2008-CA-02148 - SCT - E

No. 2008-CA-02148

GERALDSTINE MILLER, ET AL V. AMERICAN OPTICAL COMPANY, ET AL

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.

1. J. Chase Bryan- counsel for the Defendants/Appellees- Engelhard Corporation and the Mearl Corporation
2. Colleen S. Welch- counsel for the Defendants/Appellees- Engelhard Corporation and the Mearl Corporation
3. The Mearl Corporation- Appellee
4. Engelhard Corporation- Appellee
5. Spence Flatgard- counsel for the Defendant/Appellee- Continental Mineral Processing
6. Continental Mineral Processing
7. William M. Cunningham, Jr.- counsel for the Plaintiff/Appellant
8. Mike Espy- counsel for the Plaintiff/Appellant
9. Jack W. Harang- counsel for the Plaintiff/Appellant
10. The Honorable Lamar Pickard- trial court
11. Geraldstine Miller- Plaintiff/Appellant
12. Merrydythe Eiland, Daughter of the Decedent, Grover Miller
13. Nikia Glenn, Son of the Decedent- Grover Miller
14. Monica Lonette Miller, Daughter of the Appellant, Geraldstine Miller

15. Menittia Monique Miller, Daughter of the Appellant, Geraldstine Miller

16. Metina Miller, Daughter of the Appellant, Geraldstine Miller

So CERTIFIED, this the 23 day of September, 2009.

Respectfully submitted,

J. Chas. Bryan

J. Chase Bryan, (MSB No. 9333)
Colleen S. Welch (MSB No. 100807)

Attorneys for Appellees, the Mearl Corporation and Engelhard Corporation

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STATEMENT OF ISSUES

1. Whether plaintiff/appellant Miller properly substituted Engelhard and Mearl for fictitious parties pursuant to Miss. R. Civ. P. 9(h).

2. Whether plaintiff/appellant Miller's second amended complaint relates back to the date of filing of the original complaint.

3. Whether the statute of limitations on plaintiff/appellant Miller's claims expired before Engelhard and Mearl were identified as parties.

STATEMENT OF THE CASE

Judge Lamar Pickard granted summary judgment in favor of defendants Engelhard Corporation and Mearl Corporation ("Engelhard and Mearl") in the underlying case on November 28, 2008. Appellant Geraldstine Miller ("Miller"), originally filed this action on December 30, 2002, in the Circuit Court of Copiah County, Mississippi, against approximately 159 defendants typically named in silica lawsuits.

Miller's complaint claimed damages for the wrongful death of her husband, Grover Dee Miller (hereinafter "decedent"), based on his exposure to respirable silica. (R. at 80-81). In Miller's first amended complaint, she changed her claim to allege that his injuries were due to exposure to "silica and other harmful substances including but not limited to benzenes, toxic chlorides, dioxides, titanium products, resins, hydrocarbons, crystalline products, microcrystallines and lead." (R. at 191-192).

On October 15, 2003, Miller also filed a worker's compensation action against Cataphote, Inc., based on the same injuries claimed in the circuit court action. (R. at 516-517). Decedent had many medical issues well documented in his medical records through 2000, and had signed an affidavit on March 16, 2001, testifying that he knew the cause of his illness. (R. at 521-529.)[1] However, Miller did not diligently attempt to find out the identity of all the defendants she alleged were responsible for the decedent's illness and subsequent death. In fact, Miller did not name Engelhard and Mearl in her circuit court action until July 19, 2005. (R. at 246-336).

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[1] Miller appears to have first produced the affidavit in her worker's compensation action. The affidavit was later produced in the circuit court action attached to Miller's memorandum in opposition to certain defendants' motion for summary judgment.

Miller never substituted Engelhard and Mearl for any fictitious parties named in her complaint. Indeed, the same "John Doe" defendants that existed in her original complaint still exist in her first, second and third amended complaints. In fact, plaintiff added additional "John Doe" defendants to her second amended complaint. (R. at 146, R. at 176, R. at 323-324, R. at 374-376). As such, Miller attempted to add new parties in the guise of substituting parties for "John Doe" defendants without actually substituting them.

Based on the affidavit signed by the decedent which Miller submitted in support of her workers's compensation claim, Miller knew or should have known at least by March 16, 2001, which products allegedly were the cause of the decedent's injuries and subsequent death. However, Miller did not name Engelhard and Mearl in the action filed in circuit court until she had proceeded with discovery in the worker's compensation action, which was approximately two and a half years after the case in circuit court was filed.

