

Serial: 152146

**IN THE SUPREME COURT OF MISSISSIPPI**

**No. 89-R-99001-SCT**

***IN RE: THE RULES OF CIVIL PROCEDURE***

**ORDER**

This matter is before the Court, en banc, on its own motion to amend Rule 5 of the Mississippi Rules of Civil Procedure and to amend the Comment to Rule 41 of the Mississippi Rules of Civil Procedure. The proposed amendments are necessary to accommodate service and filing of pleadings and other papers electronically in conformity with the Mississippi Electronic Court System procedures.

After due consideration, the Court finds that the Rules should be amended for purposes of electronic filing in conformity with the Mississippi Electronic Court System procedures.

IT IS THEREFORE ORDERED that Rule 5 of the Mississippi Rules of Civil Procedure is hereby amended, as set forth in Exhibit "A" to this order. The amended Rule may be used where a court, by local rule, allows electronic filing in conformity with the Mississippi Electronic Court System.

IT IS ALSO ORDERED that the Comment to Rule 41 of the Mississippi Rules of Civil Procedure is hereby amended, as set forth in Exhibit "B" to this order. The amended

Rule may be used where a court, by local rule, allows electronic filing in conformity with the Mississippi Electronic Court System.

IT IS FURTHER ORDERED that the Clerk of this Court shall spread this Order upon the minutes of this Court and shall forward a certified copy to: West Publishing Company for publication in the *Southern Reporter, Second Series, (Mississippi Edition)* and the *Mississippi Rules of Court*.

SO ORDERED, this the 11th day of December, 2008.

/s/ William L. Waller, Jr.

WILLIAM L. WALLER, JR., PRESIDING JUSTICE

AGREE: SMITH, C.J., WALLER AND DIAZ, P.JJ., CARLSON, GRAVES, DICKINSON, RANDOLPH AND LAMAR, JJ.

DISAGREE: EASLEY, J.

## Exhibit A

### MISSISSIPPI RULES OF CIVIL PROCEDURE

#### RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

**(a) Service: When Required.** Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard *ex parte*, and every written notice, appearance, demand, offer of judgment, designation of record on appeal and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided in Rule 4 for service of summons. In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

**(b) (1) Service: How Made.** Whenever under these rules service is required or permitted to be made upon a party who is represented by an attorney of record in the proceedings, the service shall be made upon such attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him; or by transmitting it to him by electronic means; or by mailing it to him at his last known address, or if no address is known, by leaving it with the clerk of the court, or by transmitting it to the clerk by electronic means. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by electronic means is complete when the electronic equipment being used by the attorney or party being served acknowledges receipt of the material. If the equipment used by the attorney or party being served does not automatically acknowledge the transmission, service is not complete until the sending party obtains an acknowledgment from the recipient. Service by mail is complete upon mailing.

**(2) Electronic Court System Service: How Made.** Where a court has, by local rule, adopted the Mississippi Electronic Court System, service which is required or permitted

under these rules shall be made in conformity with the Mississippi Electronic Court System procedures.

**(c) Service: Numerous Defendants.** In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants, and that any cross-claim, counter-claim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

**(d) Filing.** All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter but, unless ordered by the court, discovery papers need not be filed until used with respect to any proceeding. Proof of service of any paper shall be upon certificate of the person executing same.

**(e) (1) Filing With the Court Defined.** The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk. ~~Filing may be accomplished by delivering the pleadings or other papers to the clerk of the court or to the judge, or by transmitting them by electronic means.~~

**(2) Electronic Filing with Court Defined.** A court may, by local rule, allow pleadings and other papers to be filed, signed, or verified by electronic means in conformity with the Mississippi Electronic Court System procedures. Pleadings and other papers filed electronically in compliance with the procedures are written papers for purposes of these rules.

[Amended effective March 1, 1989; Amended effective January 8, 2009, for the purpose of establishing a pilot program for Mississippi Electronic Court System.]

#### **Advisory Committee Historical Note**

Effective March 1, 1989, Rule 5(b) and Rule 5(e) were amended by authorizing the service and filing of pleadings and documents by electronic means. 536-538 So. 2d XXI (West Miss. Cas. 1989).

