IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

AMERICAN OPTICAL CORPORATION;
LONESTAR INDUSTRIES, INC.;
SPECIALTY SAND COMPANY;
PEARL SANDS, INC.;
PEARL SPECIALTY SAND, INC.; and
DEPENDABLE ABRASIVES, INC. — APPELLANTS

VS. — No. 2010-IA-01005-SCT

CHARLES LARRY McGRAW
and NIKKI McGRAW — APPELLEES

REPLY BRIEF OF APPELLANTS

Oral Argument Requested

Appeal from the Circuit Court of Claiborne County, Mississippi

Honorable Lamar Pickard

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CERTIFICATE OF INTERESTED PARTIES

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 this Court may evaluate possible disqualification or recusal:

1. Charles Larry McGraw and Nikki McGraw – Plaintiffs.

2. Lone Star Industries, Inc.; Specialty Sand Company; Pearl Sands, Inc.; Pearl Specialty Sand, Inc.; Dependable Abrasives, Inc. (Dissolved) – Defendants.

3. R. Allen Smith, Jr., The Smith Law Firm, Ridgeland, MS – Counsel for Plaintiffs.

4. Timothy W. Porter, Patrick C. Malouf, John T. Givens; Porter & Malouf, Jackson, MS – Counsel for Plaintiffs.

5. David A. Barfield, Kimberly P. Mangum; Barfield & Associates, Attorneys at Law, P.A., Madison, MS – Counsel for Lone Star Industries, Inc.

6. W. Wright Hill, Jr., G. Martin Street, Jr.; Page Kruger & Holland, Jackson, MS – Counsel for Specialty Sand Company.

7. Wade G. Manor, Clyde L. Nichols, III, J. Scott Rogers; Scott Sullivan Streetman & Fox, Jackson, MS – Counsel for Pearl Sands, Inc. and Pearl Specialty Sand, Inc.

8. Silas W. McCharen, Sandra D. Buchanan; Daniel Coker Horton & Bell, Jackson, MS – Counsel for Dependable Abrasives, Inc. (Dissolved).

9. Honorable Lamar Pickard; Circuit Court Judge of Claiborne County, Mississippi.

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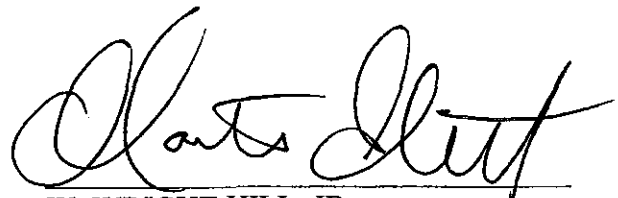

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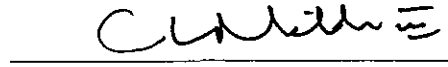

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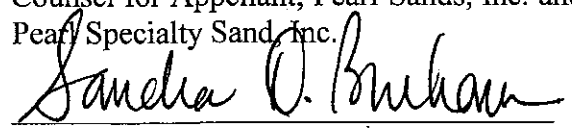

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE RULES

STATEMENT REGARDING ORAL ARGUMENT

The Appellants and now the Appellees have requested oral argument in this matter. However, Appellees asserted in their Statement Regarding Oral Argument that this case is on Interlocutory Appeal from the denial of a Motion to Strike an Amended Complaint. This statement, while partially correct, is misleading. This matter is before this Court for review of the trial court's denial of the Appellants' Motion for Summary Judgment, or Alternatively, Motion to Strike Second Amended Complaint and Dismiss First Amended Complaint. (R.000273 and R.000949).

STATEMENT OF THE CASE/FACTS AND PROCEDURAL HISTORY

The Appellants provided the Court with an accurate Statement of the Case in the Appellants' Brief and incorporate same herein by reference. However, there were several statements made in the McGraws' statement of the case and alleged undisputed facts and procedural history that need to be corrected or clarified. Those matters are set forth hereinbelow.

Throughout the McGraws' brief, they reference the procedural history of this case as it applies to Lone Star Industries, Inc. ("Lone Star") and address the arguments made by Lone Star in its brief. Lone Star is not the only Appellant in this matter. It is puzzling as to why the McGraws would only respond in their brief to arguments and positions taken and made by Lone Star. The Appellants' Brief was filed by Lone Star, Pearl Sands, Inc. ("Pearl Sands"), Pearl Specialty Sands, Inc. ("Pearl Specialty"), Dependable Abrasives, Inc., (dissolved) ("Dependable"), and Specialty Sand Company.[1]

In their statement of the case, the McGraws refer to the new defendants as silica manufacturers. The new defendants do not manufacture silica, but are suppliers of sand used for abrasive blasting purposes among others. Sand is a naturally occurring mineral and is not manufactured by anyone.

