

IN THE SUPREME COURT OF MISSISSIPPI

CAUSE NO. 2007-CA-00532

SHARON PARKER

APPELLANT

VERSUS

HARRISON COUNTY BOARD OF SUPERVISORS

APPELLEES

APPEAL

FROM THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI

SECOND JUDICIAL DISTRICT, A2402-2004-00034

REPLY BRIEF FOR APPELLEES

HARRISON COUNTY BOARD OF SUPERVISORS

ORAL ARGUMENT REQUESTED

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IN THE SUPREME COURT OF MISSISSIPPI

SHARON PARKER AND
ALINE WHISENANT

PLAINTIFFS/APPELLANTS

VERSUS

CAUSE NO. 2007-CA-00532

HARRISON COUNTY BOARD
OF SUPERVISORS

DEFENDANT/APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned Counsel of Record certifies that the following list of persons may have an interest in the outcome of this case.

These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Honorable Lisa S. Dodson, Circuit Court Judge, Harrison County, Mississippi;

2. George W. Byrne, Jr., Esquire, Attorney for Plaintiff/Appellant, Sharon Parker;

3. Karen J. Young, Esquire, Joseph R. Meadows, Sr., Attorneys for Appellee, Harrison County Board of Supervisors;

4. Sharon Parker, Appellant;

5. Aline Whisenant, Appellant;

6. Wilfred E. Ross, Appellee;

7. Harrison County Board of Supervisors, Defendant/Appellee

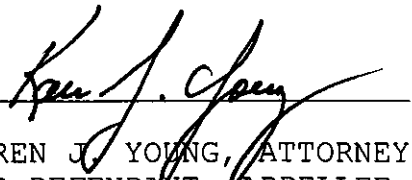

KAREN J. YOUNG, ATTORNEYS
FOR DEFENDANT, APPELLEE

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IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2007-CA-00532

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APPELLEES

BRIEF OF APPELLEE, HARRISON COUNTY
BOARD OF SUPERVISORS

STATEMENT OF THE ISSUES

1. Appellants have failed to understand the issues before this Court. Appellants argue that the trial Court erred because she did not apply the "substantial compliance" test to ascertain whether Appellants had satisfied the notice provisions of ~~Mississippi Code Ann. § 21-11-46(1)(2)~~ (1972). The Court did apply the "substantial compliance" test and found that Appellants clearly failed to meet the test. The trial Court, the Honorable Lisa Dodson, at no time in her opinion, stated she was applying a "strict compliance" test as to whether Appellants set forth the elements necessary to give proper statutory notice required by ~~Mississippi Code Ann. § 21-11-46(1)(2)~~, wherein seven different elements are required to give proper statutory notice. This Court found the elements were not statutorily complied with, and more importantly, Appellants failed to substantially comply by failing to give notice to the "Chief Executor Officer of a Governmental Entity". The Chief Executive

Officer of the Governmental Entity would have been President of the Harrison County Board of Supervisors. Alternatively, Appellants could have given notice to the Chancery Clerk, but failed to do so.

2. The trial Court correctly found that the Appellants failed to "substantially comply" with the notice provision of Miss. Code Ann. § 11-46-11.

3. The issue is not whether the trial Court erred in "retroactively applying new judicial interpretations of the notice provisions of Miss. Code Ann. § 11-46-11". The trial Court granted Summary Judgment first and foremost on the basis that Appellants failed to substantially comply with notice provisions by not giving notice to the Executive Officer of Harrison County. Second, the Court found that notwithstanding lack of substantial compliance, Appellants failed to wait the statutory ninety (90) days required after filing their lawsuit.

ARGUMENT

On March 12, 2004, Plaintiffs, Sharon Parker (hereinafter "Parker") and Aline Whisenant (hereinafter "Whisenant") filed their Complaint for damages in the Circuit Court of Harrison County, Mississippi, Second Judicial District. The complaint states that on July 27, 2003, [REDACTED] was driving a 1999 blue Chevrolet [REDACTED] when, Aline Whisenant as a front seat passenger. A [REDACTED] automobile [REDACTED] in front of [REDACTED] on highway [REDACTED] Parker was [REDACTED]

██████████ She claims that prior to the accident she noticed a truck coming up behind her, and once she realized it was not going to stop, she braced herself. A ██████████ employee, Wilfred E. Ross, who ██████████ and Grounds Department for Harrison ██████████, was working out of the BiLoxι Courthouse on that day. At the time of the accident, he was driving a county truck and was taking three (3) minutes to the Harrison County Work Center on Lorraine Road in Gulfport, Mississippi. The Complaint alleges Mr. Ross's vehicle rear ended Parker's vehicle causing serious injuries to the plaintiffs' heads, necks, low backs, and backs damages from past, future mental and physical pain and suffering, lost wages, and medical expenses. The Complaint seeks damages in the amount of \$750,000.00 for Parker and \$500,000.00 for Whisenant. At the time of the accident, Parker worked part time as a housekeeper and Whisenant did not work.

