IN THE SUPREME COURT OF MISSISSIPPI

FREDDIE L. KNOX, ET AL.	**APPELLANTS**
VS.	**CASE NO. 2010-CA-01431**
GEORGE MAHALITC	**APPELLEE**

BRIEF OF APPELLANTS FREDDIE L. KNOX, ET AL.
ORAL ARGUMENT NOT REQUESTED

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I. 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 and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Freddie L. Knox, individually, as the natural father and legal guardian of Kenyetta Knox, Jeremy Knox and Kishun Knox and as the administrator of the estates of Mary L. Knox and Lakidra Knox, Appellant;
2. Tyangela Knox, Appellant;
3. Yolanda Knox, individually and as the administrator of the estate of Deliyah Watson, Appellant;
4. Walter Watson, Appellant
5. Natasha Knox, Appellant;
6. Frederick Knox, Appellant;
7. Markeya Knox, Appellant (all Appellants are sometimes hereinafter collectively referred to as the "Knox Appellants")
8. Oby Rogers, Thomas Shea Moore, Eddie Abdeen, Attorneys for Appellants;
9. George Mahalitc, Appellee ("G. Mahalitc");
10. Bradley F. Hathaway, Attorney for Appellee George Mahalitc; and

11. Honorable Richard A. Smith, Washington County Circuit Court Judge

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1. Whether the trial court erred by failing to treat the Motion to Dismiss of G. Mahalitc, filed pursuant to *M.R.C.P.* 12(b)(6), as a Motion for Summary Judgment and dispose of and/or rule on the motion as required by *M.R.C.P.* 56, when the trial court considered matters outside the pleadings and stated on the record that the subject motion would be treated as a *Rule* 56 Motion.

2. Whether the trial court erred by granting the Motion to Dismiss of G. Mahalitc and/or ruling that the claim(s) of the Knox Appellants against G. Mahalitc, set forth in the first amended complaint of the Knox Appellants, were time barred under the applicable statute of limitations.

3. Whether the trial court erred in ruling that the Knox Appellants did not properly substitute G. Mahalitc as a defendant under *M.R.C.P.* 9(h) (fictitious party provision) so that the claim(s) of the Knox Appellants against G. Mahalitc related back to the date of the filing of the Knox Applellants' original complaint as provided for in *M.R.C.P.* 15(c)(2).

4. Whether the trial court erred in ruling that the Knox Appellants failed to exercise reasonable diligence to bring G. Mahalitc into this action in a timely manner as required by *M.R.C.P.* 9(h).

V. STATEMENT OF THE CASE/OPERATIVE FACTS

A. Background/Procedural History.

The claims of the Knox Appellants are straightforward and arise out of a motor vehicle accident that occurred on October 7, 2006 on Highway 16 in Issaquena County, Mississippi. Specifically, a collision occurred between a vehicle being driven by Yolanda Knox and a tractor-trailer

being driven by Defendant David McCoy, the trailer portion of which was partially extended into Yolanda Knox's lane of traffic and was the point of impact between the two vehicles. The collision resulted in the deaths of three members of the Knox family, as well as physical injuries to one or more of the Knox Appellants. These core facts are not in dispute.[1]

As will be demonstrated herein **and what is crucial to this appeal** is that the original complaint of Knox Appellants makes it clear that the Knox Appellants intended to sue whomever was the employer and/or principal of David McCoy under a *respondeat superior* theory[2]. This Court has recognized the doctrine of *respondeat superior* since the mid-19th century and a claim asserted under such doctrine is a derivative claim arising solely out of the negligent conduct of the employee and/or agent within the scope of the employment and/or agency. *See Crawford Logging v. Estate of Irving*, 41 So. 3d 687, 690 (Miss. 2010) ; and *Commercial Bank v. Hearn*, 923 So. 2d 202, 204 (Miss. 2006). There is nothing profound about this point and this "black letter law" concept is present in every garden variety personal injury action involving a motor vehicle accident where the defendant driver is operating a "commercial" vehicle for and on behalf of an employer and/or principal.

The following background/procedural facts have bearing on and/or are pertinent to the issues raised in this appeal:

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1 There is a separate appeal currently pending in this Court arising out of the same motor vehicle accident. Specifically, the Knox Appellants have appealed the trial court's grant of summary judgment to Russell Mahalitc, the owner of the tractor-trailer being driven by Defendant David McCoy. *See Knox, et al. v. Russell Mahalitc*, Case No. 2009-CA-01401 ("Russell Mahalitc Appeal") and the briefing of the Knox Appellants in such appeal for a more expansive description of the background and/or underlying facts of the case.