Engelhard and Mearl did not receive notice of this action within the time period prescribed by Miss. R. Civ. Pro. 4(h), or within the statute of limitations as set forth in Miss. Code. Ann. 15-1-49. Moreover, Engelhard and Mearl were not aware that these claims might have been brought against them.

The trial court found that Miller's second amended complaint did not meet the requirements as set forth in Miss. R. Civ. Pro. 9(h) and Miss. R. Civ. Pro 15. Therefore, the second amended complaint did not relate back to the date of filing of Miller's original Complaint. (R. at 999-1000). Since the trial court found that the complaint did not relate back, the statute of limitations had run regarding any claims against Engelhard and Mearl.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

This action was originally filed on December 31, 2002, against approximately 159 defendants, alleging "Plaintiffs were exposed to silica-containing dust and suffered serious and permanent bodily injuries as a result of their exposure to silica and silica dust." (R. at 79-146). Miller also filed a filed workman's compensation action, and it was in this action, upon information and belief, in which an affidavit executed by the decedent on March 16, 2001, was produced. The decedent swore that he knew what injured him, specifically testifying that:

> Cataphote INC [sic] also used other chemicals, which I now have knowledge that they are toxic and included but are not limited to toxic chlorides, dioxides, benzenes and leads.

However, even though the decedent knew in 2001 what allegedly harmed him, Engelhard and Merle were not named by Miller in the circuit court action until the Second Amended Complaint was filed on July 19, 2005, which is over four years from the date decedent executed this sworn affidavit. (R. at 246-336 and 516-517).

Engelhard and Mearl are not usually defendants in silica lawsuits. In fact, although at one point there were nearly 20,000 plaintiffs alleging injury due to exposure to respirable silica pending in Mississippi, Engelhard and Mearl have only ever been named in four (4) actions. There is no reason that Engelhard and Mearl would have, or should have, known that they could, or should, have been named in the action. Additionally, not only were Engelhard and Mearl not brought into the case within the period of time as set forth in Miss. R. Civ. P. 4(h), they were not named in this action until four years after the decedent swore out an affidavit stating he knew what injured him, and three years after the case was initially filed.

Miller had every opportunity to name Engelhard and Mearl when she originally filed her Complaint and within the three year time period as allowed by the statute of limitations. The

Material Safety Data Sheets ("MSDS") from which Miller received Engelhard and Mearl's names existed at the time this case was filed and by the decedent's own testimony, he knew in 2001, what products injured him. Additionally, when Miller attempted to substitute Engelhard and Mearl in as parties to her complaint, she simply added them as defendants rather then properly substituting the parties for fictitious parties.

Accordingly, on April 19, 2007, Engelhard and Mearl filed their motion for summary judgment based on the fact that the statute of limitations had expired prior to the date Miller named them in this action. (R. at 390-507). Miller filed her response on or about May 4, 2007, and defendants' filed their rebuttal on May 14, 2007. (R at 723-927 and 928-931). The trial court heard oral argument by all parties and entered an order on November 28, 2008, granting defendants' motion for summary judgment. (R at 999-1000). It is from this order that Miller now appeals.

STANDARD OF REVIEW

The standard of review of a trial court's grant or denial of a motion for summary judgment is *de novo*. *Wilner v. White, M.D.*, 929 So. 2d 315 (¶ 3) (Miss. 2006), (citing *Satchfield v. R.R. Morrison & Son, Inc.*, 872 So. 2d 661, 663 (Miss. 2004) (additional citations omitted)).

SUMMARY OF THE ARGUMENT

Mississippi Rule of Civil Procedure 9(h) governs the substitution of parties. Rule 9(h) only applies when there is a true substitution of parties, i.e., when a proper party is substituted for a fictitious party. *Ralph Walker, Inc. v. Gallagher,* 926 So. 2d 890 (¶ 10) (Miss. 2006). A plaintiff must show diligence in attempting to discover the true identity of party under Rule 9(h). *Id.*

Miller did not substitute Engelhard and Mearl for any "John Doe" defendants. Instead, the same "John Doe" defendants that were named in the original action were named in the second amended complaint, which is the pleading that first named Engelhard and Mearl. In addition, Miller did not name Engelhard and Mearl until four years after an affidavit was sworn out regarding the cause of decedent's injuries. Clearly, Miller did not exercise due diligence in ascertaining Engelhard and Mearl's identification as required when substituting a fictitious defendant.

