IN THE SUPREME COURT OF MISSISSIPPI

EMPIRE ABRASIVE EQUIPMENT CO., ET AL. **APPELLANTS**

VS.

NO. 2010-IA-00247-SCT
consolidated with
NO. 2010-M-00250-SCT
NO. 2010-M-00255-SCT

HENRY MORGAN, JR., ET AL. **APPELLEES**

FROM THE CIRCUIT COURT OF ADAMS COUNTY, MISSISSIPPI
CIVIL ACTION NO. 07-KV-0107-J

REPLY BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

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I. THIS IS THE THIRD APPEAL WITH THE SAME FACTS AND ISSUES.

The fact pattern and issues presented in this appeal are not new to this Court. They were presented in *Clark Sand Company, Inc. v. Kelley*, 60 So.3d 149 (Miss. 2011). They were also presented in *Kinsey v. Pangborn Corp.*, No. 2010-CA-00925 (argued on August 8, 2011). While each appeal has its own factual nuances, the three share a common core of relevant facts:

- Plaintiff filed a silica personal injury lawsuit.
- Plaintiff died during the pendency of the lawsuit. No suggestion of death was filed. No amendment asserting a survival or wrongful death claim was sought.
- Lawsuit was dismissed without prejudice by Agreed Order.
- Wrongful death claim was filed more than three years after death, but within one year of dismissal of personal injury case.

Based on these facts, *Kelley*, *Kinsey*, and this appeal present the same issues:

- Was the wrongful death statute of limitations tolled during the pendency of the underlying personal injury lawsuit?
- Can a personal injury action be dismissed and refiled as a wrongful death action pursuant to the savings statute?

Kelley answered both of these questions in the negative. *Kinsey* should do the same.

II. *KELLEY* IS DISPOSITIVE OF THIS APPEAL.

To his credit, plaintiff faces head on the impossible task of distinguishing *Kelley* from this appeal. Despite his best efforts and three and one half pages of factual recitation, plaintiff cannot show that *Kelley* is different or distinguishable from this appeal. The best argument plaintiff can muster is a diversion:

> The major issue of *Kelley* was concern with whether she had standing to even *bring* the suit – an issue which is not before the Court in this case.

Morgan Brief at p. 17 (emphasis in original). Plaintiff is correct that standing was an issue in *Kelley*, but so were the savings statute and tolling. Those two issues were squarely addressed in section II of the *Kelley* opinion at ¶¶ 41-46. Defendants are not aware of an exception to *stare decisis* which dictates only "major" issues in prior decisions should be followed, while "minor" issues can be ignored.

Kelley is on all fours with this appeal.

III. PLAINTIFF'S ARGUMENT THAT HIS HANDS WERE TIED IS FACTUALLY AND LEGALLY INCORRECT.

Plaintiff tacitly concedes that the dismissal of the underlying personal injury case and the filing of this wrongful death case were not done properly or timely. He claims, however, that his hands were tied:

> The Morgan family could not bring this wrongful death suit until Mr. Morgan's previous action was dismissed. Further, while the previous action was pending in Federal MDL Court, no action could be taken at all.

Morgan Brief at p. 10. Both of these statements are factually and legally incorrect.

Although it may not be good form, nothing prevented the wrongful death action from being filed while the underlying personal injury case was pending. Furthermore, the underlying case could have been dismissed long before it was. The complaint was filed on September 9, 2002, Morgan, Sr. died on September 14, 2002, but a notice of removal was not filed until December 8, 2003. (R. 479).[1] Plaintiff therefore had 1 year, 2 months and 24 days prior to removal to dismiss, substitute parties or amend the complaint to bring in the wrongful death beneficiaries. In fact, the *Arthur* complaint was amended, but merely re-named Morgan, Sr. as the party-plaintiff. (R.411) Finally, plaintiff's argument that the underlying case could not have

[1] The unusual delay between the filing of the complaint and removal resulted from plaintiffs filing four motions for an extension of time to serve process.

been dismissed after removal because of a stay in the MDL has no support in the record and is false. Over 1300 plaintiffs were dismissed during the pendency of the MDL.

IV. THE AFFIRMATIVE DEFENSE OF STATUTE OF LIMITATIONS WAS NOT WAIVED.

Perhaps recognizing that he has the short end of the stick on tolling and the savings statute, plaintiff devotes most of his brief to the argument that defendants waived their statute of limitations defense. This argument fails for a multitude of reasons.

First and foremost, plaintiff did not file a cross appeal on the issue of waiver, and he is therefore precluded from raising it. The trial court's order denying summary judgment specifically holds that "there has been no waiver by the defendants of any affirmative defense in this matter, and specifically defendants have not waived their statute of limitations defense." (Tab 8, R. 652-53) "In order for the appellee to gain reversal of any part of the decision of the trial court about which the appellant brings no complaint, the appellee is required to bring a cross-appeal." *Delta Chemical and Petroleum, Inc. v. Citizens Bank of Byhalia, Miss.*, 790 So.2d 862 (Miss. App. 2001) (citations omitted); *see also Dunn v. Dunn*, 853 So.2d 1150, 1152 ¶¶ 3-8 (Miss. 2003). In other words, if the trial court made a finding that the appellee wants to reverse on appeal, the appellee must file a cross-appeal. *Board of Trustees v. Knox*, 688 So.2d 778, 782 n.1 (Miss. 1997); *Brock v. Hankins Lumber Co* ., 786 So.2d 1064, 1068 ¶ 17-19 (Miss. App. 2001). In this case, the trial court made a specific finding on waiver, and plaintiff seeks reversal. In order to raise that issue on appeal, he must file a cross appeal. He did not. As a result, this Court lacks jurisdiction to review the trial court's ruling on waiver. *Lindsey v. Lindsey*, 612 So.2d 376, 378 (Miss. 1992).

