

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**WOODROE WILSON SELLARS**

**APPELLANT**

**V.**

**CAUSE NO. 2006-CA-02146**

**WALGREEN CO**

**APPELLEE**

**BRIEF OF APPELLANT**

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## 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 the judges of the Court of Appeals may evaluate possible disqualifications or recusal:

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6. Honorable Paul Funderburk  
First Circuit Court District of Mississippi Judge  
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7. Bobby R. Sellars, Wrongful Death Beneficiary  
Mantachie, Mississippi 38855
8. Venison Sellars, Wrongful Death Beneficiary  
Mantachie, Mississippi 38855

9. Johnnie Sellars, Wrongful Death Beneficiary  
Mantachie, Mississippi 38855

10. Lisa Sellars, Wrongful Death Beneficiary  
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11. Tammy Sellars Lancaster, Wrongful Death Beneficiary  
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12. Hon. Jamie R. Franks, Jr., Counsel for Wrongful Death Beneficiaries  
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Respectfully submitted, this the 29<sup>TH</sup> day of MAY, 2007.



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JAMES D. MOORE

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## STATEMENT OF ISSUES

POINT I: WHETHER THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANT, WHEN VIEWING THE FACTS IN THE LIGHT MOST FAVORABLE TO THE NONMOVING PARTY, THERE ARE TRIABLE ISSUES OF FACT.

POINT II: WHETHER THE AFFIDAVITS OF DONALD F. MCKENNA RPH AND MICHAEL E. KALAFER, M.D. SET OUT THE DUTY TO CONFORM TO THE APPLICABLE STANDARD OF CARE AND THE MANNER THE STANDARD WAS BREACHD SUFFICIENT TO SURVIVE THE MOTION FOR SUMMARY JUDGMENT.

POINT III: WHETHER A MEDICAL MALPRACTICE CLAIM AGAINST A RETAIL STORE SHOULD BE DISMISSED WITH PREJUDICE FOR FAILURE TO FILE A CERTIFICATE OF CONSULTATION, WHEN THE STATUTE HAS AN EXCEPTION TO FILING A CERTIFICATE THAT ALLOWS THE PLAINTIFF TO PROVIDE THE DEFENDANT WITH EXPERT INFORMATION IN THE FORM REQUIRED BY THE MISSISSIPPI RULES OF CIVIL PROCEDURE.

## STATEMENT OF THE CASE

The Appellant (hereinafter “Sellers”), appeals the decision of the Circuit Court of Lee County, Mississippi granting the Appellee’s (hereinafter “Walgreens”) Supplemental Motion for Summary Judgment on the ground that Walgreens’ pharmacist had no legal duty to fill a prescription.

## STATEMENT OF FACTS

March 15, 2005, Sellars filed a Complaint as a wrongful death beneficiary of Nettie Mae Dill against Walgreens and Jane Doe, (an unnamed and unknown pharmacist employed by Walgreens). (R.E. 4). The Complaint states that the death of Nettie Mae Dill was due to the negligence of Walgreens by and through its employee, Jane Doe, in refusing to fill prescriptions. (R.E. 5). The decedent, having no other pharmacy available because of the late hour (after midnight) attempted to have the prescriptions filled at Walgreens. (R.E. 5).

A Walgreens official blamed a misunderstanding over a computer shutdown for the failure of the Pharmacist to fill the prescriptions. (R.E. 126). The official further stated that the pharmacist told the Dill family that the pharmacy was unable to process Medicaid prescriptions at that time. (R.E. 127). The pharmacist did offer to let the family pay cash for the prescriptions; however the family did not have enough money to have all of the prescriptions completely filled. (R.E. 127). The official went on to say, that Walgreens could have done more for the Dill family, stating, "We do routinely give medicine to patients who need it, if they are in a situation where they are having trouble breathing or having heart problems," she said. (R.E. 127).

On May 16, 2005, Sellars made a Motion to Consolidate with another case filed representing the remaining wrongful death beneficiaries of Nettie Mae Dill and for additional time to respond to discovery. (R.E. 15).



January 4, 2006, Walgreens filed a Motion for Summary Judgment because the Plaintiff had not attached a certificate to the Complaint. (R.E. 27).

January 13, 2006, Sellars filed a Motion for Additional Time and Scheduling Order. (R.E. 47). This motion requested additional time to designate experts in accordance with the Mississippi Rules of Civil Procedure. (R.E. 48). January 23, 2006, the Court granted the Motion for Additional Time to respond the Walgreens Motion for Summary Judgment. (R.E. 55).

February 9, 2006 Sellers filed a Response to Defendants' Motion for Summary Judgment. (R.E. 56). This response had attached the sworn affidavits and curriculum vitae of two (2) expert witnesses expected to give testimony regarding the standard of care, the breach thereof, and the causal link to the injury. (R.E. 63-71).

