IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NELSON LEE — APPELLANT

VERSUS — CASE NO. 2008-CA-00795

McHANN RAILROAD SERVICES, INC. — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF MONROE COUNTY, MISSISSIPPI
CAUSE NO. 06-110-PFM

BRIEF OF APPELLANT, NELSON LEE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following 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.

1. Nelson Lee, Plaintiff/Appellant
2. W. Howard Gunn, Attorney for Plaintiff/Appellant
3. Kansas City Southern Railway Company, Defendant
4. Bill Lovett and Charles E. Ross, Attorneys for Defendant Kansas City Southern Railway Company
5. Edward J. Currie, Jr. and Joanna Gomez, Attorney for Defendant/Appellee, McHann Railroad Services, Inc. of MS

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BRIEF OF APPELLANT

I.

STATEMENT OF ISSUE

The Statute of Limitations Provided for By Mississippi Code §15-1-49 Does Not Bar The Claim of Plaintiff Against Defendant McHann Where The Plaintiff Did Not Know The Identity of, or Have Knowledge of a Claim Against Defendant McHann, Until Defendant, Kansas City Southern Railroad Served Plaintiff With Core Discovery On December 4, 2007, After Case Removal

II.

STATEMENT OF THE CASE

On April 3, 2006, Plaintiff, Nelson Lee, filed suit against Kansas City Southern Railroad (hereinafter referred to as "KCS") in the Circuit Court of Monroe County, Mississippi. The basis of such suit being that on June 2, 2003, Plaintiff, while operating his vehicle on Highway Highway 8 West in Monroe County, Mississippi, where the railroad tracks of Defendant KCS crossed said Highway 8, struck a portion of a concrete crossing plate which was protruding upward. Plaintiff alleged that as a proximate result of such collision, he suffered personal injury and property damage to his vehicle. The basis of Plaintiff's claim against Defendant, KCS, was primarily that of negligence in the installation,

construction, repair and maintenance of its tracks (R.V.I,11-13).

Prior to filing suit, Plaintiff had engaged in lengthy discussions with the Defendant's, KCS' insurance carrier regarding case settlement. After the accident, Plaintiff obtained a copy of the accident report and reviewed the same for identity of other potential defendants. No such parties were identified (R.V.I,150). Also, at no point during negotiations with the insurance carrier of KCS was the identity of a third party defendant revealed. (R.V.I,91-96, 105 and 107).

In further effort to obtain the identity of any other party performing maintenance on the aforesaid track of KCS, Plaintiff retained an investigator who, after thorough investigation, likewise did not identify any other potential defendants (R.V.I,76-77).

After suit was filed, Defendant, KCS, filed its Answer on May 18, 2006, wherein it asserted numerous defenses (R.V.I,14-16). On August 16, 2006, Defendant, KCS, filed Notice of Removal of the case to the United States District Court for the Northern District of Mississippi (R.V.I,17-18). Subsequent to the removal of the case KCS, on December 4, 2006, tendered its pre-core disclosures to Plaintiff and identified therein, Defendant, McHann Railroad Services, Inc. (hereinafter referred to as "McHann"), as the party contracted by it to perform maintenance and repair upon its tracks and the track in question (R.V.I,115-128). Upon receiving such information Plaintiff filed a Motion to Amend his Complaint to add Defendant McHann as a party defendant (R.V.I,30-36). On June 26, 2007, following reply to Plaintiff's Motion to Amend filed by Defendant, KCS, wherein the statute of limitations pursuant to Mississippi Code §15-1-49 was raised (R.V.I,41-46), the United States District Court entered its Order allowing amendment of Plaintiff's Complaint to add McHann as a

party defendant and remanding the case to the Circuit Court of Monroe County, Mississippi (R.V.I,20-23).