2 There can be no dispute about this point. Even the trial court acknowledged the original complaint of the Knox Appellants sought to impose liability on the employer of Defendant McCoy, the driver of the commercial vehicle involved in the subject collision. (R.888 – Order granting G. Mahalitc's dismissal motion at para. 2 a.-c.).

1. On or about March 4, 2008, the Knox Appellants filed their complaint in this action in the Washington County, Mississippi Circuit Court. (R.14 and R.1-15). Based upon the information contained in the accident report related to the subject collision, the Knox Appellants named David McCoy, Russell Mahalitc d/b/a Magnolia Plantation ("R. Mahalitc") and, pursuant to *M.R.C.P.* 9(h), certain "John Does"[3] as defendants. (R.1-15 – Knox Appellants' Complaint; Para. 10 Knox Appellants' Complaint (R.4) – fictitious party and/or parties "D", ... being the entity or entities who or which was the employer of the person who was the operator of the commercial vehicle [David McCoy] that was involved in the occurrence made the basis of Plaintiffs' claims and "E", ... being that entity or entities for whom David McCoy was acting as agent, servant, or employee on the occasion of the incident made the basis of this lawsuit; and R. 476-496 – Affidavit of Oby Rogers, incorporated by reference pursuant to *M.R.C.P.* 10 into the Knox Appellants' Response to the Motion to Dismiss of G. Mahalitc at para. 4 (R.769-770).

2. The Knox Appellants served discovery with the complaint served upon David McCoy ("McCoy") that included discovery requests specifically directed toward the issue of who employed McCoy. (R. 476-496 – Affidavit of Oby Rogers at para. 4; and R. 18-20 Summons to McCoy noting discovery served with complaint). While McCoy eventually responded to the interrogatories of the Knox Appellants by stating his employer was GM Farms, McCoy never supplemented his interrogatory responses to state GM Farms was a Mississippi partnership, the

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[3] The Knox Appellants initially alleged that R. Mahalitc not only owned the subject tractor-trailer but that he was also the employer of McCoy and, as a result, sought to impose liability upon Mahalitc under the legal principle of *respondeat superior*. However, because, as the facts in this case demonstrate, the owner of a tractor-trailer can turn out not to be the driver's employer, the Knox Appellants also named the employer of McCoy as a John Doe Defendant pursuant to *M.R.C.P.* 9(h). (R.3-6 – Knox Appellants' Complaint at paras. 8-10).

partners of which were G. Mahalitc and various other corporate partners. (R.803-813 – Affidavit of George Mahalitc attaching a copy of the partnership agreement (listing partners) and authenticating same in the context of filing a reply in support of G. Mahalitc's Motion to Dismiss.

3. On March 27, 2008, McCoy and R. Mahalitc filed separate answers and defenses in which they both denied that R. Mahalitc was McCoy's employer. (R.25-45).

4. On December 9, 2008, R. Mahalitc filed a Motion for Summary Judgment asserting that while R. Mahalitc/Magnolia Plantation was the owner of the subject tractor-trailer, R. Mahalitc was not the employer of McCoy and, therefore, could not be liable for the negligent operation of the tractor-trailer by McCoy. (R.175-181-Mahalitc's Memorandum Brief in Support of Summary Judgment at, *inter alia*, pp. 1-3).

5. Soon after R. Mahalitc filed his summary judgment motion, Oby Rogers, counsel for the Knox Appellants, contacted Brad Hathaway, Esq., counsel for the defendants, and they discussed, among other things, the possibility of an agreed order of substitution (in relation to the fictitious parties) to be entered after the trial court ruled on R. Mahalitc's summary judgment motion. (R. 476-496 – Affidavit of Oby Rogers at para. 12). Mr. Hathaway assured Mr. Rogers that the "proper parties could be worked out" [via an agreed order] after the trial court ruled on the pending summary judgment motion. Id. Note: The Knox Appellants incorporated the affidavit of Mr. Rogers into their response to G. Mahalitc's Motion to Dismiss pursuant to *M.R.C.P.* 10. Such affidavit was uncontested by G. Mahalitc and Mr. Hathaway never denied making the subject assurance to Mr. Roger, via an affidavit and/or in any other form of competent summary judgment evidence.

