

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2007-~~0~~00316

CA

**LEANORA MCCLAIN, INDIVIDUALLY,
AND ON BEHALF OF THE WRONGFUL
DEATH BENEFICIARIES OF CARLTON
MCCLAIN, DECEASED**

APPELLANTS

VERSUS

CASE NO. : 2007-TS-00316

**STEVEN B. CLARK, M.D.,
BENNIE B. WRIGHT, M.D.,
TARENCE E. WADE, M.D.,
BOLIVAR MEDICAL CENTER,
AND JOHN AND JANE DOES 1-5**

APPELLEES

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 3. Hon. Warren L. Conway.....Attorney for Appellant
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- RESPECTFULLY SUBMITTED this the 23rd day of January, 2008.

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APPELLEES

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CIRCUIT COURT OF BOLIVAR COUNTY, MISSISSIPPI, CAUSE NO. 2006-0035

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RESPECTFULLY SUBMITTED this the ____ day of _____, 2008.

BY:


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STATEMENT OF THE CASE

A. Nature of Case

The Complaint in the instant case alleges medical malpractice, but was filed without a certificate of consultation as mandated by § 11-1-58 Miss. Code Ann. (1972), as amended.

B. Facts Relevant to the Issues Presented for Review and Course of Proceedings and Disposition Below

On May 17, 2004, Carlton McClain died while hospitalized at Bolivar Medical Center in Cleveland, Mississippi. (R:1¹). On December 29, 2005, plaintiff forwarded a notice of claim pursuant to §15-1-36 Miss. Code Ann. (1972), as amended to Dr. Steven Clark. (R:197; RE:Ex. 6). Plaintiff filed a Complaint on April 7, 2006, and an Amended Complaint on April 27, 2006 alleging negligence of Steven Clark M.D. in the treatment of Carlton McClain. (R:1, 14). Neither the Complaint or Amended Complaint contained a certificate of consultation as mandated by § 11-1-58 Miss. Code Ann. (1972), as amended.

Dr. Clark filed a Motion to Dismiss the Complaint and Amended Complaint on May 30, 2006 seeking dismissal based upon Mississippi Tort Claims Act Immunities and the failure of the Plaintiff to comply with mandated by § 11-1-58 Miss. Code Ann. (1972), as amended. (R:27; ARE:1). On June 30, 2006, after other defendants filed their Motions to Dismiss and almost three months after the original Complaint was filed, Plaintiff for the first time filed a Certificate of Review in the Circuit Court of Bolivar County. (R:218 ; R.E. Ex. 8). The Certificate of Review failed to comply with the statute as it did not state that the expert who Plaintiff consulted was qualified to testify as to the standard of care applicable in this case. (R:218 ; R.E. Ex. 8)

¹In compliance with M.R.A.P. 28(e), all citations to the record appear as follows: R ____ refers to the record; RE ____ refers to appellant's record excerpt; ARE ____ refers to the appellee's record excerpts.

Dr. Clark converted the portion of his Motion to Dismiss concerning Mississippi Tort Claims Act protections into a Motion for Summary Judgment (R:249-288; ARE:20-59) and provided the trial court with extensive evidence establishing that he was an employee of Delta Regional Medical Center at the time of the events and was entitled to dismissal by virtue of his personal immunity under the MTCA , the expiration of the one year MTCA statute of limitations, and the failure of the Plaintiff to serve a valid Notice of Claim.

A hearing on Dr. Clark's Motion for Summary Judgment was held on January 11, 2007. Tr. 2. Based on issues that the trial court questioned counsel for Dr. Clark about at the hearing, counsel was given additional time to submit further evidence. Tr. 56. Although Plaintiff asserts that no such further evidence was provided, the Record reveals otherwise. (R:500-506;510-515; ARE:63-69;70-75) Further, counsel for Dr. Clark requested additional time to provide information based on the logistics of procuring affidavits from former employees of DRMC and other third parties. See Appendix 1. Prior to the conclusion of this supplementation, a hearing on all Defendants' Motions to Dismiss for the Plaintiff's failure to comply with § 11-1-58 *Miss. Code Ann. (1972), as amended* was had on February 9, 2007. Tr. 59. Shortly thereafter on February 16, 2007, the trial court dismissed the entire case based on Plaintiff's failure to strictly comply with the mandatory statutory requirements and the finding that the statute of limitations had expired. (R. 588-91; RE: Ex 2).

