

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DEBRA ELLIS, EXECUTRIX OF THE ESTATE OF
WILLIE B. WOODRUFF, DECEASED, GEORGE
MITCHELL, JAMES MITCHELL, and
BETTY MITCHELL individually and on behalf
of all other wrongful death beneficiaries of
WILLIE MAE MITCHELL, deceased

PLAINTIFFS-APPELLANTS

V.

NO: 2007-CA-01315

MISSISSIPPI BAPTIST MEDICAL CENTER, INC.
and MISSISSIPPI BAPTIST HEALTH SYSTEMS, INC.
d/b/a BAPTIST MEDICAL CENTER

DEFENDANTS-APPELLEES

On Appeal from the Circuit Court of the First
Judicial District of Hinds County

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

ORAL ARGUMENT REQUESTED

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STATUTES AND RULES:

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REQUEST FOR ORAL ARGUMENT

Plaintiffs request oral argument in this Appeal. Plaintiffs believe that oral argument will be helpful to the Court because this Appeal involves a fairly complex legal issue of the interplay of the relation back provisions of Rule 15(c) of the Mississippi Rules of Civil Procedure with the certification requirements that a medical malpractice Complaint must contain pursuant to §11-1-58 of the Mississippi Code Annotated (Supp.).

REPLY BRIEF

Rather than respond substantively to the argument set forth in the Brief of Plaintiffs-Appellants, the Defendants-Appellees choose to attack the integrity of Plaintiffs' attorneys. "Once again Plaintiff-Appellants presents a skewed and incomplete statement of the procedural history of the case." (Emphasis added.) (R.B.1¹) In their entire Brief, Defendants never respond to nor attempt to distinguish the principal case relied on by Plaintiffs. *Scaife v. Scaife*, 880 So. 2d 1089 (Miss. App. 2004) (P.B.6²). Instead, Defendants now for the first time argue that the ruling of the trial court granting Plaintiffs leave to file their Third Amended Complaint was an abuse of discretion (R.B.11) although the Defendants never at any time below complained of the ruling.

Chronology

The accurate chronology contained in the Record with respect to the filing of Plaintiffs' §11-1-58 certificate is as follows. (There were two sets of Defendants in the Circuit Court proceedings: set related to Community Nursing Home, Inc., since dismissed, and the Defendants-Appellees here, the "Baptist Defendants.")

21 Jan. 2005	Complaint filed without §11-1-58 certificate. (R.5)
14 Feb. 2005	Amended Complaint filed without §11-1-58 certificate. (R.8; R.E.1)
23 Feb. 2005	Motion to Dismiss filed by Community Nursing Home Defendants (co-defendants not parties to this Appeal) for failure of the Plaintiff to provide prior notice of suit required by §15-1-36 of the Mississippi Code Annotated

¹ Reply Brief of Defendants-Appellees.

²Petitioners' (Plaintiffs') Brief.

and failure to include a §11-1-58 certificate in the Complaint. (R.12; R.E.9)

28 Feb. 2005 Baptist Defendants file their Answer with affirmative defenses of failure to state a claim, accord and satisfaction, release, and statute of limitations. (R.23)

21 Mar. 2005 Plaintiffs file Motion for leave to file Third Amended Complaint with proposed Third Amended Complaint attached. (R.27; R.E.9)

23 Mar. 2005 Circuit Court enters Order granting leave to file Third Amended Complaint. (R.34; R.E.16)

30 Mar. 2005 Plaintiffs' Third Amended Complaint filed with §11-1-58 certificate. (Supplemental Record - 10-9-07; R.E.46)

7 Apr. 2005 Baptist Defendants file Answer to Third Amended Complaint raising failure to state a claim, accord and satisfaction, release, and statute of limitations as affirmative defenses. (R.35; R.E.17)

24 July 2006 Community Hospital co-defendants supplement their Motion to Dismiss. (R.39)

8 Aug. 2006 Baptist Defendants join in Motion to Dismiss of co-defendants. For the first time the Baptist Defendants raise noncompliance with §11-1-58 as a ground for dismissal. (R.45)