Should this court conclude that it has jurisdiction to consider plaintiff's waiver argument, the argument nevertheless lacks merit. A trial court's ruling on the issue of waiver of an

affirmative defense is reviewed under an abuse of discretion standard. *Jones v. Fluor Daniel Servs. Corp.*, 32 So. 3d 417, 421 ¶17 (Miss. 2010). Given the timeline of events in the record, it can hardly be said that the trial court abused its discretion.

"[T]here must be 'a substantial and unreasonable delay in pursuing the right' *plus* 'active participation in the litigation' before waiver will be found." *Garlock Sealing Technologies, LLC v. Pittman*, 2010 WL 4009151 ¶ 46 (Miss. 2010) (rehearing pending) (emphasis in original) (citations omitted). Neither exists here. The amount of time and the amount of activity in this case were essentially the same as *Garlock,* and this Court found no waiver. *Id. at ¶ 35-51.*

Furthermore, any delay was caused by plaintiff's failure to answer discovery. In his brief, plaintiff claims that "the Silica Companies waited over two years before pursuing their defense that the statute of limitations applied . . . ." Morgan Brief at p. 4. This broad brush does not tell the whole story. As is true for most waiver inquiries, the devil is in the details. In this case, the details show that any delay was caused by plaintiff himself. Relevant events include:

- May 23, 2007 – complaint filed.
- September 12, 2007 – first written discovery propounded to plaintiff. (R. 50) Plaintiff did not respond.
- January 4, 2008 – "Agreed Initial Discovery Order" was entered into by the parties. (R.229) Plaintiff agreed to respond to a "Master Set" of discovery no later than April 5, 2008.
- Plaintiff did not respond to the discovery by April 5, 2008 as ordered.
- June 24, 2009 – Motion to compel plaintiff to respond to discovery was filed. (R. 254)
- October 2, 2009 – Plaintiff finally responded to written discovery. (R. 494)
- November 4, 2009 – Motion for summary judgment filed. (R. 340)

This timeline shows that any delay was caused by plaintiff's failure to respond to discovery. Plaintiff's hands are not clean, and his waiver argument should be rejected. *Mitchell v. Mitchell,* __So. 3d__, 2011 WL 3452124 ¶ 8 (Miss. App. August 9, 2011) ("The clean-hands doctrine prevents a complaining party from obtaining equitable relief in court when he is guilty of willful misconduct in the transaction at issue.").

V. CONCLUSION.

This wrongful death action was filed almost five years after Morgan, Sr.'s death and is therefore untimely. The wrongful death statute of limitations was not tolled during the pendency of Morgan, Sr.'s personal injury action. This action is therefore barred by the statute of limitations. Furthermore, the savings statute does not apply to this case because Morgan, Sr.'s personal injury action was a different cause of action than this wrongful death action.

These issues were addressed and answered in *Kelley,* which is dispositive of this appeal. This the 26th day of August, 2011.

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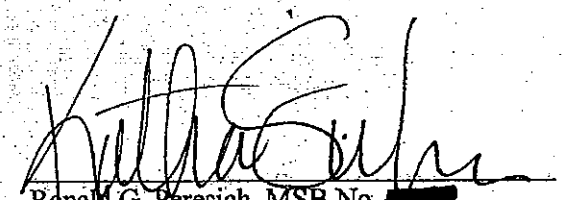

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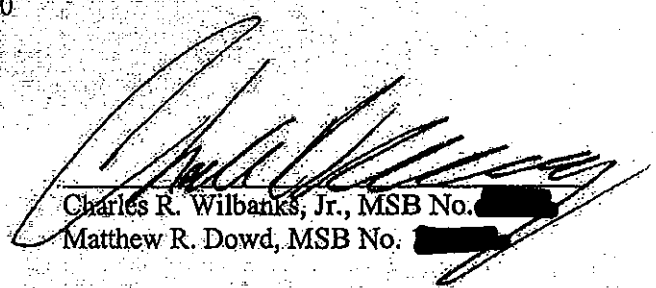

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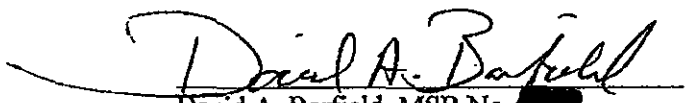

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CERTIFICATE OF SERVICE

I, the undersigned attorney, on behalf of defendants, do hereby certify that I have served by United States mail, postage prepaid, and via email and/or facsimile, a true and correct copy of the above and foregoing document, to plaintiff's counsel of record, defense counsel and the trial court.

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