STATEMENT OF THE ISSUES

- I. Plaintiff failed to strictly complied with the provisions of § 11-1-58 Miss. Code Ann. (1972), as amended by not attaching a certificate of expert consultation to her Complaint.
- II. The trial court correctly dismissed the case for the Plaintiff's failure to strictly comply with the provisions of § 11-1-58 Miss. Code Ann. (1972), as amended.
- III. Plaintiff's claims are time barred as the improperly filed Complaint failed to toll statute of limitations.
- IV. The trial court's dismissal in favor of Dr. Clark should be affirmed on the alternative basis that reversal and remand would be futile in light of Dr. Clark's personal immunity, Plaintiff's failure to serve a notice of claim pursuant to § 11-46-11 Miss. Code Ann. (1972), as amended, and the expiration of the one year statute of limitations provided by the Mississippi Tort Claims Act.

SUMMARY OF THE ARGUMENT

Despite any parsing of the argument or eloquent characterization of the same, the sole issue implicated by the trial court's order - and the outcome determinative one in this case - is:

**Did Plaintiffs strictly comply with the provisions of
§ 11-1-58 Miss. Code Ann. (1972), as amended.**

The answer is conceded by the Plaintiffs:

No.

This Court has determined that strict compliance with the certificate requirements of § 11-1-58 Miss. Code Ann. (1972), as amended, is required in any medical negligence case which requires expert proof. Whether in the form of a certificate of review or in the form of a disclosure of expert opinions, this Court has also determined that compliance is mandated at the time of the filing of the complaint. As Plaintiff did not comply with these mandatory provisions, her Complaint and Amended Complaint were correctly dismissed by the trial court. As Plaintiff never filed a valid complaint prior to the expiration of the statute of limitations, dismissal with prejudice was appropriate as Plaintiff's claims were time barred.

Regardless, dismissal in of Dr. Clark's favor should be affirmed owing to the immunity and protections of the Mississippi Tort Claims Act. At all times that he treated Carlton McClain, Dr. Clark was an employee of Delta Regional Medical Center, a community hospital organized under Title 41 of the Mississippi Code and covered by the Mississippi Tort Claims Act. No Notice of Claim was served within one year of Mr. McClain's death and the one year statute of limitations expired on May 17, 2005. Further, Dr. Clark is entitled to personal immunity. In light of these protections, reversal as pertains to Dr. Clark would be futile.

ARGUMENT

A. Defendant's Motion to Dismiss was Properly Granted by the Trial Court.

Section 11-1-58 Miss. Code Ann. (1972), as amended provides that in any action against a licensed physician for injuries or wrongful death arising out of the course of medical services where expert testimony is otherwise required by law, the complaint shall be accompanied by a certificate executed by the attorney for the plaintiff declaring that the attorney has reviewed the facts of the case and has consulted with at least one (1) expert qualified pursuant to the Mississippi Rules of Civil Procedure and the Mississippi Rules of Evidence who is qualified to give expert testimony as to standard of care or negligence and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis of such review and consultation that there is a reasonable basis for the commencement of such action. § 11-1-58(1)(a) Miss. Code Ann. (1972), as amended. The plaintiff, in lieu of serving a certificate required by this section, may provide the defendant with expert information in the form required by the Mississippi Rules of Civil Procedure. § 11-1-58(7) Miss. Code Ann. (1972), as amended.

The provisions of § 11-1-58 became effective on January 1, 2003, and apply to this case. *Walker v. Whitfield Nursing Center, Inc.*, 931 So.2d 583, 588 (Miss. 2006). This Court has determined that, when reviewing statutory requirements, the Court will examine the record to determine compliance or non-compliance. *Walker*, 931 So.2d at 589. In recent years this Court has recognized its duty to apply a strict standard of statutory construction, applying the plain meaning of unambiguous statutes. *Caves v. Yarborough*, 2007 WL 3197504, ¶ 22 (Miss. 2007). Where a Plaintiff fails to strictly comply with the statute, the trial court will be in error in denying a Defendant's motion to dismiss on the basis that the Plaintiff had "substantially

complied with the medical malpractice statutes." *Community Hosp. of Jackson v. Goodlett*, 968 So.2d 391 (Miss. 2007).

