IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2009-IA-00987-SCT

JANIS ANDERSON — PLAINTIFF/APPELLANT

VS.

ALPS AUTOMOTIVE, INC. — DEFENDANT/APPELLEE

BRIEF OF THE APPELLEE,

ALPS AUTOMOTIVE, INC.

ON INTERLOCUTORY APPEAL FROM
THE CIRCUIT COURT OF LINCOLN COUNTY, MISSISSIPPI

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following list of persons or parties have an interest in the outcome of this case. These representations are made in order that the judges of the Supreme Court may evaluate possible disqualification or recusal.

1. Janis Anderson, Plaintiff/Appellant;
2. ALPS Automotive, Inc., Defendant/Appellee;
3. Paul T. Benton and Tricia L. Beale, counsel for Janis Anderson;
4. John W. Lee, Jr. and Michael J. Shemper, counsel for Janis Anderson;
5. J. Wyatt Hazard, Brenda B. Bethany and the firm of Daniel Coker Horton & Bell, P.A., counsel for ALPS Automotive, Inc.
6. Edward M. Kronk and the firm of Butzel Long, P.C., counsel for ALPS Automotive, Inc.;
7. Stan King Chevrolet, Defendant;
8. Christopher R. Shaw and the firm of Watkins, Ludlam, Winter and Stennis, counsel for Defendant Stan King Chevrolet;
9. Henry Automotive Services, Inc., d/b/a 51 Bridgestone Firestone, Defendant;

10. W. Brady Kellems and the Kellems Law Firm, counsel for Defendant Henry Automotive Services, Inc. d/b/a 51 Bridgestone Firestone;

11. General Motors Corporation, Defendant;

12. Jimmy B. Wilkins and the firm of Watkins & Eager, counsel for Defendant General Motors Corporation;

13. Paul V. Cassisa, Jr. and the firm of Bernard, Cassisa, Elliot & Davis, counsel for Defendant General Motors Corporation; and

14. Honorable Michael M. Taylor, Circuit Court Judge, Lincoln County, Mississippi.

Respectfully submitted, this 27th day of January, 2010.

By: Brenda B. Bethany
BRENDA B. BETHANY

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COUNTERSTATEMENT OF THE ISSUES

1. Once a Plaintiff has learned the identity of a previously sued "fictitious defendant" or has learned the correct identity of a named defendant as to whose identity the Plaintiff had been "mistaken," is Plaintiff required to act with reasonable diligence to join that defendant in order for the claims against that defendant to relate-back to the date of the original filing of a Complaint?

ALPS answers: Yes.

2. Is nine months an unreasonable time to wait after learning the correct identity of the defendant before taking any action to amend the Complaint to name that defendant under either Rule 9(h) or Rule 15(c) of the Mississippi Rules of Civil Procedure?

ALPS answers: Yes.

3. Under the circumstances of this case, is whether the defendant is prejudiced by the amendment irrelevant to the question of reasonable diligence?

ALPS answers: Yes.

STATEMENT OF THE CASE

A. Proceedings And Disposition In The Court Below

Plaintiff/Appellant Janis Anderson ("Anderson") filed an action on February 13, 2006, arising from an automobile accident which occurred on February 15, 2003. (R. at 12, Appellee's ("APPE") R.E. 1.) Anderson's initial Complaint identified two Defendants by name, General Motors Corporation ("GM") and Stan King Chevrolet, Inc., and included two unnamed, fictitious Defendants listed as "ABC, Inc." and "XYZ, Inc." (R. at 12-13.) Defendant/Appellee ALPS Automotive, Inc., ("ALPS") was not named as a Defendant. The case was subsequently removed by GM to the United States District Court for the Southern District of Mississippi.

On April 7, 2006, Anderson filed a Motion to Remand and Motion to Amend Complaint to allow Anderson to name Henry Automotive Services, Inc. d/b/a 51 Bridgestone Firestone in place of one of the unnamed fictitious Defendants. (R. at 191, APPEE R.E. 9.) Anderson's Motion to Remand was granted by the Federal Court on March 14, 2007, and Anderson filed an Amended Complaint to name Henry Automotive Services, Inc. d/b/a 51 Bridgestone Firestone in place of the fictitious "ABC, Inc." defendant on August 2, 2007. (R. at 204, APPEE R.E. 12.) The unnamed "XYZ, Inc." remained a fictitious defendant.

Anderson served her First Set of Interrogatories and Requests for Production on GM on June 22, 2007, and specifically requested that GM identify the manufacturer of the clockspring that was "used on the subject vehicle." (R. at 66 and 225.) On September 10, 2007, GM responded, stating that "Delphi Corporation (formerly a division of GM) has identified Alps Automotive, Inc. . . . as the clockspring supplier." (R. at 225-26, APPEE R.E. 33-34.) GM also identified ALPS as the entity that "designed and validated the clockspring." (R. at 227, APPEE R.E. 35.)

On September 16, 2008, more than one year after Anderson learned that ALPS "supplied, designed and validated" the allegedly "defective" clockspring on the Subject Vehicle, Anderson's counsel contacted the Defendants then in the case and proposed to amend her complaint again -- this time to name ALPS. (R. at 242.) The parties agreed to the proposed amendment and the Court signed an Agreed Order allowing the amendment on November 24, 2008. On December 9, 2008, over 5 years and 9 months after the Accident, Anderson filed her Second Amended Complaint naming ALPS in place of the remaining fictitious Defendant "XYZ, Inc." (R. at 258, APPEE R.E. 36.)

