

IN THE SUPREME COURT OF MISSISSIPPI

CHARLES STEPHEN ANDREWS, II

APPELLANT

VS.

NO. 2007-01390

**SALVADORE ARCEO, M.D., RIVER OAKS
HOSPITAL, AND KAREN B. SHACKLEFORD**

APPELLEES

**ON APPEAL FROM THE CIRCUIT COURT OF
RANKIN COUNTY, MISSISSIPPI
CIVIL ACTION NO. 2006-184-C**

BRIEF OF APPELLEE

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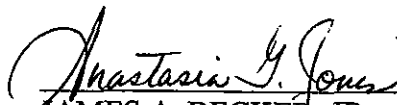
ATTORNEYS FOR APPELLEES

CERTIFICATE OF INTERESTED PARTIES

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 this Court may evaluate possible disqualification or recusal.

Charles Stephen Andrews, II	-	Plaintiff/Appellant
M. Judith Barnett, Esquire	-	Attorney of Record for Plaintiff/Appellant
Salvadore Arceo, M.D.	-	Defendant/Appellee
Anastasia G. Jones	-	Attorney of Record for Defendant/Appellee
James A. Becker, Jr.	-	Attorney of Record for Defendant/Appellee
John Chapman	-	Attorney of Record for River Oaks Hospital
Judge William E. Chapman, III	-	Rankin County Circuit Court Judge
River Oaks Hospital	-	Defendant
Karen Shackelford	-	Defendant

Respectfully submitted, this the 25th day of February, 2008.



JAMES A. BECKER, JR.
ANASTASIA G. JONES

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STATEMENT OF THE ISSUES

- I.. THE ORDER OF THE TRIAL COURT GRANTING SUMMARY JUDGMENT SHOULD BE AFFIRMED BECAUSE ANDREWS FAILED TO PROVIDE 60 DAYS' WRITTEN NOTICE TO DR. ARCEO OF HIS INTENT TