2007-CA-00755

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SUPREME COURT OF MISSISSIPPI

Court of Appeals of the State of Mississippi

JOE ELLIS RILEY	**APPELLANT**
VERSUS	**NO.: 2007-CA-00755**
F. A. RICHARD & ASSOCIATES, INC. **INGALLS SHIPBUILDING, INC.** **And ALEXIS HYLAND, an Individual**	**APPELLEES**

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 disqualification or refusal:

Joe Ellis Riley - Appellant;

Honorable Robert E. O'Dell, a solo practioner - Attorney for Joe Ellis Riley, Appellant;

F.A. Richard & Associates, Inc. - Appellee;

Ingalls Shipbuilding, Inc. now Northrop Grumman Ship Systems, Inc. - Appellee;

Alexis Hyland - Appellee;

Honorable Honorable Silas W. McCharen/Honorable Brandi N. Smith for the Firm of Daniel, Coker, Horton & Bell, P.A. - Attorney(s) for F. A. Richard & Associates, Inc. and for Alexis Hyland, Appellees;

Honorable Richard P. Salloum - Attorney for Ingalls Shipbuilding, Inc.
now Northrop Grumman Ship Systems, Inc. - Appellee; and,

Honorable Dale Harkey - Jackson County Circuit Court Judge,
Nineteenth (19th) Judicial District.

So certified by the undersigned attorney of record for Joe Ellis Riley, Appellant, this the 17th day of December, 2007.

ROBERT E. O'DELL

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STATEMENT OF ISSUES

1) Whether the trial court erred in granting summary judgment as to counts of the plaintiff's complaint for intentional interference with contract, intentional interference with prospective advantage, intentional infliction of emotional distress, intentional interference with medical care and/or confidentiality of doctor/patient privilege, intentional interference with medical care by ex parte communication and punitive damages.

2) Whether the trial court erred in holding that the plaintiff executed a valid and sufficient waiver of his medical privilege allowing for ex parte communications with his doctor as opposed to submitting the question to the jury.

3) Whether the grant of summary judgment against the plaintiff invaded the province of the jury as to questions of malice.

4) Whether the trial court erred in allowing the defendants to bring forth a second motion for summary judgment after they abandoned their first one.

II.

STATEMENT OF THE CASE

The nature of the case is that the plaintiff, being aggrieved of the conduct of the defendants in their ex parte contact with his doctor, filed a complaint seeking redress in the Circuit Court of Jackson County, Mississippi on July 5, 2000. R. 7. Thereafter the defendants removed the case to federal court with the plaintiff objecting to the improper removal and moving for remand back to state court. R. 6, 41.

Rather than remanding back to the state court, the District Court improperly granted a defense motion for dismissal and the plaintiff appealed to the Fifth Circuit Court of Appeals.

R. 44. On August 1, 2002, the Fifth Circuit vacated the order of the District Court and remanded the case back to District Court with instructions to remand it back to state court. R. 65.

On September 18, 2003, the defendants filed a motion to dismiss or stay proceedings or to grant summary judgment. On or about September 24, 2003, the plaintiff filed his first amended complaint that deleted a prior claim for special damages associated with his Longshore and Harbor Workers' Compensation Act claim. R. 69.

On November 13, 2003, the trial court entered an order granting in part (partial stay) and denying in part the defendants' pending motion. R. 137. Though the claimant had opposed the defendants' motion for summary judgment with affidavits (R. 139, 140, 142, 143) and otherwise, the defendants did not argue it before the court at the October 3, 2003 hearing on the motion and the court's order did not reference their motion for summary judgment. R. 137, 170.

On January 31, 2005, the plaintiff filed his motion to compel discovery, particularly of his first combined discovery to the defendant, Alexis Hyland, and detailing his numerous and concerted, but unsuccessful, efforts to obtain cooperation from the defendants in taking the deposition of Alexis Hyland. R. 164.

On July 5, 2005, the trial court issued an order lifting stay. The defendants then filed a second motion for summary judgment which was opposed by the plaintiff by answer, affidavits, and evidence filed on April 6, 2006. R. 170-196. The plaintiff objected to being called upon to defend a second motion for summary judgment after the first one was abandoned by the defendants at the hearing of October 3, 2003 by their presenting absolutely no argument thereon at that time. R. 170.

After oral argument before the Court, the defendants' second motion for summary judgment was granted by the trial court on April 3, 2007 and therefrom the plaintiff perfected this appeal. R. 209.

III.

STATEMENT OF FACTS

The plaintiff, Joe Ellis Riley, sustained an industrial, accident in a fall, while working in the course and scope of employment for Ingalls Shipbuilding [Now Northrop Grumman Ship Systems, Inc.], on October 16, 2007. R. 25, 148. The accident caused multiple breaks in his left ankle that were initially surgically stabilized with pins and screws in emergency surgery by Dr. Charlton H. Barnes at Singing River Hospital in Pascagoula, Mississippi, during the course of his initial hospitalization following the accident. R. 148, 149. The injuries to the ankle were so severe as to require a subsequent fusion surgery by Dr. Chris E. Wiggins (a partner of Dr. Barnes) on February 12, 1998. R. 148. The left ankle injury and fusion resulted in a shortening of the left leg of one and one-half inches and an impairment rating of 50% to the foot by Dr. Wiggins. R. 149. Joe Riley was restricted to a maximum walking distance of $1/10^{th}$ of a mile and no lifting over 10 pounds as a result of his injuries. R. 150.

Although, (due to Joe Riley's limited ability to walk around following the accident and surgeries) it was not at first realized, either the fall at Ingalls, "and/or altered gait aggravated or exacerbated" Riley's pre-existing asymptomatic back condition, thus also resulting in an award of non-scheduled benefits for the disability due to the back by the Longshore Administrative Law Judge. R. 153.

The back condition issue first came to light in a chart report issue by Dr. Chris Wiggins dated April 19, 1999, in which Dr. Wiggins gave a history of only the industrial injury, and opined that based upon Riley's fused left ankle an spondylolisthesis at L-4 he was totally disabled. R. 25, 142, 192. Receipt of the report by Pam Hale at defendant, F. A. Richard & Associates, Inc. (FARA) must have caused quite a stir, as prompt action was taken to lobby Dr.

Wiggins for a change of opinion. R. 25, 142, 188, [FARA is the claims administrator for Ingalls Shipbuilding, Inc., a self-insured]. R. 24.

On May 21, 1999, Alexis Hyland an RN and "medical case manager" for the defendants received her marching orders from Pam Hale at FARA. R. 188. They included the following "goal[s]": Obtain approval for jobs, that work restrictions have not changed, and back problems are not related to work injury to ankle." R. 188. [emphasis added]. Alexis Hyland set up an ex parte conference, on behalf of the defendants, with Dr. Wiggins for June 7, 1999 on May 24, 1999. R. 188.

On June 7, 1999, without any notice to the claimant or his counsel, Alexis Hyland met ex parte with Dr. Wiggins. Her file notes reflect:

> Consult Dr. Wiggins... stated back problems are not work related ...stated will review job descriptions and dictate to reflect that these are still approved from a workman's compensation standpoint. Voiced concern that by approving these jobs that patient may be disqualified from social security. Stated he did not want claimant to be a "burden" to Ingalls and is trying to take him "off their hands" by helping him get social security. Agreed to consult with me again after I received his dictation to answer any further questions I may have. R. 189.

Alexis Hyland also noted an update to Pam Hale. R. 189. Her job being done, (by her file note of June 24, 1999) Alexis Hyland noted, "Per Pam Hale: Close...File Closed." R. 190.

After and as a result of the ex parte conference with Alexis Hyland, Dr. Wiggins revised his April 19, 1999 notes to Joe Riley's chart. Following his original type written "this man is disabled for all substantial gainful employment" he added, by the handwritten notation, "from a social security standpoint." R. 143, 192. Dr. Wiggins also produced a typewritten narrative dated June 7, 1999 which states:

> Today's visit is actually a medical conference with Ms. Hyland, the medical case manager. Apparently my office note of 4/19/99 has led to some confusion, particularly the diagnosis spondylolisthesis as to whether that is workers' compensation related...Chart review done. I apologize for any confusion. Mr. Riley's spondylolisthesis is a preexisting problem and as such is not an industrial injury...Nevertheless, taking into consideration his age, his educational

> background, and his vocational training, he is felt to be disabled from substantial gainful employment from a social security standpoint." R. 191. [emphasis in original].

As was his usual practice the report was copied to FARA. R. 191, 192, 193.

In a December 8, 1999 correspondence to Pam Hale at FARA, Dr. Wiggins wrote: "You are correct, Mr. Riley's spondylolisthesis was pre-existing his industrial injury to his ankle and was in no way related or aggravated by his industrial injury. The problems with his back are a natural progression of the congenital/developmental spondylolisthesis defect." R. 26. The December 8, 1999 letter was, according to Dr. Wiggins, sent to Pam Hale at FARA as a direct result of the ex parte consultation with Alexis Hyland. R. 178.

Upon learning of the ex parte interference with his medical treatment and being shocked and dismayed thereby, Joe Riley filed this civil action versus the malicious actors on June 7, 2000. R. 23. The ruse as to Joe Riley's back condition not being related to his industrial injury, however, could not be sustained. At his deposition taken on June 12, 2000, five days after the complaint was filed, Dr. Wiggins recanted and re-reversed himself and acknowledged and "once more adopted his original view that a causal relationship existed between Claimant's fall and/or gait and his back symptoms." R. 151. [findings of fact by Administrative Law Judge]. Indeed, all physicians who spoke to the causation of Joe Riley's back condition in the records submitted into evidence at his LHWCA hearing, Dr. Wiggins, Dr. John McCloskey, and Dr. William Crotwell, (a medical examiner for the employer) agreed that "the accident and/or altered gait aggravated or exacerbated his low back condition causing it to be symptomatic." R. 153.

The plaintiff also alleged in his Complaint that the defendants tortuously sought to use and did use that relationship to their advantage and to the plaintiff's disadvantage by direct ex parte communications with Dr. Wiggins by persons who misrepresented their interests. Id.

