

IN THE SUPREME COURT OF MISSISSIPPI
CASE NO. 2006-IA-00364-SCT
CONSOLIDATED WITH
2006-TS-00420-SCT

TIMOTHY ESTES, M.D., ET AL.

APPELLANTS

V.

FREDERICA BRISTER, As Conservator of
WILLIE MCKEE as Personal Representative
Of PEARL HENRY, Deceased and on Behalf
Of the Wrongful Death Beneficiaries
Of PEARL HENRY, deceased

APPELLEE

**APPELLANTS' FORREST HILL NURSING CENTER AND
LONG TERM CARE MANAGEMENT'S
REPLY BRIEF**

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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:

Willie McKee, Sr., Appellee

Willie McKee, Jr., Appellee

Frederica Brister, Appellee

Carl L. Hagwood, Esquire, Sandra Doty, Esquire, Attorneys for Dr. Timothy
Estes

Jim Bullock, Esquire, Jonathan Bullock, Esquire, Attorneys for Judson
Williams

Andy McCullough, Esquire, Attorney for Robert Crawford

Charles Gibson, Gigi Gibson, Attorneys for Appellees

S. Mark Wann, Marjorie S. Busching, Heather M. Aby, Attorneys for Forrest Hill Nursing Center, A.D. Buffington, Hugh Franklin, Long Term Care Management, LLC and Rhonda Bounds

Honorable Winston L. Kidd, Hinds County Circuit Court Judge

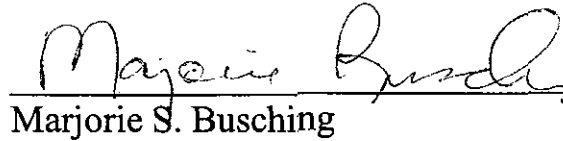

Marjorie S. Busching

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INTRODUCTION

Forest Hill Nursing Center, Inc., (hereinafter “Forest Hill”) and Long Term Care Management, LLC, confine their arguments in response to Appellee’s combined Response to Appellants Brief.

Pearl Henry was resident at Forest Hill Nursing Center. She died July 31, 2001. Following her death, November 26, 2001, Forest Hill Nursing Center received a request for medical records. (R. 391). Said request also included an authorization executed by Willie McKee, the grandson. (R. 385). Said authorization indicated the records were to be provided to counsel for Willie McKee, on behalf of Pearl Henry. (R. 385). Listed as counsel of record was Charles E. Gibson, Gibson Law Firm. (R. 385). Records were prepaid and subsequently sent to Willie McKee’s attorneys, one of whom was Charles Gibson. (R. 430-31).

On or about June 11, 2002, suit was filed against Forest Hill naming as Defendants Forest Hill Nursing Center f/k/a Crawford Nursing Home, Rhonda Bounds and Verna Ball Cook. (R. 462). Said suit was never served on any Defendant. Charles Gibson, Gibson Law Firm was counsel of record. (R. 468). On or about July 25, 2003, the same attorney representing Willie McKee on behalf of Pearl Henry filed suit for the second time in the Circuit Court of the First Judicial District of Hinds County. (R. 20-60). Said suit named as Defendants Forest Hill Nursing Center and

Scott Lindsey. Neither Forest Hill nor Mr. Lindsey received any written notice whatsoever as required under Miss. Code Ann. §15-1-36(15) prior to filing suit. The Complaint did not include a Certificate of Expert Consultation nor any certificate indicating the reason for failure to attach the certificate. (Miss. Code Ann. §§11-1-58 and 11-1-58(4)). The Defendants filed a Motion to Dismiss.

