IN THE SUPREME COURT OF MISSISSIPPI

NO. 2005-CT-02326

ANTHONY TOLLIVER, ON BEHALF OF
THE WRONGFUL DEATH BENEFICIARIES
OF SHIRLEY ANN TOLLIVER GREEN — APPELLANT/CROSS APPELLEE

V.

JOHN MLADINEO, M.D. AND
CHRISTOPHER HANCOCK, M.D. — APPELLEES/CROSS APPELLANTS

ON APPEAL FROM THE CIRCUIT COURT FROM
THE FIRST JUDICIAL DISTRICT COURT OF HINDS COUNTY

SUPPLEMENTAL BRIEF OF APPELLEE, JOHN MLADINEO, M.D.

SUBMITTED BY:

WHITMAN B. JOHNSON, III (MSB[redacted]
LORRAINE W. BOYKIN (MSB[redacted]
CURRIE, JOHNSON, GRIFFIN, GAINES & MYERS, P.A.
POST OFFICE BOX 750
JACKSON, MS 39205
TELEPHONE: (601) 969-1010
FACSIMILE: (601) 969-5120

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case. These representations are made so that the Judges of this Court may evaluate possible disqualification of recusal.

1) Mark P. Caraway, Esq. - Counsel for Appellee/Cross Appellant Dr. Hancock

2) Cory L. Radicioni, Esq. - Counsel for Appellee/Cross Appellant Dr. Hancock

3) John Christopher Hancock, M.D. - Appellee/Cross Appellant

4) Whitman B. Johnson III, Esq. - Counsel for Appellee/Cross Appellant Dr. Mladineo

5) Lorraine W. Boykin, Esq. - Counsel for Appellee/Cross Appellant Dr. Mladineo

6) John Mladineo, M.D. - Appellee/Cross Appellant

7) Hiwatha Northington, Esq. - Counsel for Appellant/Cross Appellee

8) Isaac K. Bryd, Jr., Esq. - Counsel for Appellant/Cross Appellee

9) Suzanne Keyes, Esq. - Counsel for Appellant/Cross Appellee

10) Anthony Tolliver - Appellant/Cross Appellee

11) Honorable W. Swan Yerger, Hinds County Circuit Court

Respectfully submitted,

By: 

WHITMAN B. JOHNSON, III
LORRAINE W. BOYKIN

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

ARGUMENT

Appellee/Cross-Appellant John Mladineo, M.D., pursuant to Rule 17(h) of the Mississippi Rules of Appellate Procedure, hereby files this supplemental brief in regards to the Mississippi Supreme Court's ruling of April 17, 2008, granting the Appellant/Cross Appellee's Petition for Writ of Certiorari. The Court of Appeals' ruling of July 17, 2007, affirming the dismissal of the Complaint, was the correct ruling under Mississippi law, and the binding precedent from this Court mandates that the dismissal be upheld.

The Court of Appeals was presented with two separate and independent bases for affirming the dismissal of the claims against Dr. Mladineo and Dr. Hancock. First, the initial complaint filed by a party with standing was not filed until *after* the expiration of the statute of limitations, and therefore the complaint was time-barred. Second, dismissal under Rule 41(b) was appropriate given the plaintiff's counsel's failure to attend a properly-noticed mandatory docket call before the trial court judge. The Court of Appeals found that dismissal was appropriate under Mississippi law on either of these two grounds. Op. at ¶ 25. Therefore, this Court is presented with two bases, either one of which supports a decision to affirm the dismissal of the claims against Dr. Mladineo and Dr. Hancock. *Kirksey v. Dye*, 564 So.2d 1333 (Miss. 1990) (decision may be affirmed on different basis than given by a lower court).

I. Tolliver's complaint was time-barred and therefore dismissal was appropriate.

Michael Malone filed a complaint on December 16, 2002, against Dr. John Mladineo and Dr. Christopher Hancock, alleging that their negligence led to the wrongful death of his sister, Shirley Ann Tolliver Green, on March 4, 2001. However, Malone lacked standing to pursue this claim. *Partyka v. Yazoo Development Corp.*, 376 So.2d 646 (Miss. 1979) (finding standing of second

echelon relative conditional upon lack of any relatives in first echelon). Malone was not a wrongful death beneficiary of Ms. Green under Mississippi law due to the fact that Ms. Green had been survived by a husband and children. *Briney v. United States Fid. & Guar. Co.*, 714 So.2d 962 (Miss. 1998) (discussing first and second echelons of family members under § 11-7-13). Malone therefore lacked any right to pursue a claim for her death.