The plaintiff in his Complaint also recited facts so as to negate any waiver of medical privilege or authority given either impliedly or expressly for the defendants to have ex parte communication with his physician. Such facts as alleged by the plaintiff in his petition were that a purported;

> medical authorization signed by the plaintiff on or about October 21, 1997 was procured by direct contact by a representative of the defendant, F. A. Richard & Associates, Inc., at a time when the plaintiff was disabled and incompetent to waive any medical privilege due to his being under the influence of pain medication while in the hospital and being in great pain from his injury. Rec.Vol.1, p.21.

The plaintiff alleged that in any purported medical authorization was procured by duress and by adhesion and that its full contents and consequences were not disclosed. Joe Riley's complaint alleged that even had the contents and consequences of a waiver been explained to him, he was not competent at the time to waive his medical privilege or to give full and knowledgeable consent to allow ex parte contacts with any treating physician. R. 27. Furthermore, the plaintiff alleged that the defendants were notified by correspondence dated September 9, 1998 sent by his then attorney to cease any contact with the plaintiff and that any ex parte communication with his physician that may have been previously authorized was therefore fully and finally withdrawn as of that date. R. 27. (Letter at R. 141).

The plaintiff further alleged in his Complaint that that an apparent additional unauthorized and tortuous ex parte communication by F. A. Richard & Associates, Inc. or its employees or agents, the precise nature of which was unknown and undisclosed to the plaintiff, was made on the behalf of the defendants. The Complaint filed by the plaintiff in Circuit Court further alleged that F. A. Richard & Associates, Inc. and Ingalls Shipbuilding, Inc. had established,

"either expressly or impliedly, a close working relationship with Mississippi Gulf Coast Orthopaedic Group, P.A. (MCOG) where numerous workers' compensation claimants who have

sustained industrial injuries at Ingalls Shipbuilding, Inc. are sent or referred to the physicians at MCOG for treatment of their industrial injuries and thus the said Defendants are especially situated so as to exert inappropriate unfair and/or undue influence upon the physicians and/or opinions of the physicians at MCOG by ex parte contacts."

Finally, the plaintiff's Complaint alleged that the defendants knew or should have known that at the time of the Complaint of ex parte communication with Dr. Wiggins, that (under Mississippi law) an unconditional and specific authorization was required prior to ex parte contacts and that all contacts were knowingly and maliciously made for the purpose of damaging the plaintiff and in reckless disregard of his rights. R. 28. The Complaint of Joe Riley filed in the Circuit Court of Jackson County, Mississippi, then set forth ten (10) counts or causes of action for liability as follows:

Count 1 - Intentional interference with contract.

Count 2 - Beach of fiduciary duty.

Count 3 - Intentional interference with prospective advantage.

Count 4 - Medical malpractice.

Count 5 - Fraud and misrepresentation.

Count 6 - Negligence.

Count 7 - Intentional infliction of emotional distress.

Count 8 - Intentional interference with medical care and/or breach of confidentiality of doctor/patient privilege.

Count 9 - Intentional interference with medical care by ex parte communication.

Count 10 - Punitive damages. R. 28-31.

Of the above referenced counts, the claimant withdrew claims number 2, breach of fiduciary duty, and number 4, medical malpractice, at the hearing before the trial court on September 22, 2006. T. 28.

In his demand for damages, the plaintiff sought $500,000.00 in actual damages and $25,000,000.00 in punitive damages plus all costs of Court. Such damages both general and special were sought against the defendants, jointly and severally and/or individually. In order that he comply with the requirement that special damages be identified with particularly in his Complaint, the plaintiff, in paragraph 27, identified special damages in the amount of $82,674.18, in lost disability compensation benefits under the Longshore and Harbor Workers' Compensation Act. R. 31. That complaint for "special damages" was subsequently deleted in a First Amended Complaint filed by the plaintiff. R. 69.

IV.

SUMMARY OF THE ARGUMENT

The vast majority of states have held that ex parte communications with medical care providers are prohibited under state law. Those few states that have considered the question have held that the patient holder of the privilege has an action for violation of the privilege against third parties who engage in ex parte interviews.

The tort theories of intentional interference with contract and intentional interference with prospective advantage have been recognized as supporting an action for violation of medical privilege by ex parte communications. Case law exhibits a strong nationwide toward expanding protection of physician-patient privilege by prohibiting ex parte communications with medical care providers and by allowing a cause of action against third party interlopers.

Those who violate the prohibition against ex parte contacts with medical care providers commonly, as in this case, commit the common law torts of intentional interference with contract

and/or intentional interference with prospective advantage. Even in states (among those adopting the majority view that ex pate interviews are prohibited) such as Mississippi, that have not yet considered and announced a specific cause of action for violation of the doctor-patient privilege by the conduct of ex parte physician interviews, an action founded upon intentional interference with the physician/patient contract and the patient's expectation of confidentiality and prospective advantage from that confidentiality creates a jury question for damages.

Since the interference is intentional, upon finding by the jury that it is sufficiently outrageous in character, extreme, and beyond the bounds of decency and norms of society, a cause of action intentional infliction of emotional distress, requiring consideration by a jury is presented.

The Court should not allow trial judges to be the ultimate finders of fact as to such issues as whether defendants act with malice, whether persons in extreme pain and on narcotic medication are competent to execute complex waivers, and whether a party's acts that violate the express public policy of the state may be considered outrageous; all of those issues are part of this record. This Honorable Court should decide this case in the only manner that will preserve and promote the physician-patient privilege by reversing summary judgment and allowing trial of the relevant issues of the case.

The Court should not allow defendants who have brought forth a first motion for summary judgment, and abandoned same at a hearing thereon, to file successive motions for summary judgment.

V.

ARGUMENT

1. **WHETHER THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AS TO COUNTS OF THE PLAINTIFF'S COMPLAINT FOR INTENTIONAL INTERFERENCE WITH CONTRACT, INTENTIONAL INTERFERENCE WITH PROSPECTIVE ADVANTAGE, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, INTENTIONAL INTERFERENCE WITH MEDICAL CARE AND/OR CONFIDENTIALITY OF DOCTOR/ PATIENT PRIVILEGE, INTENTIONAL INTERFERENCE WITH MEDICAL CARE BY EX PARTE COMMUNICATION AND PUNITIVE DAMAGES.**

The principal issue on appeal is whether the trial court erred in granting summary judgment against the plaintiff on the issues identified above. Since, as recognized by the trial judge, "this action may be one of first impression," the claimant listed several alternate theories of liability in his complaint. R. 208. Since the case is of first impression as to whether Mississippi recognizes a cause of action for violation of physician/patient privilege by third parties, (and if so on what theories) the trial court erred if Mississippi follows the prevailing rule in that regard.

As with all jury trial cases where summary judgment is granted the principal question is whether or not the case would more properly be submitted to the jury. The plaintiff submits that the trial court made numerous conclusions in support of the grant of summary judgment that were not only questionable, but were against the weight of the evidence presented by the Rule 56 record.

The standard for examining a defendant's motion for summary judgment is well settled. The Court must consider the evidence in the light most favorable to the non-moving party, and only upon a finding that no genuine issues of material fact remain to be decided by a jury and that the movant is entitled to judgment as a matter of law should summary judgment be granted. Miss. R. Civ. Pro. Rule 56(c), Hataway v. Estate of Nicholls, 893 So.2d 1054, 1057 (Miss. 2005).

The Court must review de novo a trial court's grant of a motion for summary judgment. Webb v Braswell, 930 So.2d 387, 395 (Miss. 2006). The movant has the burden of proving that no genuine issue of material fact exists. Franklin Collection Service, Inc. v Kyle, 955 So.2d 284, 288 (Miss. 2007).

Where there is doubt as to whether or not a fact issue exists, the Court must resolve the matter in favor of the non-moving party and the motion must be denied. Sutherland v. Estate of Ritter, 2007 So.2d (2006-CA-00082-SCT) (Miss. 2007). It is the decided policy of this Court that "summary judgment, in whole or in part, should be granted with great caution" Brown v. Credit Center, Inc., 444 So.2d 358, 363 (Miss. 1983).

The essence of this case is that it is an action against third parties for interference with the physician-patient privilege by ex parte contact with a doctor. The Mississippi Supreme Court has not rendered a decision directly on point, although as detailed later herein, has asserted positions in favor of strong protection of the physician-patient privilege.

The common law did not recognize a physician-patient privilege. Whalen v. Roe, 429 U.S. 589, 602 n. 28, 97 S.Ct. 869, 51 L. Ed 2d 64 (1977). The medical profession, however, has traditionally guarded against disclosure of confidences in the relationship. For example the Hypocratic Oath states "Whatever, in connection with my professional practice, or not in connection with it, I see or hear, in the life of men, which ought not to be spoken of abroad, I will not divulge, as reckoning that all such would be kept secret." 50 ALR 4th 714, 717.

Statutes enacted in many states have codified the privilege. Id. Mississippi is such a state. Miss. Code Ann. § 13-1-21 establishes medical privilege and prohibits disclosure of privileged information. Section (1) of the statute reads:

> All communications made to a physician, osteopath, dentist, hospital, nurse, pharmacist, podiatrist, optometrist or chiropractor by a patient under his charge or by one seeking professional advice are hereby declared to be privileged, and such

party shall not be required to disclose the same in any legal proceeding except at the instance of the patient...

This Court has recently held that Miss. Code Ann. Section 13-1-21 has been superceded by Mississippi Rule of Evidence 503 in actions in state court to which the Mississippi Rules of Evidence apply. Franklin Collection Service, Inc. v. Kyle, 955 So.2d 284 (Miss. 2007).

The main question presented by this appeal is whether the Court should allow a jury to consider a cause of action against a third party who wantonly and callously violates the doctor-patient privilege provided by § 13-1-21 and as otherwise recognized by the law of this state and the vast majority of other states. There is significant Mississippi case law strongly supporting an affirmative answer. Before turning to discussion of such authority, however, it is best to consider nationwide treatment of this issue.

The ALR annotation found at 50 ALR 4th 714 is the best source of the law of the various states (and federal courts applying state law) on the issue of third party interference with medical privilege. The annotation is entitled "Discovery: Ex Parte Interview...right to ex parte interview with injured party's treating physician." 50 ALR 4th 714. Not surprisingly, most of the cases deal with ex parte contact with the injured party's doctors by attorneys for adverse parties.

There is, however, no significant distinction between ex parte contact by attorneys in tort or workers' compensation claims, and ex parte contacts by agents of employers in workers' compensation claims, such as sub judice. In either event, the actor violating the privilege by ex parte communication is actively intruding upon the privilege.