6. On July 17, 2009, the trial court granted R. Mahalitc's summary judgment motion and on August 13, 2009, the Knox Appellants filed their notice of appeal of the judgment and/or order. (R. 476-496 – Affidavit of Oby Rogers at para. 13). Such appeal (the Russell Mahalitc

Appeal) is still pending. See footnote 1 hereto.

7. Soon after the Knox Appellants filed their Notice of Appeal in relation to the Russell Mahalitc Appeal and consistent with the previous conversation between counsel, Mr. Rogers contacted Mr. Hathaway regarding the agreed order of substitution.(R. 476-496 – Affidavit of Oby Rogers at para. 14). Despite Mr. Hathaway's previous assurance to Mr. Rogers that the proper parties could be "worked out" via an agreed order of substitution, Mr. Hathaway responded by stating that "his clients" would not allow him to agree to any substitution and that Mr. Rogers would have to do whatever he needed to do to get the substitution accomplished. Id.; See also paras. 5 and 9 of the Rogers Affidavit, wherein Mr. Rogers states that Mr. Hathaway indicated there were "other entities involved" in relation to the claims asserted by the Knox Appellants [e.g. the employer of McCoy] and that Mr. Hathaway had taken the sworn statements of, among other people, G. Mahaltic. Note: Once again, Mr. Hathaway has never disputed anything in the Rogers Affidavit and G. Mahalitc did not submit any summary judgment type evidence that disputed the contents of the Rogers Affidavit.

8. In response to Mr. Hathaway refusing to substitute the "proper parties" [i.e., McCoy's employer and/or principal] via an agreed order of substitution (despite a previous assurance to Mr. Rogers that he would do so), Mr. Rogers, on behalf of the Knox Appellants, drafted and filed, on October 6, 2009, Plaintiffs' motion to amend their original complaint to substitute George Mahalitc d/b/a GM Farms as, among other things, the employer and/or principal of McCoy [which sought to impose liability on G. Mahalitc under respondeat superior grounds], as well as the related proposed amended complaint.(R. 476-496 – Affidavit of Oby Rogers at para. 14).

9. On October 19, 2009, McCoy and R. Mahalitc, through Mr. Hathaway, opposed the Knox Appellants' Motion to Amend (to Substitute G. Mahalitc as the employer/principal of McCoy)

by arguing, among other things, that the Knox Appellants were really seeking to add G. Mahaltic as a new party (rather than properly substituting G. Mahalitc for the employer of McCoy named as a fictitious party in the original complaint of the Knox Appellants. (R.344-355 and related exhibits). Mr. Hathaway, on behalf of the defendants, made this argument in a transparent attempt to successfully rely on the Mississippi case law that stands for the proposition that a motion to add a defendant filed before the limitations period expires but not ruled upon until after the period expires does not save a cause of action from being time-barred [as against the newly named defendant], citing *Wilner v. White*, 929 So. 315 ¶4 (Miss. 2006)).

10. On November 30, 2009, the Knox Appellants filed their reply in support of motion to amend complaint to substitute G. Mahalitc d/b/a GM Farms as previously named fictitious defendant. (R.465-473). Once again, the Knox Appellants pointed out that the amended complaint sought to substitute G. Mahalitc as one of McCoy's employers and/or principals for the purpose of, among other things, imposing liability on G. Mahalitc under the *respondeat superior* doctrine. (R.466-468).

11. On January 11, 2010, the trial court granted the the Knox Appellants' Motion for Leave to Amend to Substitute G. Mahalitc for a fictitious party finding, among other things, that McCoy and R. Mahalitc did not have standing to oppose the Knox Appellants' motion. (R.573-576).

12. Thereafter, the Knox Appellants' filed their First Amended Complaint and served G. Mahalitc with process. G. Mahalitc then, through Mr. Hathaway, filed, pursuant to *M.R.C.P.* 12(b)(6), his Motion to Dismiss the Knox Appellants' First Amended Complaint on statute of limitations grounds and attached thereto matters outside the pleadings. (R.630-646, plus related exhibits that follow thereafter). Through such motion, Mr. Hathaway, for the first time, produced the partnership agreement of G.M. Farms, which listed all of the partners, including G. Mahalitc. (R.739 -

Exhibit 7).

