

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

GERALDSTINE MILLER, *et al.*

Appellant,

vs.

AMERICAN OPTICAL COMPANY, *et al.*

Appellee.

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CV NO. 2008-CA-02148

ON APPEAL FROM THE CIRCUIT COURT
OF COPIAH COUNTY, MISSISSIPPI

BRIEF OF APPELLEE
CONTINENTAL MINERAL PROCESSING

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GERALDSTINE MILLER, *et al.* v. AMERICAN OPTICAL COMPANY, *et al.*

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 disqualifications or recusal.

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8. The Honorable Lamar Pickard
9. Geraldstine Miller – Plaintiff/Appellant
10. Nikia Glenn - Son of Appellant, Geraldstine Miller
- 11-14. Merredythe Eiland, Menittia Monique Miller, Monica Lonette Miller, Metina Miller - Daughters of Appellant, Geraldstine Miller

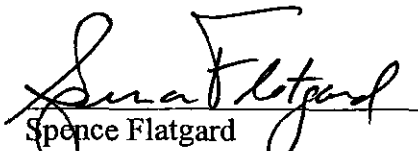

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STATEMENT OF THE ISSUES

- I. Whether the Trial Court correctly ruled that Plaintiffs' Second Amended Complaint did not relate back to filing of the original complaint where there is no evidence that the newly-named Defendants knew or should have known that an action would be brought against them but for a mistake existing as to the parties' identities, as required under Miss. R. Civ. P. 15(c).
- II. Whether the mandates of Miss. R. Civ. P. 15(c) or the statute of limitations may be set aside by Plaintiffs' counsels' citing their failed efforts to ascertain the newly-named Defendants' identities before the statute of limitations had expired.

STATEMENT OF FACTS

The Plaintiffs' underlying suit now on appeal before this Court was originally filed on December 31, 2002, against approximately one hundred and fifty-nine (159) defendants. The original wrongful death action alleged that the decedent Grover D. Miller ("Decedent") was "exposed to silica-containing dust and suffered serious and permanent bodily injuries as a result of their exposure to silica and silica dust" while employed at Cataphote, Incorporated ("Cataphote") in its Flowood, Mississippi plant. (R. at 079-146). The Appellees ("Defendants") were not included in the original action. (R. at 079-146).

Prior to the filing of the lawsuit, on March 16, 2001, the Decedent filed an affidavit in a previously filed workman's compensation action. (R. at 521-529). In Paragraph 3 of said affidavit, the Decedent specifically stated that his worksite "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." (R. at 522, ¶ 3).

The Defendants were not named by the Plaintiffs in the wrongful death action until the Second Amended Complaint was filed on July 19, 2005. (R. at 245-300). *why not Am. Optical Co.?* On April 19, 2007, Defendants Englehard Corporation, The Mearle Corporation, Kronos, Inc., The Shepherd Color Company, Millenium Specialty Chemicals Inc. f/ka/a SCM Glidco Organics Corporation d/b/a SCM Chemicals – Color and Silica filed a motion for summary judgment stating that the Plaintiffs' statute of limitations began on March 16, 2001 and expired on March 16, 2004, prior to their being identified as a defendant in the Second Amended Complaint which did not relate back to the original complaint (R. at 390-507). Defendant Continental Mineral Processing filed its joinder to the motion for summary judgment on October 6, 2008. (R. at 996-998). The Plaintiffs filed their opposition to the motion for summary judgment primarily arguing that they

had difficulty obtaining information from Cataphote's counsel during the discovery process. (R. at 510-750).

On May 14, 2007, the Trial Court heard oral argument. On November 24th, 2008, the Trial Court entered an Order Granting Summary Judgment and ruled that the Plaintiffs' Second Amended Complaint "does not relate back to the original filing under M.R.C.P. Rule 9(h) and Rule 15, because the statute of limitations for claims against the moving Defendants has run." (R. at 999-1000). The Plaintiffs now appeal the Trial Court's ruling to this Honorable Court.

