IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JANIS ANDERSON, individually and on behalf of all Wrongful Death Beneficiaries of JESSE J. ANDERSON, JR., Deceased — **APPELLANT**

vs. — **NO. 2009-IA-00987-SCT**

ALPS AUTOMOTIVE, INC. — **APPELLEE**

BRIEF OF THE APPELLANT,

JANIS ANDERSON, individually and on behalf of all Wrongful Death Beneficiaries of

JESSE J. ANDERSON, JR., Deceased

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

ORAL ARGUMENT NOT REQUESTED

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ALPS AUTOMOTIVE, INC. **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

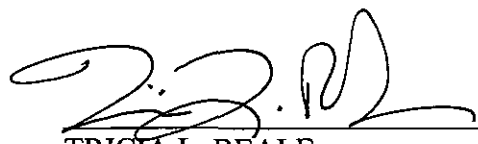
The undersigned Counsel of Record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court may evaluate possible disqualification or recusal.

1. Honorable Michael M. Taylor, Circuit Court Judge, Lincoln County, Mississippi;
2. Janis Anderson, Appellant and Plaintiff in the underlying cause of action;
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. ALPS Automotive, Inc., Appellee and Defendant in the underlying cause of action;
6. J. Wyatt Hazard and the firm of Daniel Coker Horton & Bell, P.A., counsel for ALPS Automotive, Inc.;
7. Edward M. Kronk and the firm of Butzel Long, P.A., counsel for ALPS Automotive, Inc.;
8. Christopher R. Shaw and the firm of Watkins, Ludlam, Winter & Stennis, counsel for Stan King Chevrolet, Inc., Defendant in the underlying cause of action;
9. W. Brady Kellems and the Kellems Law Firm, counsel for Henry Automotive

Services, Inc. d/b/a 51 Bridgestone Firestone, Defendant in the underlying cause of action;

10. Jimmy B. Wilkins and the firm of Watkins & Eager, counsel for General Motors Corporation, Defendant in the underlying cause of action

11. Paul V. Cassisa, Jr. and the firm of Bernard, Cassisa, Elliot & Davis, counsel for General Motors Corporation, Defendant in the underlying cause of action.



TRICIA L. BEALE
Counsel for Appellant, Janis Anderson

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Mississippi Supreme Court Cases

United States District Court Cases

Cases from Other Jurisdictions

Rules of the Court

STATEMENT OF THE ISSUES

1. IN A CASE OF FIRST IMPRESSION IN MISSISSIPPI, WHETHER THE TRIAL COURT'S INTERPRETATION OF RULE 15(c) OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE, FINDING THAT THE LACK OF PREJUDICE TO THE DEFENDANT IS IRRELEVANT TO THE DETERMINATION OF WHETHER AN AMENDED COMPLAINT RELATES BACK TO THE DATE OF THE ORIGINAL COMPLAINT, IS IN ERROR?

2. WHETHER THE TRIAL COURT'S INTERPRETATION OF RULE 15(c) OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE, FINDING THAT A 9 MONTH PERIOD BETWEEN THE TIME THE IDENTITY OF A MISTAKEN DEFENDANT IS KNOWN AND THE TIME LEAVE IS REQUESTED TO AMEND THE COMPLAINT TO ADD THE DEFENDANT IS UNREASONABLE, IS IN ERROR?

3. WHETHER THE TRIAL COURT'S INTERPRETATION OF RULE 9(h) OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE, FINDING THAT THE PLAINTIFF MUST EXERCISE DUE DILIGENCE TO AMEND THE COMPLAINT AFTER THE IDENTITY OF A FICTITIOUS PARTY IS KNOWN, IS IN ERROR?

4. WHETHER THE TRIAL COURT'S INTERPRETATION OF RULE 9(h) OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE, FINDING THAT A 9 MONTH PERIOD BETWEEN THE TIME THE IDENTITY OF A FICTITIOUS DEFENDANT IS KNOWN AND THE TIME LEAVE IS REQUESTED TO AMEND THE COMPLAINT TO ADD THE DEFENDANT IS UNREASONABLE, IS IN ERROR?

STATEMENT OF THE CASE

A. Course of the Proceedings and Disposition in the Court Below

This litigation centers around Jesse J. Anderson, Jr., a husband and a father who was killed in an automobile collision on February 15, 2003, as a result of the failure of the airbag in his 1998 Chevrolet Venture van to deploy. Plaintiff's expert, Richard C. Moakes, a chartered professional mechanical engineer, made a preliminary finding that a component part of the airbag called the clockspring was defective.

On February 13, 2006, Plaintiff, the Decedent's wife, filed a Complaint in the Circuit Court of Lincoln County, Mississippi, for the wrongful death of her husband against Defendants, General Motors Corporation, Stan King Chevrolet, Inc., and ABC, Inc. and XYZ, Inc. (R. Vol. I at 12.

On March 10, 2006, Defendant General Motors Corporation removed the case to the United States District Court of the Southern District of Mississippi, Jackson Division based on the alleged improper joinder of Defendant Stan King Chevrolet, Inc. (R. Vol. I at 20)

On April 7, 2006, Plaintiff timely filed her Motion to Remand and Motion to Amend Complaint to add Defendant 51 Bridgestone Firestone.

