

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**

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

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VS.

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LESTER BUTLER

APPELLEE

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 justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

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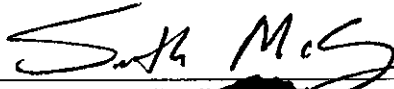


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STATEMENT OF THE ISSUES

- I. Did the Circuit Court of Copiah County err as a matter of law when it classified the attempted amendments of the original complaint in this matter by the plaintiff/appellee as a “party name” error and analyzed the present situation under the doctrine of misnomer?
- II. Did the trial court err as a matter of law in denying the defendant/appellant’s motion to dismiss or alternatively for summary judgment with regard to plaintiff/appellee’s “first” amended complaint, when such should have been granted based on the Mississippi Supreme Court’s ruling in *Doe v. Mississippi Blood Services* and *Mississippi Rule of Civil Procedure 9(h)*, and the fact that the complaint was filed outside the applicable statute of limitations?
- III. Did the Copiah County Circuit Court err as a matter of law when it denied defendant/appellant’s motion to strike plaintiff/appellee’s “purported second” amended complaint pursuant to *Mississippi Rule of Civil Procedure 15*?
- IV. Did the trial court err as a matter of law in denying the defendant/appellant’s motion to dismiss or alternatively for summary judgment with regard to plaintiff/appellee’s “purported second” amended complaint, when such should have been granted based on the Mississippi Supreme Court’s ruling in *Doe v. Mississippi Blood Services* and *Mississippi Rule of Civil Procedure 9(h)* and the fact that the complaint was filed outside the applicable statute of limitations?

STATEMENT OF THE CASE

This matter arises out of a May 9, 2003, accident involving a vehicle driven by the Plaintiff/Appellee Lester Butler and a truck driven by Tommy Jones. The Plaintiff/Appellee filed his original Complaint on April 18, 2006. The complaint named "David Holmes" and "John Does 1-5" as defendants. [R. 8-11/X. 1-4]¹ The complaint further alleged that Tommy T. Jones was "an employee, agent and servant of the defendant David Holmes. . . ." [R. 8-9/X. 1-2]. David Holmes was served with process and timely answered Butler's Complaint. [R. 14-17/X. 5-8]

The answer filed by David Holmes specifically denied that Tommy Jones was employed by David Holmes. [R. 14-15/X. 5-6] Furthermore, David Holmes' answer alleged that the Plaintiff/Appellee's complaint failed to state a claim upon which relief could be granted. [R. 14/X. 5]

Butler did not take any depositions and he propounded no written discovery to David Holmes during the course of the litigation. The trial was set for March 17, 2009. In January 2009, the parties jointly prepared a draft pre-trial order to submit to the Covich County Circuit Court. David Holmes' portion of the pre-trial order specifically listed as a contested issue of fact "whether Tommy Jones was an agent or employee of David Holmes." [Supp.R. 120-125/X. 9-14]

The trial of this matter was continued to March 18, 2009 due to an illness in the circuit clerk's office. In a telephonic hearing conducted on March 17, 2009 at the request of the plaintiff to discuss the issue of the true employer of Tommy Jones, the trial court continued the trial and granted plaintiff/Appellee permission to file a motion to amend his complaint. The Plaintiff filed his

¹ "R." refers to the citation in the record while "X" refers to the record excerpt cite

motion for substitution of parties or in alternative amendment of the complaint, on March 19, 2009. [R. 20-24/X. 15-19] Plaintiff/Appellee's motion sought "leave to amend the complaint substituting as a party defendant D.P. Holmes, LLC" or "to amend the Complaint filed herein to name the defendant, D.P. Holmes, LLC, in the place and stead of David Holmes and/or as John Doe 1 defendant". Such a motion would necessarily have to be made under *Mississippi Rule of Civil Procedure 9(h)*. David Holmes responded to said motion on March 31, 2009. [Supp.R. 116-119/X. 20-23]

At the November 23, 2009 hearing of the Plaintiff/Appellee's motion, the trial court ruled that the plaintiff/appellee could amend his complaint to join D.P. Holmes Trucking, LLC as a party and that D.P. Holmes Trucking, LLC would be availed to any and all defenses arising from the filing of the amended complaint.