According to the McGraws, Charles McGraw ("Mr. McGraw") was "...diagnosed with progressive silicosis, a lung condition so severe that he is currently a lung transplant candidate". (Appellees' Brief p. 2) In support of that statement, the McGraws have attached as Exhibit "A" to their brief a medical record from Mississippi Baptist Medical Center dated 7-13-2009 wherein Mr. McGraw is stated to be a lung transplant candidate currently listed for active transplant at University of Alabama- Birmingham. The McGraws attach this medical record without

[1] Lone Star, Pearl Sands, Pearl Specialty, Dependable and Specialty Sand Company will hereafter be referred to as the new defendants.

informing the Court that in fact, Mr. McGraw has had his lung transplant.[2] (Appendix "1") While the new defendants do not challenge the severity of McGraw's lung condition, but rather the cause of his lung condition, the new defendants believe the Court should be made aware of Mr. McGraw's current status.

The McGraws actually now claim that "[p]ortions of the case ultimately settled in the midst of trial." (Appellees' Brief p. 2) That is simply not true. The case that was before the trial court was the original complaint filed by Mr. McGraw against Clark Sand Company, Inc., ("Clark"), Mississippi Valley Silica Company, Inc. ("MS Valley"), Precision Packaging, Inc., ("Precision") and Custom Aggregates and Grinding, Inc. ("Custom").[3] The new defendants were not parties to the case at that time. What "settled in the midst of trial," was the entire case. To argue to this Court that "[p]ortions of the case ultimately settled" is more than disingenuous. The trial court had a Pre-Trial Conference, summoned a jury venire from which a jury was selected, and announced to the Court that they were ready for trial. The case proceeded to trial and after opening statements the case settled. Portions of the case did not settle. If portions of the case had settled, the jury would not have been allowed to go home and the case would have proceeded. In fact, an announcement was made to the trial court that the case had been resolved.

> **THE COURT:** Let me put this on the record. For the record, this is Cause No. 2009-25. I'm here with counsel for the plaintiff and counsel for the defendant and apparently during the day, we're about 4:20 in the trial today, and apparently after negotiations today, the parties have been able to resolve this matter and announced to this court that it is fully and finally settled; is that correct, Mr. Krutz?
>
> **MR. KRUTZ:** Yes, it is.
>
> **THE COURT:** And the plaintiffs- -that's correct?
>
> **MR. SMITH:** Allen Smith on behalf of the plaintiff.
>
> **THE COURT:** That's correct? You talked with the plaintiff and you talked with

[2] Letter from Kimberly Mangum to Allen Smith dated January 25, 2011.

[3] Clark, MS Valley, Precision and Custom may be referred to hereinafter as the original defendants.

your clients and it's a done deal?

MR. SMITH: Yes, sir.

THE COURT: This settlement is a settled with respect to all parties?

MR. SMITH: All parties have resolved this matter.

MR. KRUTZ: We're done.

(R. Volume 8, p. 1, p. 118-119); (emphasis added).

As is clear from the transcript, Mr. McGraw's case was fully and finally settled in its entirety and not a portion of same. There were no further issues to be tried. All issues raised by the Complaint had been concluded.

Last, the Appellees make much ado about the fact that the trial court granted the Motion to Amend and allowed Mr. McGraw to add the new defendants. The granting of the Motion to Amend will be discussed later in further detail, however, it is important to note that while the trial court granted the Motion to Amend, it did so with absolutely no opposition. The reason there was no opposition to the Motion to Amend is because there were no parties to the suit at that time. The Motion to Amend was filed after the original defendants had settled the case and the new defendants were not yet parties.

STANDARD OF REVIEW

The McGraws again try to posture this case as an appeal based upon a Motion to Strike the Amended Complaint. While the McGraws correctly state the standard of review on a Motion to Amend, they fail to point out to this Court that what was actually filed was a Motion for Summary Judgment, or Alternatively, Motion to Strike Second Amended Complaint and Dismiss First Amended Complaint. (R.000273-000277) Clearly the McGraws are aware that this matter is not before the Court solely on a Motion to Strike the Amended Complaint. The standard of review on a trial court's decision on a Motion for Summary Judgment is de novo, as

is set forth in the *McDonald* case cited in the McGraws' brief. *McDonald v. Memorial Hospital at Gulfport*, 8 So3d. 175 (Miss. 2009) *citing One South, Inc. v. Hollowell*, 963 So.2d 1156, 1160 (Miss. 2007) *citing Hubbard v. Wansley*, 954 So.2d 951, 956 (Miss.2007).