14 Sept. 2006 Plaintiffs and Community Nursing Home co-defendants enter an Agreed Judgment of Dismissal. (R.12)

18 Sept. 2006 Plaintiffs respond to Baptist Defendants' §11-1-58 motion noting that Plaintiffs' Third Amended Complaint with §11-1-58 certificate relates back to date of filing of original Complaint. (R.65)

24 Oct. 2006 Circuit Court enters Order of Dismissal

and Final Judgment granting Baptist Defendants' Motion to Dismiss for failure to comply with §11-1-58. (Supplemental Record - 8/27/07; R.E.44)

27 Oct. 2006 Plaintiffs file Motion to Alter or Amend and Reconsider Order of Dismissal and Final Judgment attaching affidavit of Plaintiffs' attorney and affidavit of Plaintiffs' expert, Dr. Calvin D. Ramsey, that prior to August 2004, Dr. Ramsey was retained by Plaintiffs' attorneys and provided an opinion of medical malpractice liability on the part of the Baptist Defendants. (R.69; R.E.21)

January 2007 Order entered denying Plaintiffs' Motion to Alter or Amend or Reconsider Order of Dismissal and Final Judgment. (R.96; R.E.43)

ARGUMENT

The difference in the situation in the case at bar and the cases cited by Defendants in their Brief is (1) Plaintiffs' attorneys here did consult and obtain an opinion from a qualified medical expert prior to filing their Complaint in this action as required by §11-1-58; (2) with leave of Court, Plaintiffs filed an amended Complaint with the §11-1-58 certificate that under Rule 15(c)³ of the Mississippi Rules of Civil Procedure related back to the date of filing of the original Complaint.

³"Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. . . ."

Relation Back of Third Amended Complaint

In *Scaife v. Scaife*, 880 So.2d 1089 (Miss. App. 2004), the defendant did not raise his defense of lack of personal jurisdiction⁴ in his answer to plaintiff's original complaint. Later, the defendant obtained leave of court to file an amended answer, which included a defense of lack of personal jurisdiction. The plaintiff asserted that defendant's original answer without the defense of lack of personal jurisdiction constituted a general appearance by the defendant. However, the Mississippi Court of Appeals held that since under Rule 15(c) defendant's amended answer related back to his original answer, the original answer did not constitute a general appearance. 880 So. 2d at 1094. In effect the original answer had been replaced *ab initio* by the amended answer.

The same reasoning is applicable to the case at bar. Just as the amended answer with its affirmative defense of lack of jurisdiction in *Scaife* related back to the date of the original answer, so Plaintiffs' Third Amended Complaint (Supp. Record - 10-9-07; R.E.46) in this case relates back to the date of the original Complaint. Just as the amended answer with its new affirmative defense in *Scaife* replaced the original answer which had waived the affirmative defense, so the §11-1-58 certificate in Plaintiffs' Third Amended Complaint replaced the original Complaint which omitted the certificate.

Similarly, in *Copiah Medical Associates v. Mississippi Baptist Health Systems*, 898 So. 2d 656 (Miss. 2005), Copiah Medical Associates sued Mississippi Baptist Health Systems for breach of contract. Copiah's Complaint was filed in circuit court on December 15, 2000. On February 6, 2001, Baptist Health Systems filed a separate claim against

⁴Miss. Rule of Civil Procedure Rule 8 requires lack of personal jurisdiction be pled as an affirmative defense.

Copiah Associates in chancery court for specific performance of a lease between the parties. On April 26, 2001, Copiah amended its circuit court case with leave of court to add a declaratory judgment claim that the lease between the parties was void.

The Mississippi Supreme Court held that Copiah's amended complaint for declaratory judgment, filed with leave of court, related back to the date of the original filing of Copiah's complaint, which had been filed before Baptist's suit for specific performance. Therefore, Baptist's specific performance claim was a compulsory counterclaim under Rule 13 to Copiah's circuit court complaint and the chancery court was divested of jurisdiction of the Baptist complaint under the doctrine of priority jurisdiction.