Despite repeated requests by defendant/appellant for plaintiff/appellee to prepare and submit the appropriate order, such was not done until August 2, 2010, which was approximately *nine* months after the hearing on August 2, 2010. [R. 55-58/X. 24-27]The order was entered by the Circuit Court on August 11, 2010. [R. 29-30/X. 28-29]

The plaintiff/appellee did not actually file his "first" amended complaint naming D.P. Holmes Trucking, LLC as the defendant until *six* months later on February 11, 2011. [R. 31-34/X. 30-33] This first amended complaint filed by plaintiff/appellee simply replaced the original named defendant "David Holmes" with "D.P. Holmes Trucking, LLC" and cited *Mississippi Rule of Civil Procedure 9(h)* for this substitution. [R. 31/X. 30]

After the plaintiff/appellee filed his first amended complaint, defendant/appellant D.P. Holmes Trucking, LLC answered the complaint and contemporaneously moved for dismissal or

alternatively for summary judgment due to the fact that the plaintiff's first amended complaint improperly removed the named defendant "David Holmes" and replaced him with "D.P. Holmes Trucking, LLC" and further that such was filed outside the appropriate statute of limitations, which was not tolled pursuant to *Mississippi Rule of Civil Procedure 9(h)*. [R. 35-40/X. 34-39] and [R.41-48/X. 40-47]

After the filing of D.P. Holmes Trucking, LLC's Motion to Dismiss or Alternatively for Summary Judgment, and without receiving the required permission from the Copiah County Circuit Court, the Plaintiff/Appellee filed another complaint, hereafter referred to as Plaintiff/Appellee's "purported second amended complaint." This purported second amended complaint simply added "D.P. Holmes Trucking, LLC" as a named defendant in addition to "David Holmes" and kept all the "John Doe" defendants. [R.51-54/X. 48-51]

In response, D.P. Holmes Trucking, LLC filed another motion to dismiss or alternatively for summary judgment and filed a motion to strike with regard to Plaintiff/Appellee's improperly filed purported second amended complaint as well. [R.55-59/X. 52-56]

On June 17, 2011, the trial court entered an order denying D.P. Holmes Trucking, LLC's motions for summary judgment and motion to strike. [R.100-101/X. 60-61] In its order, the Court classified the amendment of the complaint to change the named defendant "David Holmes" to "D.P. Holmes Trucking, LLC" as a misnomer or "party name error" and further indicated that the Defendant/Appellant was not prejudiced by the amended complaint. [R.100/X. 60]

Defendant/Appellant D.P. Holmes, LLC petitioned for, and was granted permission from this Honorable Court to file an interlocutory appeal. [R. 102/X. 62]

SUMMARY OF THE ARGUMENT

The trial court erred as a matter of law when it classified the attempted amendment of the complaint by the plaintiff/appellee in this case, as a misnomer or “party name error. The present situation involves an attempt to join a new party as a defendant after the expiration of the statute of limitations through an amended complaint. The “party name error” theory as relied upon by the trial court in its order is based on *Mississippi Rule of Civil Procedure 60* which addresses correcting clerical errors in judgments, which is of no moment in this case. As such the trial court’s order is clearly erroneous as a matter of law.

The trial court further erred in denying Defendant/Appellant’s motion to dismiss or alternatively for summary judgment with regard to the first amended complaint. The three year statute of limitations in this matter began to run on the date of the accident on May 9, 2003 and had long expired when the Plaintiff/Appellee filed their first amended complaint replacing “David Holmes” with “D.P. Holmes Trucking, LLC” as a defendant. The Plaintiff/Appellee’s attempted amendment wherein he simply replaced “David Holmes” with “D.P. Holmes Trucking, LLC” and maintained the same “John Doe 1-5” defendants is improper based on this Court’s ruling in *Doe v. Mississippi Blood Services*. Further the amendment must be analyzed under the “reasonable diligence” standard pursuant to *Mississippi Rule of Civil Procedure 9(h)*, and it is clear that the Plaintiff did not meet that standard. Consequently, *Rule 9(h)*’s tolling provision was not applicable. Defendant/Appellant’s motion should have been granted as a matter of law and the cause dismissed.