In response, on or about October 1, 2003, Plaintiff filed a Motion to amend the Complaint. The Motion was granted and an Order entered the very next day, October 2, 2003, without any hearing nor any opportunity for the Defendants to object. Subsequently, Defendants Forest Hill and Scott Lindsey filed a Motion to Dismiss the First Amended Complaint. Defendants again argued Plaintiff's complete failure to give notice as required under Miss. Code Ann. §15-1-36(15), as well as the failure to attach a Certificate of Expert Consultation under Miss. Code Ann. §11-1-58 required the Court to dismiss the matter. (R. 161-182). The Lower Court denied the Defendants' Motion, stating, amongst other reasons, that the notice statute was inapplicable as Ms. Henry had passed away prior to January 1, 2003 the effective date of the notice requirement. (R. 569). With all due respect, Defendants asserted then and do so now, that the Lower Court misinterpreted the statute.

In response, Defendants at that time, Forest Hill and Scott Lindsey filed a Petition for Interlocutory Appeal just three days after entry of the Court's Order. The

appeal was incorrectly filed in the Lower Court following the March 1, 2005 amendment to the Rules requiring direct petition to this Court. After transferring the appeal to the Supreme Court, it was denied by this Court as untimely. (R.750). Substitutions for John Doe Defendants were then permitted by the Lower Court and the Complaint was served on those parties. Long Term Care Management being one of the newly added Defendants along with Forest Hill Nursing Center, Hugh Franklin, A.D. Buffington, and Rhonda Bounds filed answers asserting Plaintiff's Complaint should be dismissed. These Defendants alternatively asked the Court to stay the matter pending this Court's ruling in the then pending matter of *Arceo v. Tolliver, et al.*, ___ So.2d. ___ 2006 WL 3317036 (Miss. November 16, 2006). (R. 216). All Motions to dismiss as well as those motions to dismiss based on the asserted improper substitutions were denied, as was the request for a stay.¹

As a result, Dr. Timothy Estes, one of the newly substituted Defendants filed not one, but two Petitions for Interlocutory Appeal and Emergency Request for Stay

¹Rhonda Bounds being a named Defendant in the previous suit also asserted failure to give notice and failure to attach a Certificate of Expert Consultation. She separately asserted that her claims were barred by the statute of limitations as she was clearly identified in the previous suit. (R. 447-450). The lower court denied her separate motion to dismiss. In answering the Amended Complaint, all Defendants, including Forest Hill Nursing Center as well as Long Term Care Management asserted Plaintiff failed to give notice to any Defendant whatsoever when filing suit as required under Miss. Code Ann. §15-1-36(15). All Defendants asserted the matter should be dismissed for failure by the Plaintiff to attach a Certificate of Expert Consultation in filing suit. All newly added Defendants additionally filed Motions to Dismiss for improper substitution.

with this Court. Both appeals were accepted and consolidated in this instant matter. Following submission of the separate briefs of the Defendants, the Plaintiff subsequently attempted to have Dr. Timothy Estes and Mr. Judson Williams appeals dismissed on technicalities. The Court refused to dismiss those appeals. As a result, Plaintiff then approached all the Defendants, with the exception of Forest Hill and Long Term Care Management, proposing to dismiss those Defendants if a joint motion were filed with all parties to bear their costs. As to be expected, all Defendants accepted the offer to be dismissed from the lawsuit. Plaintiff is now trying to dismiss the appeal of Forest Hill Nursing Center and Long Term Care Management as moot. Plaintiff's argument has no basis in fact whatsoever. The issue before the Court requiring notice and attachment of a Certificate of Expert Consultation presents a difference of opinion or a question of law which should be resolved.

ARGUMENT

Plaintiff filed suit against Forest Hill on or about July 25, 2003. (R. 20-58). No notice was given to any of the original Defendants as required under Miss. Code Ann. §15-1-36(15).² In response to the Complaint, Forest Hill filed a Motion to Dismiss citing the Plaintiff's failure to comply with the 60 day notice requirement of Miss.

² Forest Hill Nursing Center, LLC and Scott Lindsey as a former Administrator were the original Defendants when suit was first filed.