If they were not substituted as fictitious defendants, then in order to avoid the statute of limitations, Miller would have to prove the amended complaint related back to the filing of the original complaint. However, in order for a complaint to relate back to the original date of filing, the requirements of Miss. R. Civ. Pro 15(c) must be satisfied. Miller's second amended complaint does not relate back to the date of the original pleading because: 1) Engelhard and Mearl were prejudiced due to the amount of litigation that occurred prior to the date in which Engelhard and Mearl were given notice of or named in this case; and 2) Engelhard and Mearl did not and should not have known that they should have been named. Moreover, Engelhard and Mearl were not given notice of this action within the time period allotted under Miss. R. Civ. P. 4(h), nor within the statute of limitations.

Because the Second Amended Complaint does not relate back to the date the original case was filed, the statute of limitations against Engelhard and Mearl has run. The statute of limitations governing Miller's complaint is codified in Miss. Code Ann. § 15-1-49, which allows for a party to file a complaint: (1) within three (3) years of an alleged injury; or (2) in an action which involves a latent injury or disease, within three years of when the party knew or should have known of the injury. Furthermore, the statute of limitations associated with a wrongful

death claim is the same statute of limitations associated with the underlying tort which led to the wrongful death. *See May v. Pulmosan Safety Equipment Corp., et al,* 948 So. 2d 483 (¶ 8) (Miss. 2007). Therefore, because the statute of limitations had run prior to suit being filed against Engelhard and Mearl, the trial court properly granted summary judgment in their favor.

ARGUMENT

I. PLAINTIFF FAILED TO PROPERLY SUBSTITUTE APPELLEES FOR FICTITIOUS PARTIES PURSUANT TO MISS. R. CIV. P. 9(h).

Miss. R. Civ. P 9(h) states:

> When 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 identity 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.

There are requirements to qualify for the protections offered by Rule 9(h). One of those requirements is that a party must actually make a "substitution of a true party name for a fictitious one." *Walker*, 926 So. 2d 890 at (¶ 10). In *Doe v. Mississippi Blood Services, Inc.*, 704 So. 2d 1016, (¶ 10), the court found that plaintiff was merely "attempting to characterize the joinder of a new party after the running of the statute of limitations as a substitution for a fictitious party....[when] all 50 originally named John Does remain." The *Doe* court went on to hold that plaintiff did not substitute a defendant for a "fictitiously named defendant," rather she simply substituted one defendant for another. *Id.* In another action, this court held that when a plaintiff "made a blatant change of these five Original Defendants for the seven new defendants, not fictitious parties," Rule 9(h) does not apply. *Bedford Health Properties, LLC v. Estate of Williams,* 946 So.2d 335 (¶¶ 15-16) (Miss. 2006). Here the court found that plaintiff sued five incorrect defendants and attempted to fix their issues by dismissing the five original defendants

and "erroneously substituting the new defendants as 'fictitious' parties." *Id* at ¶16.

Doe and *Williams* are directly on point with the issues in this appeal. When Miller filed her second amended complaint, she dismissed over one-hundred (100) "silica" defendants and added over fifty (50) new "mixed chemical" defendants. There was no substitution of any of the "John Doe" defendants. To the contrary, the "John Doe" paragraph remained the same from the original complaint through the third complaint and actually, additional unknown defendants were added with the identification of "A through Z," "AA through BB," "AAA through ZZZ" and "AAAA through ZZZZ." (R. at 323-324). As in *Bedford*, plaintiff simply tried to correct her problem by dismissing the typical "silica" defendants and add the new "chemical" defendants. Accordingly, per the Court's holdings in *Walker, Bedford* and *Doe*, plaintiff did not properly substitute a fictitious party for a properly named defendant.

Another requirement of Rule 9(h) is that for it to be effective, a plaintiff must show that she was reasonably diligent in determining the identity of the proper parties. *Walker*, at (¶ 10). This "due diligence must occur prior to the running of the statute of limitations." *Doe,* at (¶ 16). If the provisions of Rule 9(h) are not satisfied, then the new party must be served "prior to the running of the statute of limitations." *Doe*, at (¶ 2). A plaintiff may not "sit on their rights." *Rawson v. Jones*, 816 So.2d 367 (¶ 7) (Miss. 2001).