ARGUMENT

1. The Doctrine of Election of Remedies bars Plaintiffs' Claim

A. The Doctrine of Election of Remedies is Applicable to This Case

The McGraws correctly recognized that the doctrine of election of remedies has 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. Hall*, 2008 So.2d 784, 786 (Miss. 1968). Those are the only three elements for the application of the doctrine of election of remedies. However, later in the McGraws' argument they try to add an additional element requiring that there be two different actions filed in two different courts. As the *O'Briant* case clearly states, that is not an element of the doctrine of election of remedies. The McGraws fail to cite any authority to support such a position. Admittedly cases discussing the doctrine of election of remedies have involved different actions. However, the Mississippi Supreme Court has not had the opportunity to consider the doctrine of election of remedies in a scenario such as we have here where the plaintiff attempts to amend his complaint after his lawsuit has been fully and finally settled. The three required elements of the doctrine of election of remedies are met in this case.

The McGraws have completely missed the point of *Coral Drilling* as it applies to the doctrine of election of remedies. *Coral Drilling, Inc. v. Bishop*, 260 So.2d 463 (Miss. 1972). In *Coral Drilling* the cause of the damage to the plaintiff was a truck. In this case the alleged cause of the damage is sand. In *Coral Drilling*, the plaintiff first claimed that the red truck operated by

G. B. Boots Smith, Inc. was the cause of his damage. Then, after obtaining a settlement in that case, the plaintiff claimed that it was, in fact, a blue truck operated by Coral Drilling Inc. which caused his damage. In the case before us, Mr. McGraw first claimed that the sand which allegedly caused his damage was supplied by the original defendants (Clark, MS Valley, Precision, and Custom). Mr. McGraw provided testimony regarding the original defendants and described in detail the packaging and containers associated with those original defendants. Those were the defendants that allegedly caused Mr. McGraw's injuries. Now, after settling with the original defendants, the McGraws claim that Mr. McGraw's alleged damages were caused by sand supplied by the new defendants which are presently before this Court.

The key to the *Coral Drilling* case and its interpretation of the doctrine of election of remedies is not the color of the trucks. The McGraws like to advance the position that this is a red truck-red truck case, therefore, the doctrine is inapplicable. If the color of both trucks had been red in *Coral Drilling,* the result would have been the same. The doctrine of election of remedies was triggered in *Coral Drilling* because in the first suit the plaintiff claimed that one defendant was liable for the plaintiff's damages and as a result of those damages the plaintiff received a settlement. In the second suit, the plaintiff claimed that a different defendant was responsible for the same damages and the Court held that the doctrine of election of remedies applied. Whether it was a red truck-red truck or a red truck-blue truck is of no consequence. The point of *Coral Drilling* is that the plaintiff elected to pursue the first remedy against one defendant and as a result received a settlement, thereafter, Plaintiff sought to pursue a remedy for the identical damages against a completely different defendant and as such the doctrine of election of remedies applied. The facts of *Coral Drilling* are strikingly similar to this case.

Mr. McGraw elected to pursue the original defendants for his alleged damages, then proceeded to trial and settled with all of the original defendants. Once he had settled with all of

the original defendants, he then claimed that it was the new defendants that were responsible for his alleged damages. The damages in both instances are the same. The facts of this case are on point with *Coral Drilling*.

B. The Doctrine of Election of Remedies Does Still Exist

The Appellees argue that the doctrine of election of remedies no longer exists, then later acknowledge that the doctrine has not been overruled by our courts. Those arguments are in conflict. The doctrine of election of remedies does still exist as admitted by the McGraws.

Mississippi Rule of Civil Procedure 8(e)(2) states as follows:

> A party may set forth two or more statements of a claim or defense alternatively or hypothetically either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them is made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has, regardless of consistency. All statements shall be made subject to the obligation set forth in Rule 11.