Following remand of the case to the Circuit Court of Monroe County, Mississippi, Defendant, McHann, after being served with process, filed his Answer (R.V.I,51-56), and its Motion to Dismiss on August 30, 2007 (R.V.I,61-63). Plaintiff filed his Response to Motion to Dismiss on September 10, 2007 (R.V.I,64-133). On March 31, 2008, the Circuit Court of Monroe County, Mississippi entered its Order granting McHann's Motion to Dismiss (R.V.II,154-155), and on April 7, 2008, entered its Final Judgment of Dismissal With Prejudice of Defendant, McHann, reasoning that Plaintiff's Claim was barred by Mississippi Code §15-1-49 (R.V.II, 156). Plaintiff being aggrieved therefrom filed his Notice of Appeal to this Court on May 6, 2008.

III.

SUMMARY OF THE ARGUMENT

Mississippi Code §15-1-49 bars claims for which no other period of limitation is prescribed to three (3) years next after the cause of such action accrued. The novel question before this Court is should Plaintiff's claim be barred by Mississippi Code §15-1-49, from proceeding in claims against a tort feasor whose existence was unknown to him after "diligent search and inquiry". Plaintiff submits that a review of the facts in the case at bar reveals the exhaustive extent of his futile efforts to ascertain the identity of any other tort feasor other than KCS, who may have caused or contributed to his injuries.

On June, 2003, Plaintiff, Nelson Lee, was traveling on Highway 8 West in Monroe County, Mississippi, and as he began to cross railroad tracks which ran across said Highway

8, he struck a portion of a concrete block which was protruding upward and which had been utilized in the installation and maintenance of such tracks.

As a proximate result of striking the concrete block, the Plaintiff suffered both personal injury and property damage.

After retention of counsel, it was discovered that the Defendant, Kansas City Southern Railway Company, owned, installed, repaired and maintained such tracks. A copy of the incident report and the investigation of Plaintiff's counsel's investigator indicated the same (R.V.I, 75-77).

The Incident Report did not identify whatsoever any other party involved in the construction, repair, and maintenance of such railroad tracks (R.V.I,75).

On July 11, 2003, Plaintiff placed Defendant, Kansas City, on notice of Plaintiff's claim (R.V.I, 78).

On July 15, 2003, Plaintiff received from Jerry A. Eakin, Defendant's, KCS', general agent, a reply to his Notice of Claim. Again, said reply did not in any regard identify other parties involved in the maintenance and/or repair of said tracks (R.V.I, 80).

On July 29, 2003, Plaintiff's counsel, pursuant to Mr. Eakin's request, tendered to Defendant proof of ownership, photos, and estimate of repair pertaining to damages of Plaintiff's vehicle (R.V.I,83-90).

On August 1, 2003, Defendant, KCS, through its agent, Mr. Eakin, forwarded to Plaintiff a claim form to be completed by Plaintiff and returned. Again, no mention whatsoever was made of the involvement of any other party in the repair and maintenance of said tracks (R.V.I, 91).

On August 18, 2003, pursuant to request of Mr. Eakin, KCS' general agent, Plaintiff forwarded the completed claim form to Defendant, Kansas City (R.V.I, 95-96).

On September 10, 2003, via fax and mail, Plaintiff proposed to Defendant, KCS, an offer of settlement of the property damage claim of Plaintiff (RV.I, 105). Again, KCS did not allege or put Plaintiff on any notice of third-party liability,

On October 9, 2003, Defendant, KCS, by and through its agent, Mr. Eakin, called counsel for Plaintiff questioning the storage involved in the property damage claim and requesting a recorded statement of Plaintiff (R.V.I, 107). Again, nothing was said about other parties having involvement in the maintenance and/or repair of said tracks.

Beginning on the date of accident and continuing, Plaintiff followed an extensive and lengthy treatment regiment and, hence, could not make demand for personal injury settlement upon Defendant, Kansas City, as Plaintiff had not reached MMI.

After failing in numerous settlement discussions with Defendant, Kansas City, by and through its agent, Mr. Eakin, of Plaintiff's property damage claim, and Plaintiff having not yet reached maximum medical recovery, Plaintiff filed suit in this cause on April 13, 2006 (R.V.I, 108-110).

After being served with process, Defendant, Kansas City, filed its Answer herein with numerous affirmative defenses.