On April 17, 2006, a text-only order was entered by the United States Magistrate Judge staying the case pending a ruling on the Motion to Remand.

On March 19, 2007, the United States District Court granted Plaintiff's Motion to Remand and sent the case back to the Circuit Court of Lincoln County, Mississippi. (R. Vol. I at 44)

On April 2, 2007, a certified copy of the Order granting remand was sent to the Circuit Clerk of Lincoln County, Mississippi.

On June 26, 2007, Plaintiff served Defendant General Motors Corporation with Interrogatories and Requests for Production of Documents. (R. Vol. I at 66)

On September 13, 2007, Defendant General Motors Corporation served Plaintiff with its Supplemental Responses to Plaintiff's First Set of Interrogatories and Plaintiff's First Set of Requests for Production. (R. Vol. I at 68) In response to Interrogatory No. 9, Defendant General Motors Corporation identified ALPS Automotive, Inc. as the clockspring supplier, not the manufacturer.

Counsel for Defendant General Motors Corporation scheduled a non-destructive inspection of the clockspring on November 30, 2007, wherein a representative from ALPS Automotive, Inc. conducted the inspection.

Thereafter, from February 2008 through September 2008, Plaintiff was served with discovery requests from Defendant General Motors Corporation from its Second Set through Seventh Set of Requests for Admissions, Second Set through Fifth Set of Interrogatories, and Second Set through Sixth Set of Requests for Production. (R. Vol. I at 74 through 140)

On August 7, 2008, Plaintiff served her First Set of Requests for Admissions to General Motors Corporation. (R. Vol. I at 96)

On August 27, 2008, General Motors served its responses to Plaintiff's First Set of Requests for Admissions wherein General Motors admitted that ALPS Automotive, Inc. "has not agreed to indemnify GM in this lawsuit." (R. Vol. I at 118; R. Vol. II at 295)

On September 16, 2008, Plaintiff circulated a proposed Agreed Order for Leave to all counsel of record to obtain agreement of counsel for leave to file her Second Amended Complaint and add ALPS Automotive, Inc. as a defendant. (R. Vol. II at 242)

On October 14, 2008, Plaintiff presented the Trial Court with the Agreed Order for

Leave, executed by counsel for the parties.

On November 24, 2008, the Court executed the Agreed Order for Leave. (R. Vol. I at 145)

On December 9, 2008, Plaintiff filed her Second Amended Complaint adding ALPS Automotive, Inc. as a defendant. (R. Vol. II at 159)

On February 19, 2009, Defendant ALPS filed its Motion for Summary Judgment alleging that the statute of limitations on Plaintiff's claims against ALPS had expired and that Plaintiff did not exercise reasonable diligence to ascertain the identity of ALPS in compliance with **Mississippi Rules of Civil Procedure 9(h) and 15(c) for fictitious parties only. The Motion for Summary Judgment contained no argument whatsoever under Mississippi Rules of Civil Procedure 15(c) regarding an amendment changing a party against whom a claim is asserted.** (R. Vol. II at 170)

On April 20, 2009, Defendant ALPS's Motion for Summary Judgment was heard before the Trial Court and a bench ruling was made granting the Motion for Summary Judgment under MRCP 9(h) solely on the grounds that nine (9) months had passed between the time Plaintiff learned that Defendant ALPS manufactured the clockspring and the time Plaintiff requested leave to amend the complaint to add ALPS as a defendant. The Trial Court did hold, however, that Plaintiff exercised reasonable diligence in ascertaining ALPS's identity which is the only applicable requirement under MRCP 9(h). (Transcript, April 20, 2009, at 38/Lines 10-16, RE 107/Lines 10-16.)

On April 23, 2009, Plaintiff filed her Motion to Reconsider (RE 51-57) because, during the April 20th hearing, counsel for ALPS admitted **for the first time** that ALPS had actual knowledge of Plaintiff's claims as early as **June 2005**, well within the original three (3) year

statute of limitations on Plaintiff's claims. (Transcript, April 20, 2009, at 15 - 17; RE 85-87) The Trial Court was requested to consider Plaintiff's Second Amended Complaint under MRCP 15(c) and not MRCP 9(h). (R. Vol. III at 360)

On May 14, 2009, Plaintiff's Motion to Reconsider was heard before the Trial Court. (Transcript, May 14, 2009, at 38/Line 12 through 65; RE 108-135) The Trial Court denied Plaintiff's Motion to Reconsider solely on the grounds that nine (9) months had passed between the time Plaintiff learned that ALPS manufactured the clockspring and the time Plaintiff requested leave to amend the complaint to add ALPS as a defendant. The Trial Court did hold that ALPS suffered **no prejudice** by the amendment, which is a requirement under MRCP 15(c), and ALPS presented absolutely no argument to the contrary in its pleadings, nor in its oral argument. (Transcript, May 14, 2009, at 64/Lines 11-15; RE 134/Lines 11-15)

On June 18, 2009, Plaintiff timely filed her Petition for Interlocutory Appeal by Permission.

