IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-CA-00532

SHARON PARKER
PLAINTIFF/APPELLANT

VERSUS

HARRISON COUNTY BOARD OF SUPERVISORS
DEFENDANT/APPELLEE

APPEAL FROM THE CIRCUIT COURT
OF HARRISON COUNTY, MISSISSIPPI,
SECOND JUDICIAL DISTRICT, A2402-2004-00034

BRIEF OF APPELLANT, SHARON PARKER

ORAL ARGUMENT IS REQUESTED

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SHARON PARKER — PLAINTIFF/APPELLANT

VERSUS — DOCKET NO. 2007-CA-00532

HARRISON COUNTY BOARD OF SUPERVISORS — DEFENDANT/APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons may 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 disqualification or recusal.

1. Honorable Lisa S. Dodson, Circuit Court Judge, Harrison County Mississippi;
2. George W. Byrne, Jr., Esq. - Attorney for Plaintiff/ Appellant;
3. Ms. Karen J. Young, Meadows Riley Law Firm, attorneys for Harrison County Board of Supervisors, Defendant/Appellee
4. Sharon Parker - Plaintiff/Appellant;
5. Harrison County Board of Supervisors - Defendant/Appellee;
6. Wilfred E. Ross - Defendant/Appellee
7. Aline Whisenant - Plaintiff/Appellant

GEORGE W. BYRNE, JR., Attorney for Plaintiff/Appellant, Sharon Parker

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STATEMENT OF THE ISSUES

1. Whether the Trial Court erred in failing to find that, at the time of the filing of Appellants' suit, "substantial compliance" was sufficient to satisfy the notice provisions of Miss. Code Ann. § 11-46-11;

2. Whether the Trial Court erred in failing to find that Appellants' actions and initial demand letter constituted "substantial compliance" with the notice provisions of Miss. Code Ann. § 11-46-11;

3. Whether the Trial Court erred in retroactively applying new judicial interpretations of the notice provisions of Miss. Code Ann. § 11-46-11 so as to preclude or foreclose Appellants' claim that was procedurally adequate at the time of the initial filing of Appellants' suit;

4. Whether the Trial Court erred in granting Appellees' Motion for Summary Judgment.

SUMMARY OF THE ARGUMENT

The Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-11, provides a procedure by which an aggrieved citizen can file suit against an governmental entity, such as Harrison County through its Board of Supervisors. The Act requires notice to the governmental entity that meets certain standards and a ninety day waiting period before suit is filed. Over the years since the 1990's, judicial interpretation of the notice requirements and the ninety day waiting period have resulted in evolving and changing court pronouncements of the actions that satisfy these provisions - from strict compliance to substantial compliance and then, in 2006, back to strict compliance.

As one would expect and the Mississippi Supreme Court has acknowledged in 2006, this modulating landscape has resulted in "confusion" necessitating direction and clarity to the Court and the bar. *South Central Regional Medical Center v. Guffy*, 930 So.2d 1252, 1258 (Miss, 2006). When Appellants' suit was filed in early 2004, the standard required of the pre-suit notice was that it substantially comply with the Mississippi Tort Claims Act provisions. Appellants' notice did so comply. Moreover, the governmental entity, at the time of receipt of the notice, had already opened a file, interviewed one of the claimants, taken a statement, obtained the police report, obtained a signed Medical Release and pursuant thereto, ordered, reviewed and evaluated claimants' medical records,

conducted an appraisal of claimants' property damage and prepared a detailed investigative report. (Rec. Ex. "E") Shortly after receiving Appellants' written notice of claim, Appellees settled claimants' property damage claim. (Rec. Ex. "E" at pps. 110-111 and 133-135) Appellees now want, after settling a portion of Appellants' claim, to go back and contest the legal sufficiency of the notice originally received from the Appellants that precipitated all of the above activity.

Appellants' notice substantially complied with the requirements of the Mississippi Tort Claims Act. The Board of Supervisors was provided with more than adequate information to reasonably afford the County an opportunity to promptly investigate the claims, which they did.

Moreover, Court decisions in 2006 that overruled the notice standards in effect in early 2004 and now require strict compliance, should not be applied retroactively to now dismiss a claim, the notice of which in 2003 met the applicable substantial compliance standard then in effect.

