damages is necessary if a defendant is going to seek application of statutory caps on non-economic damages. *See, e.g., Intown Lessee Assocs., LLC v. Howard,* 67 So. 3d 711, 723-24 (Miss. 2011). Similarly, a special verdict or a general verdict with interrogatories may be useful in a case in which the law authorizes allocation of fault among the parties determined to be at fault. A special verdict or a general verdict with answers to interrogatories may also be useful in cases involving novel or uncertain law. If the trial court is reversed on appeal, the special verdict or interrogatory answers may make retrial unnecessary if they contain sufficient factual findings on the relevant issues.

Rule 50. Motions for Directed Verdict and for Judgment Notwithstanding the Verdict

Rule 50 applies only in cases tried to a jury with power to return a binding verdict. Rule 50(a) enables the court to determine whether there is any question of fact to be submitted to the jury and whether any verdict other than the one directed would be erroneous as a matter of law; it is conceived as a device to save the time and trouble involved in a lengthy jury determination.

Rule 50(b) differs from its federal rule counterpart in that a motion for a directed verdict is no longer a prerequisite to file a motion for a judgment notwithstanding the verdict. *New Hampshire Ins. Co. v. Sid Smith & Associates, Inc.,* 610 So. 2d 340 (Miss. 1992).

A motion for judgment notwithstanding the verdict made pursuant to M.R.C.P. 50(b) must be filed within 10 days after entry of the judgment. The trial court has no authority or discretion to extend the 10-day time period. M.R.C.P. 6(b). A motion for a judgment notwithstanding the verdict is not appropriate for cases tried by a judge sitting without a jury. *See* M.R.C.P. 59(e).

Rule 51. Instructions to Jury

It is the trial court's responsibility to properly instruct the jury. "[W]here under the evidence a party is entitled to have the jury instructed regarding a particular issue and where the party requests an instruction which for whatever reason is inadequate in form or content, the trial judge has the responsibility either to reform and correct the proffered instruction himself or to advise counsel on the record of the perceived deficiencies therein and to afford counsel a reasonable opportunity to prepare a new corrected instruction." *Mississippi Valley Silica Co., Inc. v. Eastman,* 92 So. 3d 666, 669 (Miss. 2012) (quoting *Byrd v. McGill*, 478 So. 2d 302, 303 (Miss. 1985)). See Rule 3.07 of the Uniform Circuit and County Court Rules for additional provisions governing jury instructions. See also Mississippi Model Jury Instructions of 2012 which were prepared by a commission appointed by the Mississippi Supreme Court. Although not formally adopted or approved by the Supreme Court of Mississippi, the "Plain Language Model Jury Instructions" have been placed on the Supreme Court website as an aid to trial judges and attorneys.

Rule 52. Findings by the Court

Rule 52(a) requires a trial court, in cases tried without a jury, to make specific findings of fact and conclusions of law when such findings and conclusions are requested by a party or when such findings and conclusions are required by the Mississippi Rules of Civil Procedure. In the absence of a party's request for such findings and conclusions or a rule requiring such findings and conclusions, the trial court "may" make such findings and conclusions. *See Gulf Coast Research Laboratory v. Amaraneni,* 722 So. 2d 530, 534-35 (Miss. 1998). The principal purpose of the rule is to provide the appellate court with a record regarding what the trial court did—the facts it found and the law it applied, in part so that the appellate court can refrain from deciding issues of fact and issues that were not decided by the trial court. *Tricon Metals & Services, Inc. v. Topp,* 516 So. 2d 236, 239 (Miss. 1987). "In cases of any significant complexity the word 'may' in Rule 52(a) should be construed to read 'generally should.' In other words, in cases of any complexity, tried upon the facts without a jury, the Court generally should find the facts specially and state its conclusions of law thereon." *Id.* In contested complex cases, a trial court's "failure to make findings of ultimate fact and conclusions of law will generally be regarded as an abuse of discretion." *Id.* "[F]indings of fact by the chancellor, together with the legal conclusions drawn from those findings, are required [in cases involving the division of marital assets]." *Ferguson v. Ferguson,* 639 So. 2d 921, 929 (Miss. 1994).

General findings of fact and conclusions of law may technically comply with Rule 52's requirements despite a party's request for specific findings of fact and conclusions of law. *See Lowery v. Lowery,* 657 So. 2d 817, 819 (Miss. 1995) (citing *Century 21 Deep South Prop. v. Corson,* 612 So. 2d 359, 367 (Miss. 1992)). If a trial court fails to make even general findings of fact and conclusions of law when specific findings of fact and conclusions of law are requested by a party, remand to the trial court may be necessary unless the evidence is so overwhelming so as to make findings unnecessary. *See Lowery v. Lowery,* 657 So. 2d 817, 819 (Miss. 1995).

A trial court has discretion to adopt a party's proposed findings of fact and conclusions of law. *Rice Researchers, Inc. v. Hiter,* 512 So. 2d 1259, 1266 (Miss. 1987). A trial court's factual findings, even in cases where the trial court adopts verbatim a party's proposed findings of fact, will be reviewed for abuse of discretion. *Bluewater Logistics, LLC v. Williford,* 55 So. 3d 148, 157 (Miss. 2011).

See also the Uniform Chancery Court Rules regarding findings by the court.

