

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SUP. CT. NO. 2011-IA-953

D.P. HOLMES TRUCKING, LLC

APPELLANT/ DEFENDANT

VS.

LESTER BUTLER

APPELLEE/ PLAINTIFF

**ON APPEAL FROM THE DENIAL OF MOTIONS TO DISMISS
OR ALTERNATIVE FOR SUMMARY JUDGMENT AND TO
STRIKE BY THE CIRCUIT COURT OF COPIAH COUNTY, MISSISSIPPI**

BRIEF FOR APPELLEE

Submitted by:

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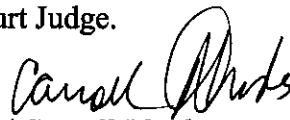
LESTER BUTLER

APPELLEE/PLAINTIFF

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 judges of this Court may evaluate possible disqualification or recusal.

1. David Holmes - defendant.
2. D.P. Holmes Trucking, LLC - appellant/defendant.
3. J. Seth McCoy, Esq., Lanny R. Pace, Esq., and STEEN DALEHITE & PACE, LLP - attorneys for defendant, David Holmes, and appellant/defendant, D. P. Holmes Trucking, LLC.
4. Lester Butler - appellee/plaintiff.
5. Ronnie Whittington, Esq., Whittington Law Firm, PC - former attorney for plaintiff.
6. Carroll Rhodes, Esq. - attorney for appellee/plaintiff, Lester Butler.
7. Honorable Lamar Pickard - Circuit Court Judge.



/s/ Carroll Rhodes
CARROLL RHODES
COUNSEL OF RECORD FOR
APPELLEE/PLAINTIFF

STATEMENT REGARDING ORAL ARGUMENT

Appellee/plaintiff, Lester Butler, (hereinafter referred to as “plaintiff” or “Butler”), submits that oral argument is not necessary in this case inasmuch as the facts, issues, and law are clearly stated in the parties Briefs.

A handwritten signature in cursive script, appearing to read "Carroll Rhodes".

/s/ Carroll Rhodes

CARROLL RHODES
COUNSEL OF RECORD FOR
APPELLEE/PLAINTIFF

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STATEMENT OF ISSUES

The central issue in this case is whether the trial court erred by granting plaintiff's motion to amend his complaint to add a new party defendant and whether the amended complaint related back to the original complaint. Subsumed within this central issue is the collateral issue - whether an amended complaint can correct the name of a party defendant who was originally misidentified.

STATEMENT OF THE CASE

a. Nature of the Case.

This is a garden variety negligence case stemming from an automobile accident that occurred in Copiah County, Mississippi on May 9, 2003.

b. Course of Proceedings and Disposition Below.

Plaintiff, Lester Butler, filed his complaint against defendants, David Holmes and John Does 1-5, in the Circuit Court of Copiah County, Mississippi on April 18, 2006. [R. V. 1, pp. 8-11, R. E., pp. 1-4].¹ A summons and copy of the complaint were served on David Holmes on April 25, 2006. [R. V. 1, p. 3, R. E., p. 60]. The summons was returned on May 5, 2006. [R. V. 1, p. 3, R. E., p. 60]. David Holmes filed his answer and affirmative defenses on May 24, 2006.² [R. V. 1, pp. 14-17, R. E., pp. 5-8]. The parties engaged in written discovery between May 24, 2006 and December 14, 2006. [R. V. 1, p. 3, R. E., p. 60]. The defendant issued subpoenas for plaintiff's medical records from April 26, 2007 until October 26, 2007, [R. V. 1, pp. 3-4, R. E., pp. 60-61], and served

¹"R" denotes the Record. "V" denotes the Volume of the Record followed by page numbers. "R. E" denotes the Record Excerpts followed by the page numbers. "Sup." denotes the Supplemental Record.

²David Holmes' answer and affirmative defenses were filed by Lanny Pace, Esq., and the Steen, Dalehite & Pace law firm.

deposition notices in May, 2008. [R. V. 1, pp. 4-5, R. E., pp.61-62].