On June 1, 2009, Defendant General Motors filed for bankruptcy protection. (R. Vol. III at 385)

On June 22, 2009, this Honorable Court granted Plaintiff's Petition for Interlocutory Appeal and stayed the trial court proceedings pending resolution of the appeal. (R. Vol. III at 413)

B. Statement of the Facts

I. The death of Jesse J. Anderson, Jr.

The Decedent, Jesse J. Anderson, Jr., was a loving father and husband whose life was terminated prematurely at the age of 52 years old. He was married to the Plaintiff, Janis Anderson, for over twenty-years and had three (3) children. (R. Vol. I at 12)

On February 15, 2003, the Decedent, Jesse Anderson, Jr., was driving the Plaintiff to work in a 1998 Chevrolet Venture Van. The Andersons had just left their home traveling westbound on Highway 84 in Monticello, Mississippi. Around the same time, Michael Beasley was on his way home from work and was traveling eastbound on Highway 84. Mr. Beasley fell asleep and crossed the center line of the Highway hitting the Anderson's vehicle head-on. (R. Vol. I at 13)

Upon impact, Janis Anderson's airbag deployed and she survived. However, at no time during or subsequent to the impact and/or impacts sustained by the 1998 Chevrolet Venture Van did Jesse Anderson's airbag deploy. As a result, Jesse Anderson was killed. (R. Vol. I at 13-14)

In June 2005, before the Complaint was filed and within the original three (3) year statute of limitations, an inspection of the subject 1998 Chevrolet Venture Van took place. A representative from General Motors Corporation and their counsel were present at the inspection. The part of the vehicle called a clockspring was removed and visually inspected. The clockspring is the part of the vehicle that provides the necessary electrical circuit link between the steering wheel column and the steering wheel itself. It is supposed to provide a continuous electrical circuit throughout the entire steering wheel rotation range. Upon command for airbag deployment, a current is sent up the steering column through the clockspring to deploy the airbag. If this electrical circuit is broken at any location, inflation of the airbag will not commence. (RE 58-66 and RE 67 (photograph))

The only identifying marks on the clockspring are the letters "GM" followed by a set of numbers. There was no way Plaintiff could have known or even thought that anyone other than General Motors manufactured the clockspring. ALPS's name does not appear anywhere on the clockspring. In fact, the identifying name on the clockspring is General Motors. (RE 68-69)

Apparently, General Motors knew who manufactured the clockspring because, after that inspection, in June 2005, General Motors notified ALPS of Plaintiff's defective product claims as was admitted by counsel for ALPS at the April 20, 2009, hearing on ALPS's Motion for Summary Judgment. (Transcript, April 20, 2009, at 15-17)

Thereafter, on February 13, 2006, the instant lawsuit was filed against General Motors Corporation, Stan King Chevrolet, Inc., the seller of the van in question, and two (2) fictitious defendants.

After removal and remand, and the remand stay was lifted, the discovery phase of the litigation began. On June 22, 2007, Plaintiff propounded her First Set of Interrogatories and Requests for Production of Documents on Defendant General Motors Corporation. (R. Vol. I at 66) Relevant to the issues on appeal is Interrogatory No. 9 which is fully set forth as follows:

INTERROGATORY NO. 9: Please identify by name and address the company that designed and manufactured the SDM, clockspring, and airbag readiness light system used on the subject vehicle. If different components were used in different model years of the Chevrolet Venture van platform, list the following information for each model year:

a. The vehicle;
b. The clockspring manufacturer;
c. The SDM manufacturer; and
d. The airbag readiness light manufacturer.

RESPONSE: GM purchased the SDM from Delphi.

a. General Motors manufactured the 1998 Chevrolet Venture van, in part, and assembled it in final form. GM refers plaintiff to the Prefatory Statement to these responses for additional information.
b. Delphi Saginaw Steering Systems, which was then a division of General Motors Corporation, supplied the steering column in the 1998 Chevrolet Venture van, as an assembly that included the clockspring. The operations of Delphi Saginaw Steering are now part of Delphi Corporation. Delphi Corporation has identified Alps Automotive, Inc., 1500 Atlantic Blvd., Auburn Hills, Michigan 48326 as the clockspring supplier. GM refers plaintiff to the Prefatory Statement to these responses for additional information.
c. Delco Electronics Corporation, which was then a wholly owned subsidiary of

Hughes Electronics Corporation, which was then a wholly own subsidiary of General Motors Corporation, supplied the SDM in the 1998 Chevrolet Venture van. Delco Electronics operations are now a part of Delphi Corporation. GM refers plaintiff to the Prefatory Statement to these responses for additional information.

d. The airbag readiness light is part of the instrument panel cluster. GM will identify the supplier of the instrument panel cluster for the 1998 Chevrolet Venture van. GM refers plaintiff to the Prefatory Statement to these responses for additional information.

To the extent this Interrogatory asks for more, GM objects because it is overly broad, asks for information that is not relevant to the claims or defenses of any party and asks for information that will not lead to admissible evidence.

SUPPLEMENTAL RESPONSE: Delco Electronics Corporation, which was then a wholly owned subsidiary of Hughes Electronics Corporation, which was then a wholly owned subsidiary of General Motors Corporation, supplied the instrument panel cluster in the 1998 Chevrolet Venture van. Delco Electronics operations are now part of Delphi Corporation. GM refers plaintiff to the Supplemental Prefatory Statement to these responses for additional information.

(R. Vol. II at 225 - 226) In Subsection "b" of General Motors's response, it identifies ALPS Automotive, Inc. as the clockspring supplier, not the manufacturer. The Trial Court found this response to be a "very unsatisfactory discovery answer" and "borderline perjurious." (Transcript, April 20, 2009, at 31/Lines 15-25)

In late October 2007, Plaintiff's counsel was contacted by General Motors's counsel about scheduling an inspection of the clockspring. Plaintiff's counsel was advised: "GM would like to set up a non-destructive inspection of the clockspring..." Again, there was no mention that ALPS was more than a mere supplier of the clockspring.

The inspection took place on November 30, 2007, wherein a representative from ALPS conducted the inspection.

Thereafter, Plaintiff was served with a barrage of discovery requests by General Motors: Second Set through Seventh Set of Requests for Admissions, Second Set through Fifth Set of

Interrogatories, and Second Set through Sixth Set of Requests for Production. (R. Vol. I at 74 through 140) During this time period, Plaintiff independently discovered that General Motors and ALPS Automotive, Inc. had an indemnity agreement between them called the Foreign Supply Agreement ("FSA"). (*See* ALPS Automotive, Inc. v. General Motors Corp., 2006 WL 51141 (Mich.App.) The FSA provided that "should any claim be made against GM alleging that personal injury or property damage was caused by an alleged defect in the clockspring, GM will provide to ALPS prompt notice of such claims." Further, that "ALPS will bear the cost of settlements and judgments incurred because of a defective clockspring claim." *Id.* Note that General Motors did not provide this information in discovery. Plaintiff discovered this information independent of this case. At this point, Plaintiff could not determine that ALPS was a necessary party to the litigation. Therefore, on August 4, 2008, Plaintiff propounded her First Set of Requests for Admissions to General Motors Corporation. (R. Vol. I at 96) On August 27, 2008, General Motors Corporation served its responses. (R. Vol. II at 295) Significant is General Motors's response to **Request for Admission No. 2** as follows:

> Admit or deny that you have an indemnity agreement with ALPS Automotive, Inc.
>
> **Response:** GM objects to this request because it is not limited to whether ALPS Automotive, Inc. has agreed to indemnify GM in this lawsuit and is, therefore, overly broad and asks for information that is beyond the permissible scope of discovery set forth in MRCP 26(b)(1) because it asks for information that is not relevant to the issues raised by the claims or defenses of any party. Without waiving that objection, GM responds that it asked ALPS Automotive, Inc. to indemnify GM in this lawsuit and ALPS Automotive, Inc. has not agreed to indemnify GM in this lawsuit.

After receiving this response, it became clear that ALPS Automotive, Inc. was a necessary party to this products liability litigation. At this time, the Plaintiff not only was aware of ALPS's identity but now was also aware of facts giving rise to a cause of action against ALPS. ALPS will argue that knowing it manufactured the clockspring provided enough facts that would

cause a lawsuit to be filed against it. However, 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. General Motors's response to Request for Admission No. 2 made it clear that ALPS had taken an adversarial position to General Motors in the instant lawsuit. It was no longer a situation of ALPS Automotive, Inc. literally standing behind the manufacturer of the final product. When ALPS refused to indemnify General Motors, ALPS stepped out from behind General Motors and exposed itself to be a Defendant in the instant case.

Consequently, and with reasonable diligence, just **nineteen (19) days** after General Motors served its Responses to Plaintiff's First Set of Requests for Admissions, Plaintiff circulated a correspondence and proposed Agreed Order for Leave to all counsel of record in order for Plaintiff to obtain leave to add ALPS Automotive, Inc. as a defendant.

SUMMARY OF THE ARGUMENT

When an amendment to the complaint substitutes the true name of a party against whom a claim is asserted in place of a fictitious party, or changes the name of a party due to a mistake concerning the identity of the proper party, one must comply with Mississippi Rules of Civil Procedure 9(h) or 15(c), respectively, in order for the amended complaint to relate back to the date of the original complaint.

An amendment to the complaint that substitutes the true name of a party against whom a claim is asserted in place of a fictitious party, is governed by Mississippi Rules of Civil Procedure 9(h) which provides:

> 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.

