IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
APPEAL FROM THE CIRCUIT COURT OF TUNICA COUNTY, MISSISSIPPI

DELFENIA RAINEY — PLAINTIFF

VS — APPELLATE # CV-2007-0201

GRAND CASINO, ET AL — DEFENDANTS

APPELLANT'S REPLY BRIEF

PREPARED BY:

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INTRODUCTION/SUMMARY OF ARGUMENT

In Defendant's Brief in Response, Defendants have set up a defense of lack of diligence on Plaintiff's behalf in seeking to amend her Complaint to name the proper party. Plaintiff has relied on MRCP 15 (c) and 9(h) to assert that such an amendment would relate back to the initial filing. Defendants rely on Wilner v. White, 929 So.2d 315 (Miss. 2006) as authority for the proposition that new parties may not be added after expiration of the statute of limitations.

In a case published after the appeal of the instant cause, the Mississippi Supreme Court has now addressed a subset of the rule on amendments to conclude that some amendments seek to merely correct a misnomer and so should be allowed. Scaggs v. GPCH-GP, Inc. d/h/a Garden Park Medical Center, 2008-CA-00983-SCT (Miss.,2009). The Scaggs case, indeed is weaker than the case at bar as Justice Carlson points out in a dissenting opinion, because the Scaggs Plaintiff did not serve the Defendants' registered agent for service of process.

This reply will address only two points:

1) the repudiation of Wilner in cases with the instant fact pattern; and

2) the "lack of diligence" argument. Appellant will make best efforts to be concise.

ARGUMENT

1) Scaggs and Wilner

In the Wilner case, "the Plaintiff sought to add four additional Defendants after expiration of the Statute of limitations. See Wilner v. White, 929 So.2d at 317-18." Scaggs, ¶ 14.

In both Scaggs and the case at bar, the proper Defendant was served, but by the wrong name. In both cases, the d/b/a name was correct, but the corporate parent was not named, (in Scaggs), and wrongly named in the instant case. That is, the Supreme Court allowed Ms. Scaggs to change the name of the Defendant from "Garden Park Medical Center "to" GPCH-CP, INC. d/b/a Garden Park Medical Center. "In the instant case, Plaintiff/Appellant Rainey seeks to change the name of the Defendant from "Grand Casino" to "BL Development Corp. d/b/a Grand Casino."

In Scaggs, reliance is placed on parallel federal cases, Mississippi case law, cases from other state courts and a lengthy quote, at ¶ 9, from 67 AC.J.S. Parties § 23F, pp.760-61:

> A misnomer or misdescription in the name of a party may be corrected by amendment, provided it does not effect an entire change of parties or cause a fraudulent or unjust result. As a general rule, frequently under statutes or rules of court so permitting, an error in the name or description of a party, whether a misnomer or misdescription in the name of a plaintiff or a misnomer or misdescription in the name of a defendant, may be corrected by an amendment of the appropriate pleading. Such an amendment, however, should not be allowed where it effects an addition or substitution of parties, or entire change of parties, or causes a fraudulent or unjust result. If the effect of an amendment of a pleading is merely to correct the name of a person, and the proper party is actually in court, as where process has actually been served on the true defendant, or he has appeared and defended or otherwise submitted himself to the jurisdiction of the court, there is no prejudice. However, if the other party suffers prejudice or surprise, the petition to change the name of a party will not be permitted. Additionally, when the proper party was not served and therefore is not before the court, a plaintiff who seeks to correct a name or description of

the party in the complaint that is deficient in some respect must demonstrate compliance with the rule governing relation back of amended pleadings.

As Justice Carlson points out in his Dissent in Scaggs:

¶21. Here, according to the record, Scaggs failed to serve process upon the correct registered agent for GPCH-GP, Inc. Instead, Scaggs caused process to be issued for service upon "Garden Park Medical Center," and the process server's return on the summons reveals that the summons was served upon "Garden Park Hospital" by personally serving William Peaks. Therefore, Mississippi Rule of Civil Procedure 15© is applicable in its entirety.

¶22. The disputed portion of the relation-back doctrine "essentially asks whether, because of the existence of a **mistake** as to the parties' identities on the part of the movant or complainant, the newly-named defendant did not know that an action would be brought against him within the 120 days." *Ralph Walker, Inc. v. Gallagher*, 926 So.2d 890, 896 (Miss. 2006) (emphasis added) (citation omitted). Garden Park asserts that Scaggs cannot argue that a mistake was made regarding the proper identity of Garden Park as GPCH-GP, Inc., since Scaggs's attorney instituted claims against GPCH-GP, Inc., prior to filing the original complaint in this action, using GPCH-GP, Inc.'s proper name. Further, In *Wilner v. White*, regarding Mississippi Rule of Civil Procedure 15(c)(2), this Court stated:

This part of the rule essentially asks whether, because of the existence of a mistake as to the parties' identities on the part of the movant or complainant, the newly-named defendant did not know that an action would be brought against him within the prescribed time. *Curry*, 832 So.2d at 513.[1] *The purpose of this rule is to allow some leeway to a party who made a mistake*, so long as the party does what is required within the time period under the rule. The United States Supreme Court, in looking at the federal counterpart to this rule, Fed.R.Civ.P. 15(c)(3)(B), noted that this "subsection applies only in cases involving 'a *mistake* concerning the identity of the proper party.'" *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 467, 120 S.Ct. 1579, 146 L.Ed.2d 530, n. 1 (2000) (quoting Fed.R.Civ.P. 15(c)(3)(B)). Here, there can be no attempt to assert that a mistake was made concerning White's identity. Also, Wilner unquestionably failed to make a reasonably diligent effort to add White's name to the complaint sooner. White's name actually appears in the body of the original complaint itself.

Wilner v. White, 929 So.2d 315, 323-24 (Miss. 2006) (emphasis added) (footnote omitted). *See also Gallagher*, 926 So.2d at 896 ("The purpose of this rule is to allow some leeway to a party who made a mistake. . . ."). Since there was evidence before the trial court that Scaggs's attorney previously had filed suit against GPCH-GP, Inc., correctly identifying GPCH-GP, Inc., the trial court did not commit error in determining

> that Scaggs knew that "Garden Park Medical Center" was not the proper identity of the defendant, and therefore, failed to meet the relation-back test of Mississippi Rule of Civil Procedure 15(c). Furthermore, as also determined by the trial court, Scaggs did not take any affirmative measures to amend the complaint other than a simple request within her Response to the Motion to Dismiss that she be allowed to amend her complaint if the trial court determined that the wrong party defendant was named.

The deficiency of which Justice Carlson complains is absent from this case. Grand Casino was served. The record makes clear that only the corporate parents name was erroneous. As the CJS cite affirms, where the proper Defendant is already in Court defending, there is no prejudice in correcting a misnomer. Such is the case here. No prior complaints were filed against BL Development. The Complaint sought to be amended by Plaintiff is the first and only Complaint served. There can be no doubt this was a simple misnomer and the trial court erred in denying Plaintiff's Motion to Amend to correct the simple error. The lower court's ruling must be reversed to allow Plaintiff to proceed with her case.

2) Lack of Diligence

Plaintiff again emphasizes that the three (3) requirements of MRCP 15 © are met in this case, as admitted by counsel for Defendant. (TR. 102). Indeed, if viewed as a misnomer, Plaintiff has properly served Defendant, but she did list the name of the corporate parent of Grand Casino, Tunica.

Defendants assert a lack of diligence in discovering who must be served to bring Grand Casino into court. They do so with more than a small amount of disingenuousness.

The Court will note that prior to their Motion For Summary Judgment, (which should have been a MRCP 12 Motion, but it was not preserved), Defendants at no time mentioned BL Development Corp. Their Answer, while containing a general denial of ownership of the Grand

Casino by the Grand Casino, did not inform Plaintiff or the court who was the "true" owner. Indeed, prior to the date of argument on Defendants' Summary Judgment Motion, the name "BL Development" cannot be found in any record.

Therefore, while generally denying ownership of the casino, Defendants at no time supplied the "proper" owner's name. In point of fact, before filing suit, Plaintiff, through counsel, attempted to negotiate with the casino and was directed to Caesar's Entertainment, another named company served by Plaintiff. Plaintiff later discovered that Caesar's Entertainment was a separate corporation contracting with the casino to manage "risk."

Upon discovery at the Motion for Summary Judgment hearing of the name "BL Development" Plaintiff moved to amend her Complaint at the same time she submitted her brief. Plaintiff asserts that her Motion to Amend at the first discovery of the corporate parent's name should be enough, under the rule of Scaggs, where this case belongs. As the Scaggs court noted, Defendants herein have "'fail[ed] to consider the well-recognized distinction between a complaint that sues the wrong party, and a complaint that sues the right party by the wrong name.' Roberts v. Michaels, 219 F.3d 775, 777-78 (8th CIR. 2000)." Scaggs, at ¶ 14.

Finally, the Scaggs court denies the applicability of "reasonable diligence" in misnomer cases. Most of this rationale is in ¶ 16 and 17 of Scaggs.

CONCLUSION

For the reasons stated hereinabove, as well as for the reasons discussed in Appellant's Brief-in-Chief and other reasons to be explored at oral argument, Appellant asserts that the lower court has erred to her detriment. She therefore prays that the Court will reverse and render this matter so that Ms. Rainey may proceed with her lawsuit. And Appellant prays for general relief.

Respectfully Submitted this 1st day of March, 2010.

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CERTIFICATE OF SERVICE

I, Stewart Guernsey, attorney for the Plaintiff, do hereby certify that I have this date served via United States Mail, postage prepaid, a true and correct copy of the above and foregoing Appellant's Reply Brief on the following persons:

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This the 1st day of March, 2010.

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