ALPS filed a Motion for Summary Judgment on the basis that the statute of limitations had expired and Anderson's claims did not relate back to the time of the initial filing of the complaint because Anderson did not act with reasonable diligence either before or after the statute of limitations ran. (R. at 170.) On April 20, 2009, the Trial Court heard and, in a bench opinion, granted ALPS' Motion for Summary Judgment. The court focused on Rule 9(h) of the Mississippi Rules of Civil Procedure because that is what had been argued by Anderson, (Transcript, April 20, 2009 at p. 24, Appellant's ("APPT") R.E. 94, lines 7-11), as her basis for seeking to bring ALPS into the lawsuit some 31 months after the statute of limitations had run. The Court said that when ALPS, in the context of an inspection of the clockspring on November 30, 2007:

> announced 'that's our clockspring' at that moment, or soon thereafter as practical, possible, it was incumbent upon the Plaintiff to substitute. I do not find the substitution to have been made with reasonable diligence under 9(h) .... I am satisfied that the Plaintiff did what the Plaintiff could do or needed to do up until the moment in time that the Plaintiff by their own admission learned that ALPS manufactured the clockspring. ... [A]nd at that point nothing excuses the Plaintiff then not naming ALPS as a Defendant, substituting ALPS as a Defendant in this case.

Transcript, April 20, 2009 at p. 37, APPT R.E. 107, lines 4-29. The Trial Court ruled that Anderson's claims against ALPS did not relate back to the filing of the original complaint, and granted ALPS' Motion for Summary Judgment.

Anderson's Motion to Reconsider was heard on May 14, 2009, and at that point Anderson's argument shifted to Rule 15(c) of the Mississippi Rules of Civil Procedure rather than Rule 9(h). The Trial Court denied Anderson's motion, and expanded on its prior ruling, noting that "in the original motion, [the Court] zeroed in, fixed its scrutiny on the period of time after Anderson knew that ALPS manufactured the clockspring." Finding that before that time, Anderson had acted with reasonable diligence, the Court continued:

> However, the Court's analysis after November 30 [2007], when ALPS claimed ownership of the clockspring or manufacture of the clockspring, everything changes at that point, in my mind. At that point under 9(h), ALPS is no longer an unknown fictitious party. They're the manufacturer of the clockspring. And also under Rule 15, whether you look at it as a substitution of parties or whether you look at it as a naming of a fictitious party, whether you're looking at 9 or 15, under Rule 15(c) at that moment there is no mistake. A mistake has been rectified, corrected. ... Once your mistake is corrected, once the knowledge has been given, there's no need for any delay rather than except for the amount of time it takes to print an Amended Complaint.

Transcript, May 14, 2009 at p. 62, APPT R.E. 132, lines 18-29, and p. 63, APPT R.E. 133, lines 5-9.

In response to Anderson's argument that reasonable diligence in naming ALPS was not required and that all that mattered was whether there was prejudice to ALPS, the Trial Court noted:

> [T]he plaintiff's argument that no prejudice had accrued to ALPS because ALPS was represented by counsel and because ALPS had knowledge of the litigation, and the court doesn't really find that -- again, I don't -- the Plaintiff could not claim to be mistaken for the nine-month period after learning of the clockspring's manufacturer, and, therefore, I don't think that the prejudice requirement is even an issue here.

Transcript, May 14, 2009 at p. 64, APPT R.E. 134, lines 12-19.

The Trial Court denied Anderson's Motion for Reconsideration, and Anderson appealed the decision granting Summary Judgment to this Court.

B. Statement Of Relevant Facts

Anderson alleged in her initial Complaint that her husband was driving a 1998 Chevrolet Venture van (the "Subject Vehicle") on **February 15, 2003**, and was hit head on by another vehicle (the "Accident"). Anderson alleged that the airbag on the decedent's (driver's) side of the Subject Vehicle failed to deploy, that her husband died as a result, and that the subject vehicle and/or its components were defective. (R. at 12-19, APPEE R.E. 1-8.)

Over two years later, on June 22, 2005, an inspection of the subject vehicle was conducted by representatives for Anderson and GM and the "clockspring" was removed from the vehicle. (R. at 185-186, APPT R.E. 60-61.) A "clockspring," also referred to as a "coil assembly inflatable restraint" or "SIR/SRS coil assembly," is a component of the airbag system on the Subject Vehicle. It is located at the top of the steering column just under the steering wheel and is used to carry current to an airbag through wires that rotate within the clockspring as the steering wheel turns.

Anderson filed her initial complaint in the Trial Court on **February 13, 2006** two days short of three years after the Accident. The complaint named GM, the vehicle manufacturer, and Stan King Chevrolet, the selling dealer. (R. at 13, APPEE R.E. 2.) ALPS was not named at that time. (R. at 12, APPEE R.E. 1). Anderson did, however, sue unnamed Defendants listed as "ABC, Inc." and "XYZ, Inc.," stating that those unnamed Defendants were "fictitious" and were included "because the identities of all entities involved in the design, manufacture, sale and repair of the subject vehicle and the airbag mechanism at issue *are presently unknown.*" (emphasis added, R. at 13, APPEE R.E. 2). The Complaint included four counts entitled: (I)

Miss. Code Ann. Section 11-1-63; (II) Strict Liability; (III) Negligence; and (IV) Breach of Warranty.[1]

GM removed the case to the United States District Court for the Southern District of Mississippi on **March 10, 2006**. (R. at 1.)