The McGraws correctly state that the M.R.C.P. Rule 8(e)(2) explicitly allows for pleading in the alternative. However, nowhere in M.R.C.P. Rule 8(e)(2) does it contemplate that the "alternative" pleading would be filed after a case is fully and finally settled. The Rule simply does not contemplate what the McGraws are attempting to do in this case. The Rule does not allow or contemplate that a plaintiff would plead one set of facts in its complaint, announce to the court that it is ready for trial, seat a jury, deliver opening statements and then settle a case, only thereafter, to lay out in an amended complaint its alternative theory of recovery.

In *Carson*, cited by the McGraws, the Mississippi Supreme Court described the doctrine of the election of remedies as follows:

> The choosing between two or more different and co-existing modes of procedure and relief allowed by law on the same

> set of facts. The doctrine is applicable whether the aggrieved party has two remedies by which he may enforce inconsistent rights growing out of the same transaction and, being cognizant of his legal rights and of such facts as will enable him to make an intelligent choice, brings his action by one of the methods.

Carson v. Colonial Insurance Company of California, 724 F.Supp. 1225, 1226 (Miss. 1989) *citing Anaconda Aluminum Company v. Sharp*, 243 Miss. 9, 136 So.2d 585, 588 (Miss. 1962) (quoting 18 Am. Jur, Election of Remedies p. 129). The McGraws had co-existing modes of procedure and relief based upon the same set of facts that could have been pursued. The Supreme Court noted that the doctrine is applicable where the aggrieved party has two remedies which grow out of the same transaction and that the aggrieved party is cognizant of his legal rights and is aware of such facts as will enable him to make an intelligent choice thereby bringing his action by the method of his choosing. McGraw, through his counsel, was certainly cognizant of his legal rights and should have been cognizant of the facts that enabled him to make the decision to pursue only the original defendants. As was pointed out in the new defendants' brief, the only two witnesses offered by the McGraws, other than Mr. McGraw, to support their allegations against the new defendants were both identified and available to the McGraws prior to the first trial of this matter. In fact, the McGraws and their counsel had the names of both witnesses they are now relying on to support their new theory long before the initial trial. Rome Fuller was identified by Mr. McGraw in his initial deposition in the first case with the original defendants. Additionally, Rome Fuller is Mr. McGraw's uncle and lives very close to the McGraws. Orlean Westrope was also identified by McGraw in his deposition taken in the first matter, long before the trial began. Furthermore, McGraws' counsel also represents Orlean Westrope in his own alleged silicosis case. The testimony from both of those witnesses regarding the products which allegedly caused Mr. McGraw's damages is certainly not new evidence and as such the McGraws could have joined the new defendants in the first case or pled

their theories against the new Defendants long before the trial commenced. The McGraws clearly chose to proceed to trial against the original defendants despite the facts available to them regarding the new defendants. Therefore, the McGraws elected their remedy preserving their expedited trial date, when they chose to proceed to trial against the original defendants, and not the new defendants.

While the doctrine of election of remedies may be sparingly applied and even disfavored by courts, the doctrine has clearly not been abolished. This case is ripe for application of the doctrine of election of remedies.

2. The Doctrine of Judicial Estoppel bars Plaintiffs' Claim

The McGraws argue that one of the reasons judicial estoppel and/or the doctrine of election of remedies are inapplicable to this case is the fact that Mr. McGraw had a potentially fatal illness which somehow impaired his ability to recount the new defendants' products. While the new defendants would take issue with that statement, it is undeniable that Mr. McGraw's failing health did not affect, in any way, his lawyer's abilities or duties to investigate his case and pursue any and all responsible parties for his alleged damages. In fact, if Mr. McGraw's failing health was so bad, it could be argued that his condition could have placed a higher burden on McGraws' counsel to investigate his claims. Regardless, Mr. McGraw's counsel had an absolute duty to investigate their client's case. The McGraws and their counsel chose which responsible parties to sue for their alleged damages. It is more than disingenuous for the McGraws to argue that Mr. McGraw's failing memory caused him not to recall the new defendants until a later time, when in fact, two of the witnesses offered by the McGraws in response to the underlying Motion herein were both known about and available prior to his first trial. As has been previously stated, one of the witnesses, Rome Fuller is Mr. McGraw's uncle. The additional witness, Orlean Westrope, is in fact a client of counsel for the McGraws. Both

were identified in Mr. McGraw's deposition taken prior to the trial. Either the McGraws' counsel failed to fully investigate the claims and bring in all proper parties prior to trial or, together with the McGraws made a decision not to pursue the new defendants at the first trial.