Rule 53. Masters, Referees and Commissioners

Rule 54. Judgments; Costs

Although it is not specifically described in the rule itself, there are several different stages that lead to the creation of a judgment that is final and appealable. It is important to differentiate the various steps that are part of this process. The first distinction is between the adjudication, either by a decision of the court or a verdict of the jury, and the judgment that is entered thereon. The terms "decision" and "judgment" are not synonymous under these rules. The decision consists of the court's opinion which consists of findings of fact and conclusions of law; the rendition of judgment is the pronouncement of that decision and the act that gives it legal effect.

A second distinction that should be noted is between the judgment itself and the "filing," or the "entry," of the judgment. A judgment is the final determination of an action and thus has the effect of terminating the litigation; it is "the act of the court." "Filing" simply refers to the delivery of the judgment to the clerk for entry and preservation. The "entry" of the judgment is the ministerial notation of the judgment by the clerk of the court pursuant to Rules 58 and 79(a); however, it is crucial to the effectiveness of the judgment and for measuring the time periods for appeal and the filing of various motions.

Rule 54(b) is designed to facilitate the entry of a final judgment upon one or more but fewer than all the claims or as to one or more but fewer than all the parties in an action involving multiple claims or multiple parties, so as to enable the non-prevailing party to perfect an appeal as of right of a final judgment. Absent a certification under Rule 54(b), any order in a multiple-party or multiple-claim action that does not dispose of the entire action is interlocutory, even it if appears to adjudicate a separable portion of the

controversy. Given that separate, piecemeal appeals of interlocutory orders entered in a single action would usually be inefficient, parties may not appeal interlocutory orders as of right. Instead, a party may request the trial court to certify such an interlocutory order as final judgment pursuant to Rule 54(b), so that an appeal of right may be taken pursuant to M.R.A.P. 4, or, alternatively, a party may petition the Supreme Court for permission to appeal an interlocutory order pursuant to M.R.A.P. 5. If a party attempts to perfect an appeal as of right pursuant to M.R.A.P. 4 of an order that does not dispose of all the claims between the parties, such appeal will be dismissed for lack of jurisdiction unless the order appealed from has been properly certified as a final judgment pursuant to Rule 54(b). *See, e.g., Williams v. Delta Reg'l Med. Ctr.,* 740 So. 2d 284 (Miss. 1999).

Rule 54(b) gives a trial court discretion to certify an interlocutory order as a final judgment if the court determines that "there is no just reason for delay" of the appeal. Rule 54(b) certification should be reserved for cases in which delay of the appeal might prejudice a party. *See Cox v. Howard, Weil, Laboussie, Friedrichs, Inc.,* 512 So. 2d 897, 900 (Miss. 1987). Courts should grant Rule 54(b) certification "cautiously in the interest of sound judicial administration in order to preserve the established judicial policy against piecemeal appeals." *See Indiana Lumbermen's Mut. Ins. Co. v. Curtis Mathes, Mfg. Co.*, 456 So. 2d 750, 752-53 (Miss. 1984).

If the trial court chooses to certify an interlocutory order as a final judgment pursuant to Rule 54(b), it must do so in a definite, unmistakable manner. If the reasons for the Rule 54(b) certification are not clear from the record, the trial court should set forth its findings and reasons for certification. *See Cox,* 512 So. 2d at 900-01.

Rule 54(c) must be read in conjunction with Rule 8, which requires that every pleading asserting a claim include a demand for the relief to which the pleader believes himself entitled. Thus, Rule 54(c) applies to any demand for relief, whether made by defendant or plaintiff or presented by way of an original claim, counter-claim, cross-claim, or third-party claim. A default judgment may not extend to matters outside the issues raised by the pleadings or beyond the scope of the relief demanded; a judgment in a default case that awards relief that either is more than or different in kind from that requested originally is null and void and defendant may attack it collaterally in another proceeding.

Three related concepts should be distinguished in considering Rule 54(d): These are costs, fees, and expenses. Costs refer to those charges that one party has incurred and is permitted to have reimbursed by his opponent as part of the judgment in the action. Although costs has an everyday meaning synonymous with expenses, taxable costs under Rule 54(d) is more limited and represents those official expenses, such as court fees, that a court will assess against a litigant. Costs almost always amount to less than a successful litigant's total expenses in connection with a law suit and their recovery is nearly always awarded to the successful party.

Fees are those amounts paid to the court or one of its officers for particular charges that generally are delineated by statute. Most commonly these include such items as filing fees, clerk's and sheriff's charges, and witnesses' fees. In most instances an award of

costs will include reimbursement for the fees paid by the party in whose favor the cost award is made.

Expenses include all the expenditures actually made by a litigant in connection with the action. Both fees and costs are expenses but by no means constitute all of them. Absent a special statute or rule, or an exceptional exercise of judicial discretion, such items as attorney's fees, travel expenditures, and investigatory expenses will not qualify either as statutory fees or reimbursable costs. These expenses must be borne by the litigants.

Rule 55. Default

Before a default judgment can be entered, the court must have jurisdiction over the party against whom the judgment is sought; which also means that the party must have been effectively served with process.

Entry of default for failure to plead or otherwise defend is not limited to situations involving a failure to answer a complaint, but applies to any of the pleadings listed in M.R.C.P. 7(a).