Miller does not even address her failure to actually substitute Engelhard and Mearl for "John Doe" defendants in her brief, but rather skips ahead to the second requirement of Rule 9. She claims she was diligent because she attempted to obtain the records from plaintiff's work site, Cataphote, and depose Cataphote on February 16, 2004. No diligence is shown here. This case was initially filed in 2002. Decedent swore out an affidavit in 2001 identifying the cause of his illness. Miller has not provided any evidence of attempts to determine the identity of the

alleged fictitious parties for the first two years she knew of the alleged cause of the decedent's injury and death, nor within the entire first year this case was filed. Miller's only "evidence" includes a request for a deposition in 2004. However, she fails to provide the Court with reasons why she could not have subpoenaed records, filed a request for production of documents or requested judicial assistance. In essence, Miller failed to act diligently as is required per the directives in *Walker*, *Doe* and *Rawson.*

If there has been a failure to properly substitute parties under Rule 9(h), the amendment "must satisfy the provisions of Rule 15(c) regarding 'changing the party against whom a claim is asserted' to prevent time bar by the statute of limitations." *Santangelo v. Green,* 920 So. 2d 521 (¶ 22) (Miss. Ct. App. 2006) (*quoting Nguyen v. Miss. Valley Gas Co.,* 859 So. 2d 971, 978 (¶ 29) (Miss. 2002).

Accordingly, since Miller failed to actually substitute Engelhard and Mearl for any of the "John Doe" defendants, and failed to attempt to identify fictitious parties in a diligent manner within the statute of limitations, Miller is not afforded the protection of Rule 9(h). Because she did not properly substitute Engelhard and Mearl for fictitious defendants, the statute of limitations did not stop running as to any claims against them. Therefore, in order for the Second Amended Complaint to have stopped the statute of limitations, there must be a finding that it relates back to the filing date of the original Complaint. However, in order for her second amended complaint to relate back to the first date of filing, she must satisfy the requirements of Rule 15(c), which she has failed to do as described below.

II. MILLER'S SECOND AMENDED COMPLAINT FAILS THE TEST AS SET FORTH IN MISS. R. CIV. P. 15(C). THEREFORE, THE SECOND AMENDED COMPLAINT DOES NOT RELATE BACK TO THE DATE OF FILING OF MILLER'S ORIGINAL COMPLAINT.

Miss. R. Civ. P. 15 allows a party to amend a pleading, but sets out certain requirements that must be met for the amended pleading to relate back to the original pleading. In *Wilner v. White, M. D.*, 929 So 2d. 315 (Miss. 2006) the Court held that when adding a new party, the plaintiff's complaint would only relate back if the plaintiff met the following requirements:

> (1) the claim in the amended complaint must arise out of the same conduct, transaction, or occurrence as that set forth in the original complaint; (2) the newly-named defendant must have received notice of the action within the period provided by Miss. R. Civ. P 4(h) such that the party will not be prejudiced; and, (3) the *newly-named defendant must have or should have known that an action would be brought against him but for a mistake existing as to the parties' identities."*

Id. at (¶ 8); Miss. R. Civ. P. 15(c) (emphasis added). The *Wilner* court assessed Rule 15, inquiring (1) whether the claim arose out of the same conduct as set for in the original claim; (2) whether the newly added party received notice within the time period allotted under Rule 4 so that "he would not be prejudiced in maintaining his defense on the merits;" and (3) whether the newly named defendant knew or should have known that the action would have been brought against him "but for a mistake" in the pending parties identities. *Id.* at (¶ 8). The *Wilner* court found that the first prong was met since the defendant was mentioned in the body of the complaint, was deposed, and was aware of the ongoing lawsuit. On these facts, the court found he knew about the action in enough time not to be prejudiced by the ongoing litigation.