February 24, 2006, Walgreens filed a Reply to Plaintiff's Response to Motion for Summary Judgment of the Defendant Walgreen Co. And Motion to Strike the Affidavit of Donald f. McKenna and the Affidavit of Michael E. Kalafer, M.D. (R.E. 74-79).

March 2, 2006, Sellars filed Supplemental Evidence to Plaintiff's Response to Defendant's Motion for Summary Judgment. (R.E. 80-81).

June 26, 2006, Walgreens filed a Supplemental Motion of Defendant, Walgreen Co. For Summary Judgment. (R.E. 141-43).

October 26, 2006, Sellars filed Plaintiff's Brief in Response to Defendant's Supplemental Motion for Summary Judgment. (R.E. 153).

November 10, 2006 Walgreens filed a Rebuttal of the Defendant, Walgreen Co., to Plaintiff's Response to Defendant's Supplemental Motion for Summary Judgment. (R.E. 158-164).

November 21, 2006, the Circuit Court of Lee County, Mississippi filed the Order Granting Summary Judgment to Walgreens. (R.E. 212-13).

A Notice of Appeal, Designation of the Record and Certificate of Compliance were all timely filed. (R.E. 214, 216, 222).

## SUMMARY OF ARGUMENT

POINT I: Summary judgment was not appropriate in this case; when viewing the facts in the light most favorable to the nonmoving party, Sellars presented sufficient evidence of genuine issues of material fact to preclude summary judgment.

POINT II: Each person owes a duty to behave as a reasonable person would under the same or similar circumstances. A professional is held at a minimum to the standard of care customarily exercised by members of that profession.

The affidavit of Donald McKenna states that he is a retired pharmacist with over forty years of experience. The affidavit lists the documents and records which were reviewed by Mr. McKenna in order to form his expert opinion in this case.

In addition, Dr. Michael E. Kalafer is a licensed pulmonologist with over twenty-five years of experience. The affidavit submitted by Dr. Kalafer states that he has reviewed the medical records of Nettie Mae Dill and based his opinion on those medical records.

Both experts set out the applicable duty to conform to the standard of care and the breach of that standard by and through Walgreens and the employee pharmacist of Walgreens. Viewing the evidence in the light most favorable to the nonmoving party,

these affidavits should be considered sufficient to survive the motion for summary judgment.

POINT III: §11-1-58 of MISSISSIPPI CODE ANNOTATED requires a filing of a certificate of consultation and that failure to do so could result in dismissal. However, §11-1-58(7) allows the Plaintiff to provide the defendant with expert information in the form required by the Mississippi Rules of Civil Procedure, in lieu of serving a certificate.

POINT I:

WHETHER THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANT, WHEN VIEWING THE FACTS IN THE LIGHT MOST FAVORABLE TO THE NONMOVING PARTY, THERE ARE TRIABLE ISSUES OF FACT.

Summary judgment is appropriate when the evidence is viewed in the light most favorable to the nonmoving party, there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. Miss. R. Civ. P. 56(c); Russell v. Orr, 700 So.2d 619,622 (Miss. 1997).

The case of Roebuck v. McDade, sets out the focal point of the de novo review, material facts. (Roebuck v. McDade, 760 So.2d 12 (Miss.Ct. App. 1999)). The Court looks at all the evidentiary matters before it, viewing the evidence in the light most favorable to the nonmoving party, giving the benefit of every reasonable doubt to the party against whom summary judgment is sought. Id. The Court went on to say that motions for summary judgment are to be viewed with a skeptical eye. Id.

“All that is required for a nonmoving party to survive a motion for summary judgment is to establish a genuine issue of material fact by the means available under... Miss. R. Civ. P. 56(c).” Spartan Foods System, Inc. V. American Nat’l Ins. Co., 582 So.2d 399, 402 (Miss. 1991).

Summary judgment was inappropriate in this case. In response to the Defendant’s Motion for Summary Judgment, Sellars attached two affidavits from qualified experts setting out the applicable duty to conform to the applicable standard of care for a reasonably prudent pharmacist under the same circumstances. (R.E. 56-72).

The affidavit of Donald McKenna states that he is a retired pharmacist with over forty years of experience. The affidavit lists the documents and records which were reviewed by Mr. McKenna in order to form his expert opinion in this case. (R.E. 69-71).

In addition, Dr. Michael E. Kalafer is a licensed pulmonologist with over twenty-five years of experience. The affidavit submitted by Dr. Kalafer states that he has reviewed the medical records of Nettie Mae Dill and based his opinion on those medical records. (R.E. 63-8).

Both experts set out the applicable duty to conform to the standard of care and the breach of that standard by and through Walgreens and the employee pharmacist of Walgreens. Viewing the evidence in the light most favorable to the nonmoving party, these affidavits should be considered sufficient to survive the motion for summary judgment.

## POINT II:

### WHETHER THE DUTY OF A PHARMACIST IS THAT OF A REASONABLY PRUDENT PHARMACIST.

Each person owes a duty to behave as a reasonable person would under the same or similar circumstances (Brown v. Kendall, 60 Mass. 292 (1850); Rest. 2d §283).

