

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

GERALDSTINE MILLER, et al

Appellant,

vs.

**AMERICAN OPTICAL
COMPANY, et al**

Appellees.

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CV NO. 2008-CA-02148

**ON APPEAL FROM THE CIRCUIT COURT
OF COPIAH COUNTY, MISSISSIPPI**

**REPLY BRIEF OF APPELLANT
GERALDSTINE MILLER**

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REPLY BRIEF OF THE APPELLANT

The brief of the Appellees, Engelhard Corporation and the Mearl Corporation suggest on page three that the Trial Court found that Miller's Second and Amended Complaint did not meet the requirements as set forth in Miss. R. Civ. P. 9(h) and Miss. R. Civ. P.15. However, the Order signed on November 24, 2008, granting Summary Judgment only states as follows:

"The Court having read all of the briefs and other substitutions, submissions by the parties and having heard oral argument, and viewing all evidence in a light most favorable to the non-moving party, finds that the Plaintiff's 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 of claims against the moving defendants has run." (R. at 999)

There is nothing contained in the Order finding that Miller's Second Amended Complaint did not meet the requirements as set forth in M.R.C.P 9(h) and M.R.C.P. 15 as suggested by the Appellees, Engelhard Corporation and the Mearl Coporation.

The Appellees, Engelhard Corporation and the Mearl Corporation in their brief argue that the Plaintiff failed to properly substitute them for fictitious parties pursuant to M.R.C.P. 9(h). This is an issue that is being first raised before this Court. In the Motion for Summary Judgment, filed by the Appellees, upon which the Order granting summary judgment on November 24, 2008 was based, there is no mention or argument that the Plaintiff somehow failed to properly substitute parties. (R. at 390). These matters are outside the scope of this appeal and are not properly before this Court. An Appellant is not entitled to raise new issues on appeal since to do so denies the Trial Court the opportunity to address the matter. *Touart v. Johnston*, 656 So.2d 318.

As the issue of compliance with M.R.C.P. 9(h) is not properly before this Court, the

Appellant will now respond to the Appellees' argument that Miller's Second Complaint fails the test as set forth in M.R.C.P 15(c) and therefore the second amended complaint does not relate back to the date of filing of Miller's original complaint.

The statutory scheme as set forth in Appellant's original argument provides the mechanism for plaintiffs to bring in responsible parties unknown, but intended, who could only be ascertained through the use of judicial mechanisms such as discovery. The principles set forth in *Doe v. Mississippi Blood Services, Inc.*, 704 So.2d 1016 (Miss. 1997) are exactly what the plaintiff followed. The only means available to her to ascertain the true identity of the manufacturers that supplied the products to the Cataphote Plant was through discovery.

Miller's second amended complaint was as a result of an order entered on May 12, 2005 by the Trial Court on a motion filed by several defendants to dismiss or in the alternative for a more definite statement. The Court having reviewed the defendants' motion and after hearing oral argument, granted the motion and ordered the Plaintiff, within sixty (60) days from the date of the order to file an amended complaint providing among other things, the specific products, by product and manufacturer which the Plaintiff contends caused or contributed to his/her injury, including a statement as to which product was used at which exposure site and the years of use. According to the Order, any defendant not listed as causing or contributing to the injury should be dismissed. The order further noted that should the Plaintiff fail to provide the Court and the defendants, in that the amended complaint with the information specified, the case would be dismissed without prejudice. (R. at 339)

When construing M.R.C.P. 15(c), a survey of federal case law under Rule 15(c), Federal Rules of Civil Procedure 15(c) is appropriate. *Penn National Gaming, Inc., v. Radcliff*, 954 So.2d

427 (Miss. 2007); *MS Comp Choice v. Clark, Scott and Streetman*, 981 So.2d 955 (Miss. 2008).

The emphasis is to be placed in determining whether the amended complaint arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading. The substitution of such parties after the applicable statute of limitations has run is not significant when the change is merely formal and in no way alters the known facts and issues upon which the action is based.new parties may be added (or substituted) in an action when a new and old parties have such an identity of interest that it can be assumed or proved that relation back is not prejudicial. *Starren v. American National Bank and Trust Company*, 529 Fed Sec. 1257 (7th Cir. 1976).

In her original brief, the appellant set forth with particularity the diligent effort through discovery conducted by her attorney, to acquire information needed concerning the unknown parties. The affidavits of William M. Cunningham, Jr. and Roger C. Riddick clearly support a finding that, in this instance, the Plaintiff, through her counsel, was diligent in obtaining documents from the only source available to determine the identities of the parties which supplied products to the Cataphote plant during the employment of her deceased husband. These efforts clearly pass the “reasonable” diligence test set forth in *Wombley v. Singing River Hospital*, 618 So.2d 252 (Miss. 1993) determine the proper substitution of unknown parties.

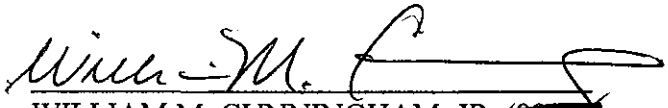

The brief of the Appellee, Continental Mineral Processing, argues that the Trial Court found no basis in law or fact for the Plaintiff’s argument that because they had difficulty in the discovery process in determining the newly named defendants’ identity that they, therefore should be allowed to bypass the requirements of M.R.C.P. 15(c) or the statute of limitations. A careful review of the order granting summary judgment signed on November 24, 2008, does not support this contention (R. at 999). The Trial Court stated as follows:

“....finds that the Plaintiff’s 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 against the moving defendants has run”.

The Trial Court does not articulate a factual basis for this finding and it would be improper authority for this court to speculate. As stated *supra*, the law recognizes the mechanism for a plaintiff faced with the difficulties of identifying proper defendants through filing an amended complaint after adequate discovery. As the Appellant has argued, and as the evidence supports the Appellants’ counsel was diligent in his discovery efforts to obtain the correct identity of the responsible parties and the Appellants’ second amended complaint should relate back as provided for by law.

As this Court is aware to survive the summary judgment the non-moving party must offer significant probative evidence demonstrating the existence of a triable issue of fact. The Appellant has done so and the Trial Court was in error granting the Appellees’ Motion for Summary Judgment on the issues presented.

Respectfully Submitted,


WILLIAM M. CUNNINGHAM, JR. 

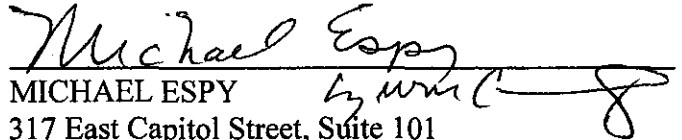
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CERTIFICATE OF SERVICE

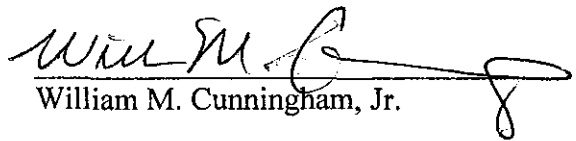
I hereby certify that I have on this 12th day of November, 2009, served a copy of the foregoing Appellant's Reply Brief on the Supreme Court of Mississippi, by mailing a copy of the same by United States Mail properly addressed and first class postage prepaid, to wit:

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