IN THE SUPREME COURT OF MISSISSIPPI

LONESTAR INDUSTRIES, INC., et al.	**APPELLANTS**
v.	**No. 2010-IA-1005-SCT**
CHARLES LARRY McGRAW and NIKKI McGRAW	**APPELLEES**

RESPONSE BRIEF OF APPELLEES CHARLES LARRY McGRAW *and* NIKKI McGRAW

ORAL ARGUMENT REQUESTED

On Petition for Interlocutory Appeal from the
Circuit Court of Claiborne County, Miss.
No. 2009-25

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v.	**No. 2010-IA-1005-SCT**
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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Miss. R. App. P. 28(a)(1), 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. Charles Larry McGraw and Nikki McGraw, *Plaintiff-Appellees*
2. American Optical Corporation, *Defendant-Appellant, now dismissed*
3. Lonestar Industries, Inc., *Defendant -Appellant*
4. Specialty Sand Company, *Defendant -Appellant*
5. Pearl Sands, Inc., *Defendant -Appellant*
6. Dependable Abrasives, Inc., *Defendant -Appellant*
7. Honorable Lamar Pickard, *Claiborne County Circuit Court*
8. Walter T. Johnson, Michael O. Gwin, Joseph G. Baladi, Robert Ireland, III; Watkins & Eager PLLC, *Counsel for Defendant-Appellant American Optical Corporation, now dismissed*
9. R. Allen Smith, Jr., *Lead Appellate Counsel and Trial Counsel for Appellees*
10. Timothy W. Porter, Patrick C. Malouf, John T. Givens; Porter & Malouf, *Trial Counsel for Appellees*
11. David Neil McCarty, *Appellate Counsel for Appellees*
12. David A. Barfield, Kimberly P. Mangum; Barfield & Associates, *Counsel for Lodestar Industries, Inc.*
13. W. Wright Hill, Jr., G. Martin Street, Jr.; Page Kruger & Holland, *Counsel for Specialty Sand Company*
14. Wade G. Manor, J. Scott Rogers, Clyde L. Nichols, III; Scott Sullivan Streetman & Fox, *Counsel for Pearl Sands, Inc. and Pearl Specialty Sand, Inc.*
15. Silas W. McCharen, Sandra D. Buchanan; Daniel Coker Horton & Bell, *Counsel for Dependable Abrasives, Inc.*

So CERTIFIED, this the 7th day of April, 2011.

Respectfully submitted,

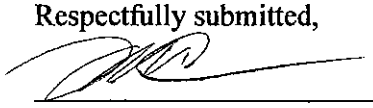

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Table of Contents

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Sources

Restatement of the Issues Presented for Review

I. The Amended Complaint Was Proper.

II. The Doctrine of Election of the Remedies Does Not Apply.

A. The Elements of the Doctrine of Election of the Remedies Are Not Met.

B. The Doctrine of Election of the Remedies No Longer Exists.

III. Judicial Estoppel Does Not Apply.

IV. The Claims Were Not Split.

V. The Court Must Not Invade the Province of the Jury.

Statement Regarding Oral Argument

Pursuant to MRAP 34(b), oral argument would assist the Court in resolving this case in two main ways. First, oral argument will clarify the procedural posture of this case, which is on interlocutory appeal following the denial of a motion to strike an amended complaint. Second, oral argument will assist the Court in determining that the sparingly used doctrines of election of remedies, judicial estoppel, and claim-splitting are not applicable to this case.

Statement of the Case

This case is about a worker with silicosis of the lungs. He filed a lawsuit against silica manufacturers, and the case settled at trial. After the trial had concluded, but before the case was dismissed from the docket, the worker amended his complaint and added additional silica manufacturers.

The newly-added defendants sought to strike on the worker's amended complaint. The trial court refused. The silica manufacturers then petitioned for interlocutory review, which this Court granted.

Undisputed Facts and Procedural History

The facts and procedural posture of this case are undisputed.