The trial court allowed Ms. Green's son, Anthony Tolliver ("Tolliver"), to file an amended complaint, in which he was substituted for his uncle as plaintiff. However, this substitution was not supported by Mississippi law and the Court of Appeals reversed this ruling. The Malone complaint was held to be a "nullity" and incapable of being amended. *Davis v. Meridian & Bigbee Railroad Co.*, 161 So.2d 171, 173 (Miss. 1964) (noting "a complaint cannot relate back to a nullity"). Consequently, the Tolliver complaint had to be viewed as an original complaint. Since the Tolliver complaint was not filed until June 16, 2004, more than three year after Ms. Green's death, the statute of limitations had expired and the Tolliver complaint was time barred. Despite Tolliver's argument that his complaint could relate back to the date that the Malone complaint was filed (hoping to avoid dismissal on the statute of limitations grounds), the Court of Appeals rejected this argument by following Mississippi precedent and correctly interpreting the wrongful death statute, Miss. Code Ann. § 11-7-13. *See National Heritage Realty, Inc. v. Boles*, 947 So.2d 238 (Miss. 2006) (finding complaint filed by relative who lacked standing to be "void *ab initio*" and further holding that Rule 17 and any substitutions thereunder would be improper since court lacked jurisdiction).

When reviewing the record in this case and the decision reached by the Mississippi Court of Appeals, it is important to consider the circumstances under which the Malone complaint was filed on December 16, 2002. A wave of tort reform was going into effect on January 1, 2003,

implementing multiple new steps which had to be taken before a plaintiff could file a medical negligence lawsuit.[1] Starting in the new year, a plaintiff would be required to provide 60 days notice to a medical care provider before filing a complaint. Miss. Code Ann. § 15-1-36(15); *Arceo v. Tolliver*, 949 So.2d 691 (Miss. 2006) (dismissing complaint when plaintiff failed to provide pre-suit notice required by statute). A plaintiff would also be required to provide a certificate that an expert witness had been consulted and that such expert had found merit with the plaintiff's case. Miss. Code Ann. § 11-1-58; *Pitalo v. GPCH-GP, Inc.*, 933 So.2d 927 (Miss. 2006) (dismissing complaint when no certificate of expert consultation had been filed). Without either of these prerequisites being satisfied, a plaintiff would face immediate dismissal of his case. Not surprisingly, an abundance of cases were filed in December 2002 as an attempt to beat the tort reform deadline. This case was undoubtedly one of them. In a desperate race to avoid tort reform, the complaint was filed by someone who clearly lacked standing to pursue this claim, despite the existence of wrongful death beneficiaries who had apparently taken <u>no</u> steps to file suit in the eighteen months following Ms. Green's death.

It should be noted that Mississippi's wrongful death statute created a cause of action that did not exist at common law. *Franklin v. Franklin ex rel. Phillips*, 858 So.2d 110 (Miss. 2003). Being in derogation of common law, it must be strictly construed according to its terms. *Id.* at 115. Under those terms, an individual had standing to pursue a claim for Ms. Green's death <u>only</u> if that individual (1) was in the "first echelon" of family members under Miss. Code Ann. § 11-7-13, i.e., husband or child, or (2) was appointed as the Administrator of Ms. Green's Estate. M.R.C.P. 17(a)

---

[1] The Court of Appeals also noted that the amended complaint which first named a true wrongful death beneficiary as plaintiff was procedurally defective for failure to adhere to the pre-suit requirements which were applicable at the time Tolliver finally decided he wanted to file suit. Opinion at n.2.

(the "real party in interest" would be the executor/administrator or the heirs as identified by § 11-7-13); *see also Partyka v. Yazoo Development Corp.*, 376 So.2d 646 (Miss. 1979) (noting mother would only have standing to file suit for son's death if son had no surviving spouse or children or if mother had been appointed as administrator of son's estate). Michael Malone was qualified under neither of these, and therefore he simply had no standing to pursue a claim for his sister's death, making the determination that his complaint was a nullity correct.

As the Court of Appeals discussed, although a brother *can* have standing to file a wrongful death lawsuit following the death of his sister under Miss. Code Ann. § 11-7-13, such standing is *conditional on the absence of the deceased having a spouse or child.* Op. at ¶ 10; *Partyka v. Yazoo Development Corp.*, 376 So.2d 646 (Miss. 1979) (stating that mother had no standing to pursue claim for adult child's death since mother was a relative of second degree and adult child had a surviving wife); *Logan v. Durham*, 95 So.2d 227 (Miss. 1957) (finding exclusive right to file wrongful death claim belonged to surviving husband and child, not woman's parents or siblings). Given the fact that Ms. Green had a surviving spouse and children, Malone had no standing to file the complaint he filed on December 16, 2002, simply by virtue of his sibling status.