Further, in previous cases, this Honorable Court has held that 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 and that the Court will make a strict inquiry as to whether the plaintiff exercised reasonable diligence in ascertaining the fictitious party's real identity. *(See Gasparrini v. Bredemeier,* 802 So.2d 1062, at 1066 (Miss.2001)) At the May 14, 2009 hearing on Plaintiff's Motion to Reconsider, the Trial Court held that Plaintiff did exercise a reasonably diligent inquiry in ascertaining the identity of ALPS Automotive, Inc. (Transcript, May 14, 2009, at 62/Line 16-18), but still overruled Plaintiff's Motion to Reconsider because the Trial Court opined that nine (9) months between the time Plaintiff learned that ALPS manufactured the clockspring and Plaintiff sought leave to amend the complaint was not "reasonable diligence". Plaintiff believes that this holding is in error because the reasonable diligence rule has not been held to apply to the time to amend the complaint. Notwithstanding, Plaintiff was diligent in amending the Complaint to add Defendant ALPS because just knowing the name of the manufacturer of the clockspring does not provide all of the facts necessary to give rise to a cause of action against ALPS. This Honorable Court has held that "It is a principle of general application, though, that ignorance of the opposing party for fictitious party practice extends beyond mere lack of knowledge of the opposing party's name. Even if the plaintiff knows the true name of the person, he is still ignorant of his name if he lacks knowledge of the facts giving him a cause of action against that person." *Gasparrini v. Bredemeier,* 802 So.2d 1062, at 1065 - 1066 (Miss. 2001) (citing *Womble v. Singing River Hospital,* 618 So.2d 1252, at 1266-1267 (Miss.1993). Therefore, even though Plaintiff learned that ALPS manufactured the clockspring, it was not determined whether ALPS was a necessary party to be brought into this litigation until

August 27, 2008, when General Motors responded to Plaintiff's Request for Admission No. 2 that ALPS had refused to indemnify General Motors in this litigation.

Plaintiff contends that her amendment to the Complaint adding Defendant ALPS complied with the requirements of Mississippi Rules of Civil Procedure 9(h). However, during the April 20, 2009 hearing on Defendant ALPS's Motion for Summary Judgment, counsel for ALPS admitted **for the first time** that ALPS had actual knowledge of Plaintiff's claims as early as **June 2005**, well within the original three (3) year statute of limitations. Interestingly, as well, General Motors never advised Plaintiff that they had put ALPS on notice. As a result of this admission, Plaintiff's Second Amended Complaint also complied with the requirements of MRCP 15(c). Amendments to pleadings pursuant to MRCP 15(c) have three (3) considerations to be able to relate back to the date of the original Complaint, as follows

> 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 bought in by amendment:
>
> (1) has received such **notice** of the institution of the action that the party will not be **prejudiced** in maintaining that 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, that 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.

MRCP 15(c). Emphasis added. All three (3) requirements of Mississippi Rules of Civil Procedure 15(c) have been met in this case: **1. Knowledge - ALPS had actual knowledge of Plaintiff's claims in June 2005; 2. No Prejudice - ALPS suffers no prejudice in the defense of its case by the amendment; and 3. Mistake in the identity - But for the mistaken belief that General Motors manufactured the clockspring, ALPS would have been named in the**

original Complaint. *(See Womble v Singing River Hospital,* 618 So.2d 1252 (Miss. 1993) and *Estes v. Starnes,* 732 So.2d 251 (Miss. 1999)).

In the April 20, 2009, hearing on ALPS's Motion for Summary Judgment and in the May 14, 2009, hearing on Plaintiff's Motion to Reconsider, ALPS presented no evidence whatsoever showing that it would be prejudiced by Plaintiff's amendment and the Trial Court found that ALPS had suffered no prejudice. (Transcript, April 20, 2009, at 1 - 38/Line 9; and May 14, 2009, at 38 - 65) The test under MRCP 15(c) is the presence of knowledge and the lack of prejudice - both are present here. Even so, the Trial Court still held that Plaintiff was unreasonable in the time to amend the Complaint. Plaintiff believes this holding is in error.

ARGUMENT

A. Standard of Review

The standard of review in considering, on appeal, a trial court's grant or denial of summary judgment is de novo. *Aetna Casualty and Surety Co. v. Berry*, 669 So.2d 56, 70 (Miss.1996). In considering this issue, the appellate court must examine all of the evidentiary matters before it, including admissions in pleadings, answers to interrogatories, and affidavits. The evidence must be viewed in the light most favorable to the party against whom the motion has been made. *Id.* (See also *Daniels v. GNB, Inc.*, 629 So.2d 595, 599 (Miss.1993)).

B. Mississippi Rules of Civil Procedure 9(h)

Pursuant to MRCP 9(h), "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. "The purpose of Rule 9(h) is to provide a mechanism to bring in responsible parties, known, but unidentified, who

can only be ascertained through the use of judicial mechanisms such as discovery. *Gasparrini v. Bredemeier,* 802 So.2d 1062, at 1066 (Miss.2001). Further, this Honorable Court has held that "the relation back privilege provided for fictitious parties under Rule 15(c)(2) requires the plaintiff to actually exercise a reasonably diligent inquiry into the identity of the fictitious party." *Id.* Additionally, the Court will make a strict inquiry as to whether the plaintiff exercised reasonable diligence in ascertaining the fictitious party's real identity. *Id.* Plaintiff 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. Even so, the time in which Plaintiff amended the complaint to add ALPS as a defendant was reasonably diligent.