Mr. McGraw worked at Grand Gulf Nuclear Power Station and other locations in Mississippi and Louisiana from the 1970s until his retirement in 1999, during which time he was exposed to sandblasting. R. at 6:770-71.[1] Although Mr. McGraw was not a sandblaster himself, he was a boilermaker and welder who worked close by with sandblasters, and constructed boilers and other metal and mechanical structures for use in refineries and paper mills. R at 6:771.

Mr. McGraw was ultimately diagnosed with progressive silicosis, a lung condition so severe that he is currently a lung transplant candidate. R at 6:775, 861; Ex. A to this brief. As a result of the damage to his lungs, he is chronically ill and chronically short of breath. R at 6:775, 861; Ex. A.

On February 6, 2009, Mr. McGraw filed a Complaint in the Circuit Court of Claiborne County against several makers of the sand used in sandblasting. R. at 1:25. He utilized a products liability theory, alleging that their products proximately caused his lung damage, and was completely defective for use in sandblasting because of the harm it caused to humans. R. at 1:34-35. Portions of the case ultimately settled in the midst of trial.

Before a final judgment was tendered in the case, Mr. McGraw filed a Motion to Amend his Complaint. R. at 1:48-50.[2] He sought to bring in Lone Star and other silica manufacturers based on new information, and to add his wife as a co-plaintiff. R. at 1:48-50. Mr. McGraw alleged that his claims against the new defendants were "substantially the same as against the [prior] named Defendants," and that he "allege[d] the same causes of action against these

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[1] These citations refer to the volume of the record and the page number; for instance, this cite refers to the sixth volume of the record at pages 770 through 771.

[2] Judgment as to the defendants in the first trial was entered on October 27, 2009. R. at 1:74-75.

additional Defendants, and the same common law standards of care as have been alleged against the original set of Defendants . . . ." R. at 1:48.[3]

The trial court granted the motion to amend and allowed Mr. McGraw to add in Lone Star and the other defendants. R. at 1:105. At this point there were no other responsive pleadings, and the statute of limitations has not run on any claims.

After engaging in discovery and deposing Mr. McGraw, Lone Star joined in a Motion for Summary Judgment filed by another defendant, based on the same reasons it now asserts in its Brief: namely, that Mr. McGraw was somehow barred from maintaining suit against them because of earlier statements he made in the case. R. at 5:739.

The trial court denied the Defendants' omnibus motions to strike the amended complaint, and they pursued interlocutory appeal. R. at 7:949. The Court granted the Petition for Interlocutory Appeal, and afterwards, another Defendant with separate arguments was dismissed from the case.

Summary of the Argument

For five reasons the order of the trial court must be upheld. First, because Mr. McGraw's Amended Complaint was properly filed in accord with the Rules of Civil Procedure. Second, because the doctrine of election of the remedies does not apply, both because the traditional elements of the doctrine are not present and because the doctrine should be eliminated in our post-Rules world. Judicial estoppel does not apply in this case, and Mr. McGraw did not engage in claim splitting. Last, the Court should not invade the province of the jury in weighing Mr. McGraw's testimony or apportioning his losses.

[3] Mr. McGraw filed an Amended Motion to Amend on December 4, 2009, clarifying the defendants to be added. R. at 1:76.

Standard of Review

Lone Star requested that the trial court strike Mr. McGraw's amended complaint. A ruling on that type of motion is subject to the trial court's discretion. *See Sanders v. Wiseman*, 29 So. 3d 138, 140 (Miss. Ct. App. 2010) (standard of review on motion to strike affidavit was abuse of discretion); *McDonald v. Memorial Hosp. at Gulfport*, 8 So. 3d 175, 182 (Miss. 2009) (abuse of discretion standard employed when reviewing motion to strike expert).

Argument

For the following five reasons, the order of the trial court must be affirmed, and this case remanded for a trial on the merits.

I. The Amended Complaint Was Proper.

Because Mr. McGraw's Amended Complaint is explicitly allowed under the Rules of Civil Procedure, the trial court did not abuse its discretion in denying Lone Star's Motion to Strike.

