

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

BRIEF OF PLAINTIFFS-APPELLANTS

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned hereby certifies that the following persons and entities 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 Courts of Appeals may evaluate possible disqualification or recusal.

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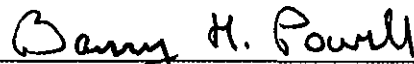
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REQUEST FOR ORAL ARGUMENT

Plaintiff requests 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.).

STATEMENT OF ISSUE

Whether in a medical malpractice case when a plaintiff's attorney has reviewed the facts of the case and consulted with a qualified medical expert prior to filing suit but omits the certification of having done so required by §11-1-58 of the Mississippi Code Annotated (Supp.), whether such omission is cured by a subsequent amended complaint filed pursuant to an unobjected to order granting leave to file the amended complaint, which under Rule 15(c) of the Mississippi Rules of Civil Procedure relates back to the date of the filing of the original complaint.

STATEMENT OF THE CASE

Plaintiffs filed a wrongful death Complaint¹(R.5) for medical negligence against Defendants and then filed an Amended Complaint (R.8; R.E.1) prior to Defendants' answer. Defendants answered Plaintiffs' Amended Complaint (R.23; R.E.5) and did not raise any defense under §11-1-58 of the Mississippi Code Annotated (Supp.), which requires a certificate of consultation with a qualified medical expert in advance of a suit's being filed for medical negligence and that the attorney has concluded based on the review that there is a reasonable basis for the commencement of the action.

Plaintiffs then filed a Motion to file a Third Amended Complaint. (R.27; R.E.9) The proposed Third Amended Complaint attached to Plaintiffs' Motion for leave to amend included the statutory language that Plaintiffs' counsel had consulted with a qualified medical expert in advance of suit being filed. (R.32; R.E.14) Defendants did not object to or oppose the Motion to file a Third Amended Complaint. An unopposed Order granting Plaintiffs leave to file their Third Amended Complaint was duly entered (R.34; R.E. 16) and Plaintiffs' Third Amended Complaint with the §11-1-58 certification was duly filed. S.R.1²; R.E. 45) In their Answer to the Third Amended Complaint, Defendants again did not plead any claim of failure to comply §11-1-58. (R.35; R.E.17).

After Plaintiffs filed their Third Amended Complaint with the statutory certification under Section 11-1-58 included, Defendants filed a Motion to Dismiss Plaintiffs' action alleging failure to comply with §11-1-58. (R.45) The Trial Court granted Defendants'

¹The Complaint and Amended Complaint named two additional Defendants who were subsequently dismissed by an agreed Final Judgment of Dismissal. (R.62)

²Supplemental Record (10/9/07)

Motion to Dismiss. (S.R.³; R.E. 44) Plaintiffs then filed a Motion to Alter or Amend and Reconsider, (R.69; R.E.21), which was denied by the Trial Court. (R.96; R.E. 43) From the dismissal of their action, Plaintiffs have prosecuted this Appeal.

SUMMARY OF ARGUMENT

Before filing their Complaint for medical negligence, Plaintiffs' attorneys duly conferred with a qualified medical expert and obtained his opinion. However, Plaintiffs' counsel inadvertently omitted the §11-1-58 certificate when the original Complaint was filed. Defendants' Answer to the Complaint did not raise lack of the statutorily required notice as an affirmative defense. Plaintiffs filed a Motion for leave to file a Third Amended Complaint, which contained the notice required under §11-1-58. Defendants did not oppose the Motion to Amend. The Order granting Plaintiffs leave to file their Third Amended Complaint with the §15-1-58 certificate was unopposed and unobjected to. Under Rule 15 (c) of the Mississippi Rules of Civil Procedure, Plaintiffs' Amended Complaint with the §11-1-58 certificate related back to the date of the filing of the original Complaint. Therefore, Defendants' Motion to Dismiss for failure to comply with §11-1-58, which was filed after Plaintiffs filed their Third Amended Complaint with the §11-1-58 certificate should not have been granted.