ARGUMENT

On July 2, 2003, Appellants, Sharon Parker and Aline Whisenant, were rear-ended in their motor vehicle on Highway 90 in Biloxi, Mississippi, by a vehicle owned by Harrison County and operated by Harrison County employee, Wilfred Ross. As a result of this accident, both women sustained serious injuries. On August 12, 2003, their initial counsel, Mr. Chip Crocker, III, notified adjuster Walt Warren of the claim being asserted by the Appellants against his insured Harrison County Board of Supervisors under the Mississippi Tort Claims Act and of his representation of them in this matter. (Rec. Ex. "E" at p. 109) However, even prior to receiving this written claim, Mr. Warren had already been contacted by Appellants with regard to their injuries and property damage and had undertaken the following action relative to this accident:

(1) Appellant Parker was interviewed by Mr. Warren and gave him a statement about the accident and her injuries, as well as her property damage. She was advised by Mr. Warren that he would open a file on the claims and conduct an investigation. She also provided him with a signed Medical Authorization (Rec. Ex. "E" at p. 110);

(2) On July 14, 2003, Mr. Warren wrote Ms. Whisenant a letter as a follow-up to his interview of Ms. Parker, enclosing a Medical Authorization for her to sign and return to him. (Rec. Ex. "E" at p. 112) Also, on this same date, Mr. Warren sent a letter concerning his investigation to date,

including a summary of Appellants' injuries and medical treatments, with a carbon copy of the letter to Patti Dedeaux and Joe Meadows, attorney for the Board of Supervisors (Rec. Ex. "E" at pps. 118-120; 133-135);

(3) In August, 2003, the Harrison County Board of Supervisors paid Ms. Parker $6,000.00 in settlement of her property damage claim (Rec. Ex. "E" at pps. 110; 133);

(4) Appellees' responses to Appellants' discovery confirm that Mr. Warren performed an investigation of the accident on July 14, 2003, spoke with and took a statement from Ms. Parker, did an appraisal of her vehicle and obtained a copy of the Uniform Accident Report dated July 2, 2003 (Rec. Ex. "E" at pps. 118-120; 133-135);

(5) As noted above, the written claim letter was then sent to Mr. Warren on August 12, 2003, shortly after which Appellants' property damage claim was paid in full. (Rec. Ex. "E" at pps. 109-111).

Thereafter, several months later, on March 12, 2004, suit was filed on behalf of Sharon Parker and Aline Whisenant against Harrison County Board of Supervisors and Wilfred Ross relative to their personal injuries. Discovery, including depositions, was conducted. Subsequently, seventeen months after the filling of the suit, Appellees filed a Motion for Summary Judgment, arguing that Miss. Code Ann. § 11-46-11 requires strict compliance with the notice provisions of the Mississippi Tort Claims Act and because Appellants'

notice did not meet such strict compliance standards, the suit should be dismissed. The Trial Court agreed and granted Appellees' Motion for Summary Judgment. It is from this ruling that Appellants now appeal.

I.

Whether "substantial compliance" was sufficient to satisfy the statutory requirements of Miss. Code Ann. § 11-46-11 at the time Appellants' notice was sent and the suit was filed.

Stated another way, the issue may be whether at the time of the filing of Appellees' Suit on November 9, 2004, substantial compliance with the statutory requirements was sufficient to satisfy the provisions of Miss. Code Ann. § 11-46-11. A review of this Honorable Court's shifting and evolving interpretation of the notice requirements of Miss. Code Ann. § 11-46-11 would shed light on this issue:

(1) In its decision announced in *City of Pascagoula v. Tomlinson*, 741 So.2d 224 (Miss., 1999), this Honorable Court rejected the argument that Miss. Code Ann. § 11-46-11 requires compliance with each and every element articulated under the Code for proper notice. Instead, it was held, citing previous case law, that "*when the simple requirements of the Act have been sustantially complied with, jurisdiction will attach for the purposes of the act.*", *Tomlinson*, supra, at 226. The Court went on to state that "*in general, a notice that is filed within the [requisite] period, informs the municipality of the claimant's intent to make a claim and contains sufficient information which reasonably affords the municipality an opportunity*

to promptly investigate the claim satisfies the purpose of the statute and will be held to substantially comply with it". *Tomlinson*, supra, at 226. In *Tomlinson*, a [redacted]

The Court went on to conclude that the claimant's failure to wait at least ninety days after the notice of claim to file suit is not a grounds for dismissal, but, instead, the governmental entity's remedy is to request an order staying the lawsuit for the applicable ninety day period. As the Court noted, "*it is apparent that the ninety day waiting period was enacted to give the "chief executive officer" of a governmental entity adequate time to study the claim in order to determine, among other things, whether settlement negotiations should be initiated or whether the matter should be contested at trial.*" *Tomlinson*, supra, at 228.