Finally, the trial court erred in denying Defendant/Appellant’s motion to strike Plaintiff/Appellee’s purported second amended complaint pursuant to *Mississippi Rule of Civil Procedure 15*. The Plaintiff/Appellee filed his purported second amended complaint *after*

Defendant/Appellant filed an answer and motion to dismiss with regard to the first amended complaint. Furthermore, the Plaintiff/Appellee did not obtain leave of court to amend his complaint a second time.

The trial court further erred in denying Defendant/Appellant's motion to dismiss or alternatively for summary judgment with regard to plaintiff/appellee's purported second amended complaint. Even apart from its impropriety under *Rule 15*, the purported second amended complaint should have been dismissed, just like the first amended complaint, under the Mississippi Supreme Court's ruling in *Doe v. Mississippi Blood Services* and *Mississippi Rule of Civil Procedure 9(h)*.

ARGUMENT

Standard of Review

The appellate standard for reviewing the grant or denial of summary judgment is the same standard as that of the trial court under *Rule 56 (c)* of the *Mississippi Rules of Civil Procedure*. This court employs a *de novo* standard of review of a lower court's grant or denial of summary judgment and examines all the evidentiary matters before it: admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. *Williamson ex rel. Williamson v. Keith*, 786 So. 2d 390, 393 (Miss. 2001). Further, the Court's denial of defendant's motion to strike the purported second amended complaint involves a question of law with regard to whether the filing of such complaint violated *Mississippi Rule of Civil Procedure 15* and as such should be reviewed under the same *de novo* standard. *Seymour v. Brunswick Corporation*, 655 So.2d 892 (Miss.1995) (holding generally that questions of law are reviewed *de novo*).

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

In its order denying Defendant/Appellant's motions for summary judgment and motion to strike the Circuit Court classified the matter before the court as one of a simple "misnomer" or party name error. [R. 100-101/X. 60-61]

In support of its position, the trial court stated in its order that "the Mississippi Supreme Court has long recognized that the doctrine of misnomer allows parties to correct 'party name' errors at any stage of the proceedings if doing so would not result in prejudice". The court cited "*Trucking Service, Inc. v. Miss. Sand and Gravel, Inc.*, 433 So.2d 321, 323-24 (Miss.1986)²" in support of its decision. [R. 100/X. 60]

The trial court erred as a matter of law in its reliance on the above referenced case and in its classification of the instant situation as a party name error.

As an initial matter, the present situation involves the attempted amendment of a complaint to change the *party* being sued by the plaintiff/appellee long after the statute of limitations for the cause of action has expired, whereas the *Southern Trucking Service* 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.

In *Southern Trucking*, 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."

The situation present in the case at bar is clearly distinguishable from *Southern Trucking* in

² The correct citation for the case is actually *Southern Trucking Service, Inc. v. Miss. Sand and Gravel, Inc.*, 483 So.2d 321 (Miss.1986)

that the present case deals with a motion for summary judgment based on the addition of a new party, after the expiration of the statute of limitations, not the correction of a judgment already entered pursuant to *Rule 60*.

Secondly, *Southern Trucking*, 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 clearly distinguishable 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.

To hold that an individual defendant "David Holmes" could suddenly be replaced by a registered limited liability company, "D.P. Holmes Trucking, LLC," would void the foundation of the Mississippi Limited Liability Company Act as it existed at the relevant time period. *See* Miss. Code § 79-29-101 *et. seq*³ (amended January 1, 2011). A limited liability company, much like a corporation, and an individual are two totally separate and distinct entities with separate legal rights and potential liabilities. Miss. Code § 79-29-108⁴ (amended January 1, 2011); *see also Bruno v. Southeastern Services Inc.*, 385 So.2d 620 (Miss.1980) (holding generally that a corporation is a separate entity from individual stockholders). It is contrary to the purpose of our state's business law to simply allow a limited liability company to be substituted for an individual.

