

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO.: 2008-CA-00795**

NELSON LEE

APPELLANT

vs.

McHANN RAILROAD SERVICES, INC.

APPELLEE

BRIEF OF APPELLEE

Interlocutory Appeal from decision of the Circuit Court of Monroe County, Mississippi

ORAL ARGUMENT REQUESTED

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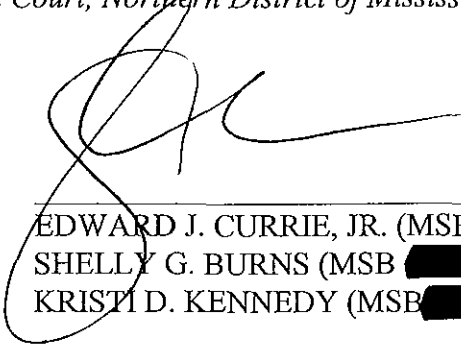
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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal:

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8. Honorable Michael P. Mills
Chief Judge, United States District Court, Northern District of Mississippi

THIS the 25th day of November, 2008.



EDWARD J. CURRIE, JR. (MSB [REDACTED])
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STATEMENT OF THE ISSUE

1. Whether Nelson Lee's claims against McHann Railroad Services, Inc. of Mississippi are barred by the statute of limitations because he failed to file suit within three years as required by MISSISSIPPI CODE ANNOTATED § 15-1-49.

STATEMENT OF THE CASE

Appellant Nelson Lee (“Lee”) initiated this action on April 13, 2006, by filing suit against defendant Kansas City Southern Railway Company (“KCS”) in the Circuit Court of Monroe County, Mississippi. (R. 11). Lee’s Complaint named only KCS as a defendant **and did not name any fictitious parties**. *Id.* KCS removed Lee’s cause of action to the United States District Court for the Northern District of Mississippi, Eastern Division, on or about August 16, 2006. (R. 17). After litigation proceeded in federal court for nearly a year, Lee moved the District Court to allow him to amend his Complaint to add a completely new defendant, Appellee McHann Railroad Services, Inc. of Mississippi (“McHann”). (R. 30). The District Court Judge entered an order on June 13, 2007, granting Lee’s motion to amend, but specifically refraining from ruling on whether Lee’s claims against McHann were barred by the statute of limitations. (R. 20). Thereafter, the District Court remanded this action to the Circuit Court of Monroe County. (R. 29).

On July 23, 2007 – over **four** years after the incident upon which Lee’s suit was based – Lee filed his Amended Complaint adding McHann Railroad Services, Inc. of Mississippi as a defendant for the first time. (R. 47). In his Amended Complaint, Lee merely added McHann’s name along side KCS’s name and asserted the exact same general claims of negligent maintenance, construction, and repair of a crossing at Highway 8 West near the intersection of Highways 8 and 45 in Monroe County, MS, as he had previously asserted against KCS in the original Complaint. (R. 11, 47). The only new claim in Lee’s Amended Complaint was his allegation that KCS is vicariously liable for the negligent acts of McHann. (R. 48).

McHann filed its answer to Lee’s Amended Complaint on August 22, 2007, asserting as one of its defenses that Lee’s claims were barred by the statute of limitations. (R. 52). A few days later, on August 28, 2007, McHann moved the trial court for a dismissal under M.R.C.P. 12(b)(6) for

failure to state a claim and asserting that Lee's claims were barred by the statute of limitations. (R. 61). After reviewing all of the evidence presented by both sides, the trial court determined that Lee's claims were barred by the statute of limitations in MISS. CODE ANN. § 15-1-49 and entered an order dismissing McHann from this cause of action with prejudice. (R. 154, 156). Aggrieved by this ruling, Lee has filed the instant appeal.

STATEMENT OF THE FACTS RELEVANT TO APPEAL

On June 2, 2003, Lee struck a concrete block that had become dislodged and projected upward while crossing a railroad track on Highway 8 West near the intersection of Highways 8 and Alternate 45 in Monroe County owned and maintained by KCS. (R. 11-12). As a result, Lee suffered injuries to himself and damage to his vehicle, which were immediately evident. (R. 11-12). Specifically, Lee was unable to drive his vehicle from the accident site because of the damage to it. (R. 150). By July 11, 2003 (a little over a month after the accident), Lee had retained an attorney and, through counsel, written the President of KCS to advise him of Lee's "bodily injury and property damage" and open settlement negotiations. (R.151).