SUMMARY OF ARGUMENT

The statute of limitations for the Plaintiffs' claims began to run on March 16, 2001, when the Decedent signed an affidavit stating that he had knowledge that he was exposed to chemicals at his workplace, allegedly causing his injuries. The Trial Court correctly ruled that the Plaintiffs' Second Amended Complaint did not relate back to the original complaint under Miss. R. Civ. P. 15(c). Since the Plaintiffs did not name the newly-named Defendants until the filing of the Second Amended Complaint on July 19, 2005, and the claims did not relate back to the original filing, the Plaintiffs' claims are barred by the three-year statute of limitations.

Mississippi Rule of Civil Procedure 15(c) only allows a plaintiff's complaint to relate back to the original filing if the newly-named defendant knew or should have known that the action would be brought against him but for a mistake existing as to the parties' identities. There is no evidence in the Record of mistaken identity or that the newly-named defendants should have known they would be brought into this action.

The Trial Court found no basis in law or fact for the Plaintiffs' counsels' argument that because they had difficulty in the discovery process in determining the newly-named Defendants' identity, that they, therefore, should be allowed to bypass the requirements of Miss. R. Civ. P. 15(c) or the statute of limitations. In other words, the Plaintiffs' counsels' failed efforts to identify the newly-named Defendants did not toll the statute of limitations. The Trial Court recognized that such an argument would render the statutes of limitations meaningless.

ARGUMENT

The Trial Court correctly ruled that the Plaintiffs' claims against the newly-named Defendants filed in the Second Amended Complaint occurred after the statute of limitations had expired, and those claims did not relate back to the original filing under the requirements of Miss. R. Civ. P. 15(c).

Mississippi Rule of Civil Procedure 15 allows a party to amend a pleading, but establishes 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, ¶ 8 (Miss. 2006), the Court held that plaintiff's complaint only related 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 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.* Miss. R. Civ. P. 15(c), (emphasis added). The *Wilner* Court held that there was no mistake as to the newly added defendant's identity and plaintiff "did not exercise reasonable diligence in adding the newly named defendants." Therefor, the Court reinstated and affirmed the lower court's granting of summary judgment based on the statute of limitations having run for the newly-named defendant.

In the case *sub judice*, the Plaintiffs offer no evidence of mistaken identity or that the newly-named Defendants must have or should have known they would be brought into this litigation, as there is none. There is no reason that the newly-named Defendants would have thought that this action "but for a mistake as to the existing parties identities" should have been brought against them. Miss. R. Civ. P. 15(c)(2).

The Appellants' Brief does not address the requirements of Rule 15(c) which are necessary for an amended complaint to relate back to its original date of filing, but instead argues that the Plaintiffs' counsel exercised reasonable due diligence in identifying the newly-named Defendants. The majority of the Appellant's Brief attempts to explain why their counsel failed to obtain information in discovery from the Decedent's employer before the statute of limitations had run. The Trial Court noted the Plaintiffs' counsels' argument and ruled that their amended pleading "does not relate back to the original filing under M.R.C.P. Rule 9(h) and Rule 15." (R. at 999-1000). The Plaintiffs' counsels' scheduling difficulties with counsel for the Decedent's employer simply do not overcome, or set aside, the threshold requirements of Miss. R. Civ. P. 15(c). The Plaintiffs failed to provide evidence of a mistaken identity of the newly-named Defendants or any evidence that they should have known that they would be included in the action, as Rule 15(c)(2) requires.

The statute of limitations governing Plaintiffs' complaint is codified in Mississippi Code Annotated § 15-1-49. It states: *“(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.”* Miss. Code Ann. § 15-1-49 (emphasis added).

This Court has consistently ruled the statute of limitations begins to run when the plaintiff has discovered an injury or should have discovered an injury with reasonable diligence. In *Owens-Illinois, Inc. v. Edwards*, 573 So. 2d 704 (Miss. 1990), the Court addressed the issue of when an asbestosis cause of action accrued for purposes of statute of limitations. The Court found that “[t]he cause of action accrues and the limitations period begins to run when the

plaintiff can reasonably be held to have knowledge of the injury or disease. In the case at bar, that date is August 26, 1986, the date [plaintiff] was diagnosed with asbestosis.” *Id.* at 709. The Court noted that “[t]hough the cause of the injury and causative relationship between the injury and the injurious act or product may also be ascertainable on this date these factors are not applicable under § 15-1-49(2), as they are under the [medical malpractice statute].” *Id.* The Court concluded that the statute of limitations period began to run when plaintiff was diagnosed with asbestosis.