(2) This Honorable Court once again addressed the issue of the notice provisions of the Mississippi Tort Claims Act in *Jackson v. City of Wiggins*, 760 So.2d 694 (Miss., 2000). In this case, the claimant failed to wait at least ninety days from the date of his notice of claim to file suit. This Honorable Court reversed the trial court's granting of summary judgment and took that opportunity to advise that "*the substantial compliance scheme of interpreting the Tort Claims Act is now firmly rooted in our jurisprudence and we decline the City's invitation to return to a strict compliance*

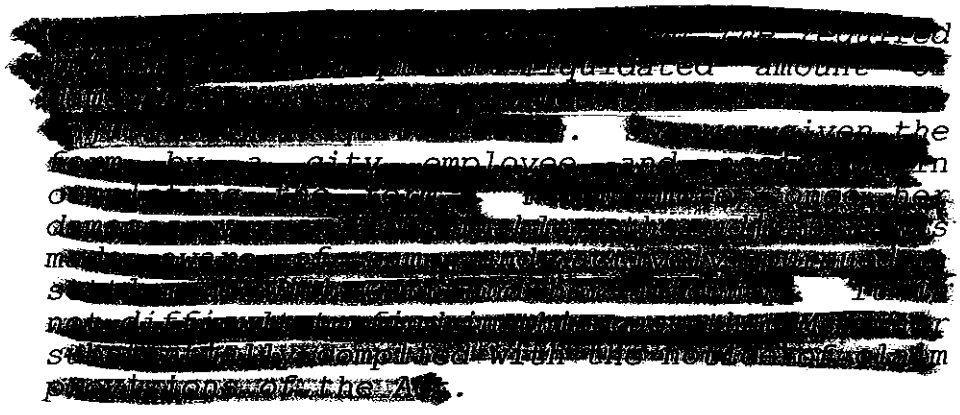
scheme." Jackson, supra, at 696.

(3) Four years later, on April 1, 2004, the decision in *Davis v. Hoss*, 869 So.2d 377 (Miss., 2004) was rendered. Again, this Honorable Court emphasized that "substantial compliance" was the standard to be applied to evaluating the notice requirements and the ninety day waiting period under the Act. However, in *Davis*, because the plaintiff gave no notice to the public entity before his suit was filed, summary judgment was appropriate. ("*Substantial compliance is not the same as, nor a substitute for, non-compliance." Davis*, supra, at 402).

(4) Only twenty-two days later, on April 22, 2004, the case of *Fairley v. George County*, 871 So.2d 713 (Miss., 2004) was decided. As in *Davis*, supra, this Honorable Court rejected a strict compliance standard and reiterated its adherence to a "substantial compliance" standard. However, contrary to the decision in *Reaves v. Randall*, 729 So.2d 1237 (Miss., 1998), a demand letter that would have passed the substantial compliance test set forth in *Reaves*, supra, was now found to fail to substantially comply with the notice provisions of the Act. This decision, although not stating so directly, seems to reject the language the Court used in *Tomlinson*, supra, that the notice, to be sufficient under the Act, need only inform the political entity of the intent to make a claim and contain "sufficient information" which reasonably affords the entity an opportunity to promptly investigate the claim. Significantly, there is no indication in *Fairley* whether, as in the case herein, the

public entity not only investigated the claim, but paid a portion of the claimant's demand before suit was filed on the remaining claims.

The Court, in *Mairley*, does cite with approval facts from the case of *Carr v. Town of Shubuta*, 733 So.2d 261, 265 (Miss., 1999), which demonstrate that the plaintiff in *Carr* substantially complied with the notice provisions:



Similarly, in the present case, the Appellants provided the Board of Supervisors with a statement and with signed medical releases so that their records could be and were reviewed and evaluated. In addition, an adjuster examined their vehicle and settled their property damage claim. See also the concurring opinion by Justice Easley in which he cites the Court's language in *Thornbury v. Magnolia Regional Health Center*, 741 So.2d 220, 222-224 (Miss., 1999):

> *It is apparent, however, that the scheme of substantial compliance adopted by the Court in Reaves and Carr does not require that a plaintiff substantially comply with each informational notice requirement set forth in the Tort Claims Act.*

(5) Shortly thereafter, on July 1, 2004, in *Wright v. Quesnel*, 876 So.2d 362 (Miss., 2004), while still expressing adherence to the substantial compliance standard, [redacted]. While not expressly doing so, the Court was rejecting its earlier decisions wherein it was ruled that under such circumstances, the appropriate remedy was for the public entity to request a ninety day stay of the litigation.