Rule 15 allows the free amendment of a Complaint, and the trial court properly exercised its discretion in refusing to strike Mr. McGraw's amended complaint. That decision was not an abuse of discretion.

"A party may amend a pleading as a matter of course at any time before a responsive pleading is served . . . leave shall be freely given when justice so requires." MRCP 15(a). Quoting and citing to several previous cases, the Mississippi Supreme Court has held that "freely given" means just that: that such a "'mandate is to be heeded . . . if the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.'" *Moeller v. Am. Guarantee and Liability Ins. Co.*, 812 So. 2d 953, 962 (Miss. 2002) (quoting *Estes v. Starnes*, 732 So. 2d 251, 252 (Miss.1999)). When there is "the absence of any apparent or declared reason—such as undue delay, bad faith

or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.—the leave sought should, as the rules require, be 'freely given.'" *Id.*

"Motions for leave to amend complaint are left to the sound discretion of trial court," subject to review "under an abuse of discretion standard." *Id.* at 961. In *Moeller*, the Court reasoned it was "difficult to ascertain the actual prejudice that [the defendant] would have suffered had [the plaintiff] been allowed to amend their complaint to include a request for prejudgment interest," and that the judges overseeing the case did not show "any insightful reason as to why the motions to amend were denied." *Id.* at 962. Accordingly, it held that the motion to amend should have been granted. *Id.*

The plain language of Rule 15 and the case law of *Moeller* control the case at hand. Mr. McGraw requested leave to amend and the trial court granted it. This is simply not an abuse of discretion, and is not a proper basis for reversal.

Lone Star asserts that the trial court should have denied the plaintiff's Motion to Amend under Rule 15(a). However, in doing so it relies on recent case law wholly distinguishable from the case at hand.

In Lone Star's primary source of authority, a plaintiff simultaneously filed a motion to amend and her amended complaint on the day the statute of limitations expired. *Wilner v. White*, 929 So. 2d 315, 318 (Miss. 2006). *Wilner* dealt with two issues: whether filing a motion to amend tolls the statute of limitations and whether the plaintiff's amended complaint could relate back to the date of the original filing under Rule 15(c). *Id.* at 319. The trial court denied Wilner's motion to amend and dismissed Wilner's amended complaint for being untimely. *Id.*

Yet in the case at hand, the trial court granted the motion to amend, and there is no issue

with the statute of limitations—and therefore no argument that the amended complaint has to relate back, as the plaintiff in *Wilner* argued.

Lone Star concedes that the facts in the case at hand are different from those in the *Wilner* case, stating that "[w]hile *Wilner* involved a plaintiff who, *unlike the Plaintiff*, had not obtained leave to file any version of an amended complaint," it still maintains that Mr. McGraw's amended complaint should be dismissed. Brief at 22 (emphasis added). The result of *Wilner* does not compel dismissal when the facts are different. In this case, Mr. McGraw filed his amended complaint after his motion to amend was granted by the trial court and within the applicable statute of limitations, and therefore neither of the problems in *Wilner* are implicated here, and *Wilner* does not mandate reversal.

Lone Star next attempts to argue that this case is similar to *Veal v. JP Morgan Trust Co.*, 955 So. 2d 843 (Miss. 2007). Lone Star faces the same problems noted in their reliance on *Wilner*. *Veal* again deals exclusively with a plaintiff who *failed* to obtain leave from the court before she amended his complaint. *Veal*, 955 So. at 844-45. Instead of seeking leave from the trial court, the *Veal* plaintiff obtained consent from opposing counsel to amend her complaint. *Id.* at 844. The trial court dismissed the amended complaint *specifically* because the plaintiff failed to obtain leave from the court to file it, when she was required to do so. *Id.* at 845. This Court affirmed, relying on Rule 21 which *requires* a plaintiff to obtain leave of the court to file an amended complaint when adding new defendants. *Id.* at 847.