In their brief, the McGraws state the following: "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)." (Appellees' Brief p. 12) From that language the McGraws make a jump that judicial estoppel does not apply because this case does not involve a prior lawsuit or multiple lawsuits. This is the only argument made by the McGraws to avoid the application of the doctrine of judicial estoppel in this case.

Because the litigation against the original defendants was undeniably *prior* to the litigation against the new defendants the doctrine of judicial estoppel bars these proceedings. The litigation against the original defendants certainly was not going on simultaneously with the litigation currently ongoing with the new defendants. The litigation against the original defendants went to trial, seated a jury, and opening statements were delivered. This most certainly was litigation prior to the litigation currently ongoing. The McGraws focus on the fact that this is one case and that there was no previous action as this case carries the same docket number and is in the same court as the prior litigation. The simple fact that this litigation has the same docket number as the prior litigation does not mean that the case against the original defendants was not prior. To hold otherwise would put form over substance. The new defendants will readily admit that there is no Mississippi case reported that squarely fits the facts before the Court. However, that does not mean judicial estoppel does not apply. It simply means the Courts have not yet been presented with a case that has gone to trial and settled, only later to have a plaintiff file an amended complaint and request an additional trial against different parties.

While the McGraws rely on *Banes* in support of their election of remedies argument, they fail to point out what *Banes* has to offer regarding the application of judicial estoppel to this case. *Banes v. Thompson,* 352 So.2d 812 (Miss. 1977). In *Banes* the court takes notice that "... Judicial estoppel prohibits a party in **a** judicial proceeding from denying or contradicting sworn statements **made therein**." *Banes* at 815 *citing Ivor v. Clark Company of Texas, Inc. v. Southern Business and Industrial Development Company*, 399 F.Supp. 825 (S.D. Miss. 1974)(emphasis added). McGraw has clearly contradicted sworn statements in a judicial proceeding. So, even if the McGraws were correct and there is no prior proceeding, the doctrine of judicial estoppel applies within the context of a single judicial proceeding. The Court further goes on to note "Judicial estoppel normally arises from the taking of a position by a party that is inconsistent with a position previously asserted." *Id.*; *citing Wright v. Jackson Municipal Airport Authority*, 300 So.2d 805 (Miss. 1974). This case fits squarely with that statement. Mr. McGraw took a position against the newly added defendants which is clearly inconsistent with the position he previously asserted. Admittedly, in *Banes* there were in fact two separate lawsuits. However, the above noted statements regarding the principles of judicial estoppel do not require there be two separate lawsuits. The McGraws' claims are barred by the doctrine of judicial estoppel.

3. The Prohibition against Claims Splitting bars Plaintiffs' Claim

Again, the McGraws' entire argument against the application of the prohibition against claim splitting seems to rest on the fact that this is one case under one docket number, therefore, the prohibition of claim splitting has not been violated. Again as with judicial estoppel, the McGraws are putting form over substance. As was discussed previously, the McGraws cannot assert that the litigation involving the original defendants was not prior to the litigation now ongoing against the new defendants. The McGraws further cannot assert that the litigation against the original defendants was not tried to a full and final settlement at trial. Now, the

McGraws want to try their case again against the new defendants. Obviously, there cannot be one trial against both set of defendants as the claims against the original defendants have already tried and settled. The claims clearly were not presented together - they were split - any argument to the contrary is disingenuous.

Allowing plaintiff to proceed in this fashion would result in endless litigation of the same claim, a complete waste of the judicial system's resources, and a denial of defendants' rights to due process. Conceivably, as plaintiff is attempting, plaintiff could sue five defendants and get full recovery from them based on the representation that they were the sole parties at fault, then later amend to add five new defendants and get additional recovery from them on the assumption that they too bear fault. The initial defendants would then have been denied the right to have fault properly allocated as they were unaware of the later added defendants. Moreover, plaintiff could subsequently name five more defendants, and on and on. The result would be endless litigation of the same claim, inconsistent verdicts on liability and damages, and plaintiff could and likely would receive duplicative recovery.