ARGUMENT

Section 11-1-58 in the Mississippi Code Annotated (Supp.) requires that complaints for medical malpractice claims must be accompanied by a certificate executed by the attorney for the Plaintiff declaring that the attorney has reviewed the facts of the case and has consulted with at least one qualified expert and that the attorney has concluded on the

³Supplemental Record.

basis of such review and consultation that there is a reasonable basis for the commencement of the action. Although in this case Plaintiffs' attorneys had consulted and retained an opinion from a qualified expert prior to filing suit (R.74, 89; R.E. 26,41), the Compliant (R.8, R.E.1) inadvertently omitted the required §11-1-58 certificate.

Plaintiffs acknowledge that this Court has strictly construed §11-1-58 and has dismissed or upheld dismissals of medical malpractice actions where the complaints did not contain the required §11-1-58 certification, but the certification was belatedly proffered. *Caldwell v. North Mississippi Medical Center*, 956 So. 2d 888 (2007); *Walker v. Whitfield Nursing Center, Inc.*, 931 So. 2d 583 (Miss. 2006). These decisions, however, are distinguishable and not controlling.

In this case, Plaintiffs did consult with a qualified expert and obtained his opinion that Plaintiffs had a meritorious claim prior to filing the Complaint. (R.74, 89; R.E. 26-42. However, Plaintiffs' attorneys inadvertently omitted the required §11-1-58 certificate from the Complaint. (R.9.) Defendants' Answer to the Complaint did not raise an affirmative defense of noncompliance with §11-1-58, but just generally pled, *inter alia*, the Mississippi Rules of Civil Procedure Rule 12 (b)(6) defense of failure to state a claim upon which relief can be granted. (R.35; R.E.17.)

Subsequently, Plaintiffs filed a Motion for leave to file their Third Amended Complaint. (R.27; R.E.9.) The proposed Third Amended Complaint attached to the Motion to Amend contained the § 11-1-58 certificate. (R.32; R.E.14) Defendants did not object to nor oppose Plaintiffs' Motion to Amend. An unopposed Order granting Plaintiffs' leave to file the Amended Complaint with the §11-1-58 certification was granted. (R.34; R.E.16) Plaintiffs filed their Third Amended Complaint containing the §11-1-58 certification. (S.R.1;

R.E. 45). Defendants' Answer once again did not plead an affirmative defense of noncompliance with §11-1-58, but generally pled their 12(b)(6) defense of failure to state a claim. (R.35; R.E.17)

Finally, Defendants filed a Motion to Dismiss for failure to comply with §11-1-58. (R.45) The Trial Court granted Defendants' motion (S.R.1⁴; R.E.44) and later denied Plaintiffs' Motion to Reconsider. (R. 96; R.E. 43) Plaintiffs respectfully submit that the Trial Court erred in granting Defendants' Motion to Dismiss for failure to comply with §11-1-58.

Defendants belatedly filed their Motion to Dismiss Plaintiffs' action alleging failure to comply with §11-1-58 (R.45) after Plaintiffs had already been granted leave of Court pursuant to Rule 15 of the Mississippi Rules of Civil Procedure to file their Third Amended Complaint, which contained the requisite statutory language of expert consultation (R.34; R.E.16) and after the Third Amended Complaint had been filed. (S.R.1⁵; R.E. 45) Rule 15(c)⁶ of the Mississippi Rules of Civil Procedure provides that a claim in an amended pleading relates back to the date of the filing of the original complaint if the amended claim arose out of the same conduct or occurrence set forth in the original complaint. The certification in Plaintiffs' Third Amended Complaint that Plaintiffs' counsel consulted with a medical expert before filing suit against the Defendants certainly relates to the same conduct and occurrence set forth in Plaintiffs' original Complaint. Therefore, under Rule

⁴Supplemental Record (10/9/07)

⁵Supplemental Record (10/9/07)

⁶"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. . ."

15 (b), Plaintiffs' §11-1-58 certification relates back to the date of Plaintiffs' original Complaint.