The plaintiff filed his motion for substitution of parties or to amend his complaint on March 18, 2009. [R. V. 1, pp. 20-24, R. E., pp. 15-19]. The defendant filed his response to this motion on March 31, 2009. [R. V. Sup., pp. 116-119, R. E., pp. 20-23]. The Circuit Court entered an Agreed Order Allowing Plaintiff to Amend [His] Complaint on August 11, 2010. [R. V. 1, pp. 29-30, R. E., pp. 28-29]. The Agreed Order was signed by counsel for both the plaintiff and defendant and specifically stated that “[t]he Court finds that the parties have agreed to allow Plaintiff to amend his Complaint to add D. P. Holmes, LLC as a Defendant.” [R. V. 1, p. 29, R. E., p. 28]. However, the Agreed Order did not state a deadline by which the amended complaint had to be filed. Additionally, the Agreed Order did not waive any defenses available to the defendant.³ [R. V. 1, p. 29, R. E., p. 28].

Plaintiff filed his amended complaint on February 11, 2011 substituting D. P. Holmes Trucking, LLC as a defendant in the place of David Holmes. [R. V. 1, pp. 31-34, R. E., pp. 30-33]. D. P. Holmes Trucking, LLC filed its motion to strike plaintiff’s amended complaint, answer, and affirmative defenses on February 17, 2011,⁴ [R. V. 1, pp. 35-40, R. E., pp. 34-39], and its motion to dismiss or alternatively for summary judgment on March 9, 2011.⁵ [R. V. 1, pp. 41-48, R. E., pp. 40-47].

³The only defendant in the case when the Agreed Order was signed was David Holmes.

⁴D. P. Holmes Trucking, LLC’s’ answer and affirmative defenses to the amended complaint were filed by Seth McCoy, Esq., and the Steen, Dalehite & Pace law firm.

⁵D. P. Holmes Trucking, LLC’s’ motion to dismiss the amended complaint or alternatively for summary judgment was filed by Seth McCoy, Esq., and the Steen, Dalehite & Pace law firm.

Plaintiff filed his second amended complaint on March 23, 2011 adding D. P. Holmes Trucking, LLC as a defendant in addition to David Holmes. [R. V. 1, pp. 51-54, R. E., pp. 48-51]. D. P. Holmes Trucking, LLC and David Holmes filed their motion to strike plaintiff's second amended complaint, answer, affirmative defenses, and motion to dismiss, or alternatively, for summary judgment on March 30, 2011.⁶ [R. V. 1, pp. 55-59, R. E., pp. 52-56].

The Circuit Court entered an Order on June 17, 2011 denying the defendants' motion to strike plaintiff's second amended complaint or alternatively to dismiss and denying the defendants' request for summary judgment. [R. V. 1, pp. 100-101, R. E., pp. 57-58]. The Court noted that "[p]laintiff was given leave...to [a]mend his [c]omplaint by Order entered on August 11, 2010.⁷ [R. V. 1, p. 100, R. E., p. 57]. The Court specifically found "that the [d]efendants [were] not prejudiced by the [a]mended [c]omplaint." [R. V. 1, p. 100, R. E., p. 57].

The defendant, D. P. Holmes Trucking, LLC, filed a petition for an interlocutory appeal, and this Court granted the petition on September 2, 2011. [R. V. 1, p. 102, R. E., p. 59].

c. Statement of Facts.

On May 9, 2003 Lester Butler was driving his automobile in a northerly direction on Interstate Highway 55. [R. V. 1, p. 51, R. E., p. 48]. Howard Coney, another motorist, and Tommy T. Jones, an employee of David Holmes and D. P. Holmes Trucking, LLC, were also driving vehicles northbound on Interstate Highway 55. [R. V. 1, pp. 51-52, R. E., pp. 48-49]. Mr. Jones was

⁶D. P. Holmes Trucking, LLC's' answer and affirmative defenses to the second amended complaint and motion to dismiss or alternatively for summary judgment were filed by Seth McCoy, Esq., and the Steen, Dalehite & Pace law firm.

⁷The Court also noted "that the doctrine of misnomer allows parties to correct 'party-name' errors at any time or any stage of the proceedings if doing so would not result in prejudice." [R. V. 1, p. 100, R. E., p. 57].

driving behind Mr. Butler. [R. V. 1, pp. 51-52, R. E., p p. 48-49]. Mr. Jones was acting within the course and scope of his employment for the defendants, David Holmes and D. P. Holmes Trucking, LLC. [R. V. 1, p. 51, R. E., p. 48].