4. The Amended Complaints were Improper and the McGraws Complaint Should be Dismissed

The McGraws' argument on this issue centers around their narrow interpretation of M.R.C.P. Rule 15(a). Specifically, they rely on the language which states that "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" M.R.C.P. Rule 15(a)" (Appellees' Brief p. 4). There is absolutely nothing in M.R.C.P. Rule 15 which authorizes an amendment of a complaint after a plaintiff has announced that he is ready for trial, seated a jury, delivered opening statements and then settled the entire case. It is not surprising that the rules do not address amendments after cases have settled with all defendants because the complaint and any issues

therein all become moot when the case is settled. After a case is settled, there is nothing left to amend. *Pharmacia Corp. v. Suggs*, 932 So.2d 95 (Ala. 2005)(finding that settlement of a case as to all parties "...renders a judicial proceeding moot and thereby destroys jurisdiction..." to rule on a subsequent motion to amend). Likewise it is not surprising that the cases cited by the new defendants in their brief are factually distinguishable because all such cases involve motions for leave to amend which were filed prior to and/or during trial. The new defendants have not found any Mississippi precedent that discusses efforts to amend a complaint to add new defendants after a case has settled as to all defendants at a trial on the merits. Presumably, no such case exists because it is generally understood that you cannot amend a complaint after the case has been totally resolved. In this case, there was effectively no complaint to amend. It is nonsensical to rely on M.R.C.P. Rule 15 as an avenue to bring additional defendants into a case after the case is over.

In support of the McGraws' position that amendments should be "freely given", they cite the following language from *Moeller*: "...the absence of an 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, the utility of the amendment, etc.- the leave sought should, as the rules require, be 'freely given'". (Appellees' Brief pp. 4 & 5. quoting *Moeller v. American Guaranty & Liability Ins. Company,* 812 So.2d 953, 962 (Miss. 2002)(quoting *Estes v. Starnes,* 732 So.2d 1251, 1252 (Miss. 1999)). Importantly, the issue in *Moeller* was a motion for leave to amend to seek pre-judgment interest from a defendant who was already a party to the case. *Moeller* had nothing to do with an amendment seeking to add additional defendants after the case was over.

Regardless, there has absolutely been undue delay on the part of Mr. McGraw in

attempting to amend his complaint. As has been stated throughout this brief, two of the witnesses Mr. McGraw is offering in support of his testimony against the new defendants, Rome Fuller and Orlean Westrope, were both identified, known and available to Mr. McGraw prior to his first trial. (The availability of both of these witnesses prior to the first trial has been discussed thoroughly in this brief in the argument sections on election of remedies and judicial estoppel, therefore, will not be discussed in detail again here).

This Court and the United States Court of Appeals for the Fifth Circuit have rejected the idea of an absolute right to amend as the McGraws attempt to argue before this Court.

> This Court does not view lack of diligence as a compelling reason to amend. 'Applications to amend the pleadings should be prompt and not the result of lack of diligence.' *Harris v. Miss. Valley State Univ.,* 873 So.2d 970, 991 (Miss. 2004) (relying on *TXG Intrastate Pipeline Co. v. Grossnickle,* 716 So.2d 991, 1011 (Miss. 1997)). We have previously rejected the argument of an absolute right to amend, disallowing such amendments based on reasoning that a party should not be allowed to later complain on an issue, when the party "had ample opportunity and time to amend its complaint, and has offered no justification for why it did not do so." *Hartford Cas. Ins. Co. v. Halliburton Co.,* 826 So.2d 1206, 1219 (Miss. 2110).

Webb v. Braswell, 930 So.2d 387, 395 (Miss. 2006). "When there has been an apparent lack of diligence, the burden shifts to the movant to prove that the delay was due to excusable neglect." *Chitimacha Tribe of Louisiana v. Harry L. Laws Company, Inc.,* 690 Fed.2d, 1157, 1163 (5th Cir. 1982). Mr. McGraw has offered no reason as to why the new defendants were not added as parties prior to his first trial. Consequently, even if it were proper to amend the complaint after the case was over, (an argument which the new defendants strongly oppose), any amendment would additionally be improper due to the inexcusable delay in seeking such an amendment.

The McGraws spend a great deal of time distinguishing the facts of *Wilner* and *Veal* from this matter. Clearly, the McGraws are misconstruing the new defendants position of the

applicability of *Wilner* and *Veal* to this case. *Wilner* and *Veal* are not cited by the new defendants for the proposition that the McGraws cannot amend their complaint to add new parties after the case was over. *Wilner* and *Veal* clearly do not address that situation. As previously stated, we have found no Mississippi case that addresses that situation as it is not contemplated by the Mississippi Rule of Civil Procedure. Such a procedure would violate the prohibition against claims splitting and is otherwise nonsensical and contrary to the dictates of judicial economy and avoiding the wasting of judicial resources.