#### **Comment**

The purpose of Rule 5 is to provide both an expedient method of exchanging written 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 not a party 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. *See* Miss. Code Ann. § 11-5-37 (1972) (answer may be made a cross-bill). However, where a plaintiff has settled his case, the service on him of a notice and motion to intervene is ineffectual to bring him back into court. This is consistent with Mississippi practice, although past procedure did not recognize intervention. *See Hyman v. Cameron*, 46 Miss. 725 (1872).

A motion which may be heard *ex parte* is not required to be served, but should be filed; see also M.R.C.P. 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.

Discovery papers, referred to in Rule 5(a), embrace interrogatories, Rule 33, requests for admission, Rule 36, and requests for production, Rule 34. Responses served under the provisions of any of these rules must also be served on all parties.

The Administrative Office of Courts (AOC) is authorized to establish procedures for a comprehensive electronic case management and electronic filing system known as the Mississippi Electronic Court System (MEC). Please refer to the Administrative Procedures for Mississippi Electronic Court System on the Supreme Court's website at [www.mssc.state.ms.us](http://www.mssc.state.ms.us). While the use of the MEC is optional for the chancery, circuit, and county courts, the procedures 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.

A secondary purpose of Rule 5(c) is to permit the court to alleviate some of the difficulties in actions where there are unusually large numbers of defendants. Rule 5(c) is the only instance in which the provisions of Rule 7(a) (pleadings allowed) are permitted to be relaxed. This relaxation extends only to replies to counter-claims and answers to cross-claims; other pleadings and all motions must still be served in the usual manner.

Rule 5(d) recognizes both the expense of making additional transcripts of recordings and duplicating exhibits or attachments to discovery papers, and the fact that the routine filing of such items can engulf the space in a clerk's office. Accordingly, papers produced in the course of discovery need not be filed with the court unless they are relevant to some proceeding or the court so directs, nor must all discovery papers be filed if only some of them

are required for the disposition of some motion or proceeding. M.R.C.P. 5(d) differs from Federal Rule 5(d) in the preceding respect, but accords with the recommendations of the American Bar Association for correcting abuses in the discovery procedures. *See* Special Committee for the Study of Discovery Abuse, Section of Litigation, A.B.A., Report, at 1, 2 (1977).

Of further significance in Rule 5(d) is that, although service must be made within the times prescribed, filing is permitted to be made within a reasonable time thereafter. *See Blank v. Bitker*, 135 F.2d 962 (7th Cir. 1943). 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 it 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 his 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.

For general discussions of the federal rule analogous to M.R.C.P. 5, *see* 1 Wright & Miller, Federal Practice and Procedure, Civil §§71-82 (1969), and 2 Moore's Federal Practice ¶¶ 5.01-5.11 (1975).

## Exhibit B

### MISSISSIPPI RULES OF CIVIL PROCEDURE

#### RULE 41. DISMISSAL OF ACTIONS

....

#### **Comment**

The purpose of Rule 41 is to establish a uniform rule governing voluntary and involuntary dismissals of actions. Rule 41(a), which permits a plaintiff voluntarily to dismiss his action, is intended to give him the right to take the case out of court if no other party will be prejudiced. The right is limited by the rule to the period before answer or motion for summary judgment; thereafter dismissal can be had only with consent of the court and on such conditions as are just.

Rule 41(a)(1) provides two methods by which a plaintiff may dismiss an action without obtaining the consent of the court: He may do so at any time by stipulation of all the parties; he may do so prior to service of an answer or of a motion for summary judgment by his own unilateral act of filing a notice of dismissal with the court.

The defenses listed in Rule 12(b) may, at the option of the defendant, be asserted in an answer or by motion to dismiss. If they are included in an answer, the service of the answer terminates plaintiff's right to dismiss by notice. Plaintiff's right of voluntary dismissal is not cut off if the defense is put forward by motion to dismiss. A motion to dismiss is neither an answer nor, unless accompanied by affidavits stating matters outside the pleadings that are not excluded by the court, a motion for summary judgment; a motion to dismiss does not terminate the right of dismissal by notice, nor does a motion for a stay or a motion for change of venue.

