IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2006-CA-01703
Consolidated with
CASE NO. 2007-CA-00821

NORMAN Q. THOMAS, JR., INDIVIDUALLY AND ON BEHALF OF WILLIAM THOMAS AND ANNA THOMAS, TWO MINORS, **APPELLANTS**

VERSUS

CLARK G. WARDEN, M.D.; MISSISSIPPI BAPTIST MEDICAL CENTER AND JOHN DOES 1 - 10, **APPELLEES**

Appeal from Circuit Court of the First Judicial District of Hinds County, MS

AMICUS CURIAE BRIEF FILED BY THE MISSISSIPPI ASSOCIATION FOR JUSTICE

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I. INTRODUCTION

The Briefs filed by the parties and *Amici* Associations focus primarily on the constitutionality of the statutory pre-notice and attorney consultation certificate requirements of the medical malpractice tort claims act amendments of 2003. *Amicus* Mississippi Association for Justice ("MAJ") joins with Defendant/Appellee Dr. Clark Warden in suggesting that it is unnecessary for this Court to consider the constitutional issues raised in order to resolve the merits of this appeal.[1] Amicus MAJ joins with Plaintiff/Appellant, Norman Q. Thomas in

[1] Brief of Appellee Clark G. Warden, M.D. at pp. 35-36.

suggesting to this Court that the primary error in the Trial Court's ruling was the failure to dismiss the Plaintiff's case without prejudice. Current members of this Court have previously ruled that dismissal **without prejudice** is required when a plaintiff does not comply with the statutory pre suit requirements. This Court must give deference to its own *stare decisis*. The ruling of the Trial Court must be reversed. Plaintiff's case should have been dismissed without prejudice, subject to Plaintiff's ability to refile.

II. ARGUMENT

A. The Trial Court should have dismissed Thomas' case without prejudice.

On November 4, 2005, Plaintiffs filed their Complaint. The statute of limitations would have run on November 6, 2005. Dismissal of this case without prejudice would have recognized the tolling of the limitations period, and allowed the Plaintiff to re-file subject to his ability to comply with both the pre-suit notice and certification requirements of the medical malpractice tort reform act. *Amicus* MAJ encourages the Court to resolve this case by reversing the Trial Court's manner of dismissal, rendering it unnecessary for this Court to engage in the complicated constitutional analysis encouraged by the parties to this appeal.

1. §15-1-36(15) pre-suit notice

At the outset, *Amicus* MAJ recognizes that this Court has previously ruled that the pre-suit notice provisions of Miss.Code Ann. § 15-1-36 (15) are mandatory. *Pitalo v. Garden Park Medical Center*, 933 So.2d 927, 929 (Miss. 2006). This Court has also previously ruled that a violation of §15-1-36(15) should not result in a dismissal with prejudice.

The first opportunity that this Court had to apply its decision in *Pitalo* was in *Arceo v. Tolliver*, 949 So.2d 691 (Miss. 2006). In *Arceo*, this Court opined that "while the notice

provisions of Miss. Code Ann. §15-1-36(15) are mandatory, they are not jurisdictional". *Id.* at 693. Relying on its recent decision in *Pitalo*, this Court reversed and rendered the trial court, holding that the plaintiff's second amended complaint should be dismissed "without prejudice" for failure to comply with the pre-suit notice provisions of Miss.Code Ann. §15-1-36(15). *Id.* at 698.

Within the last year, the Court of Appeals has also had the opportunity to consider the appropriate method of dismissal for failure to comply with the mandatory pre-suit notice provisions of § 15-1-36(15). In *Nelson v. Baptist Memorial Hospital*, 972 So.2d 667 (Miss. 2007), the plaintiffs, unlike Norman Thomas in the instant case, made no effort to serve notice prior to filing their original complaint. *Id.* at 672. In *Nelson*, the plaintiffs' original complaint was filed on July 10, 2003. However, notice was not provided until November 10, 2003, sixty days before filing an amended complaint. *Id.* Recognizing a pre-suit notice deficiency, the trial court dismissed the action, with prejudice. Relying on *Pitalo* and *Arceo*, the Court of Appeals found that it was proper to dismiss the action. However, the Court of Appeals reversed the trial judge finding that the dismissal should have been "without prejudice." *Id.* at 674.

In the instant case, Thomas gave the proper notice, but filed his case on day 59. The Trial Court erred by not following this Court's ruling in *Pitalo* and *Arceo*, and the Court of Appeal's ruling in *Nelson*. Thomas' case should have been dismissed without prejudice for non-compliance with §15-1-36(15).

2. §11-1-58 certificate of consultation

As with the pre-suit notice requirements, the certificate of consultation requirement has been found mandatory by members of this Court in *Walker v. Whitfield Nursing Center, Inc.*, 931

So.2d 583, 592 (Miss. 2006). Likewise, dismissal without prejudice is the proper remedy for failure to comply with the certificate of consultation requirements of § 11-1-58. Reference again can be made to the Court of Appeals ruling in *Nelson*.

Citing *Walker* for support, the *Nelson* Court recognized that a claim should be properly dismissed where the plaintiff did not file the required certificate of consultation with the original complaint as contemplated by § 11-1-58. *Nelson*, 972 So.2d at 673. However, reversing the trial court, the court in *Nelson* found that the dismissal should be without prejudice, rather than with prejudice. *Id.* at 673-74.