Somewhere around mile marker fifty-seven (57) in Copiah County, Mississippi, Mr. Jones attempted to pass Mr. Butler. [R. V. 1, pp. 51-52, R. E., p. 48-49]. Mr. Jones was negligent and grossly negligent for driving too close, driving at an excessive speed, and failing to keep a proper lookout for other traffic or road conditions. [R. V. 1, pp. 51-52, R. E., pp. 48-49]. An accident occurred as a proximate results of Mr. Jones' negligence injuring Mr. Butler causing him to suffer physical pain, emotional distress, and a loss of enjoyment of life as well as incur medical bills. [R. V. 1, pp. 52-53, R. E., pp. 49-50].

Mr. Butler filed suit against David Holmes on April 18, 2006 before the statute of limitations expired. [R. V. 1, pp. 8-11, R. E., p p. 1-4]. He filed his amended complaint on February 11, 2011, [R. V. 1, pp. 31-34, R. E., pp. 30-33], and his second amended complaint on March 23, 2011. [R. V. 1, pp. 51-54, R. E., pp. 48-51]. Both his amended complaint and second amended complaint arose out of the same conduct, transaction, and occurrence as that set forth in the original complaint. D. P. Holmes Trucking, LLC received notice of the complaint within 120 days of filing the original complaint. David Holmes was served with a copy of the complaint on April 25, 2006. [R. V. 1, p. 3, R. E., p. 60]. David Holmes and D. P. Holmes Trucking, LLC were represented by the same attorneys. The attorneys filed an answer and affirmative defenses on May 24, 2006 admitting an accident occurred involving vehicles driven by Tommy Jones and Lester Butler but denying Tommy Jones was employed by David Holmes. [R. V. 1, pp. 14-15, R. E., pp. 5-6].

After Mr. Butler filed his amended complaint, D. P. Holmes Trucking, LLC filed an answer

and affirmative defenses admitting the accident and the fact that Tommy Jones was an employee of D. P. Holmes Trucking, LLC acting within the course and scope of his employment for the company. [R. V. 1, p. 36, R. E., p. 35].

The Circuit Court specifically found “that the [d]efendants [were] not prejudiced by the [a]mended [c]omplaint.” [R. V. 1, p. 100, R. E., p. 57].

SUMMARY OF THE ARGUMENT

The case is before this Court on the trial court’s denial of the defendant’s motion to dismiss⁸ or, alternatively, for summary judgment. [R. V. 1, pp. 100-101, R. E., pp. 57-58]. The standard of review from an order denying a motion to dismiss is de novo. *Ralph Walker, Inc. v. Gallagher*, *infra*. The standard of review from the denial of a motion for summary judgment is de novo. *Estate of Johnson v. Chatelain*, *infra*. When considering a 12(b)(6) motion to dismiss⁹, the allegations of the complaint “must be taken as true” and the motion should not be granted unless the defendant proves “beyond any doubt that the plaintiff will be unable to prove any set of facts in support of his claim.” *Arnona v. Smith*, *infra*, at 65. When considering a Rule 56 motion for summary judgment¹⁰, the court must construe the record evidence in the light most favorable to the party opposing the motion which, in this case, is the plaintiff, drawing all reasonable inferences in that party’s favor. *Estate of Johnson v. Chatelain*, *infra*, at 686-687. When both standards of review are applied to the facts of

⁸The third affirmative defense contained in the defendants’ motion to strike plaintiff’s amended complaint and answer and affirmative defenses of D. P. Holmes Trucking, LLC states that plaintiff’s complaint “fails to state a claim...upon which relief can be granted...” [R. V. 1, p. 36, R. E., p. 35]. Consequently, the motion to dismiss was filed pursuant to Miss. R. Civ. P. 12(b)(6).

⁹Miss. R. Civ. P. 12(b)(6).

¹⁰Miss. R. Civ. P. 56.

this case, it becomes clear that the trial court did not err in denying the defendant's motion to dismiss or motion for summary judgment.