Lone Star argues that it would subvert the intent of Rule 15 and *Wilner* and *Veal* if Mr. McGraw's amended complaint is not dismissed. Yet Mr. McGraw has complied with both Rule 15 and Rule 21 because he sought leave of the trial court before amending his complaint. Unlike the cases of *Wilner* and *Veal*, there are no problems with statutes of limitation and permission was sought from the trial court prior to any action by Mr. McGraw.

As both *Wilner* and *Veal* clearly illustrate, a plaintiff is to be denied the right to amend *only* when she has not been granted the ability to do so by the trial court. Neither case deals with a plaintiff, such as Mr. McGraw, who *sought and obtained* the right to amend from the trial court. Rule 15(a) clearly grants the trial court the discretion to allow a plaintiff to amend their complaint. The trial court did not abuse its discretion in allowing the amended complaint, and Rules and precedent were followed.

Indeed, Lone Star concedes that unlike *Wilner* and *Veal* Mr. McGraw "filed, *but never served*, the First Amended Complaint." Brief at 3 (emphasis added). Under Rule 15, if a responsive pleading has not yet been filed, a party is allowed to amend without leave of court. Lone Star concedes that the Rules were followed, and accordingly the trial court must be affirmed.[4]

There is no evidence that the trial court abused its discretion by refusing to strike the Complaint. Because the Amended Complaint was proper under Rules and case law, the order denying the motion to strike must be affirmed.

II. The Doctrine of Election of the Remedies Does Not Apply.

Even if election of the remedies still exists after the adoption of the Rules of Civil Procedure, it does not apply in this case.

A. The Doctrine of Election of Remedies Is Inapplicable.

Because the equitable doctrine of election of the remedies does not apply in this case, the ruling of the trial court must be affirmed.

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[4] Further, the entirety of Lone Star's argument seems to be that the Amended Complaint was improper because it added another company, Dependable, as a new defendant. Only Dependable can make such an argument, as Lone Star is not prejudiced by the addition of another Defendant, and does not have standing to object to the addition. *See State v. Quitman County*, 807 So.2d 401, 405 (Miss. 2001) (parties only have standing to sue when they have a colorable interest in subject matter of litigation or suffer adverse effect).

Pre-Rules of Civil Procedure case law mentions a doctrine springing from equity that could bar a litigant from filing a second lawsuit with an inconsistent position. The doctrine of "election of the remedies" had three elements: "(1) the existence of two or more remedies, (2) the inconsistency between such remedies, and (3) a choice of one of them." *O'Briant v. Hull*, 208 So. 2d 784, 786 (Miss. 1968). In that case, the Court explained that a plaintiff had two possible causes of action, and "[e]ither cause of action was open to her, but not both causes." *Id.* at 787.

Examining the doctrine, "[t]he authorities are uniform in their holdings that the doctrine [of election of remedies] is a harsh one, that it is disfavored in equity, and that it should not be unduly extended." *Id.*; *see also Aetna Cas. and Sur. Co. v. Berry*, 669 So. 2d 56, 72 (Miss. 1996) (*overruled on other grounds by Owens v. Miss. Farm Bureau Cas. Ins. Co.*, 910 So. 2d 1065, 1074-75 (Miss. 2005)).

The classic example is the case where a plaintiff was hit by a truck, and filed suit asserting he was hit by a red truck—and after settling that case, asserted in a later action that he was hit by a blue truck. *Coral Drilling, Inc. v. Bishop*, 260 So. 2d 463, 464-65 (Miss. 1972). The Court stated that "[t]he two remedies [the plaintiff] sought to pursue are totally inconsistent; either a [blue] truck struck the wire, or a [red] truck struck it." *Id.* at 465. "[B]ecause [the plaintiff] prosecuted the suit against [the defendant] to the extent of reaching a settlement based on the contention that a [blue] truck caused his injuries, he was thereafter precluded from suing [a different defendant] for the same damages based on the contention that a [red] truck caused his injuries." *Id.* at 466.

The doctrine of elective remedies requires two different actions filed in different courts. Throughout its brief, Lone Star advances the patently untrue position that the case at hand is somehow comprised of two cases, despite the fact that it has only had one cause number in

Claiborne County Circuit Court, and that the same plaintiff has asserted the same theories of recovery against the same types of defendants.