Moreover, the certification that Plaintiffs' counsel consulted with a medical expert before filing their original Complaint is factually true. Plaintiffs' original Complaint was filed on January 1, 2005. (R.5) Prior to that date on August 12, 2004, Plaintiffs' counsel had consulted with a qualified physician in detail about Plaintiffs' claim.⁷

By failing to object to Plaintiffs' Motion to amend their Complaint to add the statutory language, Defendant cannot now object that the representation is contained in the Third Amended Complaint. *Cf. Broadhead v. Tempering*, 611 So.2d 949, 953 (Miss. 1992) (A trial court can grant a plaintiff's motion to amend the pleadings to include an additional claim, even during trial. If the defendant does not object, the defendant can not later complain.) And under Rule 15(c) the Plaintiffs' amendment in this case, filed pursuant to leave of Court, relates back to the date of the filing of Plaintiffs' original Complaint.

In an analogous situation in *Scaife v. Scaife*, 880 So.2d 1089 (Miss. App. 2004), the defendant did not file defense of lack of personal jurisdiction⁸ 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

⁷Dr. Calvin D. Ramsey. The Affidavit of Dr. Ramsey concerning such consultation, along with his curriculum vitae and the transcript of the notes of the conversation that were dictated at the time by Dr. Ramsey as he conferred with Plaintiffs' counsel is in the Record at R.74; R.E.26. The Affidavit of Rajita Iyer Moss, one of Plaintiffs' counsel, of her and co-counsel Bob Owens' conference with Dr. Ramsey on that date is in the record at R. 89; R.E.41.

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

a general appearance by the defendant. However, the Mississippi Court of Appeals held that since under Rule 15 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 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.

This Court's ruling in *Caldwell v. North Mississippi Medical Center*, 956 So. 2d 88 (Miss. 2007) is not controlling. In that medical malpractice case, the plaintiffs filed their Complaint without a §11-1-58 certificate. Defendants' answer specifically raised as an affirmative defense the failure of the complaint to contain the §11-1-58 certificate. This Court noted that affirmative defense was filed well within the time that would have allowed the plaintiffs to have corrected their notice deficiency within sixty days of filing their complaint pursuant §11-1-58 (b), but plaintiffs did not do so. 956 So. 2d 892. The plaintiffs filed an amended complaint, but still did not file their §11-15-58 certificate or attach the expert disclosure.

In the case *sub judice*, Defendants never raised as an affirmative defense Plaintiffs' failure to include the §11-1-58 certificate in their Complaint. However, as discussed above, Plaintiffs did obtain leave of Court to file a Third Amended Complaint with the §11-1-58

certification and did so prior to Defendants' Motion to Dismiss. Under Rule 15 (c) of the Mississippi Rules of Civil Procedure, Plaintiffs' Third Amended Complaint with §11-1-58 certificate related back to the date of the filing of the original Complaint and in essence stood as the originally filed Complaint on the date the original Complaint was filed.

In *Walker v. Whitfield Nursing Center, Inc.*, 931 So. 2d 583 (Miss. 2006), another medical malpractice case, the plaintiff also did not file a §11-1-58 certificate with her complaint. During the course of the litigation, the plaintiff submitted a sworn interrogatory answer that she had consulted no expert. Later, in response to defendant's motion for summary judgment for failure to attach the §11-1-58 certificate, the plaintiff claimed to have consulted with a nurse prior to filing suit. This Court affirmed the dismissal of plaintiff's complaint for failure to comply with §11-1-58. In that case, there was no amended complaint with a §11-1-58 certificate that related back to the date of the original filing of the complaint.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that the dismissal of Plaintiffs' Third Amended Complaint, which had been filed with leave of Court and without objection by the Defendants, for failure of the original Complaint to contain the §11-1-58 certificate was error. The certificate contained in the Third Amended Complaint related back under Rule 15(c) to the date of the filing of the original Complaint.

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This the 24th day of October 2007.

Barry H. Powell
ATTORNEY FOR PLAINTIFFS-APPELLANTS