Code Ann. §15-1-36(15), as well as the failure to attach a Certificate of Expert Consultation when the Complaint was filed as required under Miss. Code Ann. §11-1-58. (R. 60-63). Plaintiff responded asserting the statute did not apply for two reasons. (R. 65-69). Plaintiff incorrectly asserted §15-1-36(15) did not apply because the resident had died July 31, 2001 and notice was only required if the cause of action occurred after January 1, 2003.³ (R. 66). Plaintiff also asserted if any compliance was warranted, this Court has “never ruled in favor of dismissal for failure to provide adequate notice.” (R. 66). Additionally, Plaintiff asserted the Certificate of Expert Consultation was not required because the statute of limitations was about to expire, therefore Plaintiff’s “counsel thought it wise to file suit without the accompanying ‘certificate’”. (R. 67). Plaintiff also incorrectly asserted under the “partial compliance” test this Court “has never ruled in favor of dismissal for failure to provide adequate notice.” (R. 66). (See *Proli v. Hathorn*, 928 So.2d. 169 (Miss. 2006); also see *Pitalo v. GPCH-GP, Inc., d/b/a Gardens Park Medical Center, et al.*, 933 So.2d. 927 (Miss. 2006)).

In response, October 2, 2003, Plaintiff filed a Motion to Amend Complaint which was immediately granted the following day, October 3, 2003. In response to

³See, however, *Arceo v. Tolliver, et al.*, ___ So.2d. ___ 2006 WL 3317036, *3 (Miss. Nov. 16, 2006), wherein the patient died on July 13, 2002, prior to January 1, 2003. In *Arceo*, the Court applied Mississippi’s Medical Malpractice Tort Reform Act; accordingly, Plaintiff’s argument otherwise is moot.

the Court's granting the Plaintiff leave to file the Amended Complaint, Defendants filed a Motion to Dismiss the Amended Complaint which was denied. (R. 161-183). Defendants Petition for Interlocutory Appeal filed after denial of their Motion was denied as untimely.

General discovery ensued. Plaintiff was informed of the identity of the management company, corporate members of the management company and the facility, the names of the Administrator, the Medical Director, Dr. Timothy Estes (hereinafter "Estes") and all treating medical personnel, including Judson Williams (hereinafter "Williams"), the certified nurse practitioner.⁴ Plaintiff substituted parties for John Doe Defendants. None of the new Defendants were given written notice. Plaintiff then asserted the latter terms of §15-1-36(15) applied whereby written notice was not required for Defendants "unknown to the Plaintiff at the time of filing the suit." (R. 288-291). (Also see House Bill No. 2 (R. 599-617) at p. 609) Plaintiff knew the names of the original Defendants and gave no notice. Plaintiff knew the name of substituted Defendant Rhonda Bounds identified as a Defendant in the June 2002 Complaint, but gave no notice to her.

⁴Defendants' Estes, Judson Williams, as well A.D. Buffington, Hugh Franklin and Rhonda Bounds, have subsequently been dismissed from the appeal by request initiated by the Plaintiff.

The second issue is attachment of the certificate of expert consultation under Miss. Code Ann. §11-1-58. This issue has also come before this Court of late since its effective date January 1, 2003. (See *Walker v. Whitfield Nursing Center, Inc.*, 931 So.2d. 583 (Miss. 2006)). Records were requested by Plaintiff in this instant matter months *after* suit was filed although previously produced to Plaintiff in 2002. (R. 264). Plaintiff failed to attach the required Certificate when suit was filed. This failure cannot be attributed to the Defendants as asserted by the Plaintiff. Records had been produced in 2002. Internal office problems of Plaintiff's counsel in maintaining custody of the medical records is not the fault of the Defendants.