13. On March 16, 2010, the Knox Appellants filed their response to the Motion to Dismiss of G. Mahaliec. (R.768-781).

14. On June 21, 2010, the trial court heard oral argument on the Motion to Dismiss of G. Mahaliec. (R.Vol. 8 of 8 – Transcript pp. 68-113). During such argument, the trial court indicated that it was going to treat the dismissal motion of G. Mahaliec as a *Rule* 56 motion because the court was going to consider the matters outside of the pleadings submitted by the parties. (R.Vol. 8 of 8 – Transcript p. 88 - Lines 7-14)

15. On July 28, 2010, the trial court granted the Motion to Dismiss of G. Mahaliec (R.888-898).

B Facts and Claims Pled in the First Amended Complaint.

The Knox Appellants' First Amended Complaint alleges that, among other things, G. Mahaliec was the employer of McCoy and that McCoy and G. Mahaliec, under *respondeat superior* grounds, wrongfully and negligently operated the "commercial vehicle" that was involved in the occurrence made the basis of the Plaintiffs's claims (R.585-600) – Knox Appellants' First Amended Complaint paras. 9, 13 and 14).

VI. SUMMARY OF THE ARGUMENT

G. Mahaliec who, by his own admission is a partner of GM Farms, has properly been substituted pursuant to *M.R.C.P.* 9(h) as a defendant in this action, as McCoy's employer and/or otherwise. A partnership such as GM Farms (McCoy's employer), may be sued in the partnership name, **or in the names of the individuals composing the partnership**, or both and service of process on any partner shall be sufficient to maintain the suit against against all the partners so as to bind the assets of the partnership and of the individual summoned. *Miss. Code Ann. §* 13-3-55 (1972,

as amended)(emphasis added); *See Miss. Code Ann. §* 79-13-306(a)(" partners are liable jointly and severally for all obligations of the partnership ...."). Since Plaintiffs' substitution of G. Mahalitc as the defendant employer of McCoy under *M.R.C.P* 9(h) relates back to the date Plaintiffs' original complaint was filed, G. Mahalitc's statute of limitation defense and his assertion that the claims of the Knox Appellants against him are time barred have no merit. *See M.R.C.P.* 9(h) and 15(c). As a result, the trial court erred in granting G. Mahalitc's dismissal motion on statute of limitation grounds.

The Knox Appellants alleged in their original complaint that the fictitious parties named in the complaint were unknown to them, which included McCoy's employer and/or principal. (R.4-7 –Fictitious parties "D" and "E" and the last sentence of para. 10 of the original complaint (R.7)). While the original complaint also alleged R. Mahalitc d/b/a Magnolia Plantation was also McCoy's employer, the Knox Appellants were entitled to plead in the alternative under *M.R.C.P.* 8. Simply put, when the Knox Appellants sought to substitute G. Mahalitc as McCoy's employer and impose derivative liability on G. Mahalitc under *respondeat superior* grounds (for the negligence of McCoy), such substitution was proper under *Rule* 9(h). The fact that the Knox Appellants' First Amended Complaint "increased" the number of fictitious parties named in the complaint simply is not dispositive of the issue of whether G. Mahalitc was properly substituted.

As to the "reasonable diligence test" under *M.R.C.P.* 9(h), the Knox Appellants served discovery upon McCoy at the time he was served with the complaint that was directed at ascertaining McCoy's employer. Such discovery was never fully answered. However, and more importantly, the Knox Appellants' delay in filing their Motion to Amend to Substitute G. Mahalitc arose out of Counsel for G. Mahalitc and the other defendants assuring Mr. Rogers, counsel for the Knox Appellants, that the substitution of the proper parties (i.e. McCoy's employer) could be addressed via an agreed order of substitution. The Knox Appellants reasonably relied on such assurance and

moved expeditiously to file the Motion to Amend to Substitute G. Mahalitc when defense counsel changed his position on this issue. The *Rule* 56 evidence, in the form of the affidavit of Oby Rogers, is uncontested on this point. Under such circumstances, it was error for the trial court to find the Knox Appellants did not use reasonable diligence to seek to substitute G. Mahalitc as McCoy's employer.

VII. ARGUMENT

A. Standard of Review.

This Court reviews the application of the *Mississippi Rules of Civil Procedure*, which present a question of law, *de novo*. *Veal v. J.P. Morgan Trust Co.*, 955 So. 2d 843, 845 (Miss. 2007).

B. Despite Relying on Matters Outside the Pleadings, the Trial Court Failed to Apply *Rule* 56 to the Dismissal Motion of G. Mahalitc.