The words "otherwise defend" refer to a Rule 12(b)(6) motion. *See* M.R.C.P. Rule 12(b). The mere appearance by the defending party will not keep the party from being in default for failure to plead or otherwise defend, but if the party appears and indicates a desire to contest the action, the court can exercise its discretion and refuse to enter a default judgment. This approach is in line with the general policy that whenever there is doubt whether a default judgment should be entered, the court ought to allow the case to be tried on the merits.

Rule 55(a) does not represent the only source of authority in these rules for the entry of a default that may lead to judgment. For example, Rule 37(b)(2)(C) and Rule 37(d) both provide for the use of a default judgment as a sanction for violation of the discovery rules.

When the prerequisites of Rule 55(a) are satisfied, an entry of default shall be made by the clerk without any action being taken by the court. The clerk's function, however, is not perfunctory. Before the clerk can enter a default the clerk must examine the affidavits filed and be satisfied that the requirements of Rule 55(a) are met. *See* M.R.C.P. App. A, Forms 36, 37, and 38. These elements of default must be shown by affidavit or other competent proof.

The traditional requirement that "one had to file documents in or actually physically appear before a court" in order to make a Rule 55(b) appearance has been relaxed. If a party has made "an indicia of defense or denial of the allegations of the complaint," such party is entitled to written notice of the application for default judgment at least three days prior to the hearing on such application. *Wheat v. Eakin,* 491 So. 2d 523, 525 (Miss. 1986). "[I]nformal contacts between parties may constitute an appearance." *Holmes v.*

Holmes, 628 So. 2d 1361, 1364 (Miss. 1993). The Mississippi Supreme Court has found an appearance when "the defendants either 1) served or sent a document to the plaintiff indicating in writing the defendant's intent to defend, 2) filed a document with the court indicating in writing the defendant's intent to defend, or 3) had counsel communicate to opposing counsel the defendant's intent to defend." *American States Ins. Co. v. Rogillio,* 10 So. 3d 463, 467 (Miss. 2009). A defendant who has filed an answer to the complaint but who has failed to file a timely answer to an amended complaint has entered an appearance for Rule 55(b) purposes. *See Chassaniol v. Bank of Kilmichael,* 626 So. 2d 127, 130-31 (Miss. 1993). A defendant whose attorney has written the plaintiff's attorney in a divorce case and informed him that the defendant desired to settle the case if possible but intended to defend if no settlement could be reached has entered an appearance for Rule 55(b) purposes. *See Holmes v. Holmes*, 628 So. 2d 1361, 1364 (Miss. 1993). A defendant who has served a motion to set aside the entry of default has entered an appearance for Rule 55(b) purposes. *See King v. Sigrest,* 641 So. 2d 1158, 1162 (Miss. 1994). A defendant, cannot, however, enter a Rule 55(b) appearance before the case has been commenced. *See Kumar v. Loper*, 80 So. 3d 808, 814 (Miss. 2012). The defendant bears the burden of proving that an appearance has been made. *See Dynasteel Corp. v. Aztec Indus., Inc.*, 611 So. 2d 977, 982 (Miss. 1992).

Although an appearance by a defending party does not immunize defendant from being in default for failure to plead or otherwise defend, it does entitle defendant to at least three days written notice of the application to the court for the entry of a judgment based on his default. This enables a defendant in default to appear at a subsequent hearing on the question of damages and contest the amount to be assessed against him. Damages must be fixed before an entry of default judgment and there is no estoppel by judgment until the judgment by default has been entered.

When a judgment by default is entered, it is treated as a conclusive and final adjudication of the issues necessary to justify the relief awarded and is given the same effect as a judgment rendered after a trial on the merits. A judgment entered pursuant to Rule 55(b) may be reviewed on appeal to the same extent as any other judgment; however, an order denying a motion for a default judgment is interlocutory and not appealable. M.R.C.P. 54(a).

After entry of default by the clerk, defendant has no further standing to contest the actual factual allegations of the plaintiff's claim for relief. If a defendant wishes an opportunity to challenge plaintiff's right to recover, a defendant's only recourse is to show good cause for setting aside the default under Rule 55(c) and, failing that, to contest the amount of recovery.

After entry of default by the clerk, the court must conduct an evidentiary hearing on the record to determine damages in cases in which the plaintiff seeks unliquidated damages. *Capitol One Services, Inc. v. Rawls,* 904 So. 2d 1010, 1018 (Miss. 2004). "[L]iquidated damages are set or determined by contract, while unliquidated damages are established by a verdict or award and cannot be determined by a fixed formula." *Id.* (quoting *Moeller v. American Guar. & Liab. Ins. Co.,* 812 So. 2d 953, 959-60 (Miss. 2002)). Pursuant to

M.R.C.P. 54(c), a default judgment shall only order the type of relief sought in the demand for judgment (i.e., money damages, equitable relief, etc.), and shall not order money damages in an amount that exceeds the amount sought in the demand for judgment.

If a default has been entered, but a default judgment has not yet been entered, the defending party may move to set aside the entry of default "[f]or good cause shown" pursuant to M.R.C.P. 55(c). If a default judgment has been entered, the defendant may move to set aside the default judgment pursuant to M.R.C.P. 60(b). The standard for setting aside an entry of default pursuant to M.R.C.P. 55(c) is more liberal than the standard for setting aside a default judgment pursuant to M.R.C.P. 60(b). *See King v. Sigrest,* 641 So. 2d 1158, 1162 (Miss. 1994).

Rule 56. Summary Judgment

It is important to distinguish between a Rule 56 motion for summary judgment, a Rule 12(b)(6) motion to dismiss for failure to state a claim, and a Rule 12(c) motion for judgment on the pleadings. When ruling on a Rule 56 motion for summary judgment, the trial court may "pierce the pleadings" and consider extrinsic evidence, such as affidavits, depositions, answers to interrogatories, and admissions. When ruling on a Rule 12(b)(6) motion to dismiss for failure to state a claim, the trial court may not "pierce the pleadings" and shall only consider the allegations contained in the pleading asserting the claim. Similarly, when ruling on a Rule 12(c) motion on the pleadings, the trial court shall only consider the allegations within the pleadings. If matters outside the pleadings are presented to and considered by the trial court in connection with a motion for judgment on the pleadings or a motion to dismiss for failure to state a claim, the trial court must treat the motion as one for summary judgment and give all parties a reasonable opportunity to respond accordingly. *See* M.R.C.P. 12(b) and (c); *Huff-Cook, Inc. v. Dale*, 913 So. 2d 988, 992 (Miss. 2005). If the trial court converts a Rule 12 motion into a Rule 56 motion, the trial court must give the parties notice of the motion's changed status and at least ten days' notice of its intent to conduct a summary judgment hearing on a date certain. *See Dale*, 913 So. 2d at 988. A trial court's failure to give proper notice constitutes reversible error. *See Palmer v. Biloxi Reg'l Med. Ctr., Inc.,* 649 So. 2d 179, 183 (Miss. 1994).

A trial court need not make findings of fact when ruling on a motion for summary judgment because "a Rule 56 summary judgment hearing is not an action 'tried upon the facts without a jury' so as to trigger Rule 52 applicability." *See Harmon v. Regions Bank,* 961 So. 2d 693, 700 (Miss. 2007). *See also* Uniform Rules of Circuit and County Court Practice. Movant must do more than simply state a meritorious defense.

Pursuant to Rule 78, oral hearing on a motion for summary judgment is not necessary where such hearing is dispensed with by court order or rule.

Rule 57. Declaratory Judgments

A plaintiff may ask for a declaratory judgment either as sole relief or in addition or auxiliary to other relief, and a defendant may similarly counterclaim therefor. Thus the court is not limited only to remedial relief for acts already committed or losses already incurred; it may either substitute or add preventive and declaratory relief. It may be sought upon either legal or equitable claims and the right to jury trial is fully preserved as in civil actions generally.

Absent extraordinary circumstances, the failure to order separate trials in order to avoid putting the issue of insurance before the jury which tries liability and damages as between the insured and the injured party will be deemed an abuse of discretion.

Rule 58. Entry of Judgment

The "entry" of the judgment is the ministerial notation of the judgment by the clerk of the court pursuant to Rules 38 and 79(a); however, it is crucial to the effectiveness of the judgment and for measuring time periods for appeal and the filing of various motions.

Rule 59. New Trials; Amendment of Judgments

In jury trials, the trial court may grant a new trial based upon a prejudicial error by the court in the admission or exclusion of evidence, an error in the jury instructions, prejudicial comments by the judge or attorneys, a finding that the verdict is against the great weight of the evidence, a finding that the jury's verdict is the result of passion, prejudice or bias, or any grounds upon which new trials were granted in actions at law prior to the adoption of these rules. A trial court's ruling on a motion for new trial is reviewed for abuse of discretion.

Although "[i]t is clearly better practice to include all potential assignments of error in a motion for new trial,…when the assignment of error is based on an issue which has been decided by the trial court and duly recorded in the court reporter's transcript, such as the omission or exclusion of evidence, [the appellate court] may consider it regardless of whether it was raised in the motion for new trial." *See Kiddy v. Lipscomb,* 628 So. 2d 1355, 1359 (Miss. 1993).

The rule does not authorize a motion for reconsideration after entry of judgment. If a motion is mislabeled as a motion for reconsideration and was filed within ten days after the entry of judgment, the trial court should treat such motion as a post-trial motion to alter or amend the judgment pursuant to M.R.C.P. 59(e). *Boyles v. Schlumberger Tech. Corp.,* 792 So. 2d 262, 265 (Miss. 2001). A party moving to alter or amend the judgment "must show: (i) an intervening change in controlling law, (ii) availability of new evidence not previously available, or (iii) need to correct a clear error of law to prevent manifest injustice." *See Brooks v. Robertson,* 882 So. 2d 229, 233 (Miss. 2004). A motion to alter

or amend the judgment is within the trial court's discretion. When a motion is mislabeled as a motion for reconsideration, does not state that it was brought pursuant to Rule 59, and was filed more than ten days after the entry of the final judgment in the case, the trial court should treat such motion as one for relief from a judgment pursuant to Rule 60(b). *See Carlisle v. Allen,* 40 So. 3d 1252, 1260 (Miss. 2010).

A motion for new trial or a motion to alter or amend the judgment made pursuant to M.R.C.P. 59 must be filed within 10 days after entry of the judgment. The trial court has no authority or discretion to extend the 10-day time period. M.R.C.P. 6(b). A timely Rule 59 motion for a new trial or to alter or amend the judgment tolls the time in which to file a notice of appeal; the thirty-day time period in which to file a notice of appeal runs from the entry of the order disposing of the post-trial motion. M.R.A.P. 4(c). If not filed within ten days after entry of the judgment, a Rule 59 motion for a new trial, to alter or amend the judgment, or for reconsideration does not toll the time period in which to file a notice of appeal. M.R.A.P. 4(d); *but see Wilburn v. Wilburn*, 991 So. 2d 1185, 1190-191 (Miss. 2008) (Court refused to address the timeliness of appellant's notice of appeal even though appellant filed a motion to reconsider more than ten days after entry of judgment and did not file a notice of appeal within thirty days after the entry of judgment, noting that the appellee did not object to the untimely motion to reconsider.)

A motion for relief from a final judgment pursuant to M.R.C.P. 60(b) is different from a motion to alter or amend the judgment pursuant to M.R.C.P. 59(e) in that a change in the law after entry of final judgment is not an "extraordinary or compelling circumstance" warranting relief pursuant to M.R.C.P. 60(b). *See Regan v. S. Cent. Reg'l Med. Ctr.*, 47 So. 3d 651, 655 (Miss. 2010). Relief pursuant to Rule 60(b)(6) is reserved for cases involving "exceptional and compelling circumstances" in light of the desire to achieve finality in litigation. *See id.*

Rule 60. Relief From Judgment or Order

The trial court may grant relief from a judgment or order to correct clerical errors pursuant to Rule 60(a), or for other reasons enumerated in Rule 60(b). The trial court may correct clerical errors at any time, but if the case is on appeal and the trial court clerk has transmitted the record to the appellate court, the trial court must obtain leave from the appellate court before correcting any clerical mistakes. Motions for relief from a judgment or order based upon one of the reasons enumerated in Rule 60(b) must be made within a reasonable time, and in some cases, not more than six months after the judgment or order was entered.

Rule 60(a) only authorizes the trial court to correct clerical errors; it does not authorize any changes to the judgment that are substantive and change the effect or intent of the original judgment. *See Whitney Nat'l Bank v. Smith*, 613 So. 2d 312, 316 (Miss. 1993).

When ruling upon a Rule 60(b) motion, the trial court should balance the litigant's interest in a resolution on the merits of the motion with the desire to achieve finality in

litigation. *See Stringfellow v. Stringfellow*, 451 So. 2d 219, 221 (Miss. 1984). Rule 60(b) motions that attempt to merely relitigate the case should be denied. *Id*.

A party moving for relief pursuant to Rule 60(b)(1) based upon fraud, misrepresentation or other misconduct of an adverse party must do so within six months after entry of the judgment and must prove the fraud, misrepresentation or other misconduct by clear and convincing evidence. *See Stringfellow*, 451 So. 2d at 221. Relief from a final judgment based upon fraud upon the court may be sought pursuant to Rule 60(b)(6). *See In re Estate of Pearson,* 25 So. 3d 392, 395 (Miss. Ct. App. 2009). "[R]elief based on 'fraud upon the court' is reserved for only the most egregious misconduct, and requires a showing of 'an unconscionable plan or scheme which is designed to improperly influence the court in its decision.'" *Id.* (citing *Wilson v. Johns-Manville Sales Corp.,* 873 F.2d 869, 872 (5th Cir. 1989)).

A party moving for relief pursuant to Rule 60(b)(2) based upon accident or mistake must do so within six months after entry of the judgment. A Rule 60(b)(2) motion will only be granted upon a showing of exceptional circumstances. Generally, "neither ignorance nor carelessness on the part of an attorney will provide grounds for relief." *See Stringfellow*, 451 So. 2d at 221.

A party may move to set aside a default judgment pursuant to Rule 60(b)(2). When ruling on such a motion, the trial court may consider: (1) whether the default was caused by excusable neglect or a bona fide technical error; (2) whether the claimant will suffer prejudice if the default judgment is set aside; and (3) whether the defaulting party has a colorable defense to the merits. *See State Highway Comm'n of Miss. v. Hyman*, 592 So. 2d 952, 955 (Miss. 1991). Movant must show the specific facts of the meritorious defenses by affidavit or other sworn form of evidence. *American Cable Corp. v. Trilogy Communiations, Inc.,* 754 So. 2d 545 (Miss. 2000).

A party moving for relief pursuant to Rule 60(b)(3) based upon newly discovered evidence must do so within six months after entry of the judgment. To justify relief, the evidence: (i) must have been in existence at the time of trial; (ii) could not have been discovered by due diligence prior to the expiration of the ten-day period in which a Rule 59 motion for new trial could have been filed; (iii) must be material and not cumulative; and (iv) must be of such character as to probably produce a different result in the event of a new trial or be of such character as to require a different ruling on summary judgment. *See January v. Barnes*, 621 So. 2d 915, 920 (Miss. 1992).

A party may move to set aside a void judgment pursuant to Rule 60(b)(4) more than six months after entry of the judgment if the delay in moving for relief was reasonable. *See Ladner v. Logan*, 857 So. 2d 764, 770 (Miss. 2003). A judgment is void if the trial court lacked jurisdiction over the subject matter or the parties or acted in a manner inconsistent with due process of law. *See Bryant, Inc. v. Walters*, 493 So. 2d 933, 938 (Miss. 1986).