The Trial Court held that Plaintiff did exercise a reasonably diligent inquiry in ascertaining the identity of ALPS Automotive, Inc. but granted ALPS's Motion for Summary Judgment because the Trial Court opined that nine (9) months between the time Plaintiff learned that ALPS manufactured the clockspring and Plaintiff sought leave to amend the complaint was not "reasonable diligence". (Transcript, April 20, 2009 at 37/Lines 14-16; RE 107/Lines 14-16) Plaintiff believes that this holding is in error. Further, this Honorable Court has held that "It is a principle of general application, though, that ignorance of the opposing party for fictitious party practice extends beyond mere lack of knowledge of the opposing party's name. Even if the plaintiff knows the true name of the person, he is still ignorant of his name if he lacks knowledge of the facts giving him a cause of action against that person." *Gasparrini v. Bredemeier,* 802 So.2d 1062, 1065-1066 (Miss. 2001) (citing *Womble v. Singing River Hospital,* 618 So.2d 1252, at 1266-1267 (Miss.1993). Therefore, even though Plaintiff learned that ALPS manufactured the clockspring, it was not determined whether ALPS was a necessary party to be brought into this

litigation until August 27, 2008, when General Motors responded to Plaintiff's Request for Admission No. 2 as was more fully set forth above. Consequently, and with "reasonable diligence", Plaintiff circulated the Agreed Order for Leave to amend the complaint just **nineteen (19) days** after determining this knowledge. In ALPS's Opposition to Plaintiff's Petition for Interlocutory Appeal, ALPS argues that Plaintiff "for the first time in her Petition to this Court" asserted that Plaintiff had to pursue discovery about the Foreign Supply Agreement (indemnity agreement) to determine whether ALPS was a necessary party to this litigation. This is not true. Plaintiff advised the Trial Court and ALPS of this determination in Plaintiff's Memorandum in Support of the Opposition to ALPS's Motion for Summary Judgment. (R. Vol. II at 286-311; RE 11-36)

Plaintiff's correspondence and proposed Agreed Order for Leave to amend the Complaint to bring ALPS Automotive, Inc. into this litigation did not state that Plaintiff was moving under MRCP 9(h) or 15(c). (R. Vol. II at 242 - 245) After leave was granted, Plaintiff did amend the Complaint and replace the name of a fictitious defendant with ALPS Automotive, Inc. ALPS maintains that this action precludes Plaintiff's Second Amended Complaint from relating back to the date of the original Complaint under MRCP 15(c) because that rule pertains to changing a party's name and not replacing the name of a fictitious defendant. Interestingly, however, ALPS cites no authority at all for this position, and, in fact, this Honorable Court has already heard this issue in *Womble v. Singing River Hospital*, 618 So.2d 1252 (Miss. 1993) and has ruled that the Court may look to MRCP 9(h) **or** 15(c) when considering whether an amendment to the Complaint relates back to the date of the original complaint.

In *Womble v. Singing River Hospital,* the Plaintiff was granted leave to amend her complaint to add two (2) emergency room physicians, as well as other defendants. 618 So.2d at

1254 (Miss. 1993). In particular, Plaintiff amended her complaint and replaced two fictitious defendants with the names of two physicians, Drs. Longmire and Weatherall. Thereafter, Drs. Longmire and Weatherall moved for summary judgment arguing that they were added as defendants after the original two (2) year statute of limitations had expired. *Id.* at 1265. In opposition to the motions for summary judgment, the Plaintiff argued that if the Court decided that the two (2) year statute of limitations had expired, then the requirements of MRCP 9(h) were satisfied and the amended complaint would relate back to the original complaint. *Id.* at 1266-1267. This Honorable Court held that the provisions of MRCP 9(h) had not been met and therefore, any amendment would have to satisfy the provisions of MRCP 15(c) to prevent the claims being time barred. *Id.* at 1267. The opinion reflects that this Court, on its own accord, looked to the provisions of MRCP 15(c) regarding the amendment without any argument to do so by the Plaintiff. This Court concluded:

> Since we have determined that the provisions of 9(h) have not been satisfied in this case, any amendment made by appellants to add additional parties must satisfy the provisions of Rule 15(c) regarding "changing the party against whom a claim is asserted" to prevent time bar by §15-1-36.

Womble v. Singing River Hospital, 618 So.2d 1252, at 1267 (Miss. 1993) This Honorable Court did not conclude that it could not consider the amendment under MRCP 15(c) because Plaintiff replaced fictitious defendants for the names of Drs. Longmire and Weatherall. In exercising its duty to view the evidence in the light most favorable to the party against whom the motion had been made, the Plaintiff, the Court looked to the only two (2) rules 9(h) and 15(c) to find whether the amendment adding Drs. Longmire and Weatherall related back to the date of the original complaint. In so doing, this Court concluded that the Plaintiff in the *Womble* case satisfied the requirements of MRCP 15(c) and held:

> [W]ithin the statutory period provided by law for commencing this action, Longmire and Weatherall had notice of this suit and knew or should have known that but for a mistake concerning their identities, they would have been included in this suit when it was originally filed on March 28, 1988, is virtually compelled. It is also obvious beyond peradventure that they will not be prejudiced in maintaining a defense on the merits. The record shows that they were already preparing with retained counsel ...