Almost three years later on April 13, 2006, Lee filed suit against only KCS for his personal injuries and property damage. (R. 11). Lee did not include any fictitious parties in his original Complaint or allege that there were any possible unknown defendants. (R. 11). On July 10, 2007 (over a year after the statute of limitations expired), Lee sought leave for the first time to add McHann to his suit. (R.30). Lee sought to amend to add McHann because McHann had repaired and installed the railroad crossing at issue more than six (6) months prior to Lee's accident.¹ After

¹McHann repaired and installed a crossing on a railroad track on Highway 8 near the intersection of Highway 8 and Alternate Highway 45 in Monroe County, Mississippi, at the request of Kansas City Southern Railway Company beginning on or about October 30, 2002 and finishing on or about November 15, 2002.

Lee's motion for leave to amend was granted, his Amended Complaint adding McHann as a defendant was filed on July 23, 2007 – more than four years after Lee's accident and more than four years after Lee became aware of his property damage and injuries. (R. 20-23, 30, 47-50).

Despite Lee's bare declaration that he searched diligently for McHann, there is no evidence in the record that supports this. Lee's diligence, by his own admission in his brief, consisted only of reviewing the accident report, having settlement negotiations with KCS, and hiring a private investigator. *See* Brief of Appellant, Nelson Lee, page 2. Lee's private investigator testified by affidavit that his only investigation into whether there were other potential tortfeasors was reviewing unspecified incident reports and talking to unnamed "witnesses to the accident." (R. 76-77). Lee makes much of the fact that he was never told by anyone from KCS of McHann's existence. However, Lee does not allege, nor is there any evidence in the record, that he ever asked anyone representing KCS whether there were any other potential tortfeasors during any of their discussions and settlement negotiations.²

Between the date that Lee filed suit against KCS (April 13, 2006) and the date the statute of limitations ran as to McHann (June 2, 2006), Lee did not propound any discovery on KCS at all, much less discovery seeking the identification of any other person or entity which may have any potential liability for the accident. (R. 6).³ Further, Lee did not take any depositions⁴ of anyone with

²Further, Lee has not pleaded, claimed, or presented any evidence that KCS concealed, much less fraudulently concealed, the identity of McHann. *See Carder v. BASF Corp.*, 919 So. 2d 258, 261 (¶12) (Miss. Ct. App. 2005).

³ The docket does list Notices of Service Filed on Behalf of the Plaintiff on 6/21/2006 and 8/09/2006. However, these are Notices of Service of Lee's responses to discovery. Specifically, the notice on 6/21/2006 is Lee's response to KCS's interrogatories and requests for production and the notice on 8/09/2006 is Lee's response to KCS's requests for admissions.

⁴To date, Lee has not taken any depositions in the matter underlying this appeal.

KCS or anyone else prior to the expiration of the statute of limitations to determine who installed or repaired the railroad crossing at issue. (R. 6). Lee claims he was diligent, yet he failed to utilize the easiest and most effective methods of gaining the information he sought, all of which were readily available to him under the rules of civil procedure.

SUMMARY OF THE ARGUMENT

Lee was aware on June 2, 2003, that he had suffered property damage and possibly personal injuries as a result of the accident at issue. The three year statute of limitations set forth in MISS. CODE ANN. § 15-1-49(1) expired on June 2, 2006. Lee did not amend his original Complaint to add McHann as a defendant until July 20, 2007 – more than thirteen months after the statute of limitations had run. Without question, Lee’s claims against McHann are time barred.

Lee incorrectly argues that the statute of limitations was tolled by the “discovery rule” in MISS. CODE ANN. § 15-1-49(2). Lee’s interpretation of the discovery rule is incorrect as the discovery rule in Section 15-1-49(2) applies only to latent injuries or diseases. Because Lee was aware of his injury more than three years before filing suit against McHann, his claims against McHann were not tolled by the discovery rule and are barred by the statute of limitations. Even if Lee’s understanding is assumed, for argument’s sake, to be correct, his claims against McHann are still barred by the statute of limitations because he did not exercise reasonable diligence in trying to locate potentially liable third parties.

Lee’s claim is not saved by the “Relation Back” provision of MISSISSIPPI RULE OF CIVIL PROCEDURE 15(c)(2) because Lee did not list any fictitious parties in his original Complaint pursuant to MISSISSIPPI RULE OF CIVIL PROCEDURE 9(h) and was not reasonably diligent in attempting to locate fictitious parties.