(6) In 2006, due apparently to ongoing confusion and uncertainty as to the precise extent of compliance with the notice provisions of the Act that was necessary, this Honorable Court handed down decisions in *University of Mississippi Medical Center v. Easterling*, 928 So.2d 815 (Miss, 2006) and *South Central Regional Medical Center v. Guffy*, 930 So.2d 1252 (Miss, 2006). The Court's ruling in these cases was intended to eliminate the "confusion" caused by the "substantial compliance" standard and to provide "*direction and clarity to the Courts and to the bar.*" (*Guffy*, supra, at 1258) and to make it "perfectly clear" that strict compliance with the notice requirements of the Act was now required. (*Easterling*, supra, at 819-820), specifically overruling *Tomlinson*, supra, and its progeny.

At the time Appellants filed their suit in March, 2004, "substantial compliance" with the notice requirements of the Act was the standard enunciated and adopted by this Honorable Court.

II.

[redacted]

As in *Carr*, supra, "*it is not difficult to find...that [Appellants] substantially complied with the notice of claim provisions of the Act.*" Claimants contacting of the adjuster for the Board of Supervisors, the signing of the requested release forms, the providing of claimant's statement, the review of medical records, the detailed investigation, the initial written claim letter, and settlement of the property damage claim, occurred significantly more than ninety days before the suit was filed. Appellees had ample notice and reasonable opportunity to promptly investigate (and did investigate) the claim before suit was filed. Unlike *Wright*, supra, where suit was filed only eleven days after filing the notice of claim, Appellants initial notice was filed in August, 2003, with suit being filed later on March 12, 2004. Unlike *Fairley*, supra, the Board of Supervisors, upon receipt of Appellants' initial verbal notice, commenced and completed an initial investigation, requested and obtained written medical releases from Appellants and a statement from Appellant, Sharon Parker, and examined and evaluated their property damage claim. Thereafter, shortly after receipt of a written claim, Appellees settled the claimants' property damage claim, all of which occurred a great deal more than ninety days before filing of the suit. The Board of Supervisors received notice

of the claim, that notice was sufficient for the Board to initiate and conclude an investigation into the motor vehicle accident for which the Board had a police report, the claimants were contacted, a statement obtained, and signed medical release forms were provided to the Board. As this Honorable Court stated in light of the facts in *Carr*, Appellants "... *substantially complied with the Mississippi Tort Claims Act notice of claim provisions*". *Carr*, supra, at 265.

III.

Whether subsequent judicial interpretations of statutory procedural provisions can be retroactively applied to foreclose or preclude claimants who were procedurally adequate at the time of its initial filing.

As discussed earlier, at the time Appellants made their initial verbal claim in July, 2003 and filed their initial written claim notice in August, 2003, as well as at the time of the filing of their suit on March 12, 2004, decisions of this Honorable Court had established that the substantial compliance scheme of interpreting the Mississippi Tort Claims Act was "firmly rooted" in the jurisprudence. Appellants' written claim notice, that was actually sent after Appellees had already conducted a thorough investigation of Appellants' claim, satisfied the substantial compliance standard applied by the Court's judicial interpretations. However, the Trial Court, in granting the Appellees' Motion for Summary Judgment, cited judicial decisions in 2006 that overruled the case law existing in 2003 and retroactively applied the new strict compliance standard to

Appellants' 2003 written claim notice.

In the face of the admitted "confusion", lack of "direction and clarity to the Court and the bar" of the shifting judicial interpretations of the notice requirements (*Guffy*, supra, at 1258), [redacted] *Cain v. McKinnon*, 552 So.2d 91, 92 (Miss., 1989). [redacted] "the substantial compliance scheme of interpreting the Tort Claims Act is now firmly rooted in our jurisprudence" (*Jackson*, supra, at 696) [redacted].

CONCLUSION

The notice that the Appellants gave to the Harrison County Board of Supervisors in 2003 relative to their motor vehicle accident substantially complied with the provisions of the Mississippi Tort Claims Act, as interpreted at that time. Appellants' claim was

thoroughly investigated and settlement in part was reached. Thereafter, significantly more than ninety days later, suit was filed on the remaining portions of the claim. [redacted]

Respectfully submitted,

SHARON PARKER

UNGAR & BYRNE

BY: 

GEORGE W. BYRNE, JR.
Mississippi Bar No. [redacted]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above and foregoing Brief has been served on the following:

Ms. Karen J. Young
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Honorable Lisa S. Dodson, Judge
Circuit Court of Harrison County, Mississippi
2nd Judicial District Court
P.O. Box 235
Biloxi, MS 39533

by placing true and correct copies of same in the U.S. Mail, postage prepaid, and properly addressed, this 25th day of October, 2007.