The ALR annotation recognizes three categories for state law decisions on whether defendants' or employers' representatives may interview the plaintiff's (claimant's) treating physician, as follows:

1) That ex parte communications are allowed.

2) A qualified view that the injured party may be required to provide written authorization for the interview.

3) That ex parte communications are prohibited.

Of the three views, the conclusion that ex parte contacts are prohibited is by far the majority rule. It is also the only view that is in accordance with Scott v. Flynt, the foremost Mississippi case interpreting the scope of § 13-1-21. Scott v. Flynt, 704 So.2d 998 (Miss. 1996).

Five states are currently identified as supporting or somewhat supporting the view that defendant's counsel may conduct ex parte interviews of the plaintiff's physicians as part of pre-trial discovery, usually reasoning that the physician-patient privilege is waived by the filing of a lawsuit putting physical condition at issue. Those states are Alaska, Michigan, New Jersey, Rhode Island, and South Carolina. South Carolina's inclusions is by a Federal District Court decision applying state law. [For citations to relevant decisions see 50 ALR 4th 714 § 3, p. 719-721 and later case supplement for § 3].

The Alaska case is illustrative of these decisions. Arctic Motor Freight, Inc. v. Stover, 571 P 2d 1006 (Alaska 1977). In Stover, the Court held that the filing of a personal injury suit has the operative effect of waiver of the doctor-patient privilege, so that discovery normally should proceed without judicial participation.

An essential common element of the courts adopting this view is that state law does not provide for a physician-patient privilege and thus the issue is left to be decided based upon discovery rules. See, eq, Doe v. Eli Lilly & Co., 99 FRD 126 (D.C. Dist. Col. 1983) and Stempler v. Speidell, 495 A 2d 857 (N.J. 1985).

The second view of if, and when, ex parte contact with medical care providers will be allowed is the "qualified view that [the] injured party may be required to provide written authorization to facilitate conduct of [the] interview" 50 ALR 4th 714, 721 (1986). This group of

cases, representing the law of three states, including Missouri [this view overruled in part by Brant v. Pelican, 856 S.W. 2d 658 (MO 1993)], and the District of Columbia, principally prohibits ex parte communications without a written waiver, but holds that the plaintiff is required to execute the waiver to the extent that his medical condition is at issue.

The majority of states have adopted (or have had announced by Federal Courts applying state law) the rule that ex parte communications with medical care providers are prohibited. States whose Courts have adopted the rule include Alabama, Arizona, Colorado, Florida, Louisiana, Illinois, Indiana, Maine, Minnesota, Mississippi, Montana, New York, North Dakota, Ohio, Pennsylvania, Tennessee, Texas, and Virginia, Washington, and West Virginia. [for citations and synopsis of decisions see 50 ALR 4th 714, 725-731 and supplement for later cases; neither Mississippi through Scott v. Flynt, 704 So.2d 998 (Miss. 1996) nor the Tennessee, through, Alsip v. Johnson City Medical Center, 197 S.W. 3d (TN 2006) are included in the ALR annotation; some of the states listed above are included by way of decisions overruling or modifying earlier decisions].

The primary reason for the rule prohibiting ex parte communications is that the defendant's agents are limited to formal methods of discovery. 50 ALR 4th 714, 725. The various states have, however, based their decisions to prohibit ex parte communications with doctors on a variety of tort theories and expressions of public policy. Id.

The Supreme Court of Minnesota has held that discovery procedures protect both patient and physician from potential abuse of the opportunity of adverse counsel inquiring into questions of irrelevant and inadmissible health issues or history. Thus, the discovery rules are the exclusive mechanism for obtaining access to medical testimony waived by the patient. Wenninger v. Muesing, 240 NW 2d 333 (Minn. 1976). The Court also concluded that no reason justified exposing doctors to the hazard of potential tort liability or professional discipline for

participation in private non-adversarial interviews. Id. The Court thus declined to follow a prior ruling of the U.S. District Court applying Minnesota law of eight years hence, Lind v. Canada Dry Corp., 283 F. Supp 861 (D.C. Minn. 1968), which had been one of the few cases concluding that ex parte communication were allowed. Other states reversing previous minority rule holdings, and completely prohibiting ex parte interviews, include Florida, Michigan, and Montana. 50 ALR 714 (Supp. later case treatment).

The New York Court of Appeals has held that limiting disclosures of medical information to that obtainable by statute, court rule, or express consent of the parties would afford the patient's attorney an opportunity to object to improper disclosures and conduct by the adverse agents. Anker v. Brodnitz, 413 NYS 2d 582 (NY App. 1979). The court specifically referenced that the defendants made no showing that formal discovery procedures were inadequate to discover the information sought by the private interview. Id. Similarly, the defendants here make and can make no such showing, they instead seek to turn the tables and have consistently argued that that which is not specifically prohibited under the rules (here Federal Rules of Civil Procedure and administrative rules pertaining to LHWCA actions) is permitted, irrespective of state law. Absolutely no authority supports that non-sensical assertion, and a wave of authority supports the opposite view. It should also be pointed out, as detailed subsequently, ex parte communication with medical care providers are prohibited under the Federal rule of Civil Procedure. Homer v. Rowan, 153 F.R.D. 597 (5th Cir., S.D. Texas 194).

The New York Court of Appeals held that a cause of action exists both against a doctor who, without authority, disclosed his patient's confidences and against the insurer who induces the physician to disclose. Id. The Court held that utilizing only the prescribed discovery devices would protect physicians from private interviews where they may be pressured to make improper

disclosures and would alleviate a potential class of malpractice actions and the threat of cancellation of malpractice insurance for violation of medical protocol. Id.

The District Court of the Northern District of Ohio, in its opinion agreeing with the majority of courts on this issue, reasoned that an implied condition of the contract between physician and patient was the warranty of silence pertaining to confidential information belonging to the doctor-patient relationship. Hammonds v. Aetna Casualty & Surety Co., 243 F Supp. 793 (ND Ohio 1965).

In a 1962 decision espousing the majority rule, the Supreme Court of Pennsylvania held that doctors owe patients a duty of care and confidentiality, including the duty to refuse affirmative assistance to the patient's antagonist in litigation, thus supporting the public policy of prohibiting ex parte conferences. Alexander v. Knight, 177 A 2d 142 (Penn. 1962).

In a more recent Federal Court decision, Maine was added to the states supporting the majority view. The District Court, in order to preserve the integrity of the physician-patient privilege and to save the physician from the risk of having to decide a legal issue (i.e. issues on which the privilege is, and is not, waived) held the defendant limited to formal discovery mechanisms unless its counsel obtains express consent of the plaintiff to conduct ex parte contact with the physician. Neubeck v. Lundquist, 186 F.R.D. 249 (D. Me. 1999). "Express" and not general consent is a common theme of the cases.

Arizona law recognizes a physician-patient privilege prohibiting ex parte interviews by defendant's representative as a matter of public policy and as a means to preserve the integrity of the privilege. Benally v. U.S., 216 F.R.D. 478 (D. Ariz. 2003).

Under the Federal rules, the doctor-patient privilege is not completely abrogated when the patient commences litigation and the treating physician should remain able to treat his patient within the parameters of the privilege. A rule compelling execution of a release and

authorization for ex parte communications is beyond what is authorized by Rule 34 of the Federal Rules of Civil Procedure, Neal v. Boulder, 142 F.R.D. 325 (DC Colo. 1992).

Florida courts have invalidated a trial court order permitting ex parte communications with physicians. The court held that such an order violated the statutory physician-patient privilege to such an extent that relief on petition for certiorari was proper. Lemieux v. Tandem Health Care of Florida, Inc., 862 So.2d 745 (Fla. Dist. Ct. App. 2d Dist. 2003).

Illinois is in majority camp to the extent that the court has prohibited ex parte communications by a defendant hospital's representatives with doctors treating the patient despite the fact that they were also the hospital's staff physicians. Ritter v. Rush - Presbyterian - St. Luke's Medical Center, 532 NE 2d 327 (Ill. 1988).

In a 2005 Louisiana case stemming from a seaman's claim and medical treatment, the Louisiana Court of Appeals ruled that the doctor-patient privilege was breached by the employer's representatives going outside of formal discovery procedures to have ex parte communications with the employee's treating physician. Coutee v. Global Marine Drilling Co., 895 So.2d 631 (La. Ct. App 3d Cir., 2005).

The Supreme Court of Montana has ruled that although by statute the physician-patient privilege was waived by an injured worker's seeking benefits under its Workers' Compensation Act as to any information relevant to his claim, the waiver did not authorize either the employer or insurer to hold private interviews with the claimant's physician without his specific knowledge and opportunity to be present. Litton v. Great Falls, 749 P 2d 55 (Mont. 1988).

The U.S. District Court for the Western District of Virginia has held that, under Virginia law, a defendant is limited to formal discovery protocols and ex parte contacts are prohibited. McCauley v. Purdue Pharma, L.P., 224 F. Supp. 2d 1066 (W.D. Va. 2002). The same rule and

for the same or similar reasons was adopted by Washington. Loudon v. Mhyre, 756 P 2d. 138 (Wash. 1988).

A clear tend toward this rule nationwide is established by the states that have abandoned an earlier first or second view in favor of prohibiting ex parte contacts with medical care providers. This is as would be expected considering some of the earlier cases were pre-rule decisions and/or were prior to adoption of privilege statues, but is also clearly due to the better reasoning of prohibition of ex parte physician interviews.

One of the states to most recently consider the issue of prohibition of ex parte communications is Tennessee. The Tennessee case involved the sole issue of whether the trial court erred in issuing an order allowing the defense to have ex parte contact with the plaintiff's treating physicians upon a structured set of restrictions. Alsip v. Johnson City Medical Center, 197 S.W. 3d 722 (Tenn. 2006).

Although Tennessee does not have a doctor-patient privilege statute as Mississippi does, the court had in 2002, "recognized an implied *covenant of confidentiality* in medical-care contracts between treating physicians and their patients." Id at p. 725, citing Givens v. Mullikin, 75 S.W. 3d 383 (Tenn. 2002). [emphasis by the court].