Further, Lee's claim does not meet the requirements of MISSISSIPPI RULE OF CIVIL PROCEDURE 15(c) for changing or adding a party. While Lee's claims against McHann in the Amended Complaint do arise out of the same conduct, transaction, or occurrence as that of the original Complaint, Lee has provided no proof that (within 120 days of the filing of the original Complaint) McHann received formal notice that Lee's suit was filed or knew, that but for a mistake of identity, suit would have been brought against it. Accordingly, Lee's amendment adding McHann does not relate back to the filing of his original Complaint, and his claims against McHann are barred.

ARGUMENT

I. Standard of Review

A motion to dismiss for failure to state a claim raises a question of law. *Carder v. BASF Corp.*, 919 So. 2d 258, 261 (¶9) (Miss. Ct. App. 2005). The standard of review for a trial court's decision on such a motion is *de novo*. *Walker v. Gallagher*, 926 So. 2d 890, 893 (¶3) (Miss. 2006). Further, questions regarding the statute of limitations are also questions of law which require a *de novo* standard of review. *Sheriff v. Morris*, 767 So. 2d 1062, 1064 (¶10) (Miss. Ct. App. 2006). The Court is to affirm the judgment of the lower court if McHann proved that "no set of facts would entitle[] [Lee] to relief." *Walker*, 926 So. 2d at 893 (¶4).

II. Lee's Claims Against McHann Are Time Barred.

As Lee admits in his brief, his claims against McHann are subject to the general statute of limitations set forth in MISS. CODE ANN. § 15-1-49(1) (Rev. 1999), which states that: "All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after."

The accident at issue in this appeal occurred on June 2, 2003. (R. 11). The evidence in the record reflects that Lee was aware that he had, at least, a property damage claim on that day because he was unable to drive his vehicle away from the accident site. (R. 150). If he was not immediately aware of his personal injury, Lee was aware of it within a month of the accident as evidenced by the letter his attorney wrote the President of KCS on July 11, 2003. (R. 151). Without question, the three year statute of limitations began to run on the date of Lee's injury and property damage - June 2, 2003 - and expired on June 2, 2006. McHann was not named as a defendant in this lawsuit until Lee filed his Amended Complaint on July 20, 2007 - more than thirteen months after the statute of limitations had expired. Thus, Lee's claims against McHann are clearly time barred under MISS. CODE ANN. § 15-1-49.

In an effort to avoid this fact, Lee argues that the statute of limitations was tolled by the "discovery rule" in MISS. CODE ANN. § 15-1-49 because he did not discover that McHann was a potential defendant until he received KCS's pre-discovery disclosures on December 4, 2006. In support, Lee attempts to rely upon the portion of MISS. CODE ANN. § 15-1-49(2) which states: "In actions for which no other period of limitation is prescribed and which involve **latent injury or disease**, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, **the injury**." (emphasis added). As clearly stated above, Lee was aware of his injury more than three years before filing suit against McHann, and Lee does not dispute that fact. Yet, Lee attempts to convince the Court that implicit in the language of MISS. CODE ANN. § 15-1-49(2) is a discovery rule that tolls the statute of limitations while a plaintiff is seeking a potential tortfeasor. This is clearly not the law.

In support of his argument, Lee cites inapplicable cases discussing the discovery rule in which the statute of limitations was tolled because the plaintiff was not aware of his **injury**, unlike

Lee. The discovery rule in Section 15-1-49(2) applies to the discovery of latent injuries or diseases, not the discovery of unknown tortfeasors. Lee does not cite a single case that supports his position that the statute was tolled as to McHann until he discovered McHann's existence. He merely attempts to distort the "discovery rule" for his own benefit.

The first case cited by Lee is *Sarris v. Smith*, 782 So. 2d 721 (Miss. 2001). Although Lee cites this case as an example of Mississippi Courts analyzing and following the discovery rule in MISS. CODE ANN. § 15-1-49, that statute is not discussed in *Sarris*. 782 So. 2d at 723 (¶7). The discovery rule applied in *Sarris* was the one found in MISS. CODE ANN. § 15-1-36, which is the statute of limitations for medical malpractice cases and not applicable to the case at hand. In *Sarris*, the Court reiterated its interpretation of the discovery rule as follows: "the operative time is when the patient can reasonably be held to have knowledge of the injury itself, the cause of the injury, and the causative relationship between the injury and the conduct of the medical practitioner." *Sarris*, 782 So. 2d at 723 (¶9). The Supreme Court held that the statute of limitations in MISS. CODE ANN. § 15-1-36(1) was tolled while the plaintiff diligently sought to obtain her husband's medical records because she could not have known "that [her husband's] death was the result of negligence," without them. *Sarris*, 782 So. 2d at 724 (¶11).