A report prepared for Anderson by Richard Moakes of Consulting Engineers and Scientists, Inc., dated **April 6, 2006** (the "Moakes Report"), concluded, based on an examination of the subject vehicle and records relating to the repair history and data retrieval, that "the *clockspring* fitted to Mr. Anderson's vehicle was defective." (R. at 190, emphasis added.) Thus, based on the Moakes Report, Anderson knew as of about April 6, 2006, that, according to her consultant, the specific cause of the airbag non-deployment was a "defective" clockspring.

In his report, Mr. Moakes explained that because of the issue with the clockspring, the vehicle's fault detection system would set a "code" in the sensing and diagnostic module (SDM) and would illuminate a warning light on the instrument panel "to warn the driver that there is a problem with the air bag circuit and that they should have it checked out by the dealer." (R. at 187.) Mr. Moakes reported that information downloaded from the electronic module in the vehicle indicated that:

> The signal for illuminating the light on the instrument panel had occurred more than 182 hours of vehicle use prior to the download performed by General Motors. This period of time also corresponded to more than 125 ignition cycles. That is, the Venture mini van had been switched on and off more than 125 times while the warning lamp was illuminated.

(R. at 187.)

The Moakes Report then discussed the service history of the Subject Vehicle, noting that it had been serviced by Defendant Stan King Chevrolet on December 6, 2002 (a little more than

[1] Plaintiff's Breach of Warranty count was ultimately dismissed on partial summary judgment by an order entered on May 5, 2009. (R. at 8, APPT R.E. 8.) Plaintiff has not sought leave to appeal the dismissal of that portion of the Complaint.

two months before the accident) and by 51 Bridgestone Firestone (not yet named as a defendant) on January 23, 2003 (about three weeks before the accident). (R. at 190, APPT R.E. 65.) Moakes opined that the evidence he was provided about miles driven by the Anderson family each year, "along with the number of hours that the warning light was allegedly illuminated, showed that the warning lamp should have been illuminated during at least the last two visits to" 51 Bridgestone Firestone and Stan King Chevrolet. According to Mr. Moakes, the service performed by 51 Bridgestone Firestone and Stan King Chevrolet, as described in their records, was such that the repair facilities "should have seen the air bag warning light illuminated and investigated to determine the extent of the problem." (R. at 188, APPT R.E. 63.) Moakes opined that "both 51 Bridgestone Firestone and Stan King Chevrolet, Inc. were negligent in allowing the Venture minivan to leave their facility with a defective clock spring" and "not informing Mr. Anderson that this problem existed which could result in serious injuries or death in the event of a crash." (R. at 190, APPT R.E. 65.)

On **April 7, 2006**, the day after the issuance of the Moakes report, Anderson filed a Motion to Remand and Motion to Amend Complaint arguing that Stan King Chevrolet was properly joined as a real Defendant and seeking leave to substitute Henry Automotive Services, Inc. d/b/a 51 Bridgestone Firestone in place of one of the two unnamed fictitious Defendants. (R. at 191, APPEE R.E. 9.) Anderson's Motion to Remand was granted by the Federal Court on **March 14, 2007**, and Anderson filed an Amended Complaint to name Henry Automotive Services, Inc. d/b/a 51 Bridgestone Firestone in place of the unnamed "ABC, Inc." defendant on **August 2, 2007**. (R. at 204, APPEE R.E. 12.) "XYZ, Inc." remained as a fictitious defendant.

Anderson served her First Set of Interrogatories and Requests for Production on GM on **June 22, 2007** – sixteen months after the statute of limitations ran as to her claims arising out of the Accident – and specifically requested that GM identify the manufacturer of the clockspring

that was "used on the subject vehicle." (R. at 66 and 225.) This request is the earliest indication in the record of any attempt by Anderson, before or after the expiration of the statute of limitations, to identify the manufacturer of the "clockspring" – the specific air bag system component identified as "defective" in the Moakes Report more than one year earlier.

On **September 10, 2007**, GM responded, stating that "Delphi Corporation (formerly a division of GM) has identified Alps Automotive, Inc. . . . as the clockspring supplier." (R. at 225-26, APPEE R.E. 33-34.) GM also identified ALPS, in response to the very next Interrogatory, as the entity that designed and validated the clockspring. (R. at 227, APPEE R.E. 35.) Thus, as of September 10, 2007, more than one year before Anderson took any steps to add ALPS to the case, she knew that ALPS had, at the least, supplied, designed and validated the specific component that Plaintiff's expert had identified as "defective."

According to Anderson's counsel, on **November 30, 2007**, during an inspection of the clockspring in Pennsylvania, an ALPS employee in attendance informed Anderson's counsel that ALPS manufactured the clockspring. The significance of this information was discussed during the Trial Court's April 20, 2009 Hearing on ALPS' Motion for Summary Judgment:

> BY MS. BEALE [Anderson's attorney]: We were under the impression GM manufactured the clockspring.
>
> BY THE COURT: And when did you find that not to be the case?
>
> BY MS. BEALE: 100 percent clear was at the inspection. Because ALPS walked in, a representative from ALPS, and said, "Oh, hey, this is ours."
>
> BY THE COURT: Okay. And that was?
>
> BY MS. BEALE: That was November 30, 2007. Almost December.