A. Substantial Compliance is required to satisfy the Notice Provision of Miss. Code Ann. § 11-46-11.

The Court's Order granting Summary Judgment with Findings of Facts and Conclusions of Law states as follows:

"Plaintiffs in this case first argue that they complied with the ninety (90) day requirement as they had had contact with Associated in July of 2003 and as their first attorney wrote a letter on August 8 [sic], 2003 to Associated concerning their claim. Verbal communication is not sufficient under the statute. Their conversations with Associated even if Associated had been the Chief Executive Officer of the Board, is not the ninety (90) day notice required by the statute. The attorney's August letter clearly does not comply with the statutory requirements. First, again, Associated is not the Chief

Executive Officer of the Board or person designated to receive such notice. Second, the letter is devoid of the seven categories of information required by the statute. That letter, then, does not serve as notice under the statute."

See pages 5 and 6 of the Order, located at Record pages 143 and 144.

This letter is located in this record at page 109. The letter was written August 12, 2003, by Otis "Chip" Crocker, III.

The Court then referred to another letter in the file:

Plaintiffs finally claim that the letter received by the Board on January 16, 2004 from their new attorney merely reasserted the claims made verbally by Plaintiffs in July, 2003. As already stated above, verbal information is not what the MTCA requires. Nor was the first letter of August, 2003 compliance with the statute. The letter received January 16, 2004, does not comply with the statute. It is not sent to the Chief Executive Officer of the Board or person designated to receive such notices. Further, it does not contain the seven statutorily required categories of information. This letter, likewise does not serve as notice under the MTCA. See pages 6 and 7 of the Order, located at record pages 144 and 145.

The Court was referring to a letter dated January 7, 2004 and it was written from George W. Byrne, Jr. to Mr. Ross as follows:

"Please be advised that the undersigned represents Ms. Sharon Parker and Aline Whisenant in connection with a motor vehicle accident July 2, 2003 in Biloxi, Mississippi when your vehicle rear ended their car on Highway 90. Please forward a copy of this letter to your insurer of your employer and request that they contact me immediately relative to this matter." Record 138.

This is the only notice of claim in the record given by Appellants' attorneys, Unger and Byrne.

Neither this letter nor the August 12, 2003 letter were ever sent to the Board of Supervisors, nor served on the Executive

Officer of the Board of Supervisors. Thus, the only notice of claim in this file is the January 7, 2004 letter to Wilford Ross which Harrison County acknowledged receipt of on January 16, 2004. See page 5 of the transcript of the Motion for Summary Judgment hearing held on January 26, 2007. The Board of Supervisors assistant, Claudine Forbes, acknowledged receipt of the letter on the Agenda of January 16, 2004. The document was left out of the Court Reporter's transcript of the January 26, 2007 hearing, although marked as Exhibit "1". This certified letter to Wilford Ross was spread on the minutes of the Board meeting of Harrison County on January 16, 2004. Thereafter, Harrison County did not file or give Mr. Byrne any acceptance, denial or rejection of the claim.

Much ado has been made by Plaintiff that the trial Court erred by failing to apply the "substantial compliance" test to the facts of this case. This argument is flawed because the Court does apply the substantial compliance test. There is no statement in her Order that the Appellant's failed to "strictly comply" with the seven elements set forth in the notice provision of Miss. Code Ann. § 11-46-11 (2). The recent Mississippi Court of Appeals case, Suddith v. University of Southern Mississippi 2007-MSCA-0005-CA-02130-073107 (2007) sheds light on what burden of compliance is upon Plaintiff to give proper notice of a claim under the Mississippi Tort Claims Act. If [REDACTED]

~~reference with, Guffy's, employment, and~~
~~affliction of emotional distress, outrage, promissory~~
~~equitable estoppel and detrimental reliance.~~ The Court made the following pronouncement:

The Mississippi Legislature, in enacting the MTCA, elected to waive sovereign immunity. Vortice v. Fordice, 711 So. 2d 894, 896 (Miss. 1998). However, certain procedural requirements must be **substantially complied with** before an action is filed. S. Cent. Regional Medical Center v. Guffy, 930 So. 2d 1252, 1256 (Miss. 2006). First, a Plaintiff must exhaust all administrative remedies within a governmental entity before suing the entity. Miss. Code Ann. § 11-46-11(1) (Rev. 2002). Then, the Plaintiff must file a written notice of a claim with the **Chief Executive Officer** of the governmental entity ninety (90) days prior to filing suit. Miss. Code Ann. § 11-46-11(1)(2) (Rev. 2002). The MTCA notice statute provides several required categories of information which must be included in the notice of claim, which must be in writing and delivered in person. Miss. Code Ann. § 11-46-11(2) (Rev. 2002). The notice must contain a short and plain statement upon which the claim is based, including the circumstances that brought about the injury, the extent of the injury, the time and place the injury occurred, the names of the persons involved, the amount of money damages sought, the residence of the person making the claim at the time of the injury and the claimant's residence at the time of filing the notice. *Id.* While "substantial compliance" in the contents of notice is sufficient, **the failure to provide any information regarding even one of the categories described in Miss. Code Ann. § 11-46-11(2) (Rev. 2002) prevents a finding of "substantial compliance"**. Guffy, 930 So. 2d 1258 (Miss. 2006). Further, an employee's filing a grievance with her employer does not constitute substantial compliance with the MTCA notice provisions. Harris v. Miss. Valley State University, 873 So. 2d 970, 988 (Miss. 2004). Additionally, the Mississippi Supreme Court has recently held that strict compliance to the ninety (90) days notice requirement of Miss. Code Ann. § 11-46-11(1) (Rev. 2002) is mandatory. University of Miss. Medical Center

v. Easterling, 928 So. 2d 815, 819-20 (Miss. 2006).

In the Suddith case, the Court held that the Appellants' grievance was not sufficiently substantial to require a hearing. The Court held the grievance was inadequate for the same reasons as stated in the Harris decision. The Court held that the President of the U.S.M., as Chief Executive Officer, is the Chief Executive Officer "upon whom a notice of claim must be served". Harris, 873 So. 2d at 988. The letter of representation in Harris stated the amount of damages sought, the extent of the alleged injury, as required in Jackson v. the City of D'Iberville, 738 So.2d 1241 (Miss. 1999). More importantly, the Court held that because Suddith's notice of claim was served upon Dir. Lucas, President of U.S.M., this failed to give adequate notice under the "substantial compliance" requirement of the MCA. Thus, the Court held that all of Suddith's state-law tort claims were barred. Likewise, the only two letters Appellants wrote did not state the extent of injuries or the damages sought.

In a recent decision, Richard Clanton v. Desoto County Sheriff's Department and Sheriff James A. Riley, 2007 So. 2d (2005-CA-01453-COA) (2007), rendered on January 30, 2007, the Court held that in Gayle, the Mississippi Court of Appeals found that substantial compliance with the notice provisions of the Mississippi Foreclosure Act was sufficient.

Gayle, 759 So. 2d 1159. However, quoting from the Gayle decision, the Court stated "though substantial compliance with the notice provisions is sufficient, substantial compliance is not the same as, nor a substitute for, **non-compliance**". Id. The Court in Clanton, noted that the Appellant filed his Complaint on July 29, 2003, thirty-seven (37) days before he filed his notice of claim with the Sheriff's Department. Thus, there was no evidence in the record to support a finding that Clanton substantially complied with the notice provision.

On page 7 of the trial Court's Order granting Summary Judgment with Findings of Facts and Conclusions of Law, located in the record at page 145, the trial Court noted:

Plaintiffs argue that they substantially complied with the statutory requirements. The Guffy, Supra, decision, very plainly directs that this Court does not even reach that issue. Substantial compliance is addressed only with regard to the information contained in the notice letter and each of the seven categories. Neither of the Plaintiffs' letters provided information in each of the seven categories and therefore, neither constitutes a notice as required under the statute. Substantial compliance is not an issue in this case. ~~Plaintiffs~~ ~~failed to file a proper notice of claim until March 11, 2004. This is only 51 days after~~ (55) days after the receipt of the notice. ~~Plaintiffs~~ ~~submitted a copy of the notice to the Sheriff's Department on February 12, 2004, which is 51 days after the receipt of the notice.~~ Plaintiffs could not have filed their lawsuit until at least ninety (90) days had lapsed even if this had been a proper notice under the statute. Record page 145.