The other procedure for voluntary dismissal, in addition to dismissal by notice, a dismissal by stipulation of all the parties. Dismissal by stipulation may be had at any time. A stipulation will not be construed as being for dismissal in the absence of an unequivocal statement by the parties that it was so intended.

Dismissal by stipulation is without prejudice unless the stipulation provides that it is to be with prejudice. A voluntary dismissal by stipulation is effective immediately and does not require judicial approval.

The procedure under MRCP 41(a)(1) is contrary to past Mississippi nonsuit practice, which permitted the plaintiff to voluntarily dismiss his suit without prejudice at any time

before the case was submitted to the jury. Miss. Code Ann. § 11-7-125; *See* also Miss. Code Ann. § 11-7-127 (1972) (plaintiff may take a nonsuit before the clerk in vacation); *Allison v. Camp Creek Drainage Dist.*, 211 Miss. 354, 364, 51 So.2d 743, 747 (1951) (plaintiff in chancery action may nonsuit without prejudice up to time cause is submitted to chancellor for final decision on the merits); but *see Adams v. Lucedale Commercial Co.*, 113 Miss. 608, 74 So. 435 (1917). It is also contrary to practice under Federal Rule 41(a), which permits only one voluntary nonsuit at any time before defendant's responsive pleading is made.

Although Miss. Code Ann. §§ 11-27-125 and -127 (1972) are couched in terms ostensibly granting an absolute right to the plaintiff to nonsuit before the cause is submitted, the statutes have not been so interpreted, particularly in chancery practice: "When in any respect the cause has proceeded to that point . . . that the defendant has . . . secured some substantial right which would be destroyed by the dismissal, it should not be permitted." *Mitchell v. Film Transit Co.*, 194 Miss. 550, 13 So.2d 154 (1943). *See* also V. Griffith, *Mississippi Chancery Practice*, § 534 (2d ed. 1950).

The trial court has no power to impose terms and conditions if a plaintiff properly dismisses by notice under Rule 41(a)(1). Nor may the plaintiff seek to make a conditional dismissal under that portion of the rule. If dismissal is by stipulation under Rule 41(a)(1), the parties work out for themselves the conditions on which they will enter into the stipulation. Accordingly, the authority of the court to require "such terms and conditions as the court deems proper" is limited to a motion for dismissal under Rule 41(a)(2).

The terms of conditions that may be imposed upon the granting of a motion for voluntary dismissal are for the protection of the defendant, although if one of several plaintiffs moves for dismissal conditions may be imposed for the protection of the remaining plaintiffs. The court may dismiss without conditions if they have not been shown to be necessary, but should at least require that the plaintiff pay the costs of the litigation. In imposing conditions the court is not limited to taxable costs, but may require the plaintiff to compensate for all of the expenses to which his adversary has been put; the court may require plaintiff to pay the defendant's attorney's fees as well as other costs and disbursements.

Dismissal on motion under Rule 41(a)(2) is within the sound discretion of the court, and its order is reviewable only for abuse of discretion. The discretion given the court by Rule 41(a)(2) is a judicial, rather than an arbitrary, discretion. If necessary, a hearing should be held and the court should endeavor to ensure substantial justice to both parties.

The purpose of Rule 41(a)(2) is primarily to prevent voluntary dismissal which unfairly affects the other side, and to permit the imposition of curative conditions. Accordingly, the dismissal should be allowed generally unless the defendant will suffer some plain legal prejudice other than the mere prospect of a second law suit. It is not a bar to dismissal that plaintiff may obtain some tactical advantage thereby.

The second sentence of Rule 41(a)(2) provides that if a counter-claim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counter-claim can remain pending for independent adjudication by the court. The purpose of the rule is to preserve the court's jurisdiction over the parties and the counter-claim. Ordinarily the counter-claim can stand on its own and dismissal can be granted without affecting the counter-claim. If the counter-claim is compulsory, the court has jurisdiction to decide it even though the plaintiff claim is dismissed; if the counter-claim is permissive, it will ordinarily require independent grounds for jurisdiction and these independent grounds permit it to remain pending. Thus, the rule applies only when there is a permissive counter-claim that can be maintained without an independent ground of jurisdiction, as when it is a setoff, or in other unusual circumstances in which the counter-claim would fall if the plaintiff's claim were dismissed.