Transcript, April 20, 2009 at p. 21, APPT R.E. 91, line 21 – p. 22, APPT, R.E. 92, line 4.

On **September 16, 2008**, more than nine months after Anderson's counsel, by her own account, learned definitely that ALPS was the manufacturer of the clockspring on the Subject

Vehicle, she contacted the Defendants then in the case and proposed to amend her complaint to add ALPS as a named defendant. (R. at 242.) Anderson filed her Second Amended Complaint and named ALPS for the first time, on **December 9, 2008**. (R. at 258, APPEE R.E. 36.)

SUMMARY OF THE ARGUMENT

This case invites this Honorable Court to address and compare the provisions of Mississippi Rules of Civil Procedure 15(c) and 9(h), along with the common law requirement of "reasonable diligence" that must be satisfied by a litigant seeking to take advantage of the "relation back" provisions of the rules in order to escape the consequences of a statute of limitations that has expired. Specifically, the Court is asked to determine (i) whether a plaintiff who is no longer "ignorant of the name of an opposing party" (Rule 9(h)) or no longer laboring under a "mistake concerning the identity of the proper party" (Rule 15(c)) must then exercise "reasonable diligence" in naming the newly identified party as to whom the statute of limitations has long since run, and (ii) whether the failure to exercise reasonable diligence will be overlooked unless and until there is prejudice to the new defendant.

The Trial Court was correct in granting ALPS' Motion for Summary Judgment and finding that Anderson's claims against ALPS did not relate back to the time of the filing of her initial complaint. Anderson's delay of nine months after learning beyond question that ALPS was the manufacturer of the allegedly defective product fell well short of the reasonable diligence required in moving to add ALPS once its identity was known.

Irrespective of whether the case is measured by the provisions of Rule 9(h) (invoked by Anderson's counsel in responding to ALPS' Motion for Summary Judgment, Transcript, April 20, 2009, p. 24, APPT R.E. 94, lines 7-11) or by the provisions of Rule 15(c) (to which Anderson's counsel resorted during the Motion for Reconsideration, Transcript, May 14, 2009, p. 39, APPT R.E. 109, lines 6-16) the inescapable and controlling fact is that as of November 30,

2007, Anderson was no longer "ignorant" or "mistaken" as to who ALPS was and how it fit into this case.

Anderson asks this Court to disregard her failure to exercise reasonable diligence, relying primarily on the arguments that (1) she did not know that ALPS, the product manufacturer, was a "necessary party" to this product liability case until she learned that ALPS did not agree to indemnify General Motors, and (2) ALPS would not be prejudiced if the Court allowed the filing of her Second Amended Complaint to relate back to the filing of the original complaint. Anderson asks this Court at least to excuse, if not condone, the facts that she did nothing to determine ALPS' identity prior to the running of the statute of limitations and then, once she knew ALPS identity and involvement with certainty, she waited for over nine months before taking any action to amend her complaint to sue ALPS. Anderson seeks to rationalize her request by arguing that, unless ALPS was prejudiced, her lack of diligence should have no consequence. Under Anderson's analysis, once the statute of limitations has expired, the option for an amended complaint adding a new party to "relate back" would remain open for an undefined period of time governed not by the reasonableness of plaintiff's conduct but rather (and only) by whether the proposed defendant is prejudiced. That approach would render the statute of limitations meaningless. The Trial Court correctly found that reasonable diligence is a prerequisite to avoiding the consequences of the running of the statute of limitations, that the requirement is not waived when there is no prejudice to the belatedly added defendant, and that a delay of nine months is too long.

The Trial Court's decision is supported by established Mississippi law and makes good sense. ALPS asks that the summary judgment in its favor be affirmed on the ground that Anderson did not exercise reasonable diligence to name ALPS after she knew that it manufactured the component claimed to be defective.

ARGUMENT

A. Standard Of Review

The standard of review in considering a trial court's grant or denial of summary judgment is *de novo*. *Satchfield v. R.R. Morrison & Son, Inc.*, 872 So.2d 661, 663 (¶5) (Miss. 2004); *McMillan v. Rodriguez*, 823 So.2d 1173, 1176-77 (¶9) (Miss. 2002). In its review, the Court must examine all the evidentiary matters before it, including admissions in pleadings, answers to interrogatories, depositions, and affidavits. *Aetna Cas. & Sur. Co. v. Berry*, 669 So.2d 56, 70 (Miss. 1996).

B. Plaintiff's Appeal Is Grounded On Flawed Factual And Legal Propositions

Reduced to their essence, Anderson's arguments to this Honorable Court rely on the following propositions:

1. When she filed her original complaint in February 2006, although she named two "fictitious" defendants involved in the design, manufacture, sale and repair of the vehicle and the airbag mechanism (R. at 35), "there was no way plaintiff could have known or even thought that anyone other than General Motors manufactured the clockspring." Appellant's Brief, p. 5.
2. Although ALPS had been identified in discovery as having *supplied*, *designed* and *validated* the clockspring, Anderson had no reason to think someone other than GM had *manufactured* the clockspring until November 30, 2007.
3. Even though Anderson learned on November 30, 2007 that ALPS had indeed manufactured the clockspring, Anderson "could not determine that ALPS was a necessary party to the litigation" until August 2008 when GM told Anderson that ALPS was not indemnifying GM. Appellant's Brief, p. 8.