618 So.2d 1252, 1268 (Miss. 1993). Defendant ALPS, in the instant case, would like this Court to believe that Plaintiff is the one who focused on Rule 9(h) in her argument to the Trial Court for bringing in ALPS as a defendant. The truth is that ALPS focused on MRCP 9(h) in its Motion for Summary Judgment. (R. Vol. II at170) Therefore, Plaintiff presented argument to the Trial Court under MRCP 9(h) at the hearing on April 20, 2009. At that time, **for the first time,** ALPS admitted that it had knowledge of Plaintiff claims as early at **June 2005**, well within the original three (3) year statute of limitations. ALPS knew that it made the defective clockspring and knew that it should have been named in the Complaint but for the Plaintiff's mistaken belief that General Motors manufactured the clockspring. In its Opposition to Plaintiff's Petition for Interlocutory Appeal, ALPS takes great measures to throw in how much time has passed between this event and that event. But the one time that ALPS fails to apprise the Court of is the amount of time that ALPS had knowledge of Plaintiff's claims and the fact that its defective product caused the Decedent's death. **That time is within two (2) years of the Decedent's death, well within the original three (3) year statute of limitations, and four (4) years from the date ALPS had knowledge of Plaintiff's claims and the date ALPS filed its Motion for Summary Judgment.** Four (4) years of knowing that it would have been named in the instant lawsuit but for the mistaken belief that General Motors manufactured the clockspring. Within that four (4) years, ALPS retained counsel, monitored the case, and prepared its defenses.

C. Mississippi Rules of Civil Procedure 15(c)

ALPS admitted to the Trial Court on April 20, 2009 that it had knowledge of Plaintiff's claims for four (4) years, since as early as June 2005, well within the original three (3) year statute of limitations. (Transcript, April 20, 2009, at 17/Lines 1-2; RE 87/Lines 1-2) Interestingly, General Motors never advised Plaintiff that they had put ALPS on notice at any time. Notwithstanding, as a result of this admission, Plaintiff's Second Amended Complaint adding ALPS Automotive, Inc. as a defendant complied with the requirements of MRCP 15(c). Amendments to pleadings pursuant to MRCP 15(c) have three (3) considerations to be able to relate back to the date of the original Complaint:

> 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 bought in by amendment:
>
> (1) has received such **notice** of the institution of the action that the party will not be **prejudiced** in maintaining that 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, that 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.

MRCP 15(c). Emphasis added. All three (3) requirements of Mississippi Rules of Civil Procedure 15(c) have been met in this case, as follows:

1. Knowledge - ALPS had actual knowledge of Plaintiff's claims in June 2005;

2. Prejudice - ALPS admittedly suffers no prejudice in the defense of its case by the amendment; and

3. Mistake in the identity - But for the mistaken belief that General Motors

manufactured the clockspring, ALPS would have been named in the original Complaint.

(*See Womble v Singing River Hospital,* 618 So.2d 1252 (Miss. 1993) and *Estes v. Starnes,* 732 So.2d 251 (Miss. 1999)). Just as in the case of *Womble v Singing River Hospital*, in the instant case, Plaintiff changed the name of a fictitious defendant and added ALPS as a defendant in her Second Amended Complaint. Pursuant to the law of *Womble* and MRCP 15(c), Plaintiff's Second Amended Complaint relates back to the date of the original Complaint.

The opinion of this Honorable Court in *Estes v. Starnes* also supports a reversal of ALPS's summary judgment. In *Estes*, an injured motorist filed suit against the another driver (the defendant) and, three years later, moved to amend her complaint to name the son of the defendant, who was believed to be actually driving the automobile at the time of the collision. 732 So.2d 251 (Miss. 1999) The Circuit Court dismissed the Plaintiff's motion to amend and this appeal was filed. Even though there was a lack of diligence on the part of the Plaintiff, this Court held:

> Rule 15(a) allows for the liberal amendment of pleadings and Rule 15(c) has been construed as allowing the relation back of additional parties where the newly named party was aware of the proceedings during the statutory time limit for bringing suit, knew or should have known that but for a mistake in identity he would have been named, and would not be prejudiced in his defense of his case.

732 So.2d 251, 253-254 (Miss. 1999). In the instant case, ALPS had knowledge of Plaintiff's claims within the original three (3) year statute of limitations and suffers no prejudice by Plaintiff's Second Amended Complaint. In fact, in the April 20, 2009, hearing on ALPS's Motion for Summary Judgment and in the May 14, 2009, hearing on Plaintiff's Motion to Reconsider, ALPS presented no evidence whatsoever showing that it would be prejudiced by

Plaintiff's amendment and the Trial Court found that ALPS had suffered no prejudice. (Transcript, April 20, 2009 and May 14, 2009; RE 70-108 and RE 108-135).