In its pre-core disclosures, following removal of the case to the United States District Court for the Northern District of Mississippi, filed herein, Defendant, Kansas City, for the first time, identified in documents received by counsel for Plaintiff on December 4, 2006, Defendant, McHann Railroad Services, Inc. of MS, as a party involved in the maintenance

and repair of the railroad tracks of Defendant, Kansas City, in issue (R.V.I, 115-128).

On December 7, 2006, after being apprised on December 4, 2006, for the first time of the involvement of McHann Railroad Services, Inc. of MS in the maintenance and repair of said tracks, counsel for Plaintiff filed in the United States District Court, Case No. 1:06-CV-00233-MPM-JAD a Motion to File Amended Complaint to add McHann Railroad Services, Inc. of MS as a Defendant (R.V.I, 30-36). Such amendment was allowed by Order of the District Court Judge irrespective of the argument of KCS' that §15-1-49 would bar any claim against Defendant, McHann (R.V.I, 41-46).

On June 13, 2007, the United States District Court entered its Order granting Motion to Amend and remanding said case to the Circuit Court of Monroe County, MS (R.V.I, 20-23).

Plaintiff submits that Mississippi Code §15-1-49 does not bar Plaintiff's claim wherein the Plaintiff has acted diligently in seeking the discovery of potential liable parties in addition to KCS without success until such identity was divulged by KCS after the statute of limitations had run. In essence, the Plaintiff did not know and there were not facts or circumstances by which he "should have known" of the identity of McHann as a potential party to this litigation until December 4, 2006 (R.V.I,115-128). Hence, pursuant to analogous case law of Mississippi regarding the discovery of latent injuries, the statute of limitations of Mississippi Code §15-1-49 did not begin to run on Plaintiff's claim against McHann Railroad Services, Inc. until he knew or should have known of its identity as a participant in contributing to his injuries.

IV.

ARGUMENT

The Plaintiff's claim against McHann is not barred by Mississippi three-year statute of limitation, §15-1-49. Mississippi Code §15-1-49 provides:

> (1) 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.
>
> (2) 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.

In numerous cases involving an analysis of §15-1-49, and other statutes involving limitations of actions, the Mississippi Courts have followed the discovery rule. Such rule was summarized in Sarris v. Smith, 782 So.2d 721 (Miss. 2001), in which Mrs. Sarris had filed a medical malpractice case against Dr. Smith who treated her husband and the clinic which employed him. The defendants filed a motion for summary judgment alleging that the claim of Sarris was barred by the two-year statute of limitation which began to run at the time of death of Mr. Sarris. Summary Judgment was granted by the Circuit Court. The Mississippi Supreme Court reversed, holding:

> ¶8. The parties do not dispute that Sarris filed suit more than two years after Johnson's death. Sarris argues, however, that the statute of limitations was tolled until she was able to secure her husband's medical records, since she exercised reasonable diligence in getting those records and could not reasonably be

> expected to know of Dr. Smith's and JHC's tortuous conduct without the records. Smith and JHC argue that the trial court was correct in holding that the statute of limitations began to run at Johnson's death, because Sarris was on notice that some negligent act might have occurred to cause that death. The resolution of this issue therefore turns on when Sarris "discovered" the wrongful conduct within the meaning of the statute.
>
> ¶9. This Court interpreted the discovery rule to mean that "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." (Emphasis supplied) Smith v. Sanders, 485 So.2d 1051, 1052 (Miss. 1986); see also Kilgore v. Barnes, 508 So.2d 1042, 1043-46 (Miss. 1987) (holding statute of limitations did not bar malpractice suit over surgical needle left in lining of plaintiff's heart in 1974 but not discovered by plaintiff until 1982.