Where matters outside the pleadings are considered by the trial court in ruling on a motion to dismiss, *Rule* 12(b) requires the court to treat the motion as one for summary judgment and to dispose of it as required by *Rule* 56. *See Washington v. Allstate Ins. Co.*, 901 F.2d 1281, 1283-1284 (5th Cir. 1990); and *Sullivan v. Tullos*, 19 So. 3d 1271, 1274-75 (Miss. 2009). The trial court failed to follow this point of law and erred as a result. For example, the court's order granting G. Mahalitc's Motion to Dismiss clearly demonstrates the court considered the affidavit of Oby Rogers, Esq., one of the attorneys for the Knox Appellants. (R.896 at para. 44). Such affidavit, among other things, including the partnership agreement of GM Farms and the discovery responses of the defendants, constitute "matters outside the pleadings" and are, in fact, clearly summary judgment type evidence. (R.889 - order granting G. Mahalitc's dismissal motion at paras. 5-10 – trial court considering, among other things, discovery responses and the partnership agreement of GM Farms); *See M.R.C.P.* 56 (c)and (e) (noting the various types of summary judgment evidence considered in the context of a

Rule 56 motion).

C. The Knox Appellants properly substituted G. Mahalitc (as the employer of Defendant McCoy) as a defendant under *M.R.C.P.* 9(h) so that the claim(s) of the Knox Appellants against G. Mahalitc (based upon *respondeat superior* grounds) related back to the date of the filing of the Knox Applellants' original complaint as provided for in *M.R.C.P.* 15(c)(2).

As this Court has observed, "the purpose of *Rule* 9(h) is to allow a plaintiff to proceed with a lawsuit where the plaintiff knows and can articulate the wrongful conduct of, and claims against, the fictitious party, but simply does not know that party's name.". *Veal v. J.P. Morgan Trust Co.*, 955 So. 2d 843, 845-846 (Miss. 2007) (also stating, among other things, "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.".)(emphasis added by the Court).

In this case, at all times pertinent hereto, the Knox Appellants sought to impose liability upon the employer of Defendant McCoy, the driver of the commercial vehicle involved in the subject collision, on *respondeat superior* grounds. As noted herein, the *respondeat superior* doctrine is a derivative claim arising solely out of the negligent conduct of the employee and/or agent within the scope of the employment and/or agency. *See Crawford Logging v. Estate of Irving*, 41 So. 3d 687, 690 (Miss. 2010) ; and *Commercial Bank v. Hearn*, 923 So. 2d 202, 204 (Miss. 2006). As a result, such a claim does not specifically require wrongful conduct on the part of the employer and/or principal but, rather, liability arises by virtue of the mere existence of the employer/employee and/or principal/agent relationship.

As required by *M.R.C.P.* 9(h), the Knox Appellants alleged in their original complaint that the fictitious parties named in the complaint were unknown to them, which included McCoy's employer and/or principal. (R.4-7 –Fictitious parties "D" and "E" and the last sentence of para. 10 of the

complaint (R. 7)). While the original complaint also alleged R. Mahalitc d/b/a Magnolia Plantation was also McCoy's employer, the Knox Appellants were entitled to plead in the alternative under *M.R.C.P.* 8[4]. Simply put, when the Knox Appellants sought to substitute G. Mahalitc[5] as McCoy's employer and impose derivative liability on G. Mahalitc under *respondeat superior* grounds (for the negligence of McCoy), such substitution was proper under *Rule* 9(h).

By way of contrast, this Court has explained, "*Rule* 9(h) does not say that a plaintiff may include a fictitious party because the plaintiff suspects that there **might** be someone out there who **might** have engaged in conduct which might be actionable.". *Veal*, 955 So. 2d at 846. (emphasis added by the Court). Rather, "where a plaintiff suspects that there might have been others involved in the ... [event giving rise to liability] who might have been negligent, but is, at the time suit is filed,

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4 As noted herein, the Knox Appellants initially alleged that R. Mahalitc not only owned the subject tractor-trailer but that he was also the employer of McCoy and, as a result, sought to impose liability upon Mahalitc under the legal principle of *respondeat superior*. However, because, as the facts in this case demonstrate, the owner of a tractor-trailer can turn out not to be the driver's employer, the Knox Appellants also named the employer of McCoy as a John Doe Defendant pursuant to *M.R.C.P.* 9(h). (R. 3-6 – Knox Appellants' Complaint at paras. 8-10). In connection with the Knox Appellants' alternative pleading under *Rule* 8, the Knox Appellants also served discovery with the original complaint served upon Defendant David McCoy ("McCoy") that included discovery requests specifically directed toward the issue of who employed McCoy. (R. 476-496 – Affidavit of Oby Rogers at para. 4; and R. 18-20 Summons to McCoy noting discovery served with complaint).