B. The Ninety (90) Day Waiting Pursuant to the Mississippi Tort Claims Act - Miss. Code Ann. §11-46-11(1).

Miss. Code Ann. §11-46-11(1) states:

(1) After all procedures within a governmental

entity have been exhausted, any person having a claim for injury arising under the provisions of this chapter against a governmental entity or its employee shall proceed as he might in any action at law or in equity; provided, however, that ninety (90) days prior to maintaining an action thereon, such person **shall** file a notice of claim with the chief executive officer of the governmental entity.

(3) All actions brought under the provisions of this chapter shall be commenced within one (1) year next after the date of the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based, and not after; provided, however, that the filing of a notice of claim as required by subsection (1) of this section shall serve to toll the statute of limitations for a period of ninety-five (95) days from the date the chief executive officer of the state agency receives the notice of claim, or for one hundred twenty (120) days from the date the chief executive officer or other statutorily designated official of a municipality, county or other political subdivision receives the notice of claim, during which time no action may be maintained by the claimant unless the claimant has received a notice of denial of claim. After the tolling period has expired, the claimant shall then have an additional ninety (90) days to file any action against the governmental entity served with proper claim notice.

~~This accident occurred on July 27, 2000, and the Notice of~~
~~Claim was given to the [redacted] on [redacted] 2004. This~~
~~[redacted] January~~
~~10, 2004. The [redacted] March 12, 2004, and~~
~~[redacted] 2004 days after the Notice of Claim was~~
~~had made no decision regarding the [redacted] prior to the~~
~~complaint being filed before the ninety (90) day waiting period.~~

On April 1, 2004, the Mississippi Supreme Court made a decision regarding the ninety day waiting period in Davis v. Hoss, 869 So. 2d, 397 (Miss. 2004). The case was a medical malpractice case dealing with the Plaintiff's pelvis fracture which occurred in 2000. The Plaintiff in Davis did not give notice of his claim until the day he filed his lawsuit. Thus, he failed to wait the ninety days after giving notice of claim. On July 1, 2004, the Mississippi Supreme Court decided Wright v. Ouiesnel and South Panola Community Hospital, 876 So.2d 362 (Miss. 2004), where the Court affirmed a trial court's dismissal of a medical malpractice action against her Doctor and a public entity community hospital. The Court found (1) that the Doctor was an employee of the hospital and was immune from personal liability under the Mississippi Tort Claims Act; and (2) the Plaintiff did not substantially comply with the notice provisions of the Mississippi Tort Claims Act since she filed suit eleven (11) days after filing her Notice of Claim with the Defendant Hospital, instead of waiting ninety (90) days as required by the statute; and (3) the discovery rule did not apply to toll the one year statute of limitation. **However, the Court emphasized that the Plaintiff's failure to wait the statutory ninety (90) days was the prevailing reason the Mississippi Supreme Court affirmed the dismissal. The Supreme Court noted:**

**Allowing a Plaintiff to file suit before
ninety days have past since noticing the claim
is tantamount to reading out the notice**

provisions of the MTCA. Gross disregard for the notice provisions is not considered substantial compliance. Id at 366.

This case was not appealed. See also Robert v. New Albany Separate School District, 813 So. 2d 729 (Miss. 2003), when the Mississippi Supreme Court, citing Hollingsworth Ex-Rail McDonald v. City of Laurel, 2002 Miss. LEXIS 62 (Miss. 2002), applied the 2001 amendment to §11-46-11(3) retroactive after all claims pending at the time of the statutes amendment. In that case, the Plaintiff was injured on August 8, 1998. She gave notice of her claim to the School District within the one year statutory time period on August 3, 1999, tolling the statute of limitations for 120 days. One hundred twenty-five days later, after the 120 day period allowed for the School District to provide notice of denial of claim (as in the County) but within the subsequent 90 day period available for filing suit, the Plaintiff filed her cause of action. The Court held that since the School District had given no notice of denial of claim within the prescribed period of time and thus, her suit was timely filed.

C. Appellants' argument regarding retroapplication of a "new strict compliance standard" to the notice provision of Miss. Code Ann. §11-46-11 (2) is misplaced because there is no "new strict compliance standard".