Sarris is inapplicable to the case at hand because it interprets the discovery rule in the statute of limitations for medical malpractice cases, and not the general statute of limitations which is applicable to this case. "The discovery rule for medical negligence cases . . . is different" from the discovery rule in the general statute of limitations. *Sutherland v. Estate of Ritter*, 959 So. 2d 1004, 1008 (¶12) (Miss. 2007). The inquiry for the discovery rule for medical malpractice cases centers upon "the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered;" whereas the inquiry for the discovery rule for the general statute

of limitations centers upon a latent injury or disease. *Sutherland*, 959 So. 2d at 1008 (¶12). This is an important distinction as the case at hand, a general tort case, does not involve a latent injury or disease.

Further, the plaintiff in *Sarris* was not aware of the cause of her husband's death until she obtained his medical records; whereas, Lee was aware of his damages and the cause thereof immediately at the time of the accident. Lee claims, unlike the plaintiff in *Sarris*, that he was not aware of another potential tortfeasor before the expiration of the statute of limitations. The Court's interpretation of the discovery rule in *Sarris* does not include lack of knowledge of the identity of the medical practitioner or a tortfeasor. Finally, unlike the plaintiff in *Sarris*, Lee has not presented sufficient evidence that he made meaningful and diligent efforts to obtain the information he lacked. Thus, *Sarris* does not support Lee's position that the statute of limitations should have been tolled until he determined the identity of McHann.

The second case cited by Lee is *Neglen v. Breazeale*, 945 So. 2d 988 (Miss. 2006). In *Neglen*, the Court held that there was a question of fact as to whether the plaintiff could have discovered the alleged surgical negligence which resulted in her husband's death prior to the expiration of the statute of limitations. 945 So. 2d at 990 (¶10). Like *Sarris*, the *Neglen* case is inapplicable because it interprets the discovery rule in MISS. CODE ANN. § 15-1-36 and not the discovery rule in MISS. CODE ANN. § 15-1-49. Further, in reaching its conclusion, the Court stated that "[t]he discovery rule protects plaintiffs with **latent injuries**." *Neglen*, 945 So. 2d at 990 (¶9) (emphasis added). The Court also stated that it has "gone so far as to say that 'if a latent injury is *not* present the discovery rule would *not* apply.'" *Id.* at 990 (¶8). As the evidence clearly shows, Lee did not have a latent injury. Thus, the discovery rule does not apply, and Lee's claim is barred by the statute of limitations.

Next, Lee cites *Bullard v. Guardian Life Ins. Co. of America*, 941 So. 2d 812 (Miss. 2006), in support of his argument that his claim against McHann should not be barred by the statute of limitations. In *Bullard*, the Prathers purchased a single premium policy from Bullard, an insurance agent selling policies for Guardian Life. 941 So. 2d at 813 (¶3). After the Prathers learned that additional premiums would be required, they filed suit against Bullard and Guardian. *Id.* at 813 (¶4). In turn, Bullard filed a cross-claim against Guardian alleging that he had been fraudulently induced to sell the policy by Guardian and asserting damage to his reputation. *Id.* at 813 (¶4, 8). In holding that Bullard's cross-claim against Guardian was not barred by the statute of limitations, the Supreme Court found that Bullard's cause of action did not accrue or occur under MISS. CODE ANN. § 15-1-49 until he learned of the company's fraud or suffered an injury, i.e., when the Prathers filed suit against him and Guardian. *Id.* at 815 (¶9, 11). Further, the Court found that prior to the Prathers' suit against Bullard, Bullard would not have been able to maintain an action against Guardian because he would have had no injury and, thus, would have been missing an essential element of a tort claim. *Id.* at 815 (¶11). Unlike Bullard, Lee's claim accrued or occurred at the time of his accident on June 2, 2003. At that time, Lee had an "enforceable claim" and his "right to sue [had] become[] vested" because he was aware of his injury and its cause, as is evidenced by the fact that he filed suit against KCS prior to the expiration of the statute of limitations. *Bullard* does not stand for the proposition that a plaintiff can file suit after the statute of limitations against a new defendant because he was unaware of the new defendant's potential liability, especially in a situation such as this one where the plaintiff did not make a meaningful or reasonably diligent effort to locate any other potential tortfeasors.