5 As noted herein, a partnership such as GM Farms (McCoy's employer), may be sued in the partnership name, **or in the names of the individuals composing the partnership**, or both and service of process on any partner shall be sufficient to maintain the suit against all the partners so as to bind the assets of the partnership and of the individual summoned. *Miss. Code Ann. §* 13-3-55 (1972, as amended)(emphasis added); *See Miss. Code Ann. §* 79-13-306(a)(" partners are liable jointly and severally for all obligations of the partnership ...."). As set forth in the partnership agreement of GM Farms, G. Mahalitc was/is a partner of GM Farms. Therefore, the substitution of G. Mahaltic, as the employer of Defendant McCoy, was proper under the applicable substantive law applicable to partnerships.

unaware of who they are or what negligent act they are alleged to have committed, **the plaintiff may not include a fictitious party in the complaint**.". *Veal*, 955 So. 2d at 846.

As the original complaint of the Knox Appellants demonstrates, the Knox Appellants **AT ALL TIMES** sought to impose liability on the employer/principal of Defendant McCoy under *respondeat superior* grounds. Therefore, at the time suit was filed, the Knox Appellants were not "unaware of who the fictitious party was or what negligent act the fictitious party was alleged to have committed" within the meaning of *Veal, supra*, thereby violating *Rule* 9(h) through the substitution of G. Mahalitc. *See Veal*, 955 So. 2d at 846. This is so because the fictitious party was Defendant McCoy's employer/principal [G. Mahaltic] and the "negligent act" McCoy's employer/principal [G. Mahalitc] committed was derivative of the negligence of McCoy under the *respondeat superior* doctrine. As a result, there simply was no proper basis for the trial court to find the Knox Appellants improperly used *Rule* 9(h) as a mechanism to "hedge their bets" in the event discovery later showed that there might be an entity [GM Farms, McCoy's employer] who should have been sued.". (R.895 – order granting G. Mahalitc dismissal motion at paras. 41-42).

Consistent with the requirements of *Rule* 9(h), the original complaint of the Knox Appellants states, "Plaintiffs allege that the identities of the fictitious party-Defendants are otherwise unknown at this time, or, if known, their identities as party-Defendants are not known, but their true names will be substituted by amendment when ascertained.". (R.7 – last sentence of para. 10 of the original complaint; see also R.4-7 –Fictitious parties "D" and "E"). Therefore, the trial court also erred by finding the Knox Appellants "did not allege it (sic) was ignorant of the name of McCoy's employer." (R.894 – order granting G. Mahalitc's Motion to Dismiss at para. 37. a. (second to last sentence of such paragraph)).

The trial court likewise erred in finding that the Knox Appellants improperly substituted G.

Mahaltic as a defendant under *Rule* 9(h) simply because the number of fictitious parties set forth in the Amended Complaint of the Knox Appellants increased rather than decreased (by one) as a result of the substitution of G. Mahaltc as a defendant. (R895 – order granting G. Mahaltc's dismissal motion at para. 39 citing, *Doe v. Mississippi Blood Services, Inc.*, 704 So. 2d 1016, ¶10 (Miss. 1997).

In *Doe*, the Court cited to *Schulz v. Romanace*, 906 S.W. 2d 393. 395 (Mo. Ct. App. 1995). *Doe*, 704 So. 2d at 1018. In recounting *Schulz* and applying it to the facts in *Doe*, the Court observed, as follows:

> [o]n appeal the plaintiff asserted that the new parties were substitutions for named John Does; however, the plaintiff added the new names 'without deleting any fictitious name that was included in the original petition.' Missouri found this was merely an attempt to join new parties after the expiration of the statute of limitations. *Schulz*, 906 S.W. 2d at 395-396. In the case sub judice, the plaintiff is also attempting to characterize the joinder of a new party after the running of the statute of limitations as a substitution for a fictitious party. However, as in *Schulz*, all 50 originally named John Does remain. We find that the plaintiff improperly substituted Mississippi Blood Services, Inc. for United Blood Services, not for a fictitiously named defendant.

Doe, 704 So. 2d at 1018.