The Tennesse Supreme Court, after "[c]arefully weighing public policy concerns and considering the case law on this issue from other jurisdictions [held] that the trial court erred by issuing [the] order [allowing ex parte contact]." Alsip v. Johnson City Medical Center, 197 S.W. 3d 722, 723 (Tenn. 2006). The court stated, "we announce that such ex parte communications violate the implied covenant of confidentiality that exists between physicians and patients and that public policy does not require voidance of this covenant. This being the case, ex parte communications between the plaintiff's non-party physicians and defense attorneys are not allowed in the State of Tennessee." Id. at 723, 724.

The underlying basis for strong prohibition of ex parte contacts with doctors is considerably stronger in Mississippi than it was last year in Tennessee when Alsip was decided. Our state has both a statutory privilege and underlying case law (as well as Fifth Circuit precedent under the Federal Rules, see Homer v. Rowan, infra) holding that it is at to be afforded broad application. Scott v. Flynt, 704 So.2d 998 (Miss. 1996).

The 1996 Mississippi case of Scott v. Flynt presented "the court with a policy decision regarding the scope of the waiver for the medical privilege as contemplated by Mississippi Rule of Evidence 503 and whether or not ex parte contacts with medical care providers are permissible under the rules of discovery in the Mississippi Rules of Civil Procedure." Scott v. Flynt, 704 So.2d 998, 999 (Miss. 1996). Scott was a medical malpractice action which presented the questions of whether ex parte conferences with medical care providers are allowed in the state and, if not, what are the evidentiary consequences under the Mississippi Rules of Civil Procedure, particularly M.R.E. 503(f). M.R.E. 503(f) reads as follows:

> Any party to an action or proceeding subject to these rules who by his or her pleadings places in issue any aspect of his or her physical, mental or emotional condition thereby and to that extent only waives the privilege otherwise recognized by this rule. This exception does not authorize ex parte contact by the opposing party.

In Scott, the Court concluded:

> The rules - [M.R.E.] - 503 as amended, were intended to be applied as follows. When a personal injury suit is pending, the medical privilege with regard to relevant information is automatically waived, making it unnecessary to have an automatic court order issued, to permit both parties equal access to all of the relevant information needed to get to the truth. The manner by which the relevant information is to be acquired is limited to either a voluntary consensual disclosure by the patient who is the holder of the privilege or the formal discovery process to prevent any breach of confidentiality. We hold that evidence obtained from ex parte contacts, without prior patient consent, by the opposing party which is subsequently used during a legal proceeding, is inadmissible. This procedure allows the defendant access to the needed information, and does not improperly allow the plaintiff to be protected behind the shield of the privilege. In sum, the relevant information is disclosed and the plaintiffs confidentiality is protected. Scott v. Flynt, 704 So.2d 998,1007 (Miss. 1996).

While the Scott decision principally addressed the issue of admissibility of evidence procured from ex parte physician communications for cases tried under the Mississippi Rules of Evidence, it also addressed issues of public policy in the state concerning ex parte communications.

The defendant in Scott had argued in favor of the court adopting the minority rule of Doe v. Eli Lilly & Co., 99 F.R.D. 126 (D.D.C. 1983), holding that ex parte contacts are permissible and that plaintiffs be required to execute waiver forms. To that contention the court said, "[w]e do not find the reasoning of Eli Lilly & Co., persuasive or reasonable." Scott @ 1004. The Court instead specifically adopted the rationale of Homer V. Rowan for use in Mississippi state courts. Scott @ 1005.

Homer v. Rowan is a 1994 Fifth Circuit Court of Appeals case out of Texas dealing with ex parte communications under the Federal Rules. Homer v. Rowan, 153 F.R.D. 597 (S.D. Texas 1994). The specifically referenced "rationale" of Homer v. Rowan that the court adopted in Scott includes the following language:

> the appropriate rule should prohibit ex parte interviews between defense counsel and plaintiff's treating physicians unless, with advance notice thereof, plaintiff specifically and unconditionally authorizes same; this is the only way in which the physician/patient privilege can be held inviolate ....Therefore, while there is conflicting authority, in order to preserve the integrity of the physician/patient privilege, a defendant must be limited to the formal methods of discovery enumerated by the Rules of Civil Procedure, absent the plaintiff's express consent to counsel's ex parte contact with his treating physicians....Formal discovery, on the record, with notice and an opportunity to other parties to be present and to participate in the proceeding, is simply the fairest and most satisfactory means of obtaining discovery from a treating physician. Scott v. Flynt, 704 So.2d 998, 1005 (Miss. 1996) citing Homer v. Rowan, 153 F.R.D. 597, 601-602 (S.D. Texas 1994).

Thus, the Mississippi Supreme Court has adopted a public policy of vigorous protection and preservation of the physician-patient privilege.

In support of granting summary judgment to the defendants the trial court judge issued a ten page Memorandum Opinion found in the record at pages 199-208. After discussion of Joe Riley's back pain and condition the trial judge stated: "The relation of this condition to the industrial accident suffered by Riley and Dr. Wiggins' opinions as to proximate cause is the crux of this lawsuit." R. 200. That is not the case, as Joe Riley's industrial accident is only the backdrop for the real issue of the case; whether a cause of action in tort lies for willful and wanton violation of the public policy of this state as set forth in Scott v. Flynt pertaining to those who engage in ex parte contacts with other peoples' doctors.

The plaintiff's claim that the defendants' actions constituted intentional interference with his contract for medical treatment with Dr. Chris Wiggins (and/or intentional interference with prospective advantage) meets the requirements of the four-part test set forth in Par. Indus., Inc v. Target Container Co., 708 So.2d 244 (Miss. 1998). The acts were: 1) intentional and willful; 2) cause damage to plaintiff in his lawful business; 3) were done with the unlawful purpose of causing damage or loss; and, 4) caused actual damage or loss to occur. Id.

Intentional interference with the contract for medical care is a commonly recognized basis for sanctioning ex parte communications with medical care providers. 50 ALR 714; see Alsip v. Johnson City Medical Center, 197 S.W. 3d 722 (TN 2006) recognizing an "implied" covenant of confidentiality in medical-care contracts." Alsip @ 725.

The defendants' assertions that a fifth requirement that the plaintiff must prove that "the contract would have been performed but for the alleged interference" [referencing Sentinel Indus. Contr., Corp. v. Kimmins Service Corp., 743 So.2d 954, 969 (Miss. 1999)] makes no sense in the context of the special nature of physician patient contract. In any event, the contract certainly was not performed in the same manner as it would have been absent the intentional and wanton interference.

Recovery for intentional infliction of emotional distress depends upon the conduct being outrageous, evoking revulsion, and being intentionally done with foreseeable results. Wilson v. GMAC, 883 So.2d 56 (Miss. 2004). There is certainly a jury question as to whether the conduct of the defendants alleged in the pleadings and in the record did just that.

In Scott v. Flynt, this court held that the medical privilege "is of paramount importance and must be afforded protection." Scott v. Flynt, 704 So.2d 998, 1004 (Miss. 1996). Scott furthermore announced the rule of law that ex parte contacts by defendants with a plaintiff's medical care providers are prohibited, "unless with advance notice thereof, plaintiff specifically and unconditionally authorize same." Scott @1005. Nothing remotely of that kind occurred here. This court should, as the only action consistent with its prior rulings pertaining to ex parte communications with medical care providers, plainly and unequivocally announce that Mississippi recognizes a cause of action against those who initiate and participate in activities in clear deregation of and disrespect for the physician-patient privilege by way of ex parte contacts with medical care providers.

2. WHETHER THE TRIAL COURT ERRED IN HOLDING THAT THE PLAINTIFF EXECUTED A VALID AND SUFFICIENT WAIVER OF HIS MEDICAL PRIVILEGE ALLOWING FOR EX PARTE COMMUNICATIONS WITH HIS DOCTOR AS OPPOSED TO SUBMITTING THE QUESTION TO THE JURY.

The trial judge also erred in concluding that Joe Riley knowingly and competently executed a waiver of medical privilege to the defendants. R. 203-208. A jury question as to effectiveness of any purported waiver is clearly presented.

In dealing with the waiver issue the trial judge stated, "[a] tape recording of the interview and corresponding transcript and testimony of Riley himself at the LHWCA hearing do not suggest in the least that any overreaching occurred or unfair advantage taken." R. 203. The real issue of the "waiver" are; 1. competency of Joe Riley to execute it since he was in the hospital, in

great pain, and on narcotic medications at the time of the signing; 2. the general and combined purpose nature of the form; and, 3. whether it specifically and unconditionally authorizes the specific ex parte contact complained by Joe Riley. R. 139.

As detailed in Joe Riley's affidavits he signed the "authorization" in five different places, two of which were spaces calling for the date of execution! R. 139, 173. Furthermore, Riley testified through his affidavits that the purpose of the form was misrepresented to him by defendant representatives. R. 139. No copy or audition of any tape recording (as referenced by the trial judge) has ever been made available to the plaintiff nor is either the purported tape or transcript known by the plaintiff to be included in the record. If any of the plaintiff's pleadings and affidavit testimony are considered in opposition to summary judgment, there is clearly a factual dispute as to both competency and misrepresentations pertaining to the purported waiver.

The Memorandum Decision of the trial court incorrectly states, "[t]here are no facts which would indicate that Ingalls or FARA knew of (sic) should have known of Riley's incompetency". R. 204. What about the fact that he was in the hospital after emergency surgery, and under heavy narcotic medication, and in great pain, and signed the form not once, but twice in blanks clearly marked "date", and testified through his affidavit that he was told only that it was an authorization for treatment, and the complex multipurpose (choice of physician, authorization for treatment, and medical waiver) nature of the form? R. 139, 140, 173, 174. Are none of those facts as contended by the plaintiff material to Joe Riley's competency and understanding to execute a waiver purportedly allowing ex parte physician interviews? Certainly, they are; and the trial judge's conclusions as to issues of material fact about any "waiver" are clearly wrong. It is difficult to imagine an issue that is more of a jury question than is a person's state of mind and competency at a given time. Finders of fact are nearly universally the sole determiners of competency.

Finally, there is no finding by the judge, nor could there be under the facts of the case, that Joe Riley "expressly and unconditionally" waived doctor-patient privilege so as to allow ex parte contacts with his doctors.

3. WHETHER THE GRANT OF SUMMARY JUDGMENT AGAINST THE PLAINTIFF INVADED THE PROVINCE OF THE JURY AS TO QUESTIONS OF MALICE.