Unlike sub-section (1), sub-section (7) does not specify when the expert's information or report must be supplied by the plaintiff. *Walker*, 931 So.2d at 590. However, sub-section (7) specifically references the requirement of sub-section (1), and provides that the expert's information could be furnished in lieu of the certificate. § 11-1-58(7) *Miss. Code Ann.* (1972), as amended. A literal reading of § 11-1-58 illustrates the stated purpose of sub-section (7) is to provide an alternative to furnishing a certificate of expert consultation. *Walker*, 931 So.2d at 590. The statute does not alter the time requirement stated under sub-section (1). *Id.* Therefore, the mandatory time for compliance, whether providing a certificate of consultation or expert information specified in M.R.C.P 26(b)(4), is the same – **it must be done at the time of the filing of the Complaint.** *Id.*

This Court has specifically decreed that to allow furnishing the § 11-1-58(7) information at any time other than attaching it to the complaint would render § 11-1-58(1)(a) meaningless if its requirements could be so easily circumvented. *Id.* The Court has reversed all instances where trial courts have accepted anything other than literal compliance with the statutory mandates. See, *Nelson v. Baptist Memorial Hospital-North*, 2007 WL 1334373 (Miss.App. 2007)(affirming dismissal when plaintiffs filed suit, obtained additional time to serve process, filed an amended complaint containing a certificate of review and then served it); *Caldwell v. North Mississippi Medical Center, Inc.*, 956 So.2d 888 (Miss. 2007)(rejecting the argument that compliance with the statute four months after the complaint was filed – much like the plaintiff in the instant case – was sufficient compliance).

Just as in *Walker*, the instant Plaintiff concedes her failure to strictly comply with the

provisions of § 11-1-58 and provides no persuasive argument to demonstrate that she complied with the mandatory requirements contained therein. See *Walker*, 931 So.2d at 588-89. Also as in *Walker*, the instant Plaintiff asserts that she substantially complied with the requirements. See *Id.* at 589. The Walker court specifically rejected any type of substantial compliance and held that strict compliance with the provisions of § 11-1-58(1)(a) or (7) must be achieved by attaching the information to the Complaint. *Id.* The language of § 11-1-58 is clear and unambiguous that failure to comply with its mandatory statutory requirements dictates that the complaint shall be dismissed. *Id.* at 591. As in *Walker*, the instant trial court correctly dismissed Plaintiff's claims due to noncompliance with the mandatory provisions of § 11-1-58.

B. Plaintiff's claims are time barred

The statute of limitations in this case has clearly passed. Using Plaintiff's date of death of May 17, 2004, as well as the two year statute of limitations² plus the 60 day tolling for service of notice under § 15-1-36, yields an expiration date which time-bars all claims as of July 17, 2006.

The filing of a complaint which is not in conformance with a controlling statute results in the complaint being deemed a nullity. *Tolliver v. Mladino*, 2007 W.L. 2034622, *5 (Miss. App. July 17, 2007). The Plaintiff in the instant case failed to state a claim upon which relief can be granted due to her failure to comply with the notice prerequisites of § 11-1-58. *Caldwell*, 956 So.2d at 894 citing *Walker*, 931 So.2d at 591. Accordingly, by failing to duly commence a valid action, the Plaintiff failed to toll the statute of limitations.

²Dr. Clark has contended from the outset of this case that he is an employee of a political subdivision of the state of Mississippi and is governed by the one year statute of limitations. However, for the purposes of the instant argument, Dr. Clark utilizes the general two year statute of limitations for medical malpractice claims as that is what was utilized by the trial court in its ruling. Obviously, utilization of the one year MTCA statute of limitations would bar Plaintiff's claims at an even earlier date.

At no time prior to July 17, 2006 was a valid complaint, complying with the terms of § 11-1-58, filed by Plaintiffs. With the expiration of the statute of limitations on that date, Plaintiffs claims became time barred. Accordingly, Plaintiffs' claims were appropriately dismissed with prejudice.