While the Knox Appellants acknowledge that the number of fictitious parties in their Amended Complaint increased after substituting G. Mahaltc as a defendant (alleging that he was the employer/principal of Defendant McCoy), such pleading (increasing the number of fictitious parties) is not dispositive of the issue of whether G. Mahaltc was properly substituted as a defendant under *Rule* 9(h) under the circumstances presented by this case. The reason for this is because the original complaint of the Knox Appellants specifically named as a fictitious party the employer/principal of Defendant McCoy and sought to impose liability on McCoy's employer/principal under the doctrine of *respondeat superior*. There simply cannot be any legitimate dispute about this point. As a result, there is no basis for the trial court to have found that the Knox Appellants were merely seeking to

add G. Mahalitc as a **NEW party/defendant** rather than properly substituting G. Mahalitc, under *Rule* 9(h), as the fictitiously named employer/principal of Defendant McCoy. *See Brake v. Reser's Fine Foods, Inc.*, 2009 WL 2382361 *2-3 (E.D. Mo. July 30, 2009)(discussing/distinguishing *Schulz v. Romanace*, 906 S.W. 2d 393. 395 (Mo. Ct. App. 1995) and denying motion to dismiss, based on the statute of limitations, where, among other things, plaintiff named as a fictitious party the defendant agent's principal and finding that the plaintiff's description provided sufficient notice to the party the plaintiff sought to substitute that it was an entity against whom claims were made concerning plaintiff's injuries); *Doe*, 704 So. 2d at 1020 (Justice Banks, concurring)("First, I do not agree that it is significant that the amended complaint specified fifty as opposed to forty-nine John Doe defendants. That is, I would not defeat plaintiff's amendment because she failed to delete one of the John Doe defendants.").

D. Based upon the undisputed facts of this case, including the uncontested affidavit of Oby Rogers, Esq., the Knox Appellants properly exercised reasonable diligence to bring G. Mahalitc into this action in a timely manner as required by *M.R.C.P.* 9(h).

The Knox Appellants acknowledge that Rule 9(h) also has a "reasonable diligence test". As this Court has stated, "this 'due diligence' must occur prior to the running of the statute of limitations and 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'. *Doe*, 704 So. 2d at 1019. However, in *Anderson v. ALPS Automotive, Inc.*, 51 So. 3d 929 (Miss. 2010), this Court observed that it had never spoken specifically on the issue of how much time constitutes unreasonable delay in substituting a named defendant for a fictitious one. *Anderson*, 51 So. 3d at 932. In resolving the issue, this Court stated that **in the absence of any reasonable explanation by the plaintiff of why the plaintiff waited more than nine months after learning the identity of the fictitiously named defendant to seek the trial court's leave to include such defendant in the plaintiff's lawsuit**, the

plaintiff failed to exercise reasonable diligence to bring this party into the litigation in a timely manner. *Anderson*, 51 So. 3d at 933-934.

As the record clearly demonstrates, the Knox Appellants endeavored to determine the identity of Defendant McCoy's employer/principal at the very beginning of this case by serving discovery upon Defendant McCoy with the summons and complaint. (R. 476-496 – Affidavit of Oby Rogers at para. 4; and R. 18-20 Summons to McCoy noting discovery served with complaint). There simply cannot be any legitimate dispute about this point. In finding the Knox Appellants failed to exercise "reasonable diligence", within the meaning of *Rule* 9(h), the trial court placed great weight on the fact that when Defendant McCoy finally answered the Knox Appellants' discovery, he identified his employer as "GM Farms", produced an insurance policy that identified GM Farms as a partnership and listed an address for GM Farms. (R.889 and 896– order granting G. Mahaltic's dismissal motion at paras. 6-9 and 44).

What the trial court's finding of "lack of due diligence" by the Knox Appellants overlooks is that McCoy never identified the partners of GM Farms and without such information the Knox Appellants had no way of serving process on GM Farms because Mississippi partnerships are not required to have agents for service of process and an entity such as GM Farms can only be served through one of its partners where no agent for service of process exists. Moreover, all of the partners of a partnership have to be named as a defendant or the assets of the partners are not bound and subject to execution on any judgment obtained against the partnership. *See Miss. Code Ann. §* 13-3-55 (1972, as amended)(emphasis added); and *Miss. Code Ann. §* 79-13-306(a)(" partners are liable jointly and severally for all obligations of the partnership ...."). However, if this was the only point of contention raised by the Knox Appellants, being awarded any relief by this Court could be in

doubt[6].