As with the issue of the purported waiver of medical privilege, the Memorandum Decision of the trial judge further intrudes upon the province of the jury by ruling that "Riley has failed to establish the element of malice necessary to support his claims of intention interference with contract and intentional interference with prospective advantage. From the facts presented, the plaintiff submits that any reasonable juror would have no difficulty in resolving the malice requirement, if indeed required, in the plaintiff's favor.

In consideration of the claimant's several theories of liability, the trial judge incorrectly stated; "[t]here is no evidence to support the element of malice necessary in several of the claims asserted." Miss. R. Civ. Pro. 9(b) provides that "[m]alice, intent, knowledge, and other conditions of mind of person may be averred generally." Riley's complaint is repeat with references to contemptuous conduct on the part of the defendants and specifically states in paragraph XVI of his complaint:

> "Plaintiff furthermore alleges that the defendants knew or should have known that at the time of the complained of ex parte communication with plaintiff's doctor(s), that an unconditional and specific authorization was required for such contacts and that all contacts were knowingly and maliciously made for the express purpose of damaging the plaintiff's interests and in reckless disregard of his rights. R. 27, 28 [emphasis added].

Unquestionably, Joe Riley complied with the mandates of the rules as to any issue pertaining to pleading malice.

4. **WHETHER THE TRIAL COURT ERRED IN ALLOWING THE DEFENDANTS TO BRING FORTH A SECOND MOTION FOR SUMMARY JUDGMENT AFTER THEY ABANDONED THEIR FIRST ONE.**

Over the objection of the plaintiff the trial court allowed the defendants to pursue a second motion for summary judgment, which he granted. T. 18. The defendants had filed a previous motion for summary judgment two years earlier (September 18, 2003) which they had abandoned when they presented no argument thereon on hearing of the motion as evinced by the order (of the trial court) granting in part and denying in part defendants' motion. R. 66, 137. The plaintiff had opposed the motion by filing an answer and affidavits in opposition thereto. R. 78-121, 139-143.

The first remarks of the trial judge at the hearing of September 22, 2006 were "Good morning. Summary judgment again?" T. 3.

Although Miss. Rule Civ. Pro. 56 allows the defendant to assert a claim for summary judgment "at any time" it does not provide for successive motions. This court should prohibit the practice of subjecting a party to the burden of having to defend successive motions for summary judgment where, as here, the defendant files a motion for summary judgment and then, after the plaintiff defends, simply abandons the motion at the hearing hereon.

VI.

CONCLUSION

The appellant asks the court to reverse the judgment of the trial court granting summary judgment against him. In the first instance, Riley seeks that the Court announce the position of the Supreme Court as to whether Mississippi recognizes that the specific acts of third party actors soliciting and/or participation in ex parte conferences with medical care providers violates the public policy of the state and thus gives rise to a civil cause of action against the wrongdoer, whether sounded in intentional interference with contract, intentional interference with

prospective advantage, or due to violation of the public policy clearly announced by the Court in Scott v. Flynt (as per Counts 8 and 9 of the plaintiff's Complaint).

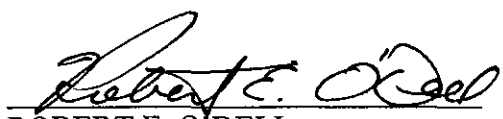
Alternatively, if the Court should decide against clearly announcing that such a cause of action exists outside of traditional specific tort remedies, that the court reverse the judgment of the trial court and remand the case for trial under those causes of action.

VII.

STATEMENT IN SUPPORT OF REQUEST FOR ORAL ARGUMENT

This case involves an issue of great public importance and interest; whether a patient may sue in tort those who willfully and maliciously disregard and interlope upon his right to private communications with his physicians. This will certainly be one of the most important issues before the Court this term. Oral argument is warranted and respectfully and earnestly requested by the Appellant.

Respectfully submitted this the 17th day of December, 2007.



ROBERT E. O'DELL

CERTIFICATE OF SERVICE

I, ROBERT E. O'DELL, hereby certify that I have this date mailed by U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of the Appellant to the following:

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Honorable W. Dale Harkey
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SO CERTIFIED, this the 17th day of December, A.D., 2007.

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ADDENDUM

Miss. Code Ann. § 13-1-21 (1972, as revised 1988).

Miss. Rule Civ. Pro. 9(b).

Miss. Rule Civ. Pro. 56.

M.R.E. 503.

§ 13–1–21. Privileged communications to physician

(1) All communications made to a physician, osteopath, dentist, hospital, nurse, pharmacist, podiatrist, optometrist or chiropractor by a patient under his charge or by one seeking professional advice are hereby declared to be privileged, and such party shall not be required to disclose the same in any legal proceeding except at the instance of the patient or, in case of the death of the patient, at the instance of his personal representative or legal heirs in case there be no personal representative, or except, if the validity of the will of the decedent is in question, at the instance of the personal representative or any of the legal heirs or any contestant or proponent of the will.

(2) Waiver of the medical privilege of patients regarding the release of medical information to health care personnel, the State Board of Health or local health departments, made to comply with Sections 41–3–15, 41–23–1 and 41–23–2 and related rules, shall be implied. The medical privilege likewise shall be waived to allow any physician, osteopath, dentist, hospital, nurse, pharmacist, podiatrist, optometrist or chiropractor to report to the State Department of Health necessary information regarding any person afflicted with any communicable disease or infected with the causative agent thereof who neglects or refuses to comply with accepted protective measures to prevent the transmission of the communicable disease.

(3) Willful violations of the provisions of this section shall constitute a misdemeanor and shall be punishable as provided for by law. Any physician, osteopath, dentist, hospital, nurse, pharmacist, podiatrist, optometrist, or chiropractor shall be civilly liable for damages for any willful or reckless and wanton acts or omissions constituting such violations.

(4) In any action commenced or claim made after July 1, 1983, against a physician, hospital, hospital employee, osteopath, dentist, nurse, pharmacist, podiatrist, optometrist or chiropractor for professional services rendered or which should have been rendered, the delivery of written notice of such claim or the filing of such an action shall constitute a waiver of the medical privilege and any medical information relevant to the allegation upon which the cause of action or claim is based shall be disclosed upon the request of the defendant, or his or her counsel.

(5) In any disciplinary action commencing on or after July 1, 1987, against a medical physician, an osteopathic physician or a podiatrist pursuant to the provisions of Sections 73–25–1 through 73–25–39, 73–25–51 through 73–25–67, 73–25–81 through 73–25–95 and 73–27–1 through 73–27–19, waiver of the medical privilege of a patient to the extent of any information other than that which would identify the patient shall be implied.

Laws 1944, Ch. 315, § 1; Laws 1968, Ch. 441, § 4; Laws 1976, Ch. 347, § 1; Laws 1979, Ch. 408, § 1; Laws 1982, Ch. 407, § 1; Laws 1983, Ch. 327, § 1; Laws 1987, Ch. 500, § 2; Laws 1988, Ch. 557, § 3, eff. July 1, 1988.

(1942); V. Griffith, Mississippi Chancery Practice, §§ 82, 175, 288, 307, 432 (2d ed. 1950).

Rule 8(g) accords with traditional Mississippi practice. See Miss.Code Ann. § 11-7-151 (1972) (all papers read in evidence on the trial of any cause may be carried from the bar by the jury).

Rule 8(h) is intended to ensure that adequate notice is provided when one sues or defends for the beneficial interest of another. See generally V. Griffith, supra, §§ 127-150.

RULE 9. PLEADING SPECIAL MATTERS

(a) Capacity. The capacity in which one sues or is sued must be stated in one's initial pleading.

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally.

(c) Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) Official Document or Act: Ordinance or Special Statute. In pleading an official document or official act it is sufficient to aver that the document was issued or the act was done in compliance with the law. In pleading an ordinance of a municipality or a county, or a special, local, or private statute or any right derived therefrom, it is sufficient to identify specifically the ordinance or statute by its title or by the date of its approval, or otherwise.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(f) Time and Place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) Special Damage. When items of special damage are claimed, they shall be specifically stated.

(h) Fictitious Parties. When a party is ignorant of the name of an opposing party and so alleges in his pleading, the opposing party may be designated by any name, and when his true name is discovered the process and all pleadings and proceedings in the action may be amended by substituting the true name and giving proper notice to the opposing party.

(i) Unknown Parties in Interest. In an action where unknown proper parties are interested in the subject matter of the action, they may be designated as unknown parties in interest.

Comment

The purpose of Rule 9 is to permit the pleading of special matters with maximum emphasis on the substance of the pleading rather than on form.

Rule 9(a) is the same as was required by prior Mississippi procedure. See V. Griffith, Mississippi Chancery Practice, § 164 (2d ed. 1950). A party desiring to raise an issue as to the legal existence, capacity, or authority of a party will be required to do so by specific negative averment. This is consistent with past procedure which held that affirmative defenses cannot be relied upon unless specially pleaded. See Miss.Code Ann. § 11-7-59(4) (1972); White v. Thomason, 310 So.2d 914 (Miss.1975). If lack of capacity appears affirmatively on the face of the complaint, the defense may be raised by a motion pursuant to Rule 12(b)(6) (failure to state a claim upon which relief may be granted), Rule 12(c) (a motion for judgment on the pleadings), or Rule 12(f) (a motion to strike).

Rule 9(b) is well-established in common law and past Mississippi practice. McMahon v. McMahon, 247 Miss. 822, 157 So.2d 494 (1963) (fraud will not be inferred or presumed and cannot be charged in general terms; the specific facts which constitute fraud must be definitely averred); Griffith, supra, §§ 176, 589. "Circumstances" refers to matters such as the time, place, and contents of the false representations, in addition to the identity of the person who made them and what he obtained as a result. See 5 Wright & Miller, Federal Practice and Procedure, Civil § 1297 (1969). The so-called "textbook" elements of fraud may be pleaded generally, i. e., (1) false representation of a material fact, Sovereign Camp, W.O.W. v. Boykin, 182 Miss. 605, 181 So. 741 (1938); (2) knowledge of or belief in its falsity by the person making it, H. D. Sojourner Co. v. Joseph, 186 Miss. 755, 191 So. 418 (1939); (3) belief in its truth by the person to whom it is made, Pilot Life Ins. Co. v. Wade, 153 Miss. 874, 121 So. 844 (1929); (4) intent that it should be acted upon, McNeer & Dodd v. Norfleet, 113 Miss. 611, 74 So. 577 (1917); (5) detrimental reliance upon it by the person claiming to have been deceived, Clopton v. Cozart, 21 Miss. 363 (1850).