4. Anderson had no reason to sue ALPS as the manufacturer of the clockspring until Anderson learned that ALPS was not indemnifying GM.

5. The provisions of Rules 15(c) and 9(h) are interchangeable and equally available to a plaintiff seeking to have an amendment relate back, irrespective of the particular facts and procedural history of a case.

6. While reasonable diligence is required in identifying the true identity of a fictitious defendant, once the identity is established, there is no requirement for a plaintiff to exercise any sort of reasonable diligence in adding a new defendant.

7. If reasonable diligence were required *after* the true identity of the intended defendant is known, Anderson's unexplained nine-month delay satisfies the requirement.

None of these propositions is factually or legally supportable.

C. Rules 9(h) And 15(c) Address Different Circumstances, They Are Not Interchangeable[2]

It is plain from the record that Anderson's attempt to add ALPS to the lawsuit was done pursuant to Rule 9(h). The Second Amended Complaint eliminated fictitious defendant XYZ, Inc. and inserted in its place ALPS Automotive Inc. (R. at 258, APPEE R.E. 36.) That ALPS was added pursuant to Rule 9(h) was not a concept conjured up by ALPS. It was asserted unequivocally by Anderson's counsel:

> And in this case, the plaintiff did exactly what is required by 9(h), substituted. We didn't add. We didn't change. We substituted a fictitious defendant.

Transcript, April 20, 2009 at p. 24, APPT R.E. 94, lines 9-11.

In response to the grant of summary judgment, plaintiff sought to rewrite the history of the case by asking the court to view the amendment as something different from what had

[2] For the convenience of the court and as directed by MRAP 28(f), Rules 9 and 15 of the Mississippi Rules of Civil Procedure are reproduced and attached as Addendum A to this brief.

occurred, namely an amendment changing a party as a result of a mistake under 15(c). Plaintiff's approach on appeal necessarily rests on the assumption that the two rules are essentially interchangeable.

While amended pleadings under Rules 9(h) and 15(c) of the Mississippi Rules of Civil Procedure can in appropriate cases "relate back" to the date of the original pleading, the Rules by their terms address different circumstances. They are not interchangeable.

Rule 9(h) provides a vehicle for naming a "fictitious party" when a plaintiff is "ignorant" of the name of the intended defendant and "so alleges in his pleading." Once the identity of the defendant is learned, it is substituted for a previously named "fictitious" defendant.

Rule 15(c) is different. It is intended not for the "ignorant" plaintiff, but for one who is "mistaken" concerning the identity of the proper party and must, therefore, "change" the party against whom a claim is asserted. By its express language, Rule 15(c) does not apply to a Rule 9(h) amendment identifying a fictitious party.

1. Rule 15(c) Does Not Apply to this Case Because Plaintiff Did Not "Change" a Party.

The cornerstone of Anderson's Motion to Reconsider under Rule 15(c) in the Trial Court and her argument here is her assertion that "but for the mistaken belief that General Motors manufactured the clockspring, ALPS would have been named in the original Complaint." Anderson seeks refuge in the language of Rule 15(c) which allows relation back if the party to be brought in by amendment "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party." MRCP 15(c)(2).

The relation back provisions of Rule 15(c) apply in two circumstances: (1) when a claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence

set forth or attempted to be set forth in the original pleading; and (2) when the amendment is "an amendment changing the party against whom a claim is asserted." The first circumstance is not in issue in this case – there was no change in the claim made against an existing party. Thus, to fall under Rule 15(c), Anderson must rely instead on the provision relating to an *"amendment changing the party against whom a claim is asserted."* The last sentence of Rule 15(c)(2) provides unequivocally that "an amendment pursuant to Rule 9(h) is *not an amendment changing the party against whom a claim is asserted.*"

Anderson's argument for the application of Rule 15(c) ignores the fact that the "knowledge," "prejudice" and "but for a mistake" provisos of Rule 15(c)(2) simply do not apply unless the proposed amendment is one "changing the party against whom a claim is asserted."

Anderson cites *Estes v. Starnes,* 732 So.2d 251 (Miss. 1999). *Estes* involved a suit arising out of a traffic accident. Plaintiff was mistaken as to whether Mr. Starnes or his minor son was driving the car involved. Plaintiff sued the father, rather than the son. Ultimately, Plaintiff was allowed to amend her complaint because she had sued the wrong party. The result in *Estes* is explained by and, indeed, dependent upon the fact that the Motion to Amend upon which relation back was sought was "to change the party against whom the claim is asserted." 732 So.2d at 252 (¶3). In this case, Anderson does not claim she sued the wrong party. GM is still a named defendant. Instead, she merely substituted ALPS in place of a previously-unnamed fictitious defendant – as contemplated under Rule 9(h). *Estes* is distinguishable.