In *Coral Drilling*, the plaintiff had filed suit against one defendant in circuit court, and after settling, filed suit against the other in chancery. *Id.* at 464-65. Likewise, in *O'Briant* the plaintiff had originally filed suit in federal court, and after settling with the defendant there, proceeded to file suit in chancery court. 208 So. 2d at 785. In the case at hand, Mr. McGraw has only ever had *one* case, in the Circuit Court of Claiborne County; Lone Star was simply brought in as a defendant later in the case. Unlike the *Coral Drilling* and *O'Briant* cases, there are no successive actions which would bar this claim.

Ultimately, the Court in *Coral Drilling* held that "[t]he compromise and settlement of a suit constitutes such an election as will preclude plaintiff from thereafter prosecuting an action based upon a theory inconsistent with that on which the former action was maintained." *Id.* at 465 (quoting *O'Briant*, at 787).

This case is not the "red truck/blue truck" scenario prohibited by *O'Briant* and *Coral Drilling*. Rather, this case is a "red truck/red truck" scenario, where the defendants are all similar and indistinguishable. "There is no estoppel by election of remedies unless the remedies asserted are inconsistent," the Court has held, and "[t]he doctrine applies only where a party elects to pursue one of two inconsistent remedies open for the assertion of a right arising from the same set of facts." *Banes v. Thompson*, 352 So. 2d 812, 815 (Miss. 1977). The *Banes* case rejected the doctrine of election of remedies when "there are no inconsistent remedies available to or claimed by appellant for the assertion of her rights," and where the plaintiff "sought to recover damages for personal injuries based on theories of negligence in both actions . . . ." *Id.* at 815. As one federal court put it, "it is essential to application of the doctrine that the remedies asserted and the facts supporting those remedies *be actually inconsistent*." *Carson by Chaffee v.*

Colonial Ins. Co. of Calif., 724 F.Supp. 1225, 1226 (S.D.Miss. 1989) (emphasis added).

The remedies in this case, whether against the first set of Defendants (who were all silica manufacturers) and the second set of remaining Defendant (who are also all silica manufacturers), are exactly the same: that the products used by and around Mr. McGraw were defective, and that their defectiveness severely damaged his lungs and shortened his life.

The remedies against the various Defendants are not "actually inconsistent"—they are the same remedies. Indeed, there is an absolute similarity between the remedies. The fact that the silica product sold and marketed by the first set of defendants was a proximate cause of Mr. McGraw's disease is wholly consistent with the theory that Lone Star and the other Silica Defendants also manufactured and marketed silica products. In *Coral Drilling*, the plaintiff could *only* have been hit by a red *or* a blue truck. Mr. McGraw was "hit" by silica. Like the *Banes* case, Mr. McGraw plead the same causes of action and theories of recovery against all Defendants, all of whom were red trucks, and there is no inconsistency between the manufacturer of one sand product or the other.

As outlined clearly above, there is no "either/or" in this situation; all silica manufacturers could contribute to the same harm of silicosis. The elements of election of remedies are not met, as this is a "red truck/red truck" scenario. Further, the doctrine is harsh and disfavored and should not be applied. For that reason, the order of the trial court must be affirmed.

B. The Doctrine of Election of the Remedies No Longer Exists.

The doctrine of election of the remedies does apply because it has been superseded by the Rules of Civil Procedure.

After the adoption of the Rules of Civil Procedure, the doctrine of election of the remedies has no place in Mississippi jurisprudence. While the doctrine has not yet been

explicitly overruled by our state courts, over a decade ago the Court recognized that it has outlived its original purpose and is a relic of a pre-Rules world.

After *O'Briant* and *Coral Drilling* were decided, the state courts adopted the Rules of Civil Procedure. The Rules explicitly allow for pleading in the alternative: "A party may set forth two or more statements of a claim or defense alternatively of hypothetically, either in one count or defense or in separate counts or defenses . . . A party may also state as many separate claims or defenses as he has, *regardless of consistency*." MRCP 8(e)(2) (emphasis added).