GEORGE W. BYRNE, JR.

STATUTES ADDENDUM

Miss. Code Ann. § 11-46-11

West's Annotated Mississippi Code Currentness
Title 11. Civil Practice and Procedure
+ Chapter 46. Immunity of State and Political Subdivisions from Liability and Suit for Torts and Torts of Employees (Refs & Annos)

>>§ 11-46-11. Notice of claim requirements; infancy or unsoundness of mind

(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. Service of notice of claim may also be had in the following manner: If the governmental entity is a county, then upon the chancery clerk of the county sued; if the governmental entity is a municipality, then upon the city clerk. If the governmental entity to be sued is a state entity as defined in Section 11-46-1(j), service of notice of claim shall be had only upon that entity's chief executive officer. If the governmental entity is participating in a plan administered by the board pursuant to Section 11-46-7(3), such chief executive officer shall notify the board of any claims filed within five (5) days after the receipt thereof.

(2) Every notice of claim required by subsection (1) of this section shall be in writing, and shall be delivered in person or by registered or certified United States mail. Every notice of claim shall contain a short and plain statement of the facts upon which the claim is based, including the circumstances which brought about the injury, the extent of the injury, the time and place the injury occurred, the names of all persons known to be involved, the amount of money damages sought and the residence of the person making the claim at the time of the injury and at the time of filing the notice.

(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. However, should the governmental entity deny any such claim, then the additional ninety (90) days during which the claimant may file an action shall begin to run upon the claimant's receipt of notice of denial of claim from the governmental entity. All notices of denial of claim shall be served by governmental entities upon claimants by certified mail, return receipt requested, only. For purposes of determining the running of limitations periods under this chapter, service of any notice of claim or notice of denial of claim shall be effective upon delivery by the methods statutorily designated in this chapter. The limitations period provided herein shall control and shall be exclusive in all actions subject to and brought under the provisions of this chapter, notwithstanding the nature of the claim, the label or other characterization the claimant may use to describe it, or the provisions of any other statute of limitations which would otherwise govern the type of claim or legal theory if it were not subject to or brought under the provisions of this chapter.

(4) From and after April 1, 1993, if any person entitled to bring any action under this chapter shall, at the time at which the cause of action accrued, be under the disability of infancy or unsoundness of mind, he may bring the action within the time allowed in this section after his disability shall be removed as provided by law. The savings in favor of persons under disability of unsoundness of mind shall never extend longer than twenty-one (21) years.

CREDIT(S)

Laws 1984, Ch. 495, § 7; Laws 1985, Ch. 474, § 6; Laws 1987, Ch. 483, § 6; Laws 1988, Ch. 479, § 3; Laws 1993, Ch. 476, § 5, eff. from and after passage (approved April 1, 1993). Amended by Laws 1999, Ch. 469, § 1, eff. from and after passage (approved March 25, 1999); Laws 2000, Ch. 315, § 1, eff. from and after passage (approved April 8, 2000); Laws 2002, Ch. 380, § 1, eff. from and after passage (approved March 18, 2002).

VALIDITY

<This section was held unconstitutional in University of Mississippi Medical Center v. Robinson (Miss. 2004) 876 So.2d 337. See Notes of Decisions, post.>

HISTORICAL AND STATUTORY NOTES

For information concerning the repeal of the law governing causes of action occurring prior to the effective date of Chapter 46, Title 11, Mississippi Code of 1972, see Historical and Statutory Notes under Section 11-46-1.

The 1999 amendment, in subsection (1), added the second and third sentences relating to alternative methods of making service of notice; at the beginning of subsection (2), substituted "Every notice of claim" for "The notice of claim", and made a nonsubstantive change; and in

subsection (3), in the first sentence, added all language following "(95) days", and inserted the new second, third, fourth, and fifth sentences preceding what was formerly the second sentence.

At its April 28, 1999 meeting, pursuant to its authority under Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation ratified the correction of a typographical error in subsec. (3). The words "service of any notice of claim or denial of notice of claim" were changed to "service of any notice of claim or notice of denial of claim".

The 2000 amendment added subsec. (4) relating to persons under a disability.

The 2002 amendment, in subsection (4), substituted "April 1, 1993," for "May 15, 2000".