

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

D.P. HOLMES TRUCKING, LLC

APPELLANT

VS.

CASE NUMBER: 2011-IA-953

LESTER BUTLER

APPELLEE

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

**REPLY BRIEF OF APPELLANT
D.P. HOLMES TRUCKING, LLC**

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ARGUMENT

The response brief of Appellee Butler outlines only two general issues: 1) the standard of review; and 2) Butler's contention that "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."

As discussed below, this appeal is based on the trial court's denial of Appellant D.P. Holmes Trucking, LLC's motion(s) to dismiss or alternatively for summary judgment and motion to strike, **NOT** the Court's order allowing Butler to file his first amended complaint.

D.P. Holmes Trucking, LLC ("Holmes Trucking") filed the instant appeal and argued that at its most basic level, the Court's order denying the motions filed by Holmes Trucking was erroneous as a matter of law in that it relied on Mississippi Rule of Civil Procedure 60 for its decision.

Holmes Trucking also presented argument that its motions to dismiss or alternatively for summary judgment should have been granted under the Mississippi Supreme Court's holding in *Doe v. Mississippi Blood Services*, and/or under a general analysis pursuant to Mississippi Rule of Civil Procedure 9(h).

Interestingly enough, the responsive brief filed by Butler does not contain any analysis of *Doe* or Mississippi Rule of Civil Procedure 9(h) nor does it even mention these two sources.

I. The Circuit Court of Copiah County erred as a matter of law in classifying the amendment of the complaint attempted by Butler as a "misnomer" and a "party name error"

Butler initially argues in his responsive brief that the substance of this appeal is the Circuit Court's order allowing the plaintiff to file his amended complaint joining Holmes Trucking as a defendant. Along those same lines, Butler attempts to argue that Holmes Trucking's appeal is

somehow improper because of an agreed order entered into by former defendant David Holmes and Butler allowing an amended complaint joining Holmes Trucking. Butler is incorrect on both arguments.

Initially, the agreed order allowing Butler to file his *first* amended complaint is irrelevant to the appeal at issue, because such order was agreed to by David Holmes, who was formerly a defendant in this action. The present appeal is brought on behalf of Holmes Trucking a completely distinct and separate entity who was not a party to any such agreement.

Secondly, the *actual* basis of this appeal is the order entered by the Circuit Court of Copiah County, Mississippi on June 17, 2011. The order denied Holmes Trucking's Motion(s) to Dismiss or Alternatively for Summary Judgment and Motion to Strike. [R.100-101/X. 60-61]

As support for the trial court's decision to deny Holmes Trucking's motions, the order, as noted in Butler's response brief, specifically referenced the doctrine of "misnomer" and cited the case of *Trucking Service, Inc. v. Miss. Sand and Gravel, Inc.* 433 So.2d 321, 323-324 (Miss.1986). Butler, in his response, argues that the *Trucking Service, Inc.* decision stands for the proposition that "parties can correct party-name errors at any time or stage of the proceedings if doing so would not result in prejudice."

The trial court and likewise Butler's reliance on the Court's rationale in *Trucking Service, Inc.* is misplaced and erroneous as a matter of law.

Initially, in *Trucking Service, Inc.*, the Mississippi Supreme Court analyzed the situation, under Mississippi Rule of Civil Procedure 60, which deals with the court's inherent power to correct clerical errors in judgments, and allowed a change in the style of a judgment from "Mississippi Sand & Gravel, Inc." to the correct "South Mississippi Sand & Gravel, Inc." *Trucking Service, Inc. v.*

Miss. Sand and Gravel, Inc. 433 So.2d 321, 323-324 (Miss.1986).

The reliance of the court on Rule 60, was addressed in Holmes Trucking's brief as an error as a matter of law. While citing *Trucking Service, Inc.* in his responsive brief, Butler fails to address Rule 60 and does not present any authority for applying Rule 60 to the situation present in the instant case.

Secondly, as stated in Holmes Trucking's original brief, the present situation involves the attempted amendment of a complaint to change the *party* being sued by the plaintiff long after the statute of limitations for the cause of action has expired, whereas the *Trucking Service, Inc.* case dealt with a situation where the circuit court was allowed to correct a default judgment because of a clerical mistake in the *name* contained in the judgment.

Also, *Trucking Service, Inc.* presented a situation where a company's name was changed from the incorrect "Mississippi Gravel & Sand, Inc." to the correct "Southern Mississippi Gravel & Sand, Inc." The present situation is totally different in that it is not simply a name change sought in the amended complaint, but rather the insertion of an entirely different and separate party and entity as the defendant, after the expiration of the statute of limitations.

Butler further argues in his responsive brief that the trial court was justified in its order denying the motion(s) for summary judgment because the court found that "justice required the amendment". A review of the trial court's order entered on June 17, 2011, yields absolutely no language to this effect. Furthermore Butler has provided no authority which would apply such a standard to the present situation.