In examining the death of the doctrine, the Court noted that "[f]ollowing the adoption of the Federal Rules of Civil Procedure, the doctrine of election of remedies in federal courts *is either sparingly applied or no longer applicable*." *Beyer v. Easterling*, 738 So. 2d 221, 225 n.1 (Miss. 1999) (internal quotations omitted; emphasis added). The Court held that "the doctrine of election of remedies is in disfavor nationwide, and the doctrine is generally applied with caution and only in cases where the equities so dictate." *Id.* at 225.

As one source terms it, "[t]he doctrine of election of remedies is not favored by the courts," in part because it is "harsh," and after the adoption of the federal Rules the use of it by courts was rare. 25 Am. Jur. 2d Election of Remedies § 5.

It is well established that "[t]his Court routinely looks to federal case law for guidance in construing the Mississippi Rules of Civil Procedure because they were patterned after the Federal Rules of Civil Procedure." *MS Comp Choice, SIF v. Clark, Scott & Streetman*, 981 So. 2d 955, 959 (Miss. 2008). The Court should follow the lead of the federal courts in disregarding or abolishing the doctrine of election of remedies as superseded by the Rules of Civil Procedure.

Because the doctrine of election of the remedies does not apply in a post-Rules case, the order of the trial court must be affirmed.

III. The Doctrine of Judicial Estoppel Does Not Apply.

Because this case not involve prior lawsuits or multiple lawsuits, the doctrine of judicial estoppel does not apply.

"Judicial estoppel arises from the taking of a position by a party to a suit that is inconsistent with the position previously asserted *in prior litigation.*" *Beyer*, 738 So. 2d at 227 (internal quotations and citation omitted, emphasis added). "In the cases in which this Court has invoked the doctrine of judicial estoppel, the party against whom the estoppel was sought, knowingly, with full knowledge of the facts, asserted a position which was inconsistent with the position *in prior judicial proceedings*." *Daughtrey v. Daughtrey*, 474 So. 2d 598, 602 (Miss. 1985) (internal quotations and citations omitted, emphasis added).

Further, "[t]he doctrine of election of remedies is generally not applicable to lawsuits which were filed with incomplete or inaccurate knowledge of the underlying facts." *Beyer v. Easterling*, 738 So. 2d 221, 226 (Miss. 1999). In the statements set out at length in Lone Star's brief, Mr. McGraw offered at his second deposition that his debilitating and fatal illness had impaired his faculties, resulting in his incomplete and inaccurate telling of the facts in his first deposition. The doctrine is not applicable in such situations.

Not only are there not inconsistent positions, as discussed above, there is no "prior litigation." Lone Star inventively resorts to this doctrine because there is no actual basis in the law for precluding claims asserted *in the same action. See Matter of Gober*, 100 F.3d 1195, 1200 n.2 (5th Cir. 1996) ("The rule of issue preclusion, or collateral estoppel, bars relitigation of issues that were actually litigated and decided *in a previous action*") (emphasis added).

It is uncontested that this case is the same case filed by Mr. McGraw in 2009. There has never been a previous action; this case carried the same docket number in the same court.

Judicial estoppel simply does not apply, and for this reason the order of the trial court must be affirmed.

IV. The Plaintiff Has Not Engaged in Claim-Splitting.

Because there has only ever been one case and one Complaint, the prohibition on claim-splitting has not been violated.

Lone Star cites cases that prohibit claim-splitting in two separate actions, which is indeed prohibited in Mississippi. *See Adams v. Baptist Memorial Hospital-Desoto, Inc.*, 965 So. 2d 652, 55 (Miss. 2007). Lone Star strains heavily to argue that amending the Complaint to add in new defendants violates the prohibition on claim-splitting—yet continues to cling to the fiction that there are somehow two separate cases in play. There has only been one case under one docket number in the same court.