A party may move to set aside the judgment pursuant to Rule 60(b)(5) if the judgment has been satisfied, released or discharged or a prior judgment upon which it is based has

been reversed or otherwise vacated. Rule 60(b)(5), however, "does not authorize relief from a judgment on the ground that the law applied by the court in making its adjudication has been subsequently overruled or declared erroneous in another and unrelated proceeding." *See Regan v. S. Cent. Reg'l Med. Ctr.*, 47 So. 3d 651, 655 (Miss. 2010).

A party may move to set aside the judgment pursuant to Rule 60(b)(6) if there are "extraordinary and compelling" circumstances justifying relief. When ruling on a Rule 60(b)(6) motion, the trial court may consider the following factors: "(1) [t]hat final judgments should not lightly be disturbed; (2) that the Rule 60(b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) whether the motion was made within a reasonable time; (5) [omitted factor relevant only to default judgments]; (6) whether if the judgment was rendered after a trial on the merits-the movant had a fair opportunity to present his claim or defense; (7) whether there are intervening equities that would make it inequitable to grant relief; and (8) any other factors relevant to the justice of the judgment under attack." *See Carpenter v. Berry*, 58 So. 3d 1158, 1162 (Miss. 2011).

The trial court has discretion to grant or deny a Rule 60(b) motion, unless the judgment is void, in which case the court is required to set aside the judgment. *See Sartain v. White*, 588 So. 2d 204, 211 (Miss. 1991).

Motions for relief under this rule are filed in the original action, rather than as an independent action.

Rule 60 motions for relief from a judgment filed no later than ten days after entry of judgment toll the time period in which an appeal may be taken. M.R.A.P. 4(d). Rule 60 motions filed more than ten days after entry of judgment do not toll the time period in which an appeal may be taken. A Rule 60(b) motion for relief from a judgment does not automatically stay execution upon the judgment. The trial court has discretion to stay execution upon the judgment while a Rule 60(b) motion is pending. M.R.C.P. 62(b).

Rule 61. Harmless Error

Rule 62. Stay of Proceedings to Enforce a Judgment

Subdivision (e) of the Federal Rules applies to stays in favor of the United States; it is omitted from the Mississippi Rules of Civil Procedure.

Rule 63. Disability of a Judge

Rule 64. Seizure of Person or Property

Rule 65. Injunctions

Rule 65 authorizes parties to seek temporary restraining orders (TROs) and preliminary injunctions in civil cases in which permanent injunctive relief or other relief is being sought. A party may move for, and in appropriate circumstances, obtain a TRO and/or a preliminary injunction before the merits of the case are resolved.

Generally, the purpose of a TRO is to provide temporary short term relief until further action can be taken in the case. To obtain a TRO without notice to the adverse party, the party seeking relief must show, by affidavit or verified complaint, that it will suffer immediate and irreparable injury before the adverse party can be heard in opposition. In addition, the attorney for the party seeking the TRO must certify to the court in writing the efforts made to give the adverse party notice and the reasons why the notice to the adverse party should not be required. If a TRO is granted without notice, it must contain the information required by Rule 65(b) and it must expire by its terms, not more than 10 days after its entry, except in domestic relations cases. Before its expiration, a TRO may be extended by the court for a like period if the restrained party consents or the court extends the TRO for good cause shown.

The purpose of a preliminary injunction is to provide injunctive relief until the merits of the case are resolved. Preliminary injunctions cannot be granted without notice. A party moving for preliminary injunctive relief pursuant to Rule 65(a) must demonstrate that "(i) there exists a substantial likelihood that the [movant] will prevail on the merits; (ii) the injunction is necessary to prevent irreparable harm; (iii) the threatened injury to the [movant] outweighs the harm an injunction might do to the [opposing party]; and (iv) granting a preliminary injunction is consistent with the public interest." *See Littleton v. McAdams,* 60 So. 3d 169, 171 (Miss. 2011). Motions for preliminary injunctions are within the trial court's discretion. *See City of Durant v. Humphreys County Mem'l Hosp.,* 587 So. 2d 244, 250 (Miss. 1991).

Rule 65 (c) requires that proper security be given by the movant obtaining a TRO or preliminary injunction so that proper payment for costs, damages and reasonable attorneys' fees may be made to the restrained party in the event it is determined that such party was wrongfully enjoined or restrained. Such security is not required from the State of Mississippi and may be waived in domestic relations cases. Mississippi Code Annotated §11-13-37 provides an independent statutory basis for awarding damages and attorneys' fees upon dissolution of an injunction.

County courts have some authority to issue injunctive relief. Mississippi Code Annotated §9-9-21 provides that county courts "shall have jurisdiction concurrent with the circuit and chancery courts in all matters of law and equity wherein the amount of value of the things in controversy shall not exceeds…the sum of …$200,000.00." Mississippi Code Annotated §99-9-23 provides that county courts "shall have the power to order the issuances of writs of certiorari, supersedeas, attachments, and other remedial writs in all

cases pending in, or within the jurisdiction of, [the county court]." Section 9-9-23, however, further provides that county courts "shall not have original power to issue writs of injunction, or other remedial writs of equity or in law except in those cases hereinabove specified as being within [the court's] jurisdiction." The statutes have been interpreted as authorizing county courts to issue injunctions in cases falling within the concurrent jurisdiction of the chancery and county court. *See, e.g., Lee v. Coahoma Opportunities, Inc.,* 485 So. 2d 293, 294 (Miss. 1986) (citing Miss. Code Ann. §9-9-21(1)) ("A claim for specific performance of a contract of employment plus attendant injunctive relief is well within the jurisdiction of the county court on its equity side"); *Swan v. Hill,* 855 So. 2d 459, 462-63 (Miss. Ct. App. 2003) (holding that the county court had jurisdiction to issue injunctive relief in a case involving property rights).