C. Reversal as to Dr. Clark would be futile as the claims against him are barred by the immunities and protections of the Mississippi Tort Claims Act

Subsequent to the hearing on Dr. Clark's Motion to Dismiss premised on Tort Claims Act immunities, counsel for Dr. Clark supplemented with additional affidavits to address questions posed by the trial court. (R:500-506;510-515; ARE:63-69;70-75) Plaintiff asserts that Dr. Clark did not provide the requested materials. To the contrary, Dr. Clark supplemented with affidavits of person's with knowledge of the issues raised by the trial court. (R:500-506;510-515; ARE:63-69;70-75) Due to the logistics of gathering information from former employees, the affidavits were not provided within 10 days. However, counsel asked for additional time from the Court to provide the same. See Appendix 1.

After requesting additional time, Defendants established through competent and uncontested proof that Dr. Steven Clark was an employee of Delta Regional Medical Center through its Physician Practices Division. (R:266; ARE:37) Defendants provided a properly authenticated copy of minutes from the Board of Trustees of Delta Regional Medical Center agreeing to enter into a one year employment contract with the physicians at the former Cleveland Medical Center in Cleveland, Mississippi. (R.514; ARE:74). Dr. Clark produced a valid resolution from his former employer, Cleveland Medical Clinic, PLLC evidencing that its former employees became employees of Delta Regional Medical Center on February 1, 2004. (R.383; ARE60). Dr. Clark provided an extensive employment agreement between he and Delta

Regional Medical Center governing every aspect of his medical practice, excepting his medical judgment.(R:271-282 ; ARE:42-53) Further, Dr. Clark provided his personal affidavit setting forth his employment relationship with Delta Regional Medical Center and provided uncontradicted evidence that, at all times during which he treated Carlton McClain, he was acting as an employee of Delta Regional Medical Center. (R:266-270; ARE:37-41) Dr. Clark showed that Delta Physician Practices, a division of Delta Regional Medical Center terminated his contract as of March 11, 2006. (R.385; ARE:62).

Delta Regional Medical Center is a community hospital organized under Title 41 of the Mississippi Code and subject to the protections of the Mississippi Tort Claims Act, *§ 11-46-1, et seq., Miss. Code Ann. (1972), as amended.* (R.266; ARE:37). Accordingly, as its employee, Dr. Clark is entitled to invoke the immunities and protections of the Mississippi Tort Claims Act. Included in those protections are an immunity from suit in his personal capacity (*§11-46-7*), a notice of claim provision under *§11-46-11*, and a one year statute of limitations. *§11-46-11 Miss. Code Ann. (1972), as amended.* Plaintiffs' own timeline demonstrates that no notice, filing or other action was taken within one year of the date of death of Carlton McClain.

Should the case against Dr. Clark be remanded, he would be entitled to immediate dismissal with prejudice owing to the statute of repose set forth in the Mississippi Tort Claims Act. Accordingly, reversal of the judgment of dismissal of prejudice in his favor would be futile. For the failure of the Plaintiff to comply with the provisions of the Mississippi Tort Claims Act and the personal immunities of Dr. Clark, this Court should affirm dismissal in Dr. Clark's favor on these alternative grounds.

CONCLUSION


Because Appellant McClain did not provide a certificate of review with either the Complaint

or the Amended Complaint upon filing as required by statute, and the Certificate of Review which was provided was inadequate, her claims are now time-barred. In the alternative, Dr. Clark is entitled to dismissal under the Mississippi Tort Claims Act. Accordingly, the February 16, 2007, Order of the Circuit Court of Bolivar County which dismissed Dr. Clark should be affirmed.

RESPECTFULLY SUBMITTED this the 22 day of January, 2008.

UPSHAW, WILLIAMS, BIGGERS,
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CERTIFICATE OF SERVICE

I, J. L. Wilson, IV, of counsel to Defendant Steven G. Clark, M.D., hereby certify that I have this day mailed with postage prepaid, a true and correct copy of the above and foregoing document into:

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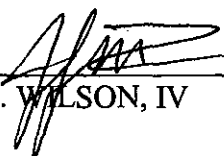
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SO CERTIFIED, this the 22 day of January, 2008.



J. L. WILSON, IV