The test under MRCP 15(c) is the presence of knowledge and the lack of prejudice - both are present here. Even so, the Trial Court still held that Plaintiff was unreasonable in the time to amend the Complaint. In response to this appeal, ALPS will argue then that the Plaintiff's position is that you can amend the Complaint at any time - that there is no time limit. This is not Plaintiff's position. The test is prejudice. If sufficient prejudice exists, then it would be unfair to Defendant to allow the amendment. That is the test. Here - ALPS presented no argument, no document, no witness, no affidavit, nothing that shows ALPS will suffer any prejudice by naming ALPS as a defendant in the instant case. In fact, only the Plaintiff will be prejudiced if the amendment adding ALPS is not allowed. General Motors, the other products liability defendant, is currently under bankruptcy protection. If ALPS is allowed to escape liability despite having knowledge of Plaintiff's claims within two (2) years of the Decedent's death and for four (4) years before filing its Motion for Summary Judgment, there will be no defendant left to pursue for the defective product that caused Jesse J. Anderson, Jr.'s death. ALPS will maintain that there are two (2) automotive service defendants still remaining in the case, however, those defendants are not liable for the defective product.

Vibrock v. Peerless Conveyor & Manufacturing Corporation, 2009 WL 1663437 (N.D.Miss) - In Plaintiff's Petition for Interlocutory Appeal, Plaintiff cited the March 23, 2009 decision in the *Vibrock* case as persuasive authority which remanded a case due to the substitution of a Mississippi based defendant in place of a fictitious defendant. Recently, on June 15, 2009, the United States District Court reversed its prior decision and held that since the Plaintiff's Motion to Amend the Complaint to add the Mississippi based defendant was filed

after the case had been removed, the Court was in error applying Mississippi Rules of Civil Procedure and should have applied the Federal Rules of Civil Procedure. *Id.* at 2. Since the Federal Rules of Civil Procedure do not have a Rule 9(h) similar to Mississippi's rule, the Court had to consider the Plaintiff's amendment under FRCP 15. The Court held that the Plaintiff did not make a mistake in not naming the Mississippi based defendant in its original complaint, therefore, the amendment did not relate back to the date of the original complaint. *Id.* Even though the instant case is governed by the Mississippi Rules of Civil Procedure, Plaintiff's amendment of ALPS Automotive, Inc. would still relate back to the date of the original complaint under the *Vibrock* holding and the Federal Rules of Civil Procedure because but for the mistaken belief that General Motors manufactured the clockspring, ALPS would have been named in the original Complaint and ALPS had actual knowledge of Plaintiff's claims in June 2005 and admittedly suffers no prejudice in the defense of its case by the amendment.

CONCLUSION

Plaintiff did not know the identity of ALPS Automotive, Inc. at the time she filed her Complaint, whether it was by ignorance of ALPS's identity or by the mistaken belief that General Motors manufactured the clockspring. Pursuant to MRCP 9(h), as set forth above, and as found by the Trial Court, Plaintiff exercised reasonable diligence in ascertaining the identity of ALPS Automotive, Inc. and, when it was determined that ALPS was a necessary party to the litigation, Plaintiff circulated an Agreed Order for Leave to obtain agreement of counsel and presented said proposed order to the Trial Court. Once leave was granted, Plaintiff filed her Second Amended Complaint and substituted ALPS Automotive, Inc. in place of a fictitious defendant. Plaintiff complied with all the requirements of MRCP 9(h) for her Second Amended Complaint to relate back to the date of the original Complaint.

Pursuant to MRCP 15(c), ALPS had actual knowledge of Plaintiff's claims in June 2005, within two (2) years of the Decedent's death and well within the original three (3) year statute of limitations; ALPS suffers no prejudice in maintaining its defense on the merits of the case by the Plaintiff's amendment as found by the Trial Court; and, but for the mistaken belief that General Motors manufactured the clockspring, ALPS would have been named in the original Complaint. Plaintiff complied with all of the requirements of MRCP 15(c) for her Second Amended Complaint to relate back the date of the original Complaint.

After the discovery of the true identity of ALPS Automotive, Inc., Plaintiff submitted discovery to General Motors to determine whether ALPS was a necessary party to the litigation. As soon as Plaintiff received General Motors's responses to Plaintiff's First Set of Requests for Admissions, Plaintiff was able to ascertain that ALPS Automotive, Inc. was a necessary party to this products liability action. General Motors's admission responses were served on August 27, 2008. Consequently, and with reasonable diligence, Plaintiff circulated the proposed Agreed Order for Leave to all counsel of record just nineteen (19) days later.

Plaintiff respectfully requests this Honorable Court to reverse the judgment of the Trial Court granting the Motion for Summary Judgment of ALPS Automotive, Inc. and remand this case back to the Circuit Court of Lincoln County, Mississippi with ALPS Automotive, Inc. remaining as a Defendant in the case.

Respectfully submitted, this the 24th day of November, 2009.

JANIS ANDERSON, individually and on behalf of all Wrongful Death Beneficiaries of JESSE J. ANDERSON, JR., Deceased

BY: _____

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CERTIFICATE OF SERVICE

I, Tricia L. Beale, 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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This the 24th day of November, 2009.

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