Conditions of mind, such as intent and malice, are required to be averred only generally. Cf. Benson v. Hall, 339 So.2d 570 (Miss.1976), and Edmunds v. Delta Democrat Pub. Co., 230 Miss. 583, 93 So.2d 171 (1957) (charge in a libel suit that defendant published libelous material "falsely and maliciously or with reckless disregard of the truth" without alleging any facts, were mere conclusions of the pleader and were not admitted on demurrer).

Rule 9(c) conforms to traditional Mississippi practice. See Miss.Code Ann. § 11-7-109 (1972); McClave-Brooks Co. v. Belzoni Oil Works, 113 Miss. 500, 74 So. 332 (1917).

Rule 9(d) provides that in pleading an official document or official act, it is sufficient to aver that the document was issued or the act done in compliance with law; it is not necessary to allege facts showing due compliance. A defense based on the theory that an official document or act is defective must be raised by a specific denial. See Ludlow Corp. v. Arkwright-Boston Mfrs. Mut. Ins. Co., 317 So.2d 47 (Miss.1975) (portions of official document pertaining to Hurricane Camille, prepared by U.S. Army Corps of Engineers, were admitted into evidence to prove empirical facts; portions containing hearsay, conclusions, and irrelevant information were excluded).

Pleading ordinances, under Rule 9(d), is not significantly different from prior Mississippi practice. When a claim or defense is founded upon an ordinance, the pleader must specifically refer to the ordinance, as by its title or by the date of its approval; it is not necessary that a certified copy of the ordinance be attached thereto, as was formerly required. See White v. Thomason, supra.

Rule 9(d) does not modify the requirement of proof of local and private legislation before such can be admitted into evidence; Miss. Code Ann. § 13–1–147 (1972) provides that such legislation need not be specially pleaded.

Rule 9(e) is identical to Federal Rule 9(e) and conforms, generally, to prior Mississippi practice. See Miss. Code Ann. § 11–7–111 (1972). Of course, MRCP 10(d) states that a copy of the judgment should be attached to the pleading. If a defendant wishes to question the validity of the judgment being sued upon, he must do so specifically in his answer; he cannot raise the issue by a general denial or by a motion to dismiss. Once jurisdiction is put in issue, however, the party relying on the earlier judgment or decision has the burden of establishing its validity. 5 Wright & Miller, supra, §§ 1306–1307.

Under common law practice, allegations of time and place were considered immaterial to a statement of the cause of action. A party was required to plead time accurately only when it formed a material part of the substance of the case, as, for example, the date of a written instrument being sued upon. Allegations of place were also immaterial and only in local, as opposed to transitory, causes of action was it necessary to plead this assertion accurately. MRCP 9(f) treats time and place as material on a motion testing the sufficiency of the pleadings; accuracy in pleading time and place will facilitate the identification and isolation of the transaction or event in issue and provide mechanism for the early adjudication or testing of certain claims and defenses most notably, statutes of limitations. 5 Wright & Miller, supra, §§ 1308–1309; See also V. Griffith, supra, § 83(a).

Rule 9(g) conforms to past Mississippi practice requiring a detailed pleading of special damages and only a general pleading of general damages.

Briefly stated, "general" damage may be considered to be that which is so usual an accompaniment of the kind of breach or wrongdoing alleged in a complaint that the mere allegation of the wrong gives sufficient notice. Conversely, "special" damage is loss or injury of relatively unusual kind, which without specific notice the adversary would not understand to be claimed. See Vicksburg & M.R.R. Co. v. Ragsdale, 46 Miss. 458 (1872) (damages as may be presumed necessarily to result from a breach of contract need not be stated; special damages must be specifically stated).

General damage includes all those normal and standardized elements of recovery which the courts have adopted as safe bases of compensation and as to which they find it desirable to forego, not only the requirement of detailed pleading, but other requirements such as the "contemplation of the parties" requirement in contracts, or the requirement of certainty of proof. In contract and property cases, general elements of damage are usually based upon evaluation. Examples are the seller's claim for the refusal of the buyer to take the land or goods, measured by the difference between the contract price and the market value, or damages for the wrongful detention of land or goods, measured by the value of the use of the rental, valued during the delay. Similarly, when interest is allowable as damages, it is general damage.

The kinds of damage which are special and required to be set out in the complaint are infinite; only a few instances will be noted here. In cases of injury or to destruction of property, or its detention, any specific claims for damages other than the standardized compensation (based upon the value of the property and interest, or in case of detention, the rental or usable value) would be special. So in actions for breach of contract all consequential losses, such as expenses or the loss of profits expected upon transactions with third persons, must be specially pleaded. In personal injury suits, the following are usually treated as matters to be specially pleaded: loss of time and earnings; impairment of future earning capacity; aggravation by the injury of a pre-existing disease; and insanity resulting from the injury. C. McCormick, Damages § 8 (1935).

Rule 9(h) is an adaptation of Miss.Code Ann. § 11–7–39 (1972), while Rule 9(i) is an adaptation of Miss.Code Ann. § 11–5–11 (1972); neither provision is new to Mississippi practice.

[Comment amended effective April 13, 2000.]

RULE 10. FORM OF PLEADINGS

(a) Caption; Names of Parties. Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

(b) Paragraphs; Separate Statement. The first paragraph of a claim for relief shall contain the names and, if known, the addresses of all the parties. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and the paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) Adoption by Reference; Exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

(d) Copy Must Be Attached. When any claim or defense is founded on an account or other written instrument, a copy thereof should be attached to or filed with the pleading unless sufficient justification for its omission is stated in the pleading.

[Amended effective April 13, 2000.]

Advisory Committee Historical Note

Effective April 13, 2000, Rule 10(d) was amended to suggest, rather than require that documents on which a

been ascertained, which typically requires a hearing, in which the defaulting party may participate; in some situations a trial may be made available to determine an issue of damages. Moreover, the entry of a default judgment is a final disposition of the case and is an appealable order.

The distinction between an entry of default and a default judgment also has significance in terms of the procedure for setting them aside. The party against whom a default has been entered typically will attempt to have his default set aside in order to enable the action to proceed. A motion for relief under Rule 55(c) is appropriate for this purpose even though there has not been a formal entry of default. For example, when defendant fails to answer within the time specified by the rules, he is in default even if that fact is not officially noted. Therefore, he must request that the default be "excused" and secure leave to answer before his responsive pleading will be recognized.

Relief from a default judgment must be requested by a formal application as required by Rule 60(b). Because the request is for relief from a final disposition of the case, the party in default must take affirmative action to bring the case before the trial court a second time. A motion for relief under Rule 55(c) is not the equivalent of or an alternative to appeal. Of course, if the motion is denied, it is ripe for immediate appeal, but the right to appeal may be lost for failure to pursue it in a timely fashion.

Rule 55(d) sets out two relatively straight-forward propositions. The first sentence of the subdivision states that the provisions of Rule 55 are applicable to any party seeking relief, whether a plaintiff, third-party plaintiff, counterclaimant, or cross-claimant. According to the second sentence of Rule 55(d), which simply serves as a cross-reference, a default judgment in any case is "subject to the limitation of Rule 54(d)." The latter provision states that a default judgment "shall not be different in kind from or exceed in amount that prayed for in the demand for judgment."

For detailed discussions of Federal Rule 55, after which MRCP 55 is patterned, see 6 Moore's Federal Practice ¶¶ 55.01–.11 (1972), and 10 Wright & Miller, Federal Practice and Procedure, Civil §§ 2681–2690, 2692–2701 (1973).

RULE 56. SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim, or to obtain a declaratory judgment may, at any time after the expiration of thirty days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least ten days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered on the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affida-

vits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) Costs to Prevailing Party When Summary Judgment Denied. If summary judgment is denied the court shall award to the prevailing party the reasonable expenses incurred in attending the hearing of the motion and may, if it finds that the motion is without reasonable cause, award attorneys' fees.

Comment

The purpose of Rule 56 is to expedite the determination of actions on their merits and eliminate unmeritorious claims or defenses without the necessity of a full trial.

Rule 56 permits any party to a civil action to move for a summary judgment on a claim, counterclaim, or cross-claim when he believes that there is no genuine issue of material fact and that he is entitled to prevail as a matter of law. The motion may be directed toward all or part of a claim or defense and it may be made on the basis of the pleadings or other portions of the record, or it may be supported by affidavits and other outside material. Thus, the motion for a summary judgment challenges the very existence or legal sufficiency of the claim or defense to which it is addressed; in effect, the moving party takes the position that he is entitled to prevail as a matter of law because his opponent has no valid claim for relief or defense to the action, as the case may be.

Rule 56 provides the means by which a party may pierce the allegations in the pleadings and obtain relief by introducing outside evidence showing that there are no fact issues that need to be tried. The rule should operate to prevent the system of extremely simple pleadings from shielding claimants without real claims or defendants without real defenses; in addition to providing an effective means of summary action in clear cases, it serves as an instrument of discovery in calling forth quickly the disclosure on the merits of either a claim or defense on pain of loss of the case for failure to do so. In this connection the rule may be utilized to separate formal from substantial issues, eliminate improper assertions, determine what, if any, issues of fact are present for the jury to determine, and make it possible for the court to render a judgment on the law when no disputed facts are found to exist.

A motion for summary judgment lies only when there is no genuine issue of material fact; summary judgment is not a substitute for the trial of disputed fact issues. Accordingly, the court cannot try issues of fact on a Rule 56 motion; it may only determine whether there are issues to be tried. Given this function, the court examines the affidavits or other evidence introduced on a Rule 56 motion simply to determine whether a triable issue exists, rather than for the purpose of resolving that issue. Similarly, although the summary judgment procedure is well adapted to expose sham claims and defenses, it cannot be used to deprive a litigant of a full trial of genuine fact issues.

Rule 56 is not a dilatory or technical procedure; it affects the substantive rights of litigants. A summary judgment motion goes to the merits of the case and, because it does not simply raise a matter in abatement, a granted motion operates to merge or bar the cause of action for purposes of res judicata. A litigant cannot amend as a matter of right under Rule 15(a) after a summary judgment has been rendered against him.