Rule 65.1. Security: Proceedings Against Sureties

Rule 66. Receivers

Rule 67. Deposit in Court

Rule 68. Offer of Judgment

Rule 69. Execution

Rule 70. Judgment for Specific Acts; Vesting Title

Rule 70 applies only after judgment is entered; Rules 6 and 65 provide for remedies prior to judgment. Rule 70 applies only if a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents to perform only other specific acts and the party has failed to comply within the time specified.

Rule 71. Process in Behalf of and Against Persons Not Parties

A court order may be enforced by a non-party if the non-party shares an identity of interest with the prevailing party. For example, an assignee of a prevailing party in a case concerning title to property is entitled to enforce a judgment in the same manner as the party assignor. Similarly, a judgment may be against a person who is the successor in interest to a party, but the court must first obtain personal jurisdiction on the successor in interest. *See, e.g., Mansour v. Charmax Ind., Inc.,* 680 So. 2d 852, 855 (Miss. 1996) (holding that service of process is requirement to personal jurisdiction before Rule 71 can

be applied); *Libutti v. U.S.,* 178 F.3d 114, 124-25 (2d Cir. 1999) (holding that the court must have personal jurisdiction over the non-party against whom the judgment is enforced).

Rule 71A. Eminent Domain [Reserved]

Rules 72 to 76. [Omitted]

Rule 77. Courts and Clerks

Rule 77(a) provides that the courts shall be deemed always open for the purpose of filing papers and issuing and returning process and making motions and orders. This does not mean that the office of the clerk must be physically open at all hours or that the filing of papers can be effected by leaving them in a closed or vacant office. Under Rule 5(e)(1) papers may be filed out of business hours by delivering them to the clerk or to the judge if he or she permits. *See* Miss. Const. § 24 (all courts shall be open).

Rule 77(b) requires that the "all trials upon the merits" be conducted in "open court"; all other acts or proceedings may be done or conducted by a judge "in chambers," without the necessity of the attendance of the clerk or other court official and at any place within the state. However, no hearing, other than one heard ex parte, shall be conducted outside the district without the consent of all parties affected thereby. *See Corporate Mgmt., Inc. v. Greene Rural Health Ctr. Bd. of Trustees,* 47 So. 3d 142, 146 (Miss. 2010).

Rule 77(d) requires that the clerk provide copies of all orders and judgments, immediately upon their entry, to all parties who are not in default for failure to appear.

M.R.A.P. 4(h) provides that a party who did not receive notice of entry of a judgment or order from the clerk or any party within 21 days of its entry may move the trial court to reopen the time for appeal.

Rule 77(d) gives a prevailing party who wants to ensure that the time for appeal is not reopened pursuant to M.R.A.P. 4(h), the opportunity to serve notice of entry of the judgment or order upon opposing parties in the manner provided in Rule 5. Although prevailing parties may take the initiative to assure that their adversaries receive effective notice, the clerk retains the duty to give notice of entry of judgments and orders.

Rule 78. Motion Practice

Rule 78 does not alter any local rules governing motion practice; however, the rule must be considered in light of Rule 83.

Rule 79. Books and Records Kept by the Clerk and Entries Therein

Rule 79(a) specifies that the docket entries reflect the date on which entries are made in the general docket. Since several important time periods and deadlines are calculated from the date of the entry of judgments and orders, these entries must accurately reflect the actual date of the entries rather than another date, such as the date on which a judgment or order is signed by the judge. See, for example, Rule 58 mandating that a judgment is effective only when entered as provided in Rule 79(a), and Rule 59 which requires that motions to alter or amend judgments be filed within ten days after the entry of judgment.

Rule 80. Stenographic Report or Transcript as Evidence [Omitted]

Mississippi has statutory provisions for the appointment, oath, nature and term of office, bond, removal from office, and duties and responsibilities of court reporters. *See* Miss. Code Ann. §§9-13-1 *et seq.* (1972) and M.R.A.P. Appendix III.

Rule 81. Applicability of Rules

Rule 81 compliments Rule 1 by specifying which civil actions are governed only partially, or not at all, by the provisions of the M.R.C.P.