The parties entered into an Agreed Order agreeing that plaintiff could amend his complaint by adding D. P. Holmes LLC as a defendant. [R. V. 1, pp. 29-30, R. E., pp. 28-29]. Plaintiff's second amended complaint added D. P. Holmes Trucking, LLC as a defendant. [R. V. 1, pp. 51-54, R. E., pp. 48-51]. The plaintiff alleged that the person who caused the accident and his injuries was an employee of David Holmes and D. P. Holmes Trucking, LLC. [R. V. 1, pp. 51-54, R. E., pp. 48-51]. Both David Holmes and D. P. Holmes Trucking, LLC were represented by the same attorneys. Those attorneys filed an answer to the original complaint within 120 days after David Holmes had been served with a copy of the complaint. [R. V. 1, pp. 14-17, R. E., pp. 5-8]. The original complaint and second amended complaint grew out of the same conduct, transaction, and occurrence. D. P. Holmes Trucking, LLC was aware of plaintiff's lawsuit by May 24, 2006. [R. V. 1, pp. 14-17, R. E., pp. 5-8]. The trial court specifically found that the defendants were "not prejudiced by the [a]mended [c]omplaint." [R. V. 1, p. 100, R. E., p. 57]. Therefore, plaintiff's amended complaint related back to his original complaint and was not barred by the statute of limitations. *Wilner v. White*, *infra*, at 323; *Ralph Walker, Inc. v. Gallagher*, *infra*; Miss. R. Civ. P. 15(c).

THE ARGUMENT

a. The Standard of Review.

This case is before the Court on the defendants' motion to dismiss, or alternatively, for summary judgment. "A motion to dismiss under Miss. R. Civ. P. 12(b)(6) raises an issue of law." *Arnona v. Smith*, 749 So. 2d 63, at 65 (Miss. 1999). This Court applies a de novo standard of review when considering such a motion. *Arnona v. Smith*, *supra*, at 65; *Ralph Walker, Inc. v. Gallagher*,

926 So. 2d 890 (Miss. 2006). The burden is on the moving party to show beyond doubt that the plaintiff will not be able “to prove any set of facts in support of his claim.” *Arnona v. Smith*, supra, at 65; *Ralph Walker, Inc. v. Gallagher*, supra. When considering the motion, “the allegations of the complaint must be taken as true.” *Arnona v. Smith*, supra, at 65.

When considering a motion for summary judgment, the Court applies the same standard of review as the trial court. *Estate of Johnson v. Chatelain*, 943 So. 2d 684, at 686-687 (Miss. 2006). Summary judgment is appropriate only where there is no genuine issue of material fact, *Estate of Johnson v. Chatelain*, supra, at 686, and the plaintiff has failed to present evidence to support an essential element of his claim. *Bullard v. Guardian Life Insurance Company of America*, 941 So. 2d 812, 814 (Miss. 2006) (*en banc*). “The burden of demonstrating that there is no genuine issue of material fact falls upon the party requesting the summary judgment.” *Estate of Johnson v. Chatelain*, supra, at 686, ¶ 4.

A Court must review all of the record evidence including the “pleadings, answers to interrogatories, depositions, affidavits, etc.-in the light most favorable to the party against whom the motion for summary judgment is made.” *Estate of Johnson v. Chatelain*, supra, at 686-687, ¶ 5. A motion for “summary judgment is not a substitute for the trial of disputed fact issues.” *Willis v. Mississippi Farm Bureau Mutual Ins. Co.*, 481 So. 2d 256, 258 (Miss. 1985). This Court has defined a material fact as “one which resolves any ‘of the issues, properly raised by the parties.’” *Strantz v. Pinion*, 652 So. 2d 738, at 741 (Miss. 1995) (*en banc*), quoting, *Stegall v. WTVV, Inc.*, 609 So. 2d 348, at 351 (1992).

When the complaint and record evidence are construed, as true and in the light most favorable to the plaintiff, the party opposing the motion, it becomes clear that the trial court did not

err in denying the defendant's motion to dismiss or motion for summary judgment.

b. The Trial Court Did Not Err by Allowing the Plaintiff to Amend His Complaint to Add a Party Defendant and Allowing the Amended Complaint to Relate Back.