However, the court then had to ask whether "but for a mistake on Wilner's part, White (the defendant) knew, or should have known that an action would be brought against him," and found if the "answer [is] in the affirmative, the amended complaint will relate back to the date of

the original complaint, and the suit will not be time-barred by the statute of limitations." *Id.* (internal citations omitted). The court found this was not the case, and held that plaintiff failed to "meet the test in Miss. R. Civ. P. 15 (c)(2)." *Id.* at (¶ 9). In so ruling, the *Wilner* court held that plaintiff knew of the defendant's identity (even mentioning him in the original complaint) and therefore, there could not claim that she made a mistake as to the names of the parties. *Id.* Additionally, the Court pointed out that since plaintiff failed to "make a reasonably diligent effort to add" the defendant to the Complaint, the trial court was correct in dismissing the suit based on the running of the statute of limitations. *Id.*

The court also analyzed the second prong to Rule 15(c) in *Ralph Walker, Inc. v. Gallagher,* 926 So. 2d 890 (Miss. 2006). Litigation started approximately three years after the accident in *Walker* occurred. *Walker*, at (¶ 8). The plaintiff filed suit on March 21, 2002, and served the original defendants. *Id.* The newly named defendant was not added until April 2004. In finding that the plaintiff failed to put forth any proof that the defendant had notice of the suit within 120 days of filing of the original complaint, the *Walker* court held that plaintiff failed the test in Miss. R. Civ. P. 15(c)(2). *Walker*, at (¶¶ 8-9).

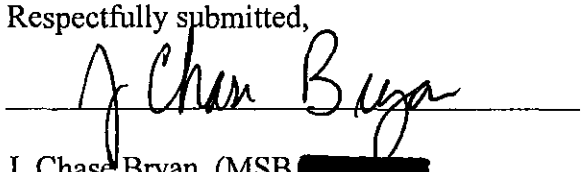
Here, Miller filed her case, but did not name Engelhard and Mearl within the 120 days of filing of the original complaint. Miller knew on March 16, 2001, when decedent executed a nine page affidavit detailing his injuries, what allegedly harmed him and caused his death. Based on this affidavit, Miller filed her original complaint on December 30, 2002. However, Miller did not name the parties that she now alleges injured the decedent in her original complaint, instead naming approximately 159 defendants who are known to be defendants in silica litigation. Engelhard and Mearl are not typical silica defendants and did not receive any notice of this action. This case was litigated for nearly three years before Engelhard and Mearl were served.

caused by silica, as well as half a dozen other chemical products. She did not provide any notice to Engelhard and Mearl within the time period as set by Rule 4(h) and since defendants had no notice of this action and are not part of this type of litigation, there was not any reason why they would have known that they could have been named in the action. Therefore, Miller's claims that her Second Amended Complaint should relate back to the date of the filing of the original action pursuant to Miss. R. Civ. P. 15(c)(2) fail.

Since Miller's claims against Engelhard and Mearl do not relate back to the date of the filing of the original complaint, the statute of limitations against Engelhard and Mearl has run and this Court should affirm the trial court's ruling granting summary judgment.

This the 23rd day of September, 2009.

Respectfully submitted,



J. Chase Bryan, (MSB [redacted]
Colleen S. Welch (MSB [redacted])

Attorneys for Appellees, Engelhard Corporation and the Mearl Corporation

OF COUNSEL:
FORMAN PERRY WATKINS KRUTZ & TARDY, LLP
200 South Lamar St. 100
Jackson, Mississippi 39201
Post Office Box 22608
Jackson, Mississippi 39225-2608
Phone: (601) 960-8600
Facsimile: (601) 960-8613

CERTIFICATE OF SERVICE

I, hereby certify, that I have on this day, served a copy of the foregoing Appellee's brief on the Supreme Court of Mississippi, and by mailing a copy of the same by United States Mail properly addressed and first class postage prepaid to:

William M. Cunningham, Jr.
Burns, Cunningham & Mackey, P.C.
50 Saint Emanuel Street
Mobile, AL 36602
Attorney for the Appellant

Mike Espy
Mike Espy, PLLC
317 East Capitol Street, Suite 101
Jackson, MS 39216
Attorney for the Appellant

Jack W. Harang
Law Offices of Jack W. Harang
3500 North Hullen Street
Metairie, LA 70002
Attorney for the Appellant

Spence Flatgard
210 East Capital Street, Suite 200
Jackson, MS 39083

The Honorable Judge Lamar Pickard
P.O. Box 310
Hazlehurst, MS 39083

Clerk of the Mississippi Supreme Court
P.O. Box 249
Jackson, MS 39205-0249

J. Chase Bryan