Rule 81(a) lists 12 categories of civil actions which are not governed entirely by the M.R.C.P. In each of those actions there are statutory provisions detailing certain procedures to be utilized. *See generally* Miss. Code Ann. §§11-43-1, *et seq.,* (habeas corpus); 73-3-301, *et seq.*, (disciplining of attorneys); 43-21-1, *et seq.,* (youth court proceedings); 23-15-911 *et seq.* (election contests); 31-13-1, *et seq.*, (bond validation); 41-21-61, *et seq.,* (persons with mental illness or an intellectual disability); 41-30-1, *et seq.,* (adjudication, commitment and release of alcohol and drug addicts); 11-27-1, *et seq.,* (eminent domain); 91-1-1, *et seq.,* (trusts and estates); 93-1-1, *et seq.,* (domestic relations); 51-29-1, *et seq.,* and 51-31-1, *et seq.,* (creation and maintenance of drainage and water management districts); 21-1-1, *et seq.,* (creation of and change in boundaries of municipalities); and those proceedings identified in category (12) by their Code Title as follows: 9-5-103 (bonds of receivers, assignees, executors may be reduced or cancelled, if excessive or for sufficient cause); 11-1-23 (court or judge may require new security); 11-1-29 (proceedings on death of surety on bonds, etc.); 11-1-31 (death of parties on bonds having force of judgment—citation in anticipation of judgment); 11-1-35 (death of parties on bonds having force of judgment when citation issued and returnable); 11-1-43 through 11-1-49 (seizure of perishable commodities by legal process); 11-5-151 through 11-5-167 (receivers in chancery); and 11-17-33 (receivers appointed for nonresident or unknown owners of mineral interests).

However, in any instance in the twelve listed categories in which the controlling statutes are silent as to a procedure, the M.R.C.P. govern.

As to ex parte matters, Rule 81(b) is intended to preserve, inter alia, the summary manner in which many matters testamentary, of administration, in minors/wards' business, and in cases of idiocy, lunacy, and persons of unsound mind are handled. *See* Miss. Code Ann. §11-5-49 (1972).

Rule 81(c) pertains to actions or matters where a statute requires that summons or notice be made by publication. In those instances, publication as provided by Rule 4 shall satisfy the requirements of such statute(s).

Rule 81(d) recognizes that there are certain actions and matters whose nature requires special rules of procedure. Basically these are matters of which the State has an interest in the outcome or which because of their mature should not subject a defendant/respondent to a default judgment for failure to answer. Furthermore, they are matters that should not be taken as confessed even in the absence of the appearance of the defendant/respondent. Most of the matters enumerated are peculiar to chancery court. Rule 81(d) divides the actions therein detailed into two categories. This division is based upon the recognition that some matters, because of either their simplicity or need for speedy resolution, should be triable after a short notice to the defendant/respondent; while others, because of their complexity, should afford the defendant/respondent more time for trial preparation.

Rule 81(d)(3) provides that the pleading initiating the action should be commenced by complaint or petition only and shall not be taken as confessed. Initiating Rule 81(d) actions by "motion" is not intended.

Rule 81(d)(5) recognizes that since no answer is required of a defendant/respondent, then the summons issued shall inform him of the time and place where he is to appear and defend. If the matter is not heard on the date originally set for the hearing, the court may sign an order on that day continuing the matter to a later date. The rule also provides that the Court may adopt a rule or issue an order authorizing its Clerk to set actions or matters for original hearings and to continue the same for hearing on a later date. (Local rules should be filed with the Supreme Court as required by Rule 83).

Rule 81(d)(6) provides that as to any temporary hearing in a pending action for divorce, separate maintenance, child custody or support, notice in the manner prescribed by Rule 5(b) shall be sufficient, provided the defendant/respondent has already been summoned to answer.

Rule 82. Jurisdiction and Venue

Rule 82(c) provides that if venue is proper for one plaintiff's claim and such plaintiff has been properly joined with other plaintiffs, venue is proper for all plaintiffs' claims. Mississippi Code Annotated §11-11-3(2), however, provides that "[i]n any civil action where more than one (1) plaintiff is joined, each plaintiff shall independently establish proper venue; it is not sufficient that venue is proper for any other plaintiff joined in the civil action." Rule 82(b) states that "[e]xcept as provided by this rule, venue in all actions shall be as provided by statute." Thus, there is a conflict between the rule and the statute in that the rule states that venue is proper in cases involving multiple plaintiffs who are properly joined if venue is proper for a single plaintiff's claim, whereas the statute provides that in cases involving multiple plaintiffs venue must be proper for each plaintiff's claim. There is no conflict in cases involving multiple defendants—"venue properly established against one defendant generally is proper against all defendants." *See Penn Nat'l Gaming, Inc. v. Ratliff,* 954 So. 2d 427, 432 (Miss. 2007). In cases involving a medical malpractice defendant and another defendant, however, venue established by Mississippi Code Annotated §11-11-3 is only appropriate in the county where the alleged malpractice occurred. *See Adams v. Baptist Memorial Hospital-DeSoto, Inc.,* 965 So. 2d 652, 657-58 (Miss. 2007).

Rule 82(e) authorizes a motion to transfer venue to another court having proper venue within the state based upon forum non-conveniens. In addition, Mississippi Code Annotated §11-11-3 authorizes transfer to another forum within Mississippi that is more convenient and further authorizes dismissal of the case in Mississippi if a more convenient forum is available in another state. A trial court ruling on a motion to dismiss made pursuant to the statute must determine whether, given "the interest of justice" and "the convenience of the parties and witnesses," "a claim or action would be more properly heard in a forum outside this state or in a different county of proper venue within this state." Mississippi Code Annotated §11-11-3(4)(a). The trial court may consider the factors set forth in Mississippi Code Annotated §11-11-3(4)(a).

Rule 83. Local Court Rules

Practitioners may access local rules that have been approved by the Mississippi Supreme Court on the Court's website.

Rule 84. Forms

This rule has no comment.

Rule 85. Title

This rule has no comment.