It is important to distinguish the motion for summary judgment under Rule 56 from the motion to dismiss under Rule 12(b), the motion for a judgment on the pleadings under Rule 12(c), or motion for a directed verdict permitted by Rule 50.

A motion under Rule 12(b) usually raises a matter of abatement and a dismissal for any of the reasons listed in that rule will not prevent the claim from being reasserted once the defect is remedied. Thus a motion to dismiss for lack of subject matter or personal jurisdiction, improper venue, insufficiency of process or service of process, or failure to join a party under Rule 19, only contemplates dismissal of that proceeding and is not a judgment on the merits for either party. Similarly, although a motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted is addressed to the claim itself, the movant merely is asserting that the pleading to which the motion is directed does not sufficiently state a claim for relief; unless the motion is converted into one for summary judgment as permitted by the last sentence of Rule 12(b), it does not challenge the actual existence of a meritorious claim.

A motion for judgment on the pleadings, Rule 12(c), is an assertion that the moving party is entitled to a judgment on the face of all the pleadings; consideration of the motion only entails an examination of the sufficiency of the pleadings.

In contrast, a summary judgment motion is based on the pleadings and any affidavits, depositions, and other forms of evidence relative to the merits of the challenged claim or defense that are available at the time the motion is made. The movant under Rule 56 is asserting that on the basis of the record as it then exists, there is no genuine issue as to any material fact and that he is entitled to a judgment on the merits as a matter of law. The directed verdict motion, which rests on the same theory as a Rule 56 motion, is made either after plaintiff has presented his evidence at trial or after both parties have completed their evidence; it claims that there is no question of fact worthy of being sent to the jury and that the moving party is entitled, as a matter of law, to have a judgment on the merits entered in his favor.

A Rule 12(c) motion can be made only after the pleadings are closed, whereas a Rule 56 motion always may be made by defendant before answering and under certain circumstances may be made by plaintiff before the responsive pleading is interposed. Second, a motion for judgment on the pleadings is restricted to the content of the pleading, so that simply by denying one or more of the factual allegations in the complaint or interposing an affirmative defense, defendant may prevent a judgment from being entered under Rule 12(c), since a genuine issue will appear to exist and the case cannot be resolved as a matter of law on the pleadings.

Subsections (g) and (h) are intended to deter abuses of the summary judgment practice. Thus, the trial court may impose sanctions for improper use of summary judgment and shall, in all cases, award expenses to the party who successfully defends against a motion for summary judgment.

For detailed discussions of Federal Rule 56, after which MRCP 56 is patterned, see 10 Wright & Miller, Federal Practice and Procedure, Civil §§ 2711–2742 (1973); 6 Moore's Federal Practice ¶¶ 56.01–.26 (1970); C. Wright, Federal Courts § 99 (3d ed. 1976); see also Comment, Proce-

dural Reform in Mississippi: A Current Analysis, 47 Miss. L.J. 33, 63 (1976).

RULE 57. DECLARATORY JUDGMENTS

(a) Procedure. Courts of record within their respective jurisdictions may declare rights, status, and other legal relations regardless of whether further relief is or could be claimed. The court may refuse to render or enter a declaratory judgment where such judgment, if entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

The procedure for obtaining a declaratory judgment shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in actions where it is appropriate.

The court may order a speedy hearing of an action for declaratory judgment and may advance it on the calendar. The judgment in a declaratory relief action may be either affirmative or negative in form and effect.

(b) When Available.

(1) Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status or other legal relations thereunder.

(2) A contract may be construed either before or after there has been a breach thereof. Where an insurer has denied or indicated that it may deny that a contract covers a party's claim against an insured, that party may seek a declaratory judgment construing the contract to cover the claim.

(3) Any person interested as or through an executor, administrator, trustee guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust in the administration of a trust, or of the estate of a decedent, an infant, insolvent, or person under a legal disability, may have a declaration of rights or legal relations in respect thereto:

(A) to ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or,

(B) to direct the executors, administrators, or trustees, to do or abstain from doing any particular act in their fiduciary capacity; or,

(C) to determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

(4) The enumeration in subdivisions (1), (2) and (3) of this rule does not limit or restrict the exercise of the general powers stated in paragraph (a) in any proceeding where declaratory relief is sought in which a judgment will terminate the controversy or remove an uncertainty.

[Amended effective July 27, 2000.]

Comment

The purpose of Rule 57 is to create a procedure by which rights and obligations may be adjudicated in cases involving an actual controversy that has not reached the stage at which either party may seek a coercive remedy, or in which the party entitled to such a remedy fails to sue for it.

Actions for declaratory judgment represent a comparatively recent development in American jurisprudence. The traditional and conventional concept of the judicial process has been that the courts may act only when a complainant is entitled to a coercive remedy, such as a judgment for damages or an injunction. Until a controversy had matured to a point at which such relief was appropriate and the person entitled thereto sought to invoke it, the courts were powerless to act.

At times, however, there may be an actual dispute about the rights and obligations of the parties, and yet the controversy may not have ripened to a point at which an affirmative remedy is needed. Or this stage may have been reached, but the party entitled to seek the remedy may fail to take the necessary steps. For example, the maker of a promissory note may have stated to the payee that the instrument would not be honored at maturity because, perhaps, his signature is claimed to have been forged, or procured by fraud, or affixed without his authority. The payee had to wait until payment was due before appealing to the courts. It might well have been important for him to ascertain in advance whether the note was a binding obligation and whether he might rely on it and list it among his assets. Nevertheless, he could receive no judicial relief until the instrument became due and was dishonored. Or it might have been necessary for a person to determine whether he was bound by some contractual provision that he deemed void. In that event, if he desired to contest the matter, he had to assume the risk and to hazard the consequences of committing a breach and then await a suit.

In such situations the declaratory judgment remedy provides a useful solution. This remedy enlarges the judicial process and makes it more flexible by putting a new implement at the disposal of the court. Use of this procedure is always discretionary with the court. The jurisdiction of the courts is not expanded and requests for declaratory judgments may be heard only in cases that otherwise are within their jurisdiction.

Any doubt or difficulty about the procedure in an action for a declaratory judgment should disappear if the action is regarded as an ordinary civil action, as Rule 57 clearly intends. The incidents of pleading, process, discovery, trial, and judgment are the same. Only when the nature of the factual situation requires is a prayer for declaratory relief appropriate. The request for a declaratory judgment is but a normal part of the ordinary civil action.

As Rule 57 expressly provides, the procedure for obtaining a declaratory judgment must be "in accordance with these rules." Thus the requirements of pleading and practice in actions for declaratory relief are exactly the same as in the other civil actions. Consequently, the action is commenced by filing a complaint with the clerk and the issuance of a

(5) *Joint Clients.* As to a communication relevant to a matter of common interest between or among two (2) or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

Comment

Subsection (a) defines pertinent terms: who is a lawyer, who is a client, who are their representatives. These definitions clarify Mississippi law. The only existing statute relating to attorney-client relationship is M.C.A. § 73-3-37 which, among other things, includes a provision that one of an attorney's duties is "to maintain inviolate the confidence and, at every peril to themselves, to preserve the secrets of their clients . . . ."

The term "client" includes individuals, corporations and associations, and governmental bodies. Mississippi decisional law is in accord with Rule 502(a)(1) in that the privilege protects communications between an attorney and one who consults him with a view towards retaining him, but who eventually decides not to employ him. See Perkins v. Guy, 55 Miss. 153 (1877). The services provided by the attorney must be legal services in order to be cloaked with the privilege. Services which are strictly business or personal do not enjoy the privilege. See McCormick, Evidence, § 92. The Mississippi court has not recognized the privilege in those cases in which the attorney is merely a scrivener. Rogers v. State, 266 So.2d 10 (Miss.1972).

Rule 502(a)(2) defines representatives of a client. This takes on particular significance in regards to corporate clients. This group of employees who may be a client's representatives is larger than the "control group". The "control group" was formerly one of the leading tests for determining which corporate employees had the benefit of the privilege. See Upjohn Co. v. United States, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981), in which the Supreme Court construed the language of the Federal Rules of Evidence as invalidating the control group test and so rejected it.

The definition of lawyer in Rule 502(a)(3) covers any person licensed to practice law in any state or nation. It includes persons who are not lawyers but whom the client reasonably believes are lawyers.

The definition of representative of the lawyer in Rule 502(a)(4) is broadly designed to include the lawyer's employees and assistants. It also includes experts that the lawyer has hired to assist in the preparation of the case. It does not extend to an expert employed to be a witness. This conforms to existing Mississippi practice. Dictum in Wilburn v. Williams, 193 Miss. 831, 11 So.2d 306 (1943), indicated that the court might have followed such a definition if the issue was before it.

A communication which takes place in the presence of a third party is not confidential unless it complies with the statement in Rule 502(a)(5). If the third party does not fall within these categories in this subsection, his presence deems the communication not to be confidential. See Taylor v. State, 285 So.2d 172 (Miss.1973); Ferrell v. State, 208 Miss. 539, 45 So.2d 127 (1950).

The test for confidentiality is intent. Thus, a communication made in public cannot be considered confidential. Intent can be inferred from the particular circumstances.

Subsection (b) is a statement of the rule. The rule is drafted in such a way as to prevent eavesdroppers from testifying about the privileged communication. See the Advisory Committee's Notes to Deleted FRE 503 [which is identical to U.R.E. 502(b)].

The privilege extends to statements made in multiple party cases in which different lawyers represent clients who have common interests. Each client has a privilege as to his own statements. The FRE Advisory Committee's Notes to Deleted Rule 503 state that the rule is inapplicable in situations where there is no common interest to be promoted by a joint consultation or where the parties meet on a purely adversary basis.

Subparagraph (b) provides that the privilege includes lawyer to client communications as well as client to lawyer communications. See Barnes v. State, 460 So.2d 126, 131 (Miss.1984).

Subsection (c) establishes that the privilege belongs to the client or his personal representative. Barnes v. State, 460 So.2d 126, 131 (Miss.1984). The lawyer's claim is limited to one made on behalf of the client; he himself has no independent claim. See United States v. Jones, 517 F.2d 666 (5th Cir.1975).