A professional is held at a minimum to the standard of care customarily exercised by members of that profession. (Heath v. Swift Wings, Inc., 252 S.E.2d 256 (N.C. 1979); Rest. 2d §299A).

As stated in Defendant's Motion for Summary Judgment, "to establish a prima facie case of professional negligence against Walgreens, Plaintiffs have the burden to

prove: (a) the existence of a duty of Walgreens to perform to a specific standard of care; (b) a failure to perform to the standard of care; and (c) an injury to the plaintiff proximately caused by the breach of the standard of care. (R.E. 28).

Walgreens pharmacist owed a duty to act as a reasonably prudent pharmacist would in the same or similar circumstances. Because the applicable standard in the case of a professional, is at a minimum, the standard of care customarily exercised by members of that profession, expert testimony is generally necessary to establish the standard. The opinions offered by Sellars' experts outline the standard for a professional pharmacist. (R.E. 69).

### POINT III:

WHETHER A MEDICAL MALPRACTICE CLAIM AGAINST  
A RETAIL STORE SHOULD BE DISMISSED WITH PREJUDICE FOR FAILURE TO  
FILE A CERTIFICATE OF CONSULTATION, WHEN THE STATUTE HAS AN  
EXCEPTION TO FILING A CERTIFICATE THAT ALLOWS THE PLAINTIFF TO  
PROVIDE THE DEFENDANT WITH EXPERT INFORMATION IN THE FORM  
REQUIRED BY THE MISSISSIPPI RULES OF CIVIL PROCEDURE.

§ 11-1-58(7) allows the Plaintiff to provide the defendant with expert information in the form required by the Mississippi Rules of Civil Procedure, in lieu of serving a certificate. (R.E. 35-8 Exhibit "B" to Defendant's Motion for Summary Judgment). The Mississippi Rule of Civil Procedure 26 (f) allows for a Plaintiff to supplement his response with respect to any question directly addressed to... "(B) the identity of each

person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony”.

Sellars responded to Walgreens request for discovery. (R.E. 40-44). In answering the interrogatories and requests for admissions, Sellars responded that the discovery would be supplemented in accordance with the Mississippi Rules of Civil Procedure. (R.E. 40-44). In response to the Defendant’s Motion for Summary Judgment, Sellars attached two affidavits from qualified experts setting out the applicable duty to conform to the applicable standard of care for a reasonably prudent pharmacist under the same circumstances. (R.E. 56-72).

The affidavit of Donald McKenna states that he is a retired pharmacist with over forty years of experience. The affidavit lists the documents and records which were reviewed by Mr. McKenna in order to form his expert opinion in this case. (R.E. 69-71).

In addition, Dr. Michael E. Kalafer is a licensed pulmonologist with over twenty-five years of experience. The affidavit submitted by Dr. Kalafer states that he has reviewed the medical records of Nettie Mae Dill and based his opinion on those medical records. (R.E. 63-8).




## CONCLUSION

This case should be remanded to the Circuit Court of Lee County, Mississippi. Summary judgment was not appropriate in this case; when viewing the facts in the light most favorable to the nonmoving party, Sellars presented sufficient evidence of genuine issues of material fact to preclude summary judgment.

The standard of care of the Walgreens pharmacist is that of a reasonably prudent pharmacist. The applicable standard of care and any deviation from it is a question for the jury to decide at a trial on the merits of the case. The submission of affidavits by the experts in this case creates genuine issues of material fact that are to be resolved by the trier of fact.

In addition, the failure to attach a certificate of consultation to the complaint should not be fatal to this suit. There is an express exception in the statute which allows another means of satisfying the requirement.

Viewing the evidence in the light most favorable to the nonmoving party and giving the benefit of all reasonable doubt to the nonmoving party, this case should be remanded back to the Circuit Court for further proceedings. Mr. Sellars now respectfully asks this honorable Court to correct this injustice and allow the plaintiff to have his day in court.



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CERTIFICATE OF SERVICE

This is to certify that I, James D. Moore, have this day mailed a true and correct copy of the above and foregoing Brief of Appellant, via United States mail, postage prepaid, to the following:

1. Woodroe Wilson Sellars, Appellant  
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Hon. Robert K. Upchurch and  
Hon. Janelle M. Lowrey  
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4. Honorable Paul Funderburk  
First Circuit Court District of Mississippi Judge  
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Tupelo, Mississippi 38802

CERTIFICATE OF MAILING

This is to certify that I, James D. Moore, Attorney for the Appellant, have this day filed by mailing pursuant to M.R.A.P. 25, the foregoing Brief of Appellant and four copies on May 29, 2007, by personally depositing same in the United States mail, first class with postage prepaid, addressed to the Clerk of the Mississippi Supreme Court.

Respectfully submitted, this the 29<sup>th</sup> day of May, 2007.



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JAMES D. MOORE