What, however, conclusively erases any doubt that the Knox Appellants are entitled to relief from this Court is the fact that the Knox Appellants' delay in filing their Motion to Amend to Substitute G. Mahalitc arose out of Mr. Brad Hathaway, Counsel for G. Mahalitc and the other defendants, orally assuring Mr. Rogers, counsel for the Knox Appellants, that the substitution of the proper parties (i.e. McCoy's employer) could be addressed via an agreed order of substitution.(R. 476-496 – Affidavit of Oby Rogers at para. 12). The Knox Appellants reasonably relied on such assurance and moved expeditiously to file the Motion to Amend to Substitute G. Mahalitc when defense counsel changed his position on this issue. (R. 476-496 – Affidavit of Oby Rogers at para. 14). Mr. Roger's affidavit regarding Mr. Hathaway's oral assurances to him, which clearly constituted competent *Rule* 56 evidence, was UNCONTESTED on this point. Under such circumstances, it was error for the trial court to find the Knox Appellants did not use reasonable diligence to seek to substitute G. Mahalitc as McCoy's employer.

The trial court's recounting of the affidavit of Mr. Rogers was merely that Mr. Rogers learned in September of 2009 that defense counsel, Mr. Hathaway, was not authorized to agree to any substitution of parties. (R.897 – order granting G. Mahalitc's dismissal motion at para. 50). With all due respect to the trial court, this treatment and/or consideration of Mr. Roger's affidavit is less than complete and, in and of itself, constitutes an erroneous finding of fact.

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[6] Despite not knowing who the partners were, the Knox Appellants could have filed a motion to substitute GM Farms, a Mississippi Partnership, as the employer of McCoy. However, under such an approach, the Knox Appellants would have been unable to effectuate service of process and there would have been no way to bind the assets of the partners of the partnership.

First, Mr. Hathaway, as attorney for G. Mahalitc and the other defendants, assured Mr. Rogers an agreed order of substitution would be submitted to the trial court and when Mr. Rogers contacted Mr. Hathaway about signing off on such an agreed order, Mr. Hathaway responded by changing his position and stating his clients would not allow him to agree to any substitution. The law does not allow Mr. Hathaway or his clients to gain advantage in such a manner. *See Parmley v. 84 Lumber Co.*, 911 So. 2d 569, 573 (Miss. Ct. App. 2005)("An attorney is presumed to have the authority to speak for and bind his client.").

Second, even if Mr. Hathaway's oral assurances to Mr. Rogers regarding an agreed order of substitution are not binding on his clients, G. Mahalitc and the other defendants, the Knox Appellants surely should not be prejudiced by Mr. Hathway's change in position on an agreed substitution order upon which Mr. Roger's reasonably relied. This is particularly true since Mr. Hathaway never disputed the affidavit of Mr. Rogers and the affidavit of Mr. Rogers was the ONLY RULE 56 EVIDENCE BEFORE THE TRIAL COURT on this issue.

Based on the foregoing authorities and the uncontested affidavit of Mr. Rogers, discussed above, the Knox Appellants have clearly demonstrated a "reasonable explanation", within the meaning of *Anderson, supra*, why they delayed seeking to substitute G. Mahaltic as a defendant under *Rule* 9(h). *Anderson*, 51 So. 3d at 933-934. Under such circumstances, the trial court erred in finding the Knox Appellants did not use reasonable diligence in seeking to substitute G. Mahalitc as a defendant in this action.

IV. CONCLUSION

The Knox Appellants have demonstrated that G. Mahalic was properly substituted as a defendant under Rule 9(h). As a result, the Knox Appellants claims against G. Mahalitc, as the employer/principal of Defendant McCoy related back to the date of the filing of the original complaint

pursuant to the provisions of Rule 15(c)(2). Therefore, since the Knox Appellants original complaint was filed before the applicable statute of limitations expired, the trial court erred by granting G. Mahalitc's Motion to Dismiss, including finding that the claims of the Knox Appellants against G. Mahaltic were time barred.

Respectfully submitted this the 21st day of March, 2011.

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CERTIFICATE OF SERVICE

I, Eddie Abdeen, do hereby certify that I have this day mailed via United States Mail, postage fully prepaid, a true and correct copy of the above and foregoing document to:

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Honorable Richard A. Smith
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This the 21st day of March, 2011.

Eddie Abdeen

EDDIE ABDEEN