The defendants argue that the trial court erred by allowing plaintiff to file his second amended complaint adding D. P. Holmes Trucking, LLC as a defendant. However, the defendant, David Holmes, agreed to the amendment. [R. V. 1, pp. 29-30, R. E., pp. 28-29]. David Holmes and D. P. Holmes Trucking, LLC were represented by the same attorneys. Furthermore, "when justice so requires, leave to amend shall be freely given." *Wilner v. White*, 929 So. 2d 315, at 319 (Miss. 2006), citing, Miss. R. Civ. P. 15(a). The trial court found that justice required the amendment. The trial court noted that plaintiff mistakenly named David Holmes as the defendant instead of D. P. Holmes Trucking, LLC. [R. V. 1, p. 100, R. E., p. 57]. The trial court stated that "[t]he Mississippi Supreme Court has long recognized that the doctrine of misnomer allows parties to correct 'party-name' errors at any time or any stage of the proceedings if doing so would not result in prejudice." [R. V. 1, p. 100, R. E., p. 57]. The trial court cited *Trucking Service, Inc. v. Miss. Sand and Gravel, Inc.*, 433 So. 2d 321 (Miss. 1986) as authority for its decision. In other words, the trial court found that justice required the amendment and the defendants would not be prejudiced by the amendment.¹¹

¹¹In support of his motion for substitution of parties, or in the alternative, to amend his complaint, the plaintiff argued:

The plaintiff would show that a companion case to the incident matter is an action that was styled *Howard Coney v. David Holmes and John Does 1-5*, In the Circuit Court of Copiah County, Mississippi, Civil Action No. 2006-117. The plaintiff would show that in the course of the litigation of these two matters, the defendant moved to consolidate these cases, but that subsequent to a hearing thereon, the parties agreed on mediation of both cases. Said mediation was accomplished by counsel for the parties and at the date of time of said mediation, the matter of *Howard Coney v. David Holmes and John Does 1-5*, Civil Action No. 2006-117, was compromised and settled and subsequent

[R. V. 1, p. 100, R. E., p. 57].

Although the defendant, David Holmes, agreed to the amendment, he and co-defendant, D. P. Holmes Trucking, LLC, now argue that the amendment should not relate back under Miss. R. Civ. P. 15(c). However, this Court has held that an amended complaint relates back to the date the original complaint was filed if the requirements of Miss. R. Civ. P. 15(c) have been met. *Wilner v. White*, supra, at 323. “[T]hose requirement are:

(1) the claim in the amended complaint must arise out of the same conduct, transaction, or occurrence as that set forth in the original complaint; (2) the newly-named defendant must have received notice of the action within the period provided by Miss. R. Civ. P. 4(h) such that the party will not be prejudiced; and (3) the newly-named defendant must have or should have known that an action would be brought against him but for a mistake existing as to the parties’ identities.

Wilner v. White, supra, at 323. When the allegations of plaintiff’s second amended complaint are considered as true and the record evidence is construed in the light most favorable to him, drawing all reasonable inferences in his favor, it is apparent that plaintiff met the requirements of Miss. R. Civ. P. 15(c). The claim in the complaint and second amended complaint arose out of the same conduct and occurrence. D. P. Holmes Trucking, LLC must have received notice because its attorney filed an answer for David Holmes within 120 days after the original complaint was filed.

thereto a full, final and complete release of all claims was executed and a final order of dismissal with prejudice was entered by this Honorable Court. The mediation was accomplished on or about July 6, 2007. The plaintiff would further show that as part of the settlement entered in the *Coney v. Holmes, et al.* matter, a release and settlement agreement was executed by Howard Coney ‘To and in favor of David Holmes; D.P. Holmes Trucking, LLC, a Mississippi limited liability company; Tommy Jones; Acceptance Indemnity Insurance Company....

[R. V. 1, p. 22, R. E., p. 17]. The defendants did not dispute these allegations.

Furthermore, D. P. Holmes Trucking, LLC should have known that but for a mistake existing as to the parties' identities, the company would have been named as a defendant in the original complaint. Therefore, the requirements of Miss. R. Civ. P. 15(c) were met in this case and the second amended complaint related back to the date the original complaint was filed. *Wilner v. White*, supra, at 323. As such, the trial court did not err in allowing plaintiff to file his second amended complaint.

CONCLUSION

On the basis of the foregoing facts and authorities, the Court should affirm the lower court and remand the case to proceed to trial.

This the 30th day of January, 2012.

Respectfully submitted,
LESTER BUTLER,
APPELLEE/PLAINTIFF



/s/ Carroll Rhodes

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CERTIFICATE OF SERVICE


I, CARROLL RHODES, counsel for the appellee/plaintiff, hereby certify that I have this day mailed, by the United States Mail, first-class postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee to the following:

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Honorable Lamar Pickard
Circuit Court Judge
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This the 30th day of January, 2012.



/s/ Carroll Rhodes
CARROLL RHODES