In one of the only two post-Rules cases Lone Star cites, the Court specifically prohibited multiple actions. In the first, the Court ruled that "the Court of Appeals [was] mistaken in its assumption that Wilner could have properly named the new parties in a separate complaint," because had the plaintiff done so, "she would have offended the long-standing principal of law in Mississippi prohibiting a party from splitting a cause of action into the subject of two different actions . . . ." *Wilner*, 929 So. 2d at 320.

In this case, Mr. McGraw did not name the defendants in a *separate action*, but the *same case*, which does not split the claim.

Further, the Court was careful to distinguish that an "amended complaint . . . filed before the expiration of the statute of limitations" would not be prohibited, which was "not the case" in *Wilner*. *Id.* at 321. As noted above, it is uncontested that the statute of limitations has not run in this case.

Mr. McGraw has not split his claim by filing two separate actions; he has maintained his claims in one case. For this reason, the order of the trial court must be affirmed.

V. The Court Must Not Invade the Province of the Jury.

Because dismissal is not a remedy for allegedly inconsistent statements or to determine comparative negligence, the order of the trial court refusing to dismiss the case must be affirmed.

It is a basic rule of court and common law that "[t]he credibility of a witness may be attacked by any party, including the party calling him." MRE 607; *see generally Robinson Property Group, L.P. v. Mitchell*, 7 So. 3d 240, 245 (Miss. 2009) (describing impeachment of a witness under Rule 607).

Further, the testimony of a witness is for a jury to weigh. *See McClain v. State*, 625 So.2d 774, 778 (Miss. 1993) ("Matters regarding the weight and credibility of the evidence are to be resolved by the jury"). If there is a conflict or inconsistency in testimony, the Court has made clear that the jury is who determines the facts, since "[t]he jury is charged with the responsibility of weighing and considering the conflicting evidence and credibility of the witnesses and determining whose testimony should be believed." *Id.* at 781; *see also McFarland v. Entergy Mississippi, Inc.*, 919 So.2d 894, 908 (Miss. 2005) (Randolph, J., concurring in part and dissenting in part) ("It is clearly the jury's prerogative, indeed duty, to weigh all witness testimony, and to accept or reject all or part, in order to reach its verdict").

When there is a dispute in testimony or allegations, "juries are impaneled for the very purpose of passing upon such questions of disputed fact, and [the appellate courts] do not intend to invade the province and prerogative of the jury." *Hales v. State*, 933 So.2d 962, 968 (Miss. 2006) (internal quotations and citations omitted).

The great majority of Lone Star's brief and record excerpts are constructed to prove that Mr. McGraw took inconsistent positions regarding his undisputed sickness. Yet any

determination if there is an inconsistency, or how it should be weighed, is for a jury to determine. Lone Star wishes the Court to invade the province of the jury and have the Court determine two things: first, that Mr. McGraw's testimony was somehow improper, and second, that it warrants dismissal of his case. Under clear precedent the Court cannot weigh this testimony.

If any remedy in this case is needed, it is simply to allow a factfinder to weigh the evidence at trial. If Lone Star wishes to attack Mr. McGraw's recollections or deposition testimony, they are allowed to do so—at trial, during cross-examination.

Lone Star argues that Mr. McGraw somehow made a "choice" between proceeding against the Defendants in this case. Yet from the inception of this case, Mr. McGraw has consistently maintained that numerous Defendants contributed to cause his life-threatening lung injuries. Any inferences to these facts, negative or positive, are for a jury to weigh.

Further, Lone Star appears to argue to the Court that comparative negligence bars Mr. McGraw's claims. If so, this is for a jury to determine, for under state statute, "[i]n actions involving joint tort-feasors, the trier of fact shall determine the percentage of fault for each party alleged to be at fault without regard to whether the joint tort-feasor is immune from damages." Miss. Code Ann. § 85-5-7(5); *see Cumberland Tel. & Tel. Co. v. Woodham*, 99 Miss. 318, 54 So. 890, 891 (1911) ("[i]n order that a person may be liable for damages resulting from his negligence, it is not necessary that his negligence should have been the sole cause of the injury").