Two years after *Owens-Illinois*, the Court decided *Schiro v. American Tobacco Comp.*, 611 So. 2d 962 (Miss. 1992). The Court again found a cause of action accrues when it is an enforceable claim, *ie.*, when the right to sue becomes vested. *Id.* at 965 (*citing, Owens* at 706 *citing Rankin v. Mark*, 238 Miss. 858, 120 So. 2d 435 (1960); *Aultman v. Kelly*, 236 Miss. 1, 109 So. 2d 344 (1959); *Walley v. Hunt*, 212 Miss. 294, 54 So. 2d 393 (1951); *Forman v. Mississippi Publishers Corp.*, 195 Miss. 90, 14 So. 2d 344 (1943)).

In 2005, this Court again held that the statute of limitations began to run when a plaintiff “clearly knew or reasonably should have known [the night of her injury] what the cause of her injury was.” *PPG Architectural Finishes, Inc. v. Lowery*, 909 So. 2d 48 (Miss. 2005). The Court reiterated the belief regarding “when” the statute of limitations begins to run, holding that “the focus is on the time that the patient discovers, or should have discovered by the exercise of reasonable diligence that he probably has an actionable injury.” *Id.* (*quoting Wright v. Quesnel*, 876 So. 2d 362, 366 (Miss. 2004), *quoting Smith v. Sanders*, 485 So. 2d 1051, 1052 (Miss. 1986).

In addition, as to Plaintiffs’ wrongful death claim, the Court has held “[a] wrongful death claim is subject to, and limited by, the statute of limitations associated with the claims of specific wrongful acts which allegedly led to the wrongful death.” *May v. Pulmosan Safety Equipment*

Corp., 948 So. 2d 483, ¶ 8 (Miss. 2007); *quoting Jenkins v. Pensacola Health Trust, Inc.*, 933 So. 2d 923, ¶ 12 (Miss. 2006).

In the case *sub judice*, the question is not when the Decedent should have discovered the injury. It is undisputed that the Decedent knew on March 16, 2001, the date of his affidavit in his worker's compensation action, that he was allegedly harmed by "other chemicals, which I now have knowledge that they are toxic and included but are not limited to toxic chlorides, dioxides, benzenes and leads." (R. at 522, ¶ 3.) Based upon Decedent's affidavit, the Plaintiffs' statute of limitations began to run on March 16, 2001. Therefore, the Plaintiffs, who, under *May*, are limited by the statute of limitations that governs Decedent's claims, would have had to have brought this suit against the newly-named Defendants by March 16, 2004. Again, Plaintiffs' counsel's failed efforts to identify the newly-named Defendants did not toll the statute of limitations from running. Since the Plaintiffs did not name these Defendants in this action until July 19, 2005, and the claims against these Defendants do not relate back to the original filing, the Plaintiffs' claims are barred by the statute of limitations.

CONCLUSION

Based upon the facts set forth in the Record and the law cited herein, it is clear the Plaintiffs' Second Amended Complaint does not meet the requirements of Miss. R. Civ. P. 15(c), and its claims against the newly-named Defendants are barred by the statute of limitations. Accordingly, Appellee Continental Mineral Processing respectfully requests this Court to affirm the Trial Court's Order Granting Summary Judgment.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have on this 4th day of August, 2009, served a copy of the forgoing Appellee Continental Mineral Processing's Brief on the Supreme Court of Mississippi, via hand delivery, and by mailing a copy of the same by United States Mail properly addressed and first class postage prepaid, to wit:

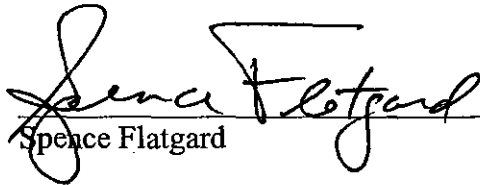
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