Rule 41(b) allows the court to dismiss an action involuntarily for three different causes: dismissal at the close of the plaintiff's evidence for failure to show a right to relief, which operates as a decision on the merits, dismissal for want of prosecution, which is a penalty for dilatoriness, *See* Miss. Code Ann. § 11-53-25 (1972) (dismissal for want of prosecution); and dismissal for failure to comply with "these rules" or any order of the court; *see Sherwin Williams Co. v. Feld Bros. & Co.*, 139 Miss. 21, 28, 103 So. 795, 796 (1925) (plaintiff may be nonsuited by the court for failure to comply with order to make declaration more specific). Unless otherwise specifically ordered by the court, an involuntary dismissal under Rule 41(b) ordinarily operates as an adjudication upon the merits and is with prejudice. *See* 9 Wright & Miller, Federal Practice and Procedure, Civil §§ 2369-2373 (1971). However, past Mississippi practice has tempered this harsh result by allowing dismissed cases to be reinstated, except in extreme situations. *See, e. g., Ross v. Milner*, 194 Miss. 497, 505-06, 12 So.2d 917, 918 (1943) (where order did not recite that cause was dismissed without prejudice, it was considered as being dismissed with prejudice); *Peoples Bank v. D'Lo Royalties, Inc.*, 206 So.2d 836, 837 (Miss.1968) (dismissal is a drastic punishment which should not be invoked except where conduct of parties has been so deliberately careless as to call for such action).

Rule 41(c) provides that the other subdivisions of Rule 41, stating the procedures for and consequences of dismissals, apply to the dismissal of a counter-claim, cross-claim, or third-party claim.

One exception is allowed for Rule 41(c) matters because the right of voluntary dismissal with notice, MRCP 41(a)(1), is terminated by an answer. This will not work for counter-claims, cross-claims, or third-party claims, since defendant will ordinarily assert these with or subsequent to his answer. Accordingly, Rule 41(c) provides that a voluntary dismissal by a defendant, or other claimant, of a counter-claim, cross-claim, or third-party claim must be made before a responsive pleading is served or, if none, before the introduction of evidence at the trial. MRCP 41(a)(1) also provides that the service of a

motion for summary judgment also terminates the right to dismiss by notice. As a matter of logic and judicial consistency, if a motion for summary judgment defeats plaintiff's right to dismiss, then it should also defeat the right of a defendant to dismiss his counter-claim, cross-claim, or third-party claim. *See* 9 Wright & Miller, *supra*, § 2374.

Rule 41(d) authorizes the clerk to move for dismissal of cases in which there has been no action of record during the preceding 12 months. The clerk is required to give notice of such action to the opposing parties who may counter the clerk's motion to retain the case on the court's docket. This provision supersedes Miss. Code Ann. § 11-53-25 (1972) (clerk shall move for dismissal of any cause pending in which no action has been taken for the two preceding terms). The statute did not require notice of the dismissal -- the parties were deemed to be before the court in cases pending on the active docket. *Ross v. Milner, supra*. If a court has implemented the Mississippi Electronic Court System, the notice required by Rule 41(d) may be sent in the same manner as other notices consistent with the Mississippi Electronic Court System procedures. Please refer to the Administrative Procedures for Mississippi Electronic Court System on the Supreme Court's website at [www.mssc.state.ms.us](http://www.mssc.state.ms.us).

Under Rule 41(e), if a plaintiff who has once dismissed an action in any court commences another action on the same claim against the same defendant, the court may require the payment of costs in the prior action before proceeding with the latter. The matter is discretionary with the court. Rule 41(e) by its terms is applicable only when the plaintiff "has once dismissed an action"; thus, it does not cover cases in which there was an involuntary dismissal of the prior action by the court. This accords with prior practice pursuant to Miss. Code Ann. §§ 11-7-127 and 11-53-25 (1972).