The circuit court's reliance on the *Southern Trucking* case was erroneous as a matter of law and therefore the court's decision should be reversed by this Court.

II. Defendant/Appellee's motion to dismiss or alternatively for summary judgment with

³ As of January 1, 2011, the Revised Mississippi Limited Liability Company Act.

⁴ See also Miss. Code § 79-29-117, the present version of former § 79-29-108.

regard to plaintiff/appellee'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

— In the first amended complaint, the Plaintiff/Appellee simply changed the named defendant "David Holmes" to "D.P. Holmes Trucking". The first amended complaint filed by Plaintiff/Appellee was nearly identical to the original complaint with only the names of "David Holmes" changed to "D.P. Holmes Trucking, LLC." Further, the Plaintiff/Appellee's first amended complaint still had fictitious parties "John Does 1-5" listed as defendants as was the case with the original complaint.

A. Doe v. Mississippi Blood Services, Inc.

The Mississippi Supreme Court has addressed this identical situation in the case of *Doe v. Mississippi Blood Services, Inc.*, which was cited in Defendant/Appellant's motions for summary judgment and properly before the Circuit Court for consideration. See *Doe v. Mississippi Blood Service, Inc.* 704 So.2d 1016 (Miss.1997).

In *Doe*, the court examined a situation where the daughter of a woman who died of AIDS as a result of a blood transfusion brought a wrongful death action against a blood bank, the national association of blood banks and (50) unnamed defendants. *Doe*, 704 So.2d at 1017. The Plaintiff in *Doe* originally filed her wrongful death complaint against United Blood Services of Mississippi, American Association of Blood Banks and John Does 1-50. *Id.* The plaintiff then 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 *Doe* Court held that the plaintiff in *Doe* had attempted to join a new party after the expiration of the statute of limitations in the guise of a substitution under *Rule 9(h)*. *Id.* 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.*

In the present case we are faced with the exact same situation with regard to Plaintiff/Appellee's first amended complaint. The Plaintiff/Appellee simply attempted to replace defendant "David Holmes" with "D.P. Holmes Trucking, LLC". The amended complaint filed by Plaintiff/Appellee was nearly identical to the original complaint with only the names of "David Holmes" changed to "D.P. Holmes Trucking, LLC." Further, the Plaintiff/Appellee's "first" amended complaint still had fictitious parties "John Does 1-5" listed as defendants as was the case with the original complaint.

Consistent with the Court's analysis and decision in the *Doe* case, the actions by the plaintiff/appellee in the instant case constitute an improper attempt to join D.P. Holmes Trucking, LLC as a party beyond the applicable statute of limitations. As such, the first amended complaint naming only D.P. Holmes Trucking, LLC as a defendant should be dismissed with prejudice.

B. Mississippi Rule of Civil Procedure 9(h)

The Court in *Doe* further undertook an analysis of the situation under *Mississippi Rule of Civil Procedure 9(h)* and found that the plaintiff failed to exercise "reasonable diligence" in determining the true parties to suit. *Id.* at 1018-1019. This rule governs substitution of parties and was cited in the plaintiff/appellee's first Amended Complaint in the present case. [R. 31/X.30]

As indicated by Plaintiff's own amended complaint, the proposed joinder of D.P. Holmes Trucking, LLC would be subject to *Mississippi Rule of Civil Procedure 9(h)*. [R.31/X.30] Under *Rule*

9(h), the Mississippi Supreme Court has fashioned a reasonable diligence standard in determining whether a substitution of unknown parties was proper. *Womble v. Singing River Hosp.*, 618 So.2d 1252, 1266-68 (Miss.1993). The Mississippi Supreme Court has further required that the trial court's review of the diligence standard be strict. *Doe*, 704 So.2d at 1019(¶ 13). The court also requires that a plaintiff *actually* exercise a reasonably diligent inquiry. *Doe* 704 So.2d at 1019 (¶ 12).