Defendants' Belated Claim of Abuse of Discretion

In their Brief in this case, the Baptist Defendants make no effort to distinguish the legal reasoning of *Scaife* with respect to the relation back of amended complaints. Instead, the Baptist Defendants argue for the first time in these entire proceedings that "it was an abuse of discretion for Judge Green to allow the Plaintiff to attempt to 'substantially comply' with §11-1-58 by way of a belated amendment." (R.B.11) However, from the date of Judge Green's Order granting leave to file a Third Amended Complaint on March 23, 2005 (R.34; R.E.16) through the trial court's final Order denying Plaintiffs' Motion to Alter or Amend and Reconsider Order of Dismissal and Final Judgment on January 10, 2007 (R.96; R.E.43), the Baptist Defendants never presented to Judge Green or to Judge Yerger, after the case was transferred to him, any objection, any motion to reconsider or any complaint

whatsoever concerning the trial court's granting Plaintiffs' leave to file their Third Amended Complaint.⁵

Defendants argue in their Brief that Judge Green ruled on Plaintiffs' Motion to Amend too quickly and did not give Defendants' 10 days in which to object. (R.B.10) However, Defendants never objected or otherwise complain to Judge Green, or Judge Yerger, of not been afforded 10 days to object to Plaintiffs' motion. Defendants seek to raise this issue for the first time in this appeal. No issue can be raised for the first time on appeal. A trial judge can not be put in error on a claim that was never presented to the trial judge for ruling. *Methodist Hospitals of Memphis v. Guardianship of Marsh*, 518 So. 2d 1227, 1228 (Miss. 1988).

The §11-1-58 Certificate Relates Back Under Rule 15(c)

Defendants also argue that the §11-1-58 certificate attached to Plaintiffs' Third Amended Complaint somehow did not arise out of the "conduct, transaction, or occurrence" set forth in the original Complaint and therefore does not relate back to the date of the original Complaint. Clearly, consultation with Plaintiffs' medical expert prior to the filing of the original Complaint, as set forth in the Affidavits of Plaintiffs' attorney (R.89; R.41) and Plaintiffs' medical expert (R.E.74; R.E.26) arises out of the medical malpractice conduct complained of in this action. *Scaife v. Scaife* held that defendants' affirmative defense of lack of personal jurisdiction in his amended answer related back to the date of his original answer. The *Scaife* court did not rule that the defense of lack of personal

⁵Plaintiffs' proposed Third Amended Complaint containing the §11-1-58 certificate was attached to the Plaintiffs' Motion to File Third Amended Complaint. (R.29; R.E.11)

jurisdiction did not arise out of the transaction that constituted the *gravamen* for the complaint and answer.

CONCLUSION

This is not a case where Plaintiffs failed to consult with a medical expert prior to filing suit as required by §11-1-58 and are now trying to rectify that failure. Plaintiffs' attorneys did in fact consult with a qualified medical expert prior to filing their Complaint and obtained his opinion that medical negligence had probably been committed by the Baptist Defendants. Although complying with the substantive requirements of §11-1-58, Plaintiffs attorneys did neglect to include the §11-1-58 to their original Complaint. This was cured by the relation back provisions of Rule 15(c) when Plaintiffs with leave of Court filed their Third Amended Complaint with the required §11-1-58 certificate included. Plaintiffs-Appellants respectfully submit that the judgment of the trial court dismissing their Third Amended Complaint should be reversed.

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CERTIFICATE OF SERVICE

I certify that I have this date mailed, postage prepaid, a true and correct copy of the foregoing to:

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ATTORNEY FOR APPELLEES

Honorable W. Swan Yerger
CIRCUIT JUDGE
Post Office Box 327
Jackson, MS 39205

This the 12th day of March 2008.

Barry H. Powell

ATTORNEY FOR PLAINTIFFS-APPELLANTS