Lee cites the unpublished opinion of *Silvas v. Remington Oil and Gas Corp.*, 109 Fed. Appx. 676 (5th Cir. 2004), for the proposition that his "claims against McHann are not futile." This case

is irrelevant⁵ to Lee's argument as it does not address any statute of limitations claim or the discovery rule found in MISS. CODE ANN. § 15-1-49. In *Silvas*, The Fifth Circuit held that the trial court did not abuse its discretion by denying Silvas' motion for leave to amend his Complaint because Silvas' amendment would have been futile for it failed to state a claim upon which relief could be granted. 109 Fed. Appx. at 678. Lee's amendment to his Complaint adding McHann was futile because it did fail to state a claim upon which relief could be granted as Lee's claims against McHann are barred by the statute of limitations. For that reason, the trial court did not err in granting McHann's motion to dismiss.

The final case cited by Lee in support of his claim that the statute of limitations was tolled as to McHann is *Essary v. Wal-Mart Stores, Inc.*, 2000 WL 33907699 (N.D. Miss. 2000). The plaintiff, Essary, slipped and fell in a Wal-Mart store in the proximity of a McDonald's concession stand. *Essary*, 2000 WL 33907699 at *1. Like Lee, Essary conducted settlement negotiations with Wal-Mart prior to filing suit. *Id.* After her suit was filed and removed to federal court, Essary learned that McDonald's may have had some liability with regard to her injury. *Id.* Essary was given leave to amend her Complaint to add McDonalds. *Id.* Essary added McDonald's as a new defendant instead of substituting it for a fictitious party, and then later substituted West Mac III for McDonald's. *Id.* Subsequently, West Mac III moved for a dismissal on the grounds that the statute

⁵In *Silvas*, the plaintiff complained that the trial court abused its discretion by denying his motion for default judgment, dismissing his Complaint, and denying his motion to amend his Complaint. *Silvas v. Remington Oil and Gas Corp.*, 109 Fed. Appx. 676, 677 (5th Cir. 2004). The Fifth Circuit held that the trial court did not abuse its discretion in denying Silvas' motion for default judgment because Silvas failed to show that the defendant "willfully delayed its response" and because entries of default judgment are disfavored. *Silvas*, 109 Fed. Appx. at 677. The Court further held that the trial court did not abuse its discretion in dismissing his Complaint because Silvas had failed to join an indispensable party, i.e. the owner of the real property in dispute. *Id.* at 677-678. Finally, the Fifth Circuit held that the trial court did not abuse its discretion by denying Silvas' motion for leave to amend his Complaint. *Id.* at 678. The Court found that Silvas' requested amendment would have been futile because Silvas had no evidence to support his claim that the defendant had granted him a first right of refusal with regard to the real property at issue. *Id.*

of limitations had expired. *Id.* The District Court granted West Mac III's motion to dismiss because Essary, like Lee in this case,⁶ did not substitute West Mac III for a fictitious party prohibiting her amendment from relating back to the filing of her original Complaint under MISSISSIPPI RULES OF CIVIL PROCEDURE 9(h) and 15(c). *Id.* at *3. As the court stated, "Rule 9(h), and thus the saving provision of 15(c)(2), only applies when a plaintiff makes a direct substitution for a fictitious party; otherwise **'the new party must be served prior to the running of the statute of limitations.'**" *Id.* (emphasis added). McHann was not substituted for a fictitious party and was not served with Lee's Amended Complaint within the statute of limitations. As a result, Lee's claims against McHann are barred by the statute of limitations, as were Essary's. Additionally, in its decision, the court noted that Essary "acted less than diligently in identifying the appropriate parties for suit." *Id.* Likewise, Lee "acted less than diligently" in determining that McHann was a potential defendant. Lee spent a great deal of time negotiating with KCS, apparently without ever asking it about potentially liable third parties. Then, Lee filed suit and failed to conduct any discovery to determine whether there were any other potential defendants. As a result of Lee's lack of diligence, his claims against McHann are now time barred.

Assuming *arguendo* that Lee's interpretation of the "discovery rule" in MISS. CODE ANN. § 15-1-49 is correct, it still does not save his claims against McHann because Lee was not diligent in his efforts to locate any potential third parties. Lee's failure to discover the existence of McHann is not related to any action or inaction of McHann, but is a result of Lee's own inaction. Lee was aware of his injuries and property damage on, or shortly after, the date of accident; yet, Lee chose not to file suit for **two (2) years and ten (10) months**. Lee could have filed suit at any time after

⁶However, unlike Essary, Lee did not name any fictitious parties in his original Complaint. (R. 11).