Anderson argues the significance of this Court's ruling in *Womble v. Singing River Hospital,* 618 So.2d 1252 (Miss. 1993) – a medical malpractice case. That opinion appears to disregard the last sentence of Rule 15(c)(2), which unambiguously provides that "an amendment pursuant to Rule 9(h) is not an amendment changing the party against whom a claim is asserted." The explanation, and point of distinction, of the *Womble* decision can be found, however, in the

Court's finding that the Plaintiff could not invoke Rule 9(h), because Plaintiff was not "ignorant" (in the sense contemplated in Rule 9(h)) of the physicians' identities. 618 So.2d at 1267. In this case, the Trial Court properly accepted Anderson's assertion in her Complaint and her response to ALPS Motion for Summary Judgment that Rule 9 (h) applied because she was "ignorant of ALPS' identity." (R. at 308.) Anderson does not now claim she was not "ignorant" in the Rule 9(h) sense. Rule 15(c) does not apply in this case and *Womble* is distinguishable.

2. Rule 9(h) Governs This Case and Requires "Reasonable Diligence."

Because Rule 15(c) simply does not fit the procedural facts of this case, Anderson's attempt to substitute ALPS for a previously named "fictitious" party must be supported, if at all, on the provisions of Rule 9(h).

Pursuant to Rule 9(h) of the Mississippi Rules of Civil Procedure, "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 name 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." See M.R.C.P. 9(h). That is precisely what Anderson attempted to do. This Court has consistently held that "the purpose of Rule 9(h) is to provide a mechanism to bring in responsible parties, known, but not identified, who can only be ascertained through the use of judicial mechanisms such as discovery. It is not designed to allow tardy plaintiffs to sleep on their rights." *Bedford Health Properties v. Estate of Williams*, 946 So.2d 335, 341 (¶ 13) (Miss. 2006) (*quoting Doe v. Mississippi Blood Services*, 704 So.2d 1016, 1019 (¶14) (Miss. 1997)).

The relation-back privilege provided for fictitious parties requires the plaintiff to actually exercise a reasonably diligent inquiry into the identity of the fictitious party. *See Doe*, 704 So.2d at 1019 (¶13). Furthermore, this diligence must entail the actual exercise of "due diligence"

rather than a mere finding that the party could have found the defendant's identity if it had exercised "due diligence." *Id.* at 1019 (¶16); *Nguyen v. Mississippi Valley Gas Co.*, 859 So.2d 971, 979 (¶34) (Miss. 2002).

In *Doe*, this Court emphasized that "[t]he trial court's review of whether the plaintiff exercised a reasonably diligent inquiry is to be strict," and that "Mississippi already enjoys one of the nation's longest general statute of limitations. This need not be judicially expanded to allow non-diligent plaintiffs the opportunities to sleep on their rights indefinitely." *Id.*, 704 So.2d at 1019 (¶13).

Anderson is precisely the type of "tardy plaintiff" who "slept on her rights" regarding her product liability claims against ALPS.

D. Under Either Rule "Reasonable Diligence" Is Required After Learning The Identity Of A Fictitious Or Mistakenly Identified Defendant

In its ruling on April 20, the Court recognized that "9(h) requires that the Plaintiff act diligently to substitute parties when fictitious parties are named." (Transcript, April 20, 2009 at p. 36, APPT R.E. 106, lines 12-14.) On reconsideration, the Trial Court rejected Anderson's arguments under Rule 15(c) about ALPS' notice or lack of prejudice. The Trial Court found that under either Rule 9(h) or Rule 15(c) Anderson's unexplained nine month delay from November 2007 until September of 2008 before taking any action to bring ALPS into the case was unreasonable, and, for that reason, that Anderson's Second Amended Complaint naming ALPS did not relate back.

In her arguments in the Trial Court and to this Honorable Court, Anderson seems to have conceded that in order to take advantage of the relation back provisions of either Rule 9(h) or Rule 15(c), a plaintiff must exercise reasonable diligence to resolve the "ignorance" (Rule 9(h)) or "mistake" (Rule 15(c)). The issue Anderson presents to this Honorable Court is whether there is any reasonable diligence requirement in moving forward to seek leave to file an amended

complaint once the "ignorance" or "mistake" is resolved. In her brief to this Honorable Court, Anderson says she has been unable to locate a Mississippi Supreme Court decision "that has addressed the issue of the time to amend the complaint after reasonable diligence has been exercised in ascertaining the fictitious party's identity." (Appellant's Brief at p. 13.) In other words, Anderson suggests that Mississippi law thus far is silent on whether, once ignorance or a mistake is resolved, the party must still act with reasonable diligence in order to file a pleading that will relate back. In fact, this Court has considered the reasonableness of a plaintiff's actions in seeking to amend a complaint after issues relating to identification of the proper party have been resolved.

In *Wilner v. White*, 929 So.2d 315 (Miss. 2006), this Honorable Court considered and affirmed a summary judgment in a malpractice action in favor of certain defendants whom the plaintiff had sought to add by amendment and relation back after the statute of limitations had expired. The Court discussed the provisions of both Rule 9(h) and Rule 15(c). This Honorable Court observed that Rule 9(h) would apply when there is a "substitution of a true party name for a fictitious one," and that Rule 15(c) "clearly contemplates a 'new party to be added by the amendment.'" 929 So.2d at 322 (¶6).