Regardless of whether or not records were received has no impact on whether or not the Plaintiff provided notice as required under Miss. Code Ann. §15-1-36(15). Strict compliance is demanded in all medical malpractice/negligence actions filed after January 1, 2003. See *Arceo v. Tolliver, et al.* referenced *supra*. It is because of this complete failure to give notice to *any* Defendant, including Forest Hill, Scott Lindsey and all newly named Defendants the matter should be dismissed. All Defendants sought dismissal of the matter both for failure to comply with the notice requirements failure to attach a Certificate, as well as the improper substitution of parties. The Circuit Court denied the original Defendants' Motion to Dismiss, as well as the subsequent Motions to Dismiss filed by all parties after the Complaint was amended

and after parties were substituted. Plaintiff during this period, filed a Motion for Attorneys Fees and Sanctions against the Defendant Forest Hill for filing what Plaintiff asserted were “meritless defenses” and “baseless allegations that Plaintiff failed to comply with Miss. Code Ann. §§15-1-36 and 11-1-58.” (R. 813). The Lower Court has taken the motion under advisement as of December 2005. (R. 816).

In denying the Motions to Dismiss, the Lower Court interpreted the notice requirement of Miss. Code Ann. §15-1-36(15) to only apply to suits, the cause of which accrued after January 1, 2003. (R. 569-70). The Lower Court concluded that since the 60 day notice requirement was enacted during the 2002 legislative session, it was not applicable. (R. 569). The Court misapplied the limiting clause of Miss. Code Ann. §15-1-36(14) to limit the subsequent clause in §15-1-36(15). (R. 569). Miss. Code Ann. §15-1-36(14) is a limitation related to the statute of limitations as is §15-1-36(13)(12)(11)(10) and (9) which had all been established prior to the passing of this specific Bill and the requirement of written notice in §15-1-36(15).⁵

After denial of the Motions by the Lower Court, Dr. Timothy Estes as one of the Defendants, filed a Petition for interlocutory appeal related to the 60 day notice requirement and attachment of the Certificate of Expert Consultation. All Defendants

⁵House Bill No. 2, added institutions for the aged or infirm to “reduce the period for commencing a malpractice action against an institution for the aged or infirm.” (R. 600).

including Forest Hill and Long Term Care Management joined the appeal making them proper Appellants in the instant appeal. Said appeal was ultimately accepted by this Court and consolidated with the second appeal filed by Dr. Estes related to the improper substitution under Miss. R.Civ.P. 9(h), asserted by the newly added Defendants. The issues were and continue to be highly significant when filing suit asserting professional negligence against a healthcare provider. All parties filed joinders and supplementations to the Statement of the Issues, including Forest Hill and Long Term Care Management. A.D. Buffington, Hugh Franklin and Rhonda Bounds.⁶ All newly named Defendants were not given written notice and operated off of the original Defendant's failure to receive notice.

All Forest Hill Defendants, including Long Term Care Management, A.D. Buffington, Hugh Franklin and Rhonda Bounds have been defended by Forest Hill Nursing Center for those reasons previously stated *supra*. Plaintiff has subsequently filed a Motion to Dismiss, as well as their brief in chief, once again trying to dismiss this appeal. It is undisputed the issue related to the attachment of a Certificate of Expert Consultation, as well as the notice requirement dictated by Mississippi Code Annotated Section 15-1-36(15) are issues of general importance that have been before

⁶Forest Hill under both the management contract, as well as representing members or employees, has a duty to defend any and all such named parties by virtue of their membership or employment or contract with Forest Hill.

this Court on previous occasions since the effective date January 1, 2003. It applies to all medical negligence and/or malpractice claims *filed* on or after that date. The statute demands written notification of any medical negligence suit at least 60 days before filing suit. The Plaintiff's Complaint clearly falls under the governance of the statute.

The interlocutory appeal before the Court was accepted because there exists a substantial basis for a difference of opinion on a question of law as to which Appellate resolution may: 1) materially advance the termination of the litigation and avoid exceptional expense to the parties 2) will protect a party from substantial and irreparable injury; and 3) resolve an issue of general importance in the administration of justice.