the accident and begun the discovery process to locate any other potentially liable third parties, but chose not to do so. Once Lee filed suit almost two (2) months passed before the statute of limitations expired, during which time Lee could have availed himself of the discovery methods provided by the Mississippi Rules of Civil Procedure. Between the date suit was filed and the date the statute of limitations expired, Lee did not propound any interrogatories or requests for production whatsoever to KCS.⁷ (R. 6). *See Walker*, 926 So. 2d at 894-95 (stating that the plaintiff's "lack of any attempt to get answers to the discovery before almost two years had passed would be indicative of [his] lack of reasonable diligence to correct a mistaken identity or uncover the true identity of an earlier-unknown party"). Nor did Lee take any depositions. (R. 6). A simple interrogatory to KCS or deposition question prior to June 2, 2006, could have alerted Lee to other potential third parties in time for him to have amended his Complaint before the statute of limitations expired. Other than Lee's investigator's interviews with witnesses to the accident (who likely would have had no reason to know anything about the installation or repair of the railroad crossing), there is no evidence in the record that Lee ever made any inquiry of anyone regarding other potentially liable entities or people. The discovery rule was not designed to protect plaintiffs who sit on their rights. Accordingly, this Court should affirm the trial court's dismissal of Lee's claims against McHann with prejudice. To do otherwise would completely obliterate the statute of limitations set forth by the legislature in MISS. CODE ANN. § 15-1-49 and weaken the public's faith in the judiciary.

⁷The General Docket of the Monroe County Circuit Court reflects that Lee's complaint was filed on April 13, 2006. (R. 6). KCS filed an answer to Lee's complaint on May 18, 2006. *Id.* On that same day, KCS propounded interrogatories and requests for production on Lee. *Id.* On June 21, 2006, Lee filed a notice of service for his response to KCS's interrogatories and requests for production, and on August 9, 2006, Lee filed a notice of service for his response to KCS's requests for admissions. Based upon Lee's responses to the requests for admissions, KCS removed this case to federal court. While KCS took full advantage of the discovery process, Lee did not. Lee could have propounded discovery with the service of his complaint or at any time before this case was removed to federal court on August 17, 2006, but chose not to do so. *Id.*

III. The Amended Complaint Does Not Relate Back.

On appeal, Lee argues that the statute of limitations should be tolled because he did not discover the existence of McHann until he received KCS's pre-discovery disclosures on December 4, 2006. However, there was a mechanism available to Lee that he failed to utilize which would have prevented his current situation. MISSISSIPPI RULE OF CIVIL PROCEDURE 9(h) provides that:

[w]hen a party is ignorant of the name of an opposing party and so alleges in his pleading, the opposing party may be designated by any name, and when his true name is discovered the process and all pleadings and proceedings in the action may be amended by substituting the true name and giving proper notice to the opposing party.

The Mississippi Supreme Court has held that the purpose of Rule 9(h) is to provide a "mechanism to bring in responsible parties, known, but unidentified, who can only be ascertained through the use of judicial mechanisms such as discovery." *Doe v. Mississippi Blood Services*, 704 So. 2d 1016, 1019 (¶14) (Miss. 1997). "It is not designed to allow tardy plaintiffs to sleep on their rights" for nearly two years without making a meaningful inquiry or conducting discovery, "and then enjoy the benefits of the rule." *Doe*, 704 So. 2d at 1019 (¶14).

Had Lee named fictitious parties in his original Complaint, he could have later substituted the name of a real party in interest for a fictitious name once he discovered it; and pursuant to MISSISSIPPI RULE OF CIVIL PROCEDURE 15(c)(2),⁸ that amendment would have related back to the filing of his original Complaint. However, Lee did not list any fictitious parties in his original Complaint; and, therefore, did not comply with the requirements of Rule 9(h). Thus, Lee's amendment does not relate back to the filing of his original Complaint. If a plaintiff joins a new

⁸MISSISSIPPI RULE OF CIVIL PROCEDURE 15(c)(2) provides: "An amendment pursuant to Rule 9(h) is not an amendment changing the party against whom a claim is asserted and such amendment relates back to the date of the original pleading."

party without satisfying the requirements set forth in Rule 9(h), “the new party must be served prior to the running of the statute of limitations,” which Lee also failed to do. *Doe*, 704 So. 2d at 1018, ¶9.