Wilner and *Veal* are cited for the purpose of pointing out that even if this Court were to allow a party to amend his complaint after the case was over, the amendment in this case was procedurally defective and the complaint should be dismissed/stricken. *Veal* stands for the proposition that in addition to M.R.C.P. Rule 15, a party seeking to amend a complaint which adds parties must be read in conjunction with other applicable rules such as M.R.C.P. Rule 21. *Veal v. JP Morgan Trust Company,* 955 So.2d 843, 847-48 (Miss. 2007). The court noted that M.R.C.P. Rule 15 governs amended pleadings generally, but that a request to amend to add a new party must be evaluated under M.R.C.P. Rule 21, which provides that "[p]arties may be dropped or added by order of the court". The court held that leave of court must be obtained to permissibly file an amended complaint adding a new defendant. *Id.* at 848.

The McGraws sought and obtained leave of court to file the first amended complaint against five new defendants. The first amended complaint was never served on any of the new defendants. The McGraws however, did not get court approval prior to filing the second amended complaint, which added a sixth new defendant. It is the second amended complaint that was served on all new defendants. Because the second amended complaint was filed without leave of court, it should be stricken pursuant to M.R.C.P. Rules 15 and 21 in accordance with *Veal* and *Wilner*. The McGraws have not complied with M.R.C.P. Rules 15 and 21. The

McGraws would like this court to view their amendment under M.R.C.P. Rule 15 only and ignore the requirements of M.R.C.P. Rule 21 and the clear dictates of *Wilner* and *Veal* with regard to those Rules.

The McGraws incorrectly rely on the language in M.R.C.P. Rule 15 and assert they can file their second amended complaint and serve it on the new defendants because they were granted leave to amend and file a first amended complaint and no responsive pleading had yet been filed. Such a position would completely circumvent the purpose of M.R.C.P Rules 15 and 21. Essentially, the McGraws would be adding an additional party as they did in the second amended complaint without the trial court's approval. The trial court allowed the McGraws to file an amended complaint against certain defendants. The trial court did not approve the McGraws' filing of a complaint against the sixth new defendant. While the new defendants would argue again that the trial court abused its discretion in allowing the first amended complaint, the second amended complaint filed by the McGraws was certainly in violation of the rules and case law.

The McGraws in footnote number 4 of their brief indicate that Lone Star does not have standing to object to the addition of the new defendant, Dependable, which was added in the second amended complaint. The new defendants are perplexed at this argument as this argument is also being made by Dependable.

To avoid duplicative and cumulative pleadings being filed, and having essentially the same issues for presentation to the Court, the new defendants joined in this Interlocutory Appeal. This Court previously recognized that this Interlocutory Appeal was being brought by all of the new defendants (Lone Star, Pearl Sands, Pearl Specialty, Dependable and Specialty Sands) in

denying Appellees previous request to dismiss.[4]

Absolutely nowhere in Appellees' response, or the record, is there any indication that Appellees sought leave to add Dependable as a party as required by Rule 21. Most notably, in their responsive brief, Appellees concede that leave of Court is required when adding a new defendant (Appellees' Response, p. 6):

> "*Veal* again deals exclusively with a plaintiff who *failed* to obtain leave from the court before she amended his (sic) complaint. *Veal,* 955 So. (sic) 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 court to file an amended complaint when adding new defendants.** *Id.* 847." (Emphasis added)

The trial court never issued an order allowing Appellees to add Dependable as a new party, nor did the trial court grant leave to Appellees to file the Second Amended Complaint. Appellees should not be allowed to engage in haphazard and piecemeal litigation in total disregard or manipulation of the rules and law. The amended complaints in this matter should all be stricken and/or dismissed.

As has been addressed previously in this reply, the McGraws' entire response is centered around what Lone Star's argument is or is not. The Appellants' Brief, as well as this reply, are filed by the "Appellants" which include all of the new defendants, not just Lone Star. Dependable is an Appellant and has jointly filed its brief and this Reply Brief with its co-appellants. Also, Lone Star does have standing as the second amended complaint is the only

[4] After filing the Petition for Interlocutory Appeal, joined by all defendants, American Optical settled with Appellees. American Optical and Appellees later filed Motions to Dismiss Interlocutory Appeal. On February 9, 2011, The Supreme Court panel found that the appeal should be dismissed as to American Optical only recognizing that several other defendants joined in the petition. The Supreme Court denied the Motions to Dismiss, specifically stating that the appeal should proceed as to the remaining Appellants.

complaint with which it has been served.