The trial Court, Honorable Lisa Dobson, ~~held~~ never applied a "new strict compliance" standard to the Appellants in this case. The trial Court, on page 7 in it's Order and at record 145, stated that "substantial compliance is not an issue in this case". The

Court rendered Summary Judgment to Harrison County because notice was never given to the Board President or Chancery Clerk and because Plaintiffs did not wait ninety (90) days before filing suit. Notice was never given to the Board . On page 8 of the Court's Order at Record 146, she states as follows:

The Mississippi Supreme Court has made it abundantly clear in Easterling, supra, and Guffy, supra, decisions that the ninety days notice requirement and the providing of all seven categories of information is mandatory. Plaintiffs did not provide proper notice with all seven categories of information in being either of the letters sent with regard to this case. The second letter was provided to the Board on January 16, 2004. **Even had this letter been acceptable notice, Plaintiffs then did not wait the required ninety days from the receipt of that letter by the Board to file their suit.**

CONCLUSION

The totality of the Appellants' argument is this: they claim that the trial Court applied a "new strict compliance" test to them as to what they considered to be proper notice of claim to the Board regarding this litigation. The Court, throughout her opinion, quoted the "substantial compliance" test. The word "strict" compliance was not in her opinion anywhere. The fact of this case is that **whatever** notice the Appellants gave to Harrison County, it was given to them on January 16, 2004. This notice was a letter to Wilford Ross dated January 7, 2004. It is merely a letter of representation and, as the Court in Suddith v. USM, supra, noted, this is clearly failure to substantially comply with the notice provision. More importantly, the Appellants in this

case have completely failed to address the Court's ruling, that they failed to wait ninety (90) days from giving notice on January 16, 2004 before filing their lawsuit. The reason the Appellants could not address this issue is simple, there is no excuse for their failure to do so. The fact is, the Appellants in this case did not wait ninety (90) days from the date of giving whatever notice they gave the Board on January 16, 2004, before filing their lawsuit on March 12, 2004.

Clearly, the Appellants' claims are barred in this case pursuant to ~~Miss. Code Ann. §11-46-11(1)~~. The arguments concerning the trial Court's application of legal precedent retroactively are just simply inapplicable in this case. The decisions quoted by the Court in granting Summary Judgment were based on decisions which all dealt with facts occurring from 2000 through 2004. The Easterling, supra and Guffy, supra, cases all dealt with earlier claims occurring at the same time of the Appellants in this case. The Davis, supra, decision was rendered on April 1, 2004, pertaining to an incident occurring in 2000, before Appellants' accident. The fact that the Court relied on opinions which were cited in 2006 does not mean that the laws set forth therein were applied "retroactively" to the Appellants in this case. More significantly, the Appellants' arguments regarding retroactive application all deal with the "new strict compliance" standard regarding to the seven requirements set forth in Miss. Code Ann. §

11-46-11(2). Appellants do not argue that there was an incorrect standard applied to them when the Court based her decision on Miss. Code Ann. § 11-46-11(1) regarding Appellants' noncompliance with the ninety day rule requirement. That is because the Mississippi Supreme Court has steadily maintained that it is mandatory that ninety (90) days be given to a governmental entity after they receive notice of claim so that they can properly evaluate the claim and submit an acceptance, rejection, or denial letter. If not, governmental entities would never be given proper opportunity to investigate a claim and would be forced to litigate frivolous and unnecessary lawsuits because attorneys and clients jump the gun before trying to resolve the issues in a judicious manner. The Mississippi Supreme Court in Easterling, made the following pronouncement:

"We adhere to our controlling cases of Davis v. Hoss, 869 So. 2d 397 (Miss. 2004), and Wright v. Quesnel, 876 So. 2d 362 (Miss. 2004), and accordingly find that Easterling failed to follow the ninety day rule which this Court strictly enforces".

As noted earlier, the Davis decision was rendered April 1, 2004 and dealt with facts occurring in the year 2000. The Wright decision was rendered on July 1, 2004 and dealt with facts occurring in 1999. The accident to which Plaintiffs filed their lawsuit occurred on July 2, 2003.

There has been no retroactive application to Appellants of any "new strict compliance test" to Miss. Code Ann. § 11-46-11 (2), nor

to Miss. Code Ann. § 11-46-11(1) regarding the ninety day waiting period. ~~The court properly granted Summary Judgment to Harrison County in this case, and this appeal should be denied.~~

RESPECTFULLY SUBMITTED, this the 19th day of December, 2007.

HARRISON COUNTY, MISSISSIPPI
APPELLEE

MEADOWS LAW FIRM

BY: _____


KAREN J. YOUNG
BAR NUMBER 

CERTIFICATE OF SERVICE

I, Karen J. Young, of Meadows Law Firm, do hereby certify that a true and correct copy of the foregoing instrument was mailed, postage prepaid, United States mail, to George W. Byrne, Jr., Esquire, at his regular mailing address of 365 Canal Street, Suite 2520, New Orleans, Louisiana, 70130 and Hon. Lisa S. Dodson, Judge, Circuit Court of Harrison County, Mississippi, 2nd Judicial District, P.O. Box 235, Biloxi, MS 39533.

THIS the 14th day of December, 2007.


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