Further, the relation back provision of Rule 15(c)(2) requires the plaintiff to conduct a “reasonably diligent inquiry into the identity of the fictitious party” prior to the expiration of the statute of limitations. *Doe*, 704 So. 2d at 1019 (¶13); *see also Santangelo v. Green*, 920 So. 2d 521, 525 (¶16) (Miss. 2006). The question is, not whether the plaintiff could have discovered the identity of the new defendant had he exercised due diligence, but whether the plaintiff “actually exercised due diligence.” *Santangelo*, 920 So. 2d at 526 (¶20). The trial court is required to strictly review the question of whether or not a plaintiff exercised reasonable diligence in determining the identity of a fictitious party. *Doe*, 704 So. 2d at 1019 (¶13); *Santangelo*, 920 So. 2d at 525-6 (¶16). As discussed previously herein, Lee failed to make a reasonably diligent search for potential third parties. He did not make a meaningful inquiry of anyone with potential knowledge regarding the installation or repair of the railroad crossing and failed to utilize any of the various discovery tools provided in the rules of civil procedure to determine the names of any other potential tortfeasors. Ultimately, because Lee did not have knowledge of McHann, neglected to name any fictitious parties, and failed to make a diligent inquiry into the identity of fictitious parties, Rule 9(h) cannot help him and his claims against McHann are time barred. *See Walker*, 926 So. 2d at 897 (¶10).

IV. The Amended Complaint Does Not Meet The Requirements Of Rule 15(c) For Changing the Party Against Whom A Claim Is Asserted.

Since Lee did not meet the requirements under Rules 9(h) and 15(c)(2) for substitution of a fictitious party, he must meet the requirements of MISSISSIPPI RULE OF CIVIL PROCEDURE 15(c) for

changing a party against whom a claim is asserted to have his amendment relate back to the filing of his original Complaint. Rule 15(c) provides:

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

(1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining the party's defense on the merits, and

(2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party

Rule 15(c) requires that the claims in the Amended Complaint arise out of the same conduct, transaction, or occurrence as that of the original Complaint. *Walker*, 926 So. 2d at 894. Where a plaintiff seeks to change or add a named defendant, there are two further requirements: under Rule 15(c)(1), the newly named defendant must have received notice of the institution of the action, and under 15(c)(2), he must have knowledge that an action would likely be brought against him. *Walker*, 926 So. 2d at 894. Both requirements must be met within 120 days of the filing of the original Complaint, as required by Rule 4(h)⁹. *Id.*

In his Amended Complaint, Lee asserted the same claims against McHann as those claims originally asserted against KCS, namely, negligence in the maintenance, construction, and/or repair of a railroad crossing at the accident site, and defendants' alleged failure to warn of any hazard then existing at the site. Thus, the first requirement of Rule 15(c) is satisfied.

⁹MISSISSIPPI RULE OF CIVIL PROCEDURE 4(h) requires that service of a summons and complaint be made upon a defendant within 120 days of the filing of the complaint or, absent a showing of good cause, the action shall be dismissed without prejudice.

However, Lee is unable to satisfy both of the requirements of the second prong: notice and knowledge. Lee has provided no evidence to demonstrate that McHann received notice, formal or otherwise, of the suit within 120 days of its filing. The record reflects that a summons was not issued for McHann until July 23, 2007, and was not served until August 6, 2007, far longer than 120 days from the filing date of Lee's original Complaint on April 13, 2006. (R. 6). Further, Lee has provided no evidence that McHann "must have or should have known that an action would be brought against him within the 120 days unless a mistake existed as to the parties' identities." *Bedford Health Properties, LLC v. Estate of Williams*, 946 So. 2d 335, 351 (¶46) (Miss. 2006) (quoting *Walker*, 926 So. 2d at 894-95).

No evidence exists in the record to indicate that McHann had either notice of the suit or reason to believe, within that time period, that this action would have been brought against it but for a mistake in identities. Even if McHann had notice of Lee's claims prior to the expiration of the statute of limitations or within 120 days of the filing of the original Complaint, there would have been no reason for McHann to have believed that it would have been named in the suit. McHann and KCS are completely separate companies; thus, there was no corporate connection between them that would have led McHann to assume that it would be sued when KCS was. Further, McHann finished the repair and installation of the crossing more than six (6) months before the accident occurred, and the crossing at issue was thereafter maintained by KCS.¹⁰ For these reasons, McHann would have had no reason to believe it would have been sued even if it had knowledge of Lee's suit against KCS. Therefore, Lee cannot meet the requirements under Rule 15(c)(2). "If either question under Rule 15(c)(1) or (2) is answered in the negative . . . the amended complaint does not relate

¹⁰KCS maintained all of its own railroad tracks.

back, resulting in the suit being time barred.” *Walker*, 926 So. 2d at 895. Clearly, Lee cannot meet the requirements for relation back under Rule 15(c) and as a result, his claims against McHann are barred by the statute of limitations.