In discussing the provisions of Rule 15(c), the rule Anderson would have applied in this case, this Honorable Court noted the three requirements of Rule 15(c): (i) claim in the amended complaint arises out of the same conduct, transaction or occurrence, (ii) newly named defendant must have received notice within the prescribed period such that it would not be prejudiced, and (iii) the newly named defendant should have known that an action would have been brought against him but for a mistake existing as to the parties' identities. 929 So.2d at 323 (¶8). In *Wilner* the Court found that the first two requirements were satisfied. The Court then turned to

the third requirement, mistake, and found that there had been no mistake concerning the proposed defendant's identity. What the Court said next is what matters here:

> Also, Wilner unquestionably failed to make a reasonably diligent effort to add White's name to the complaint sooner. ... Wilner admits that months before she filed her motion to amend she was well aware of the possibility of a claim she might have against White. Why she did not attempt to add White sooner is perplexing.

929 So.2d at 324 (¶9). This Honorable Court held:

> Further, Wilner's argument that her amended complaint should relate back to the date of the original complaint under Miss. R. Civ. P. 15(c) fails. There was no mistake as to White's identity, and Wilner did not exercise reasonable diligence in adding the newly named defendants.

929 So.2d at 324 (¶10). In this case Anderson argues that she was "mistaken" as to the identity of ALPS and that she is entitled to relief under Rule 15(c). Even if she had been "mistaken" in the sense contemplated by Rule 15(c), and ignoring the final sentence of Rule 15(c)(2), as of November 30, 2007 she was no longer mistaken. Like plaintiff Wilner, Anderson knew "months before she filed her motion to amend" of the "possibility of a claim she might have against" ALPS. And like plaintiff Wilner, Anderson did not exercise reasonable diligence in adding ALPS.

Under *Wilner* this Honorable Court has recognized the commonsense requirement that a plaintiff acting on the borrowed time provided by the relation back rule must act with reasonable diligence once the truth is known. Anderson did not.

E. Anderson's Attempt To Transform Her Admitted Nine-Month Delay Into A Nineteen-Day Delay Should Be Rejected

In the Trial Court Anderson acknowledged the nine month delay, arguing that "we were fully aware of ALPS, and within at least a nine month time frame we asked for leave, granted leave, amended the Complaint." Transcript, April 20, 2009 at p. 25, lines 10-12. Anderson argued that a nine month delay was not unreasonable.

The Trial Court found Anderson's nine-month delay in taking steps to name ALPS after her counsel was told directly that ALPS manufactured the clockspring was unreasonable. Having had her nine-month argument rejected in the Trial Court, Anderson revised her position, claiming before this Honorable Court that it was not really a *nine-month* delay, but only a *19 day* delay because it was not until August of 2008, when GM responded to Anderson's Request for Admission regarding its indemnification agreement with ALPS, that Anderson learned that ALPS was a "necessary party to the litigation." Anderson argues that in this product liability action, the manufacturer of the allegedly defective product was not considered to be a "necessary party" until Anderson learned about some possibly applicable indemnification agreement between GM and ALPS and ALPS' refusal to indemnify GM.

Paradoxically, Anderson anticipates ALPS' argument that "knowing [ALPS] manufactured the clockspring provided enough facts that would cause a lawsuit to be filed against it." (Appellant's Brief, pp. 8-9.) Anderson goes on to argue that it is "an established rule of law that the company that holds itself out as the manufacturer of a final product is liable for any defective components in the product." (Appellant's Brief, p. 9.) Thus, Anderson seems to say, she didn't really need to sue ALPS at all. She then goes on to say that when she learned from GM that ALPS was not indemnifying GM "ALPS stepped out from behind General Motors and exposed itself to be a defendant in the instant case." (Appellant's Brief, p. 9.) In other words, if ALPS were indemnifying GM, Anderson would have no reason to sue ALPS. The argument is puzzling at best.

In any event, this revised theory should be rejected out of hand. Anderson argued in the Trial Court that the reason she did not act sooner to name ALPS as a defendant was because she believed GM to be the manufacturer of the clockspring, and that she needed discovery to determine that ALPS, in fact, manufactured the part. (R. at 308, 346-347). Anderson's

Supplement to her Opposition to ALPS' Motion for Summary Judgment acknowledged the relevant time frame: "The time between when ALPS was first identified as the supplier of the clockspring and held an inspection of the clockspring [November 30, 2007], and when Anderson requested the agreement of counsel to an Agreed Order for leave to amend the complaint and substitute ALPS for the last fictitious defendant [September 16, 2008] was not unreasonable." (R. at 347, APPT R.E. 45).

Anderson has claimed that GM's discovery responses were deficient in their characterization of ALPS' involvement, and she has gone to great lengths attempting to draw a distinction between ALPS' status as a supplier (and designer) of the clockspring and its later-confirmed role as the manufacturer. Anderson has taken the position that it was critical to determine that ALPS was the manufacturer of the clockspring. Now, in order to escape the consequences of her delay, she claims even when she knew ALPS was the manufacturer (i.e. she was no longer "mistaken") that *still* was not enough to require her to act with diligence to name ALPS. This new position flatly contradicts her previous stance.

Moreover, the purported indemnification agreement, even if applicable to this claim, has no impact whatsoever on whether ALPS is a "necessary party."[3] Anderson's incredible claim that she did not consider ALPS a "necessary party to the litigation" until she knew of the indemnity agreement is no more than an attempt somehow to avoid the fact that she waited nine months to seek the agreement of counsel to name ALPS as a defendant in this matter. Anderson should not be permitted to attempt to turn what was admitted to be a nine-month delay into a

[3] There is no evidence in the record that the "indemnity agreement" to which Anderson refers has any applicability in this case. Indeed, Anderson acknowledges information that ALPS has not agreed to indemnify GM in this lawsuit. Appellant's Brief, pp. 8-9. And even without ALPS (or GM), Anderson's claims against the other two parties she sued will remain.