Subsection (d) excludes certain instances from the privilege. Rule 502(d)(1) does not extend the privilege to advice in aid of a future crime or fraud. The provision that the client knew or reasonably should have known of the criminal or fraudulent nature of the act is designed to protect the client who is mistakenly advised that a proposed action is lawful. See McCormick, Evidence, § 75. Existing law in Mississippi on this point is unclear. Dicta in two 19th century cases suggest that the privilege did apply to protect statements regarding the client's motives in fraudulent schemes. See Parkhurst v. McGraw, 24 Miss. 134 (1852); Lengsfield and Co. v. Richardson and May, 52 Miss. 443 (1876). Additionally, the federal appellate court in Hyde Construction Co. v. Koehring Co., 455 F.2d 337 (5th Cir. 1972), has determined that the Mississippi courts would allow the privilege when an attorney, acting as the client's alter ego, commits a tort or fraud. It is uncertain, if this is an accurate reflection of the scarce Mississippi law on the point, but clearly under Rule 502(d)(1) the privilege in such a case would not apply.

Rule 502(d)(2) permits no privilege when the adversaries in a case claim the privilege from the same deceased client. The general rule is that the privilege survives death and may be claimed by the deceased's representative. However, this rule makes no sense in some cases, for instance, in will contests when various parties claim to be the representative of the decedent. Only at the end of the litigation will the court have determined who is the deceased's successor, and until it has made that determination, neither party is entitled to invoke the privilege.

Rule 502(d)(3) permits the use of statements made between a lawyer and his client when a controversy later develops between them, such as in a dispute over attorney's fees or legal malpractice.

RULE 503. PHYSICIAN AND PSYCHOTHERAPIST-PATIENT PRIVILEGE

(a) Definitions. As used in this rule:

(1) A *"patient"* is a person who consults or is examined or interviewed by a physician or psychotherapist.

(2) A *"physician"* is a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be.

(3) A *"psychotherapist"* is (1) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction, or (2) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

(4) A communication is *"confidential"* if not intended to be disclosed to third persons, except persons present to further the interest of the patient in the consultation, examination, or interview, persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist, including members of the patient's family.

(b) General Rule of Privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing (A) knowledge derived by the physician or psychotherapist by virtue of his professional relationship with the patient, or (B) confidential communications made for the purpose of diagnosis or treatment of his physical, mental or emotional condition, including alcohol or drug addiction, among himself, his physician or psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.

(c) Who May Claim the Privilege. The privilege may be claimed by the patient, his guardian or conservator, or the personal representative of a deceased patient. The person who was the physician or psychotherapist at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the patient.

(d) Exceptions.

(1) *Proceedings for Hospitalization.* There is no privilege under this rule in a proceeding to hospitalize the patient for mental illness, if the physician or psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(2) *Examination by Order of Court.* If the court orders an examination of the physical, mental or emotional condition of a patient, whether a party or a witness, there is no privilege under this rule with respect to the particular purpose for which the examination is ordered unless the court orders otherwise.

(3) There is no privilege under this rule as to an issue of breach of duty by the physician or psychotherapist to his patient or by the patient to his physician or psychotherapist.

(4) There is no privilege under this rule for communications, including past and current records of whatever nature, regarding a party's physical, mental, or emotional health or drug or alcohol condition relevant to child custody, visitation, adoption, or termination of parental rights. Upon a hearing in chambers, a judge, in the exercise of discretion, may order release of such records relevant to the custody, visitation, adoption, or termination action. The court may order the records sealed.

(e) In an action commenced or claim made against a person for professional services rendered or which should have been rendered, the delivery of written notice of such claim or the filing of such an action shall constitute a waiver of the privilege under this rule.

(f) Any party to an action or proceeding subject to these rules who by his or her pleadings places in issue any aspect of his or her physical, mental or emotional condition thereby and to that extent only waives the privilege otherwise recognized by this rule. This exception does not authorize ex parte contact by the opposing party.

[Amended October 13, 1992; amended effective May 27, 2004 to remove the privilege in child custody and like proceedings.]

Advisory Committee Historical Note

Effective October 13, 1992, Rule 503(f) was amended to state that the rule is inapplicable in contexts other than hearings or discovery proceedings and to delete reference to workers' compensation proceedings. 603–605 So.2d XXI (West Miss.Cas.1993).

Comment

Subsection (a) defines the terms "patient," "physician," "psychotherapist," and "confidential communication." Existing Mississippi law is codified at M.C.A. § 13–1–21. The existing statute is broader than Rule 503(a) in that it extends the privilege to physicians, osteopaths, dentists, hospitals, nurses, pharmacists, podiatrists, optometrists, and chiropractors. M.C.A. § 73–31–29 extends the privilege to psychologists. Additionally, under existing Mississippi law no allowance has been made for an erroneous belief that the treating individual was a physician. Rules 503(a)(2) and (3) make such an allowance.

Rule 503(a)(4) is essentially a codification of existing state practice. It is compatible with the definition of "confidential communication" under Rule 502 (the attorney-client privilege.)

Rule 503(b) is a statement of the privilege rule. It, too, is compatible with the statement of the attorney-client privilege in Rule 502. The public policy protecting communications made about alcohol and drug addiction arises out of the current contemporary concern about these problems. By protecting these communications it is hoped that rehabilitation efforts will be encouraged.

Subsection (c) is reflective of M.C.A. § 13–1–21. The privilege belongs to the patient, and only the patient can waive it.

Subsection (d) excepts four instances from the privilege. The first exception concerns commitment proceedings. Existing law in Mississippi is structured so that such communications currently are not privileged. See M.C.A. § 41–21–67 et seq.

The second exception under subsection (d) pertains to court-ordered physical or mental examinations. The exception is necessary for the effective utilization of this procedure. It is important to note that the exception is effective only with respect to the particular purpose for which the examination is ordered. No statement made by an accused in the course of an examination into competency to stand trial is admissible on the issue of guilt. See also Rule 4.08, Uniform Criminal Rules of Circuit Court Practice.

Under the third exception there is no privilege when a controversy develops between physician and patient, such as in a dispute over medical fees or medical malpractice.

Under subsection (d)(4), when determining whether records are relevant to a custody, termination, or adoption action, some of the factors courts should consider include whether: (1) the treatment was recent enough to be relevant; (2) substantive independent evidence of serious impairment exists; (3) sufficient evidence is unavailable elsewhere; (4) court ordered evaluations are an inadequate substitute; and (5) given the severity of the alleged disorder, communications made in the course of treatment are likely to be relevant.

Subsection (e) is required by considerations of fairness and policy, and simply provides that the institution of a claim, either by delivery of written notice or by the filing of an action, operates to waive the privilege as to any medical information relevant to the claim.

The primary impact of subsection (f) will be in personal injury actions, although the exception by its terms is not so limited. This subsection, like the remainder of these rules, has no application outside the context of hearing or discovery processes in the Mississippi Rules of Civil Procedure and other rules of court. See Rules 101 and 1101. By virtue of this exception a party who seeks recovery of damages for a physical, mental or emotional injury waives the privilege for purposes of that action only and to the extent that he or she has put his or her physical, mental or emotional condition in issue by his or her pleadings. With respect to any aspect of the party's physical, mental or emotional condition not put in issue by his or her pleadings, the privilege remains in full force and effect. Rules of Evidence by their definition govern the admissibility of evidence at trial. Subsection (f) is not a procedural rule and cannot be used as such.

[Amended October 13, 1992; amended effective May 27, 2004.]

RULE 504. HUSBAND–WIFE PRIVILEGE

(a) **Definition.** A communication is confidential if it is made privately by any person to that person's spouse and is not intended for disclosure to any other person.

(b) **General Rule of Privilege.** In any proceeding, civil or criminal, a person has a privilege to prevent that person's spouse, or former spouse, from testifying as to any confidential communication between that person and that person's spouse.

(c) **Who May Claim the Privilege.** The privilege may be claimed by either spouse in that spouse's own right or on behalf of the other.

(d) **Exceptions.** There is no privilege under this rule in civil actions between the spouses or in a proceeding in which one spouse is charged with a crime against (1) the person of any minor child or (2) the person or property of (i) the other spouse, (ii) a person residing in the household of either spouse, or (iii) a third person committed in the course of committing a crime against any of the persons described in (d)(1), or (2) of this rule.

[Rule 504(d) amended in *Fisher v. State*, 690 So.2d 268, 272 (Miss. 1996) to "apply prospectively upon publication in West's *Southern Reporter*" (published in *Southern Reporter 2d* advance sheet issue of May 1, 1997; amended May 2, 2002, amended effective April 3, 2003.]

[Amended effective May 1, 1997; May 2, 2002; April 3, 2003.]

Advisory Committee Historical Note

Effective April 3, 2003, Rule 504 was amended to effect technical changes. So.2d (West Miss.Cas.2003).

Effective May 2, 2002, Rule 504(d) and its Comment were amended to remove the privilege in civil actions between the spouses. 813–815 So.2d XXI (West Miss. Cases2002).

Rule 504(d) was amended in Fisher v. State, 690 So. 2d 268, 272 (Miss. 1996) to substitute "any minor child" for "a child of either" and to effect technical changes. The amendment applied prospectively upon publication (May 1, 1997, advance sheet) in West's Southern Reporter.

Comment

There are two areas of law which govern if and when one spouse may testify against the other, spousal competency and marital privilege. M.C.A. § 13–1–5 governs matters of spousal competency. On the other hand, marital privilege protects certain communications made during the marriage. The privilege extends only to communications which were intended to be confidential. Thus, the presence of another person, even a family member, is deemed to mean that the communication was not intended to be confidential. Likewise, if the intent was that the communication would be confidential, a third party may not testify regarding the communication, even if that third party learned it from one of the spouses directly. Rule 504(a) is in accord with existing Mississippi practice.

Rule 504(b) states the general rule. One spouse can prevent the other from testifying regarding the confidential communication in either a civil or criminal proceeding.

Rule 504(c) was amended in 2002 to make the spousal privilege rule consistent with Rule 601(a)(1) which makes spouses competent witnesses against each other in civil actions between them. The policy of preserving marital harmony which supports both rules is not applicable in cases in which they are adversary parties.

[Comment amended March 20, 1995; May 2, 2002, amended effective April 3, 2003.]