The issue is one of law, whether the notice requirements of Miss. Code Ann. §15-1-36(15) requiring 60 day notice apply to these Plaintiffs. This Court confirmed strict compliance is required in all medical negligence claims filed on or after January 1, 2003. (*Arceo v. Tolliver, et al.*, ___ So.2d. ___ 2006 WL 3317036, *3 (Miss. Nov. 16, 2006). Attachment of a Certificate of Expert Consultation to the Complaint, when filed, is required under Miss. Code Ann. §11-1-58. The Plaintiff failed to comply with either of these requirements. Plaintiff goes so far as to assert he has no duty to comply with either statute as both are inapplicable. Plaintiff is mistaken. The statutes clearly

apply to all causes of action filed from and after January 1, 2003. (Miss. Code Ann. §15-1-36(15)). The remaining Appellants Forest Hill Nursing Center and Long Term Care Management face the possibility of continued litigation, including a lengthy trial, for which jurisdiction never attached in the Lower Court due to the Plaintiff's noncompliance with the statutory prerequisites before and at the time suit was filed.

Plaintiff's subsequent assertion that this interlocutory appeal will not resolve an issue of general importance in the administration of justice is wholly without merit.

Defendants joined and additionally supplemented the appeal filed by Dr. Timothy Estes. Forest Hill and Long Term Care Management filed their brief addressing the crucial issues before this Court in a timely manner. Plaintiff's dismissal of the various Defendants appears to be solely an attempt to claim the appeal in and of itself should be dismissed in its entirety. Additionally, all dismissed parties bear their costs which have been substantial since suit was filed July 2003. In responding to the Complaint in July 2003 and all subsequent pleadings, including a request to stay pending a decision in *Arceo, supra*, Forest Hill has requested attorneys fees and costs, to date, totaling over \$130,000. The legal maneuverings of the Plaintiff, including seeking sanctions against Forest Hill's attorneys, have resulted in unnecessary and considerable costs to the Defendants for over three and a half years to the extent this Court granted the emergency stay requested on the eve of trial.

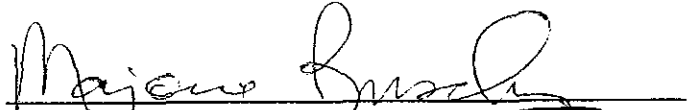
The issue before this Court remains of utmost importance: the applicability of the notice requirements under Miss. Code Ann. §15-1-36(15) and attachment of a Certificate of Expert Consultation under §11-1-58 mandated for all suits filed on or after January 1, 2003. This Court's ruling as to the appeal will be dispositive of this case in its entirety. Should this Court dismiss the appeal and remand it to the Lower Court, Defendants would then be forced to appeal to this Honorable Court, but that appeal would follow a lengthy trial when the Lower Court had no jurisdiction based on the failure to provide notice and attach the Certificate of Expert Consultation.

CONCLUSION

Defendants Forest Hill Nursing Center and Long Term Care Management respectfully request this Court deny the Plaintiffs Motion to Dismiss the appeal and rule on the merits of said appeal and award these Defendants any other relief deemed appropriate under the circumstances.

Respectfully submitted,

Forest Hill Nursing Center, A.D. Buffington,
Hugh Franklin, Long Term Care Management
LLC and Rhonda Bounds

A handwritten signature in cursive script, appearing to read "Marjorie S. Busching", written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date set forth hereinafter, a true and correct copy of the above and foregoing document was forwarded *via U.S. Mail* to the following:

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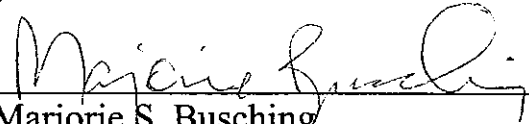
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Dated this the 28th day of March, 2007.


Marjorie S. Busching