The only method by which Malone could have created for himself standing to pursue a claim for his sister's death would have been for an estate to be opened and Malone appointed as administrator. M.R.C.P. 17(a). This was *not* done, probably because the creation of an estate imposes various costs, responsibilities, and duties on both the administrator and the estate's attorneys. *Estate of Thomas v. Thomas*, 883 So.2d 1173 (Miss. 2004) (discussing numerous responsibilities of administratrix of estate); *Smith ex rel. Young v. Estate of King*, 501 So.2d 1120 (Miss. 1987) (acknowledging fiduciary duties owed by administratrix); *Shepherd v. Townsend*, 162

So.2d 878 (Miss. 1964) (administrator owes duties to *all persons who have any interest in the estate*); *see also Mississippi State Bar Ass'n v. Moyo*, 525 So.2d 1289 (Miss. 1988) (discussing attorney's representative capacity and fiduciary duties). Malone nonetheless moved forward with the easier route of simply filing a complaint, despite his lack of standing, which allowed him (and his attorneys)[2] to avoid the duties and responsibilities of opening an estate. The fact that the original suit was filed by Malone and his attorneys without anyone taking the steps necessary to justify the filing of that suit cannot be condoned. This Court must require plaintiffs and their attorneys to abide by the rules. Failure to do so creates both confusion and a loss of confidence in the judicial system.

In addition to the precedent from this Court which directs a finding that Malone lacked standing to file his complaint, there is a strong policy argument requiring such a ruling. A "stranger" should not be allowed to pursue a claim for an individual's death.[3] Section 11-7-13 provides a list of individuals who may pursue wrongful death claims, but it does in fact include a *hierarchy* which makes some beneficiaries' abilities to pursue such a claim conditional upon the absence of other beneficiaries, i.e., Ms. Green's brother was incapable of filing a complaint related to her death because her husband and children had that exclusive right. *Briney v. United States Fid. & Guar. Co.*, 714 So.2d 962 (Miss. 1998) (discussing tiers of beneficiaries under § 11-7-13). Neither Tolliver nor

---

[2] It should be pointed out that while Tolliver attempted to take his uncle's place as the plaintiff, the attorneys at that time did not change.

[3] If this Court reverses the Court of Appeals' decision to find that someone without standing may pursue a wrongful death claim as Malone did, confusion will follow as to who may in fact file a death claim. If a brother may pursue a claim for the death of his sister despite the surviving husband and children's exclusive rights to pursue the claim, such a decision would open the door to any relative beyond the second echelon, such as aunts and uncles, to have the ability to file suit. In fact, the entire hierarchy of § 11-7-13 would no longer have meaning. A blood relative would not even be required to pursue death claims. This is certainly not what the legislature intended by the creation of the multiple tiers in § 11-7-13, but a scenario could become a reality if this Court allows a complete "stranger" (i.e., someone with no standing whatsoever) to be able to maintain a wrongful death action.

his father took any steps to pursue the wrongful death claim against Dr. Mladineo or Dr. Hancock prior to the expiration of the statute of limitations. Apparently, those persons who had standing made a willful decision to not pursue a claim arising out of Ms. Green's death.

The Plaintiff/Petitioner argued in his Amended Petition for Writ of Certiorari that the Court of Appeals' discussion of the statute of limitations is moot based upon his interpretation of Rule 17. However, the authorities included in the Court of Appeals' opinion are directly on point on the pertinent issues before this Court. The law is well-established in this State that Malone did not have standing to file the complaint on December 16, 2002, making it null and void and therefore insufficient to serve as a basis for the Tolliver complaint to relate back and avoid the statute of limitations bar. *Davis v. Meridian & Bigbee Railroad Co.*, 161 So.2d 171 (Miss. 1964) (subsequent amendment cannot be based on complaint which is a nullity). Further, this issue was not raised before the trial court and therefore has been waived by the Plaintiff/Petitioner. *Varvaris v. Perreault*, 813 So.2d 750 (Miss. 2001).