In the present case, applying a strict standard, it is clear that there is no possible scenario wherein the Plaintiff/Appellee's actions with regard to ascertaining the identity of D.P. Holmes Trucking, LLC and amending his complaint could be seen as diligent.

The plaintiff/appellee's lack of diligence began after the filing of David Holmes' answer in this matter in May of 2006. In David Holmes' answer, he denied that he was the employer of Tommy Jones, who was the driver of the vehicle involved in the accident at issue. [R. 14-15/X. 5-6] Reasonable diligence on the part of the Plaintiff/Appellee would have been to make some sort of inquiry as to who was actually the employer of Tommy Jones; which was not done by Plaintiff/Appellee.

Further, reasonable diligence would have included submitting interrogatories to David Holmes in an attempt to verify the actual employer. However, the Plaintiff/Appellee during the pendency of this litigation did not submit a single item of discovery.

Also reasonable diligence by the Plaintiff/Appellee would have included taking Tommy Jones' or David Holmes' deposition to determine if Holmes was the employer of Tommy Jones, in light of Holmes' denial of such in his Answer. However, the Plaintiff/Appellee did not take the deposition of either individual.

This litigation continued without any discovery, activity or inquiries as to Tommy Jones'

employer by Plaintiff/Appellee for the approximately three-year period from the filing of Plaintiff/Appellee's complaint until March of 2009, when as stated above, the plaintiff finally acknowledged that David Holmes was not the employer of Tommy Jones.

The Plaintiff/Appellee's lack of diligence continued after the identification of D.P. Holmes Trucking, LLC when, after Plaintiff/Appellee was allowed to amend his complaint, it took the plaintiff/appellee almost nine months to prepare the appropriate order to present to the court despite numerous requests from Defendant/Appellant for plaintiff to do so. [R. 55-58/X. 24-17]

Further evidence of the Plaintiff/Appellee's lack of diligence comes in the form of a delay of almost six more months following the entry of the appropriate order by the court, before the Plaintiff/Appellee actually filed his amended complaint.

Certainly, when viewed with the strict standard required by the Mississippi Supreme Court, the Plaintiff/Appellee did not exercise reasonable diligence in discovering the identity of D.P. Holmes Trucking, LLC or in amending his complaint to join D.P. Holmes Trucking, LLC as a party. In the present case the Plaintiff/Appellee not only did not make a diligent inquiry, he did not make any inquiry whatsoever.

The Mississippi Supreme Court has stated that *Rule 9(h)* is to provide a mechanism to bring in responsible parties, known, but unidentified, who can only be ascertained through the use of judicial mechanisms. It is not designed to allow tardy plaintiffs to sleep on their rights. *Womble v. Singing River Hosp.*, 618 So.2d 1252, 1266-68 (Miss.1993). In the present case it is undisputed that no judicial mechanisms were used by the plaintiff in any attempt to ascertain the true identity of Tommy Jones' employer. As such the Plaintiff/Appellee should not be allowed to benefit from their lack of discovery in this case in order to extend the statute of limitations in this matter from three

years to eight.

In *Anderson v. ALPS Automotive, Inc.*, the Mississippi Supreme Court, held that a nine and a half month delay between the discovery of a party's true identity and the amendment of the complaint to add said party was unreasonable and granted summary judgment on behalf of the new party. See *Anderson v. ALPS Automotive, Inc.* 51 So.3d 929, 933 (Miss.2010). In the present case there is a much lengthier delay. As stated above, the Plaintiff/Appellee could have made inquiry of the true identity of Tommy Jones' employer at any time subsequent to David Holmes denying being such in his answer. The Plaintiff/Appellee did not make any such inquiry at any time. Also following permission for the Plaintiff/Appellee to amend his complaint, the Plaintiff/Appellee delayed another *fourteen* months before actually filing his amended complaint.

The inactivity and delay by the Plaintiff/Appellee as outlined above clearly shows that the Plaintiff/Appellee was not diligent in obtaining the true identity of an easily identifiable party and filing a complaint naming such party and as such the statute of limitations does not extend to the filing of Plaintiff's amended complaint and the present cause of action of which D.P. Holmes, LLC is the only named defendant should be dismissed with prejudice.