There was effectively no complaint to amend at the time Mr. McGraw filed his motion to amend his complaint. Mr. McGraw's case had proceeded to trial by his announcement to the court that he was ready for trial, seated a jury, delivered opening statements and then settled the entire case. At that point the issues in his complaint were moot. The trial court did not have discretion at that point in time to grant an amendment. However, if this Court finds the trial court had discretion at that juncture to allow Mr. McGraw's amendment, it was clearly abused. Lastly, if the trial court had such discretion, the McGraws did not obtain leave of court to file the second amended complaint which was served on the new defendants and therefore the amendment is improper and should be dismissed/stricken.

5. Province of the Jury

This issue, as is raised by the McGraws for the first time in their response, is not a genuine issue before this Court. The issues on appeal and questions being presented here are whether or not this claim can even be filed based upon the various legal doctrines discussed herein. The questions presented to this Court are whether or not the McGraws can even pursue these claims so it is not appropriate to determine whether the province of the jury has been invaded. The question is whether the jury should have any province to consider this case at all.

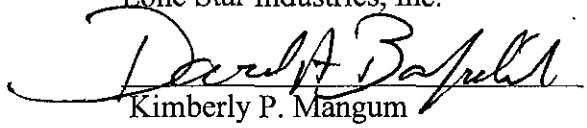
CONCLUSION

The doctrines of judicial estoppel, election of remedies and/or other legal principles promoting judicial economy and the preservation of judicial resources preclude the McGraws from maintaining this action against the new defendants, Lone Star, Specialty Sand Company, Pearl Sands, Pearl Specialty and Dependable. Further the prohibition against claims splitting also prevents the McGraws from pursuing this action against the new defendants. The McGraws' Second Amended Complaint, which was filed without leave of the court, is a nullity and should

be stricken. For the reasons set forth in this reply and all the reasons set forth in the Appellants' Brief, Lone Star, Specialty Sand Company, Pearl Sands, Pearl Specialty and Dependable respectfully request that this Court reverse and render the trial court's denial of the Motion for Summary Judgment, or In The Alternative, Motion to Dismiss and dismiss Lone Star, Specialty Sand Company, Pearl Sands, Pearl Specialty and Dependable with prejudice.

Respectfully submitted, this the 25th day of May, 2011.

Lone Star Industries, Inc.



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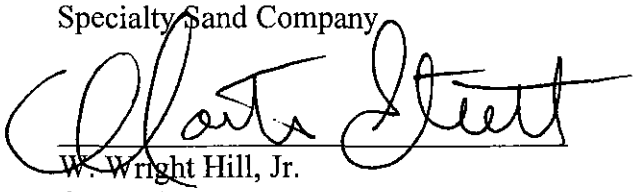

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CERTIFICATE OF SERVICE

I, the undersigned attorney of record, hereby certify that I have this day served via U.S. Mail, postage prepaid, or hand delivery a true and correct copy of the foregoing document, as noted, to the following:

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This the 25th day of May, 2011.

David A. Barfield

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January 25, 2011

VIA FACSIMILE AND U.S. MAIL

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RE: *Charles Larry McGraw and Nikki McGraw v. American Optical Corporation, et al;* Circuit Court of Claiborne County, Mississippi; Civil Action No. 2009-25; and

Charles Larry McGraw and Nikki McGraw v. American Optical Corporation, et al; Circuit Court of Claiborne County, Mississippi; Civil Action No. 2010-155

Dear Allen:

It is my understanding after speaking with you on Friday, that Mr. McGraw has in fact received his double-lung transplant. As you are aware, both of the McGraw cases referenced hereinabove are stayed and as such I am unable to make any type of formal discovery request from you or the health care providers regarding the lungs that were removed. Since it has been known from day one that it is disputed that Mr. McGraw has silicosis, I trust that you took the proper steps to have the health care providers preserve the lungs that were removed, so as to prevent spoliation of this vital evidence in these cases. Also, please take all necessary steps to continue preservation of the removed lungs so they may be properly subjected to a pathological diagnosis after the stays are lifted.

Thank you for your attention to this matter and I look forward to speaking with you if you have any questions regarding same.

Sincerely,

BARFIELD & ASSOCIATES
Attorneys at Law, P.A.

Kimberly P. Mangum

KPM/cr
cc: Tim Porter

Appendix "A"