Rule 17 reiterates the fact that Malone lacked standing because he was neither the person authorized by statute (i.e., a member of the first echelon under § 11-7-13) or the administrator of Ms. Green's estate. M.R.C.P. 17(a); *see also National Heritage Realty, Inc. v. Boles*, 947 So.2d 238 (Miss. 2006) (substitution under Rule 17 would not be proper because initial complaint was void and therefore the court lacked subject matter jurisdiction); *Pruitt v. Hancock Medical Center*, 942 So.2d 797 (Miss. 2006) (discussing that plaintiff who lacks standing cannot file suit and stand in place of a real party in interest, then seek substitution of proper party under Rule 17 to avoid dismissal).

Though the Plaintiff/Petitioner relies on *Methodist Hospital of Hattiesburg v. Richardson*, 909 So.2d 1066 (Miss. 2005), his logic is flawed because unlike *Richardson*, a *real party of interest*

did exist at the time that Malone filed his complaint - Tolliver. In allowing a substitution of parties, the *Richardson* court acknowledged that the real party in interest did not exist until after the statute of limitations expired. That is clearly not the situation in this case. There were no changes which created a "new" real party in interest to justify the position asserted by Plaintiff/Petitioner. The real party in interest existed *prior* to the expiration of the statute of limitations; he just had not filed suit. His apparent disinterest in making a timely filing is no justification for using Rule 17 as a means to disregard the procedural errors made by everyone associated with the claims being pursued.[4]

The fact that Malone's initial suit was a nullity is most clearly shown by the fact that Malone could not even have been joined in this wrongful death action under Rule 19 had Tolliver filed his complaint first. Complete relief could be granted in Malone's absence, as Malone was neither a relative of the first echelon under § 11-7-13 nor the administrator of the estate. He had no viable claim. This Court in *Long v. McKinney* recognized that wrongful death claimants "may join in the litigation and participate as fully as any other claimant" if the claimant was not initially included in the one suit allowed for a death. *Long v. McKinney*, 897 So.2d 160, 174 (Miss. 2004). However, had Tolliver's complaint been the first one filed, Malone would have had no basis to support an argument that he should be allowed to join and engage in equal participation because he was not entitled to any portion of the proceeds. This illustrates that Malone was *not* a person with standing to file the original complaint.

---

[4] Plaintiff's procedural errors are legion. The wrong party filed the first complaint. No steps were taken on the plaintiff's side to substitute in the proper party until the issue was raised by the defendants. The plaintiff then failed to appear at a mandatory docket call. Even on appeal, there have been errors of multiple motions for rehearing being filed by various plaintiff's attorneys, though not permitted by this Court. In these, the plaintiff raised the issue of Rule 17 for the first time, and due to this procedural error, such argument on appeal has been waived.

Stated another way, if Tolliver had not hired the same attorneys, but instead had retained separate counsel and filed his own original complaint, Tolliver would have wanted the Malone complaint vacated. *Long*, 897 So.2d at 173 (discussing that any complaint filed after an initial complaint has been filed shall have "no effect" since only one suit allowed for a wrongful death). Tolliver would have undoubtedly pointed to the language of § 11-7-13 and cases such as *Partyka* to show that Malone was not a proper party and therefore lacked standing to file any complaint for Ms. Green's death, despite the fact that these are the very same authorities which he now contests.

As the Court of Appeals aptly stated, "Because the correct party did not initially file the lawsuit for the wrongful death of Shirley Ann Tolliver Green, the complaint was never properly filed." Op. at ¶ 26. This Court has previously ruled that an unauthorized filing of a complaint cannot later become valid by the proper party being substituted as plaintiff. *Davis v. Meridian & Bigbee Railroad Co.*, 161 So.2d 171 (Miss. 1964) (holding that the unauthorized filing of a complaint by a party who lacked standing cannot be cured by an amendment to substitute the proper party). Tolliver's efforts to legitimize Malone's complaint should not be condoned by this Court, as he is only attempting to salvage his complaint from being dismissed on statute of limitations grounds when the authorities do not support his position.

II. Rule 41(b) supports dismissal of the claims against the defendants.

Additionally, the dismissal of the complaint was appropriate under Rule 41(b) for the failure of Plaintiff's counsel to appear for a mandatory docket call. This case was several years old with little activity, making it appropriate for dismissal under Rule 41(b). As the Court of Appeals noted, Rule 41(b) does not require contumacious conduct *and* delay, but that either of these factors will

support dismissal under the rule. Op. at n.4; *see Hine v. Anchor Lake Prop. Owners Association*, 911 So.2d 1001 (Miss. App. 2005).