C. Statute of limitations

As referenced above, the statute of limitations in this matter had long been expired when the first amended complaint was filed. The present cause of action arises from an automobile accident and the alleged negligence of Tommy Jones. The statute of limitations for negligence claims such as this are governed by MISS. CODE ANN. § 15-1-49. Pursuant to this statute, all actions must be commenced within three (3) years next after the cause of such action accrued. There is no doubt that in the present case the statute of limitations began to run on the date of the accident, which was May

9, 2003. As defendant/appellant D.P. Holmes Trucking, LLC was not named as a defendant in this matter until almost eight years later, on February 11, 2011 the three year statute of limitations had clearly run.

III. Defendant/Appellant's Motion to Strike Plaintiff/Appellee's "Purported Second Amended Complaint" should have been granted as a matter of law.

As stated *infra*, the Plaintiff/Appellee in February 2011 filed his first amended complaint which simply replaced the named defendant "David Holmes" with "D.P. Holmes Trucking, LLC." In response, defendant/appellant D.P. Holmes Trucking, LLC filed an answer as well as a Motion to Dismiss or Alternatively for Summary Judgment. [R. 35-40/X. 34-39] That motion was set for hearing on May 16, 2011.

After receipt of Defendant/Appellant's D.P. Holmes Trucking, LLC's responsive filings, the Plaintiff/Appellee filed a "purported second amended complaint." [R. 51-54/X. 48-51]

Mississippi Rule of Civil Procedure 15(a) requires that leave of court be obtained for amendments to pleadings which are sought after an opposing party has filed a responsive pleading to such a pleading. The Plaintiff/Appellee's purported second amended complaint was filed after responsive pleadings were filed with regard to the first amended complaint. Pursuant to *Mississippi Rule of Civil Procedure 15*, leave of court was required with regard to the purported second amended complaint. As leave of court was never obtained, the Plaintiff/Appellee'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.

IV. Defendant/Appellant's motion to dismiss or alternatively for summary judgment with regard to Plaintiff/Appellee's purported second amended complaint should have been granted pursuant to Doe v. Mississippi Blood Services and Mississippi Rule of Civil Procedure 9(h).




In the event that this Honorable Court finds that Plaintiff/Appellee's purported second amended complaint was properly before the trial court, then it is the position of Defendant/Appellant that the purported second amended complaint should be dismissed based on this Court's ruling in *Doe v. Mississippi Blood Services* as well as an analysis under *Mississippi Rule of Civil Procedure 9(h)*. Defendant/Appellant hereby incorporates fully its previous arguments with regard to the plaintiff/appellee's first amended complaint in support of the dismissal of plaintiff's second amended complaint and ask that the second amended complaint be dismissed with prejudice.

CONCLUSION



As stated above the trial court's order denying Defendant/Appellant's motions to dismiss or alternatively for summary judgment and to strike was clearly erroneous as a matter of law and such should be reversed by this Honorable Court.

Further, Defendant/Appellant requests that this Honorable Court dismiss the Defendant/Appellant D.P. Holmes Trucking, LLC from this cause with prejudice as it was not named until long after the expiration of the statute of limitations expired and no tolling of the limitations period is proper.

Moreover, the dismissal of D.P. Holmes Trucking, LLC would fully and finally conclude this matter as former defendant David Holmes was previously dismissed by the filing of Plaintiff/Appellee's first amended complaint and therefore is no longer a party. Consequently this Court should reverse the trial court's order and render a dismissal of this matter with prejudice.

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CERTIFICATE OF SERVICE


I hereby certify that I have this day forwarded U.S. Mail, postage prepaid, true and correct copies of the above and foregoing to:

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This the 8th day of December, 2011.



J. Seth McCoy

Exhibit 4
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ROAD

Kenny TRUCK

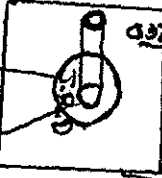


GUARD
DROPPED
WELL
HEAD



LOOK
Kenny
Stands

13 FT
JACK
TRAWER



RIG

BAT TRUCK



CREW TRUCK