"nineteen-day" delay because of some unexplained significance of an inapplicable indemnification agreement.

F. The Trial Court Properly Held That Prejudice Is Irrelevant To Anderson's Failure To Exercise Reasonable Diligence

The Trial Court rejected Anderson's arguments regarding ALPS' notice or lack of prejudice. The Trial Court found that Anderson's nine-month delay from November 2007 until September of 2008 before taking any action to bring ALPS into the case was unreasonable, and, on that basis, that Anderson's Second Amended Complaint naming ALPS did not relate back.

With respect to the Anderson's prejudice argument, the Trial Court stated:

> The Court notes, for the record, the Plaintiff's argument that no prejudice had accrued to ALPS because ALPS was represented by counsel and because ALPS had knowledge of the litigation, and the court doesn't really find that – again, I don't – the Plaintiff could not claim to be mistaken for the nine-month period after learning of the clockspring's manufacturer, and, therefore, I don't think that the prejudice requirement is even an issue here. I simply think nine months is too long. And that's all that needs to be decided.

Transcript, May 14, 2009 at p. 64, APPT R.E. 134, lines 11-19.[4]

Anderson necessarily argues that if ALPS cannot show that it would be prejudiced by the amendment to add ALPS as a defendant, there is no need for her to act with reasonable diligence to bring ALPS into the case. That analysis would make no sense as a matter of policy. The focus of the Trial Court's inquiry was whether the statute of limitations expired on Plaintiff's claim and whether, under these circumstances, Plaintiff should be permitted to "relate back" her claims against ALPS under Mississippi law. Any question of ALPS' notice or prejudice is irrelevant and Plaintiff has offered no authority to the contrary. Mississippi courts have stated that

[4] Anderson's assertion at p. 3 of her Petition that "the trial court did hold that ALPS suffered no prejudice by the amendment" is not correct. The Trial Court made no finding on whether ALPS was or was not prejudiced. Instead it held that the lack of prejudice was irrelevant in the face of the unexplained nine-month delay.

> [T]he primary purpose of statutory time limitations is to compel the exercise of a right of action within a reasonable time. These statutes are founded upon the general experience of society that valid claims will be promptly pursued and not allowed to remain neglected.

Miss. Department of Pub. Safety v. Stringer, 748 So. 2d 662, 665 (Miss. 1999).

The requirement of reasonable diligence must be recognized and adhered to because if either rule allowed plaintiffs to act otherwise, a claim could relate-back at any time, seemingly in perpetuity – limited *only* by whether a potential defendant is prejudiced. Neither of these rules is intended to condone delay or otherwise reward plaintiffs for their failure to act reasonably to bring proper parties into an action after the expiration of the applicable statute of limitations.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the Trial Court's Judgment Granting Defendant/Appellee ALPS Automotive, Inc.'s Motion for Summary Judgment and remand the case to the Circuit Court of Lincoln County to continue as to the remaining defendants without ALPS Automotive, Inc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I Brenda Bethany, do hereby certify that I have this day mailed, via United States Mail, postage pre-paid, a true and correct copy of the above and foregoing document to the following:

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Brenda Bethany

ADDENDUM A

RULE 9. PLEADING SPECIAL MATTERS

(a) Capacity. The capacity in which one sues or is sued must be stated in one's initial pleading.

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally.

(c) Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) Official Document or Act: Ordinance or Special Statute. In pleading an official document or official act it is sufficient to aver that the document was issued or the act was done in compliance with the law. In pleading an ordinance of a municipality or a county, or a special, local, or private statute or any right derived therefrom, it is sufficient to identify specifically the ordinance or statute by its title or by the date of its approval, or otherwise.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(f) Time and Place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) Special Damage. When items of special damage are claimed, they shall be specifically stated.

(h) Fictitious Parties. 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 name 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.

(i) Unknown Parties in Interest. In an action where unknown proper parties are interested in the subject matter of the action, they may be designated as unknown parties in interest.

RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS

(a) Amendments. A party may amend a pleading as a matter of course at any time before a responsive pleading is served, or, if a pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within thirty days after it is served. On sustaining a motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6), or for judgment on the pleadings, pursuant to Rule 12(c), leave to amend shall be granted when justice so requires upon conditions and within time as determined by the court, provided matters outside the pleadings are not presented at the hearing on the motion. Otherwise a party may amend a pleading only by leave of court or upon written consent of the adverse party; leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders.

(b) Amendment to Conform to the Evidence. When issues not raised by the pleadings are tried by expressed or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the maintaining of the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence. The court is to be liberal in granting permission to amend when justice so requires.

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by Rule 4(h) for service of the summons and complaint, the party to be brought in by amendment:

(1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining the party's defense on the merits, and

(2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party. An amendment pursuant to

Rule 9(h) is not an amendment changing the party against whom a claim is asserted and such amendment relates back to the date of the original pleading.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions, occurrences, or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

[Amended effective July 1, 1998; amended effective April 17, 2003 to allow amendments on dismissal under Rule 12(b)(6) or judgment on the pleadings under Rule 12(c) where the court determines that justice so requires.]