Likewise, see Neglen v. Breazeale, 2006 WL 3094143 (Miss.) where the Court recently held:

> ¶7. The discovery rule tolls the statute of limitations until a plaintiff should have reasonably known of some negligent conduct, even if the plaintiff does not know with absolute certainty that the conduct was legally negligent. Wright v. Quesnel, 876 So.2d 362, 366 (Miss. 2004) (citing Wayne Gen. Hosp. v. Hayes, 868 So.2d 997, 1000-01 (Miss. 2004). In other words, statute of limitations begins to run 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. Hayes, 868 So.2d at 1000 (citing Williams v. Clay County, 861 So.2d 953, 976 (Miss. 2003), overruled on other grounds, Page v. Univ. of So. Miss., 878 So.2d 1003, 1005 (Miss. 2004)).

Furthermore, see Bullard v. The Guardian, 941 So.2d 812 (Miss. 2006). In Bullard, the insureds, Prathers, on December 15, 2000, sued Bullard and Guardian alleging that Bullard, as agent of Guardian, misrepresented to them terms and information regarding Guardian's life insurance policies sold to them. Bullard, on February 5, 2002, filed his cross-claim against Guardian, alleging that Guardian induced him to sell the Prathers life insurance based upon false and misleading sales presentations. Guardian moved for summary judgment on Bullard's cross-claim alleging the same as being barred by Mississippi's three-year statute of limitations, Mississippi Code §15-1-49. The trial court granted summary judgment. The Mississippi Supreme Court reversed and held:

> ¶7. Bullard argues the trial court erred in holding that the statute of limitations began to run at the time Bullard sold the insurance policy to the Prathers. Miss. Code Ann. Section 15-1-49 states, in part: "(1) 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."
>
> ¶8. Bullard contends that his cause of action did not accrue until 2000 when he first learned of Guardian's alleged fraud and dishonesty. In his amended cross-claim against Guardian, Bullard averred damage to his reputation after the Prathers filed suit and that it "appeared to the community that Guardian's 'vanishing premium' concept caused him to betray his policyholders."

> Guardian argues that Bullard's claims based on Guardian's alleged fraud began to run in 1990 upon completion of the sale of insurance to the Prathers that was purportedly induced by the alleged false representation.
>
> ¶9. This Court finds that in 1990 Bullard was without a cause of action, if as he claims he had no knowledge of being involved in an alleged fraudulent scheme, but more importantly, because he had suffered no damage. In the absence of damage, no litigable event arose. Bullard's cause of action against Guardian did not accrue or occur pursuant to Miss. Code Ann. Section 15-1-49(1) until the Prathers filed suit against him in 2000. As Bullard's claim against Guardian did not accrue until 2000, Bullard timely filed a cross-claim in 2002, within the applicable statute of limitations.

In the case at bar, a review of the above outlined facts reveals that Plaintiff, through investigation and correspondence with Defendant, McHann's employer or principal, Kansas City, had no knowledge whatsoever of the existence or identity of McHann, and more importantly, its involvement in the maintenance and/or repair of the railroad tracks in question until December 4, 2006, when Plaintiff's counsel received Defendant's, Kansas City's, pre-discovery core disclosure. Hence, the Plaintiff did not have knowledge of any claim which he might have had against McHann prior thereto. Thus, the three-year statute of limitation regarding Plaintiff's claims against McHann began to run on December 4, 2006. Thus, pursuant to Mississippi case law in analyzing Mississippi Code §15-1-49, Plaintiff's claims against McHann are not futile. See Silvas v. Remington Oil and Gas Corporation, 109 F.Appx. 676, 678 (5th Cir.2004). Hence, such claim under Mississippi Law is not barred

by the statute of limitations.

Also, see Essary v. Wal-Mart Stores, Inc., et al. 2000 WL 33907699 (N.D.Miss.) wherein Judge L. T. Senter gave adherence to Mississippi's discovery rule in applying Mississippi Code §15-1-49. Essary involved an October 22, 1996 slip and fall accident and subsequent action filed on September 15, 1999 by Essary against Wal-Mart and other fictitious defendants. Essary alleged that she fell while on the premises of Wal-Mart. However, on January 2000, at a case management conference, Wal-Mart indicated that a McDonald's located on the Wal-Mart premises was responsible for the location where Essary fell. Essary amended her complaint on April 2000 to add West Mac (McDonald's) as a defendant. West Mac moved to dismiss arguing the three-year statute of limitation. In granting the motion to dismiss, Judge Senter held that not only did the plaintiff fail pursuant to Mississippi Rules of Civil Procedure 9(h) to substitute McDonald's and West Mac for numerous fictitious defendants named by plaintiff in her complaint and gain relation back benefit defeating the statute of limitation, but plaintiff also knew or should have known of its claim against West Mac (McDonald's) prior to the running of the statute of limitation:

> In this case, Miss.R.Civ.P. 9(h) would not provide plaintiffs with any relation back benefit. McDonald's was not brought in until four and one-half months after the statute of limitations had expired; West Mac, not until six months after the limitations period had run. In that situation, the only way to gain relation back relief would have been to substitute McDonald's and West Mac for fictitious parties. Plaintiffs did not pursue that course, instead moving first to join McDonald's as an additional defendant in this litigation without deleting any of the original

> fifty fictitious parties. Likewise, when the Essarys discovered the proper corporate identity of McDonald's, they, like the plaintiffs in Doe, moved to substitute a new party for a named party, rather than for one of the fictitious defendants. Although these failures may represent, as plaintiffs and the Doe dissent argue, a "matter of semantics," Doe, 704 So.2d at 1020 (McRae, J., dissenting), and serve only to "inequitably limit the extent to which real parties may be substituted for fictitious parties," Id., it is a failure which nonetheless forecloses relation back relief under the provisions of 9(h)
>
> The court also believes that under the rationale of Doe, a Mississippi court would find that plaintiffs acted less than diligently in identifying the appropriate parts for suit. Ms. Essary knows where she was walking when she fell in Wal-Mart. Though no one has edified the court on this point, the court assumes that, given the position taken by Wal-Mart at the case management conference and plaintiffs' argument in their memorandum that "McDonald's personnel were present and aware of the injuries," the accident occurred somewhere near the McDonald's concession in the Wal-Mart facility. In almost three years of investigating this matter and attempting to negotiate a settlement with Wal-Mart, plaintiffs-in the same way they put the onus on McDonald's-should have considered the possibility that McDonald's might be at least partly responsible for Ms. Essary's accident. (Emphasis supplied) Cf. Womble v. Singing River Hospital, 618 So.2d 1252, 167 (Miss. 1993) ("Even if the plaintiff knows the true name of the person, he is still ignorant of his name if he lacks knowledge of the facts giving him a cause of action against that person").

In the case at bar, Plaintiff, until December 4, 2006, had not one scintilla of evidence

of the involvement of McHann in the maintenance and/or repair of Defendant's, Kansas City's, railroad tracks. Thus, unlike the plaintiff in Essary, due to lack of such knowledge, Plaintiff in the case at bar had no occasion or cause to name fictitious defendants herein:

(A) There were no workers identified as McHann employees at the scene of the accident, see Accident Report and Affidavit of Plaintiff's investigator (R.V.I, 75-79)

(B) Prior to December 4, 2006, documents and settlement discussions made no reference whatsoever as to McHann's involvement.

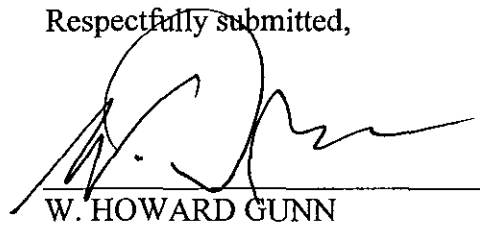
(C) Plaintiff's investigator made extensive investigation, only to discover that the tracks and employee workers thereon were identified as employees of the Kansas City Southern Railway Company.

V.

CONCLUSION

A review of the above facts and applicable statutory and case law reveals that Plaintiff's claim against McHann and is not barred by the statute of limitations.

Respectfully submitted,



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VI.

CERTIFICATE OF SERVICE

I, W. HOWARD GUNN, do hereby certify that on this date a true and correct copy of the foregoing **BRIEF OF APPELLANT, NELSON LEE** has been mailed via United States Mail, postage prepaid to:

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So certified on this the 23rd day of September, 2008.

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