Dismissal on this basis was well-supported by Mississippi law. *See Watson v. Lillard*, 493 So.2d 1277, 1278 (Miss. 1986) (noting dismissal for failure to comply with court order is rooted in "orderly expedition of justice and the court's control of its own docket"). Further, it cannot be overlooked that the dismissal under Rule 41(b) can only be reversed if there is evidence to show Judge Yerger abused his discretion. *Wallace v. Jones*, 572 So.2d 371 (Miss. 1990) (Rule 41(b) dismissal is reviewed under an abuse of discretion standard). Given the breadth of the court's authority to manage the cases on its docket and dismiss stale cases, such as this one, it cannot be said that there was an abuse of discretion when Judge Yerger dismissed this case under Rule 41(b).

This Court has cautioned parties against having a benevolent attitude toward the rules of the Court. *See, e.g., Educational Placement Services v. Wilson*, 487 So.2d 1316 (Miss. 1986) (noting parties' cavalier attitude toward civil procedure rules). However, the conduct by the Plaintiff has shown a pattern of disregarding the rules of this Court. The rules regarding standing were blatantly ignored when Malone filed the complaint in December 2002 despite a total lack of standing. The Plaintiff's counsel failed to appear for the mandatory docket call, despite admitting that notice of the docket call had been received and knowing that failure to attend could result in dismissal of the client's case. Even through this appeal process, the Plaintiff had two attorneys filing two separate Motions for Rehearing, though not allowed under Rule 40 of the Mississippi Rules of Appellate Procedure. Most importantly, Plaintiff raised arguments on appeal that were never presented to the trial court.

Dismissal was the appropriate sanction for the Plaintiff and his attorneys in this matter. *American Tel. & Tel. Co. v. Days Inn of Winona*, 720 So.2d 178 (Miss. 1998) (discussing prejudice to defendant as important factor in determining appropriate sanctions). Drs. Mladineo and Hancock have been the subjects of the litigation that (improperly) began back in December 2002, with the time and energy of litigation being expended for several years. Given the Plaintiff's lack of pursuit of the claims and pattern of delay and rule violations, the interests of justice were best served by dismissal of the claims against these physicians.

CONCLUSION

The Court of Appeals' opinion correctly interpreted Mississippi statutory and common law, and it properly affirmed the trial court's dismissal of the Plaintiff's claims. In addition to the authorities contained above, this Court should also consider the effects that a reversal would have on the public and the judicial system.

If this Court were to reverse the Court of Appeals' decision, such a ruling would open the doors to the courthouse to allow anybody to be able to pursue a wrongful death claim for anyone. Standing would no longer have any meaning, and complete strangers could seek recovery on wrongful death claims. The hierarchy found in § 11-7-13 would be destroyed, resulting in chaos due to strangers filing wrongful death claims for individuals with whom they have no relationship. Additionally, a decision that the dismissal was improper under Rule 41(b) would rob trial court judges of the ability to control their dockets and eliminate the power to dismiss cases for lack of prosecution or non-compliance with orders of the courts, thus leading to over-crowded dockets with numerous cases filed yet never prosecuted. For all of the above reasons, Dr. Mladineo respectfully requests that the Mississippi Supreme Court affirm the Court of Appeals' ruling of July 17, 2007.

Respectfully submitted,

JOHN MLADINEO, M.D.

By: _____
WHITMAN B. JOHNSON III, MSB No. 3158
LORRAINE W. BOYKIN, MSB No. 101221

OF COUNSEL:
CURRIE JOHNSON GRIFFIN
GAINES & MYERS, P.A.
P.O. Box 750
Jackson, MS 39205
Telephone: 601.969.1010
Facsimile: 601.969.5120

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served a complete and correct copy of the Supplemental Brief of Appellee Dr. John Mladineo, via United States Postal Service, postage prepaid, to the following:

Isaac K. Byrd, Jr., Esq.
Suzanne Keys, Esq.
Byrd & Associates, PLLC
427 E. Fortification Street
Jackson, MS 39201

Mark P. Caraway, Esq.
Cory L. Radicioni, Esq.
Wise Carter Child & Caraway, P.A.
P.O. Box 651
Jackson, MS 39205

Hiawatha Northington II, Esq.
Smith & Fawer, LLC
774 Avery Blvd., Suite C
Ridgeland, MS 39157

Honorable W. Swan Yerger
Hinds County Circuit Court
Post Office Box 327
Jackson, Mississippi 39205

This the 29th day of April, 2008.

_____
LORRAINE W. BOYKIN