Any disputed questions of fact or allegedly inconsistent testimony should not be resolved by this Court, but by a jury. Dismissal of Mr. McGraw's Complaint is simply not a remedy for allegedly inconsistent testimony or a legitimate substitution for the decision of a jury. Accordingly, the order of the trial court denying must be affirmed.

CONCLUSION

For five reasons the order of the trial court must be upheld. First, because Mr. McGraw's Amended Complaint was properly filed in accord with the Rules of Civil Procedure. Second, because the doctrine of election of the remedies does not apply, both because the traditional elements of the doctrine are not present and because the doctrine should be eliminated in our post-Rules world. Judicial estoppel does not apply in this case, and Mr. McGraw did not engage in claim splitting. Last, the Court should not invade the province of the jury in weighing Mr. McGraw's testimony or apportioning his losses.

Because there was no abuse of discretion, the trial court must be AFFIRMED.

Filed this the 7th day of April, 2011,

Respectfully Submitted,

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Jackson, Miss. 39201
T: 601.874.0721

CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that I have served by United States mail, postage prepaid, or via hand delivery if specified, a true and correct copy of the above and foregoing document, to the following persons at these addresses:

Ms. Kathy Gillis, Clerk
(via Hand Delivery)
MISSISSIPPI SUPREME COURT
P.O. Box 117
Jackson, Miss. 39205

Sammie Lee Good
Claiborne County Circuit Clerk
P. O. Box 549
Port Gibson, Miss. 39150

David A. Barfield, Kimberly P. Mangum
Barfield & Associates, P.A.
P.O. Box 2749Madison, Miss. 39130-2749

Sandra D. Buchanan,
Silas W. McCharen
Daniel Coker Horton & Bell, P.A.
P.O. Box 1084
Jackson, Miss. 39215-1084

Wade G. Manor, J. Scott Rogers, Clyde L. Nichols, III
Scott, Sullivan, Streetman & Fox, P.C.
P.O. Box 13847
Jackson, Miss. 39236-3847

W. Wright Hill, Jr., G. Martin Street, Jr.
Page Kruger and Holland
P.O. Box 1163
Jackson, Miss. 39215-1163

THIS, the 7th day of April, 2011.

DAVID NEIL McCARTY, ESQ.

MISSISSIPPI BAPTIST MEDICAL CENTER
1225 North State Street
Jackson, MS. 39202

HISTORY AND PHYSICAL EXAMINATION

MCGRAW, CHARLES L
010103290
0919400435
6010
William D Frazier, M.D.
IP

DOB: 01/01/1954
ADMISSION DATE: 07/13/2009

PATIENT NAME: Charles Larry McGraw

ADMISSION DIAGNOSIS: Respiratory failure secondary to silicosis.

HISTORY OF PRESENT ILLNESS: The patient is a 55-year-old man I have followed for many years with progressive silicosis. The patient called today saying he has been feeling terrible for the last month and had basically been in the bed. It has gotten to the point that he thinks he needs to be hospitalized. We have arranged that to be done. The patient has had no purulent sputum production, fever, hemoptysis, chest pain or loss of consciousness. He simply is having more shortness of breath and lack of energy. He has longstanding open lung biopsy proven silicosis. He is a lung transplant candidate and is currently listed for active transplant at University of Alabama at Birmingham, being #12 on the list.

PAST MEDICAL HISTORY: Significant for depression, dyslipidemia, fluid retention, hypothyroidism,

MEDICATIONS: Tricor, Zetia, Cymbalta, Ambien, Prevacid, Provigil, HCTZ Darvocet, Levoxyl, dexamethasone 4 mg a day, and O2 at home.

ALLERGIES: NONE KNOWN.

FAMILY HISTORY: Noncontributory.

SOCIAL HISTORY: Noncontributory. He worked at the Grand Gulf Nuclear Power Plant as the source of his asbestos exposure.

PHYSICAL EXAMINATION:
GENERAL: Shows a plethoric, cushingoid-appearing gentleman and chronically ill and chronically short of breath.
VITAL SIGNS: Stable. He has no fever.

EXHIBIT
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