The case at hand is factually very similar to *Walker v. Gallagher*, 926 So. 2d 890 (Miss. 2006). In *Walker*, Gallagher was involved in a motor vehicle accident with a semi-truck. 926 So. 2d at 892 (¶2). Gallagher (just like Lee) waited two years and ten months after the accident to file suit against the driver of the truck, the company which employed the driver, and the company’s owner. *Id.* Like Lee, Gallagher did not list any fictitious parties in his original Complaint. *Id.* at 896 (¶10). During discovery, Gallagher learned that Walker owned the trailer involved in the accident and that the driver was hauling a load at Walker’s direction to Walker’s place of business when the accident occurred. *Id.* at 892 (¶2). After the expiration of the statute of limitations, Gallagher (as Lee did) filed suit for the first time against Walker with the trial court’s permission. *Id.* Thereafter, Walker filed a motion to dismiss based upon the statute of limitations, which was denied. *Id.* While the Supreme Court on appeal found that the ““same conduct, transaction, or occurrence”” test was met, it found that Gallagher provided no proof that Walker had received formal notice or that Walker had received any notice or had any knowledge of the suit within 120 days after the filing of the original Complaint. *Id.* at 895-896 (¶8-9). The Court further found that Gallagher had presented no proof that Walker knew, but for a mistake in identities, that suit would have been brought against it within that same time period. *Id.* at 896 (¶9). Ultimately, the Supreme Court held that the trial court erred by denying Walker’s motion to dismiss because Gallagher did not meet the requirements of Rule 15(c) for relation back resulting in Gallagher’s claims against Walker being time barred. *Id.* at 897 (¶13). Likewise, in the case *sub judice*, Lee has not met the requirements for

relation back under MISSISSIPPI RULE OF CIVIL PROCEDURE 15(c) and his claims against McHann are time barred.

CONCLUSION

Lee was aware of his personal injuries and property damage, if not immediately, within a month of the date of the accident. Yet, Lee waited over four years after his accident to amend his Complaint to add McHann. As a result, Lee's claims against McHann are barred by the three-year statute of limitations in MISS. CODE ANN. § 15-1-49(1). The statute of limitations was not tolled by the discovery rule in MISS. CODE ANN. § 15-1-49(2) as it applies only to latent injury or disease, which was not present in this case. Further, even if the discovery rule applied, Lee's claims against McHann would be barred because Lee did not make a reasonably diligent inquiry into the identity of other potential tortfeasors. Additionally, the Relation Back provision of MISSISSIPPI RULE OF CIVIL PROCEDURE 15(c)(2), does not apply to this case because Lee did not list any fictitious parties in his original Complaint and was not reasonably diligent in attempting to locate fictitious parties. Finally, Lee's amendment to add McHann does not relate back to his original filing because he failed provide proof that McHann had notice and knowledge of the suit with 120 days of the filing of the original Complaint as required by MISSISSIPPI RULE OF CIVIL PROCEDURE 15(c). Because it is conclusively established that Lee was aware of his claim on the day of his accident on June 2, 2003, and because his Amended Complaint does not relate back to his original Complaint under Mississippi Rules of Civil Procedure 9(h) or 15(c), Lee's claims against McHann are barred by the three-year statute of limitations set forth in MISS. CODE ANN. § 15-1-49. Accordingly, McHann respectfully requests this Court affirm the trial court's order dismissing it with prejudice.

RESPECTFULLY SUBMITTED, this the 25th day of November, 2008.

**McHANN RAILROAD SERVICES, INC.
OF MISSISSIPPI**

By: _____

EDWARD J. CURRIE, JR. (MSB [REDACTED])

SHELLY G. BURNS (MSB # [REDACTED])

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day caused to be mailed, via United States Mail, postage prepaid, a true and correct copy of the foregoing document to:

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SO CERTIFIED this the 25th day of November, 2008.

EDWARD J. CURRIE, JR. (MSB [REDACTED])

SHELLY G. BURNS (MSB # [REDACTED])

KRISTI D. KENNEDY (MSB [REDACTED])

CERTIFICATE OF SERVICE

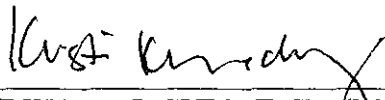
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Honorable Paul S. Funderburk
Post Office Drawer 1100
Tupelo, MS 38802-1100
MONROE COUNTY CIRCUIT COURT JUDGE

SO CERTIFIED this the 1st day of December, 2008.



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