This same result was reached by members of this Court in *Caldwell v. North Mississippi Medical Center, Inc.*, 956 So.2d 888 (Miss. 2007). In *Caldwell*, the plaintiffs did not attach an attorney's certificate of consultation to their original complaint as required by § 11-1-58(1). Alternatively, the plaintiffs did not file the certificate within sixty days of serving the complaint as required by § 11-1-58(1)(b). *Id.* at 891. The plaintiffs attempted to cure the error by filing an expert disclosure in lieu of certificate of counsel approximately four months after the complaint was filed. Finding that the statute required strict compliance, this Court held that the complaint as filed "failed to state a claim upon which relief can be granted." *Id.* at 894. Therefore, the trial court properly dismissed the claim "without prejudice." *Id.* at 895.

Like the plaintiffs in *Caldwell*, Thomas tried to cure his failure to attach an attorney certificate of consultation. The Trial Court erred by not following this Court's ruling in *Caldwell*, and the Court of Appeal's ruling in *Nelson*. Thomas' case should have been dismissed without prejudice for non-compliance with §11-1-58.

It is significant that this Court has affirmed the above trial court dismissals based on

principles of "failure to state a claim upon which relief can be granted" as opposed to dismissal on the merits or on jurisdictional grounds. *See, e.g., Walker,* 931 So.2d at 591, cited for support in *Caldwell,* 956 So.2d at 894. Such dismissal, without prejudice, would clearly have allowed Thomas to re-file his complaint against Warden and MBMC to correct the technical errors. *See, e.g., Williams v. Mid-South Paving Co.*, 25 So. 2d 792, 798 (Miss. 1946) (dismissal without prejudice allows the plaintiff to file new suit on the same cause of action), cited with approval in *Nelson v. Baptist Memorial Hospital*, 972 So. 2d at 673-74.

B. Resolution of the Constitutional Issue Raised is not Necessary for this Court to decide this Appeal.

Amicus MAJ agrees with Dr. Warden. It is not necessary for this Court to rule on the constitutionality of §15-1-36(15) or §11-1-58 to resolve the appellate issue before this Court.[2] Indeed, this Court has a history of passing on the constitutionality of medical malpractice statutes where resolution of the constitutional question is not necessary to reach a decision in the case. *Tribou v. Gunn*, 410 So.2d 378, 380 (Miss. 1982). There are striking similarities between the appeal in *Tribou* and the instant case.

In *Tribou*, the plaintiff's case was dismissed with prejudice by the trial court as being barred by the two year medical malpractice statute of limitations. *Id.* The plaintiff argued that her claim was not time barred as it was filed within two years after having learned of the malpractice. In the alternative, plaintiff argued that the medical malpractice two year statute of

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[2] In his principal brief, Dr. Warden cites *Grant v. State*, 686 So.2d 1078, 1090 (Miss. 1996), *Western Line Consolidated School District, et al. v. Greenville Municipal Separate School District*, 433 So.2d 954, 957 (Miss. 1983), and *Williams v. Stevens,* 390 So.2d 1012, 1014 (Miss. 1980) all of which stand for the proposition that this Court should not address a constitutional ground for appeal if the Court can decide the case on other grounds.

limitations was unconstitutional. *Id.* at 379. Recognizing that the plaintiff's claim was not time barred, the Mississippi Supreme Court held that it was unnecessary to pass on the constitutionality of the medical malpractice statue of limitations "because constitutional questions are not reached unless necessary for decision of a case." *Id.* at 380. The trial court's dismissal in *Tribou* was reversed without addressing the constitutional issue raised. In the instant case, the trial court's dismissal of Thomas' complaint with prejudice should be reversed without this Court addressing the constitutional issue raised.

III. CONCLUSION

The current members of this Court have stated, unequivocally, that failure to comply with the pre-notice and consultation requirements should result in dismissal without prejudice. Therefore, Thomas should have been given the remainder of the limitations period within which to refile his Complaint in compliance with both provisions. Such a dismissal without prejudice would be consistent with Defendants' position regarding the purpose and intent of the pre-suit notice and consultation statutes, i.e., weeding out non-meritorious cases. Nowhere in the text or history of medical malpractice tort reform does it appear that the Legislature's intent was to create a technical trap that could be used to defeat meritorious cases.

Resolution of this case within these narrow confines is consistent with this Court's pronouncements confirming that constitutional issues should not be reached if the case can be resolved on other grounds.[3] This Court should be especially sensitive to this policy of *stare decisis* and avoid stepping into the politically charged area of medical malpractice tort reform

[3] *Williams v. Stevens*, 390 So.2d at 1014.

based on the sparse record in the instant case.[4] *Amicus* MAJ would leave this Court with the wisdom of Mr. Justice Frankfurter, relied on in part by this Court in *Williams v. Stevens*:

> The more issues of law are inescapably entangled in political controversies, especially those that touch the passions of the day, the more the Court is under duty to dispose of a controversy within the narrowest confines that intellectual integrity permits.

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 149-150 (1951), cited with approval in, *Williams v. Stevens*, 390 So.2d at 1014.

The thorny question of the constitutionality and/or unconstitutionality of medical malpractice tort reform must be left for another day. This case can be decided on other grounds.

DATED this 5th day of May, 2008.

Respectfully submitted,

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[4] As this Court will recall, Thomas' constitutional challenge did not arise until **after** the trial court signed its August 28, 2006 Order granting Defendant Warden's Motion to Dismiss. Consequently, there is no record at all in this case on which this Court can rely for purposes of determining the constitutionality and/or unconstitutionality of the legislative acts challenged. *Amicus* MAJ suggests that this Court should be guided by the principles of restraint urged by Justice Hawkins in his dissent in *Hall v. State*, 539 So.2d 1338 (Miss. 1989), the dissent which *Amici* Associations urge this Court to adopt. Throughout his dissent, Justice Hawkins criticizes the majority for ruling on the constitutionality of a statute without citation to authority, without a sufficient record, and finally by decreeing its authority to act "out of thin air." *Id.* at 1350.

CERTIFICATE OF SERVICE

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