II. Holmes Trucking's motion to dismiss or alternatively for summary judgment with regard to Butler's "first" amended complaint should have been granted pursuant to Doe v. Mississippi Blood Services and Mississippi Rule of Civil Procedure 9(h) and the

cause of action should have been dismissed with prejudice

Butler's next argument is that the trial court was correct in denying the motion(s) of Holmes Trucking, based on Mississippi Rule of Civil Procedure 15. Holmes Trucking would reassert its arguments presented in its original brief with regard to the correct standard to review the actions of Butler as being Rule 9(h), not Rule 15.

Moreover, a review of Butler's own "first" amended complaint indicates that he relied on the authority of Mississippi Rule of Civil Procedure 9(h) for the amendment. **[R. 31-34/X 30-33]**

The fact that former defendant David Holmes and Butler agreed to an order allowing Butler's first amended complaint is of no moment to the present appeal as your Appellant Holmes Trucking did not agree to this amendment and further can avail itself of any and all defense available after being brought into the lawsuit.

Holmes Trucking promptly moved for dismissal or for summary judgment based on an analysis of Rule 9(h) following the filing of this amended complaint. Significant authority and analysis was presented by Holmes Trucking to the trial court and to this Court on these issues. Notably Butler's response is devoid of any analysis of Rule 9(h) and/or its "reasonable diligence" standard.

It is further significant that the proof, as cited in Holmes Trucking's original brief, showing that Butler was not diligent in ascertaining Holmes Trucking's identity, nor in seeking to amend his complaint or filing such, was not disputed in Butler's responsive brief. As Holmes Trucking's arguments with regard to the lack of reasonable diligence in this matter are un-controverted, Holmes Trucking would request that this court render a decision granting Holmes Trucking's motion(s) for summary judgment without the necessity of further proceedings in the Circuit Court.

A review of the trial court's order of June, 2011, indicates that the only defendants in the case at that time were "D.P. Holmes Trucking, LLC" and "John Does, 1-5". In his "first" amended complaint, the plaintiff simply replaced former defendant David Holmes with D.P. Holmes Trucking, LLC after the expiration of the applicable statute of limitations. As outlined in Holmes Trucking's brief this situation is identical to the one presented in *Doe v. Mississippi Blood Services, Inc.*, which was cited in Holmes Trucking's motions for summary judgment and properly before the Circuit Court for consideration. *See Doe v. Mississippi Blood Services, Inc.* 704 So.2d 1016 (Miss.1997).

In *Doe*, the court examined a situation where the plaintiff attempted to join Mississippi Blood Services, Inc. as a defendant by replacing "United Blood Services of Mississippi" with "Mississippi Blood Services, Inc." after the expiration of the statute of limitations. *Id.* In *Doe* all 50 "John Doe" defendants remained after the substitution of Mississippi Blood Services, Inc. *Id.* at 1018. The Court found that the *Doe* plaintiff's attempt at such a substitution when all John Doe defendants still remained in the amended complaint was improper. *Id.*

Although cited in Holmes Trucking's brief the *Doe* case is completely absent in the responsive brief of Butler.

III. Holmes Trucking's Motion to Strike Butler's "Purported Second Amended Complaint" should have been granted as a matter of law.

As indicated above, an agreed order was entered into between former defendant David Holmes and Butler with regard to the filing of an amended complaint. Butler filed such on February 11, 2011. [R. 31/X. 30] This first amended complaint simply replaced the named defendant "David Holmes" with "D.P. Holmes Trucking, LLC."

Thus, Holmes Trucking was the only remaining defendant and as such filed an answer as well

as a Motion to Dismiss or Alternatively for Summary Judgment. [R. 35-40/X. 34-39]

After receipt of Holmes Trucking responsive filings, Butler filed a “purported second amended complaint.” [R. 51-54/X. 48-51]

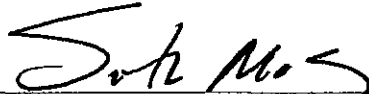


This purported second amended complaint was not subject to any agreement between Holmes Trucking and Butler. Furthermore, as the second amended complaint was filed *after* the responsive filings/motion to dismiss or for summary judgment of Holmes Trucking, leave of court was required to file such. *Mississippi Rule of Civil Procedure 15(a)*. Such was never obtained by Butler.

As leave of court was never obtained, Butler’s purported second amended complaint was improperly filed, should have been stricken as a matter of law and further should not be under consideration by this Honorable Court.

In any event Holmes Trucking’s arguments with regard to Butler’s first amended complaint are equally applicable to the second amended complaint as set forth in Holmes Trucking’s original brief in this matter.

CONCLUSION

For any of the above reasons, Appellant D.P. Holmes Trucking, LLC requests that this Court reverse the judgment of the trial court and render a decision dismissing the lone named defendant D.P. Holmes Trucking, LLC, with prejudice.

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CERTIFICATE OF SERVICE

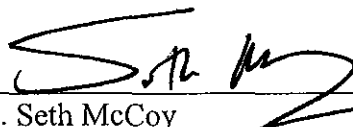
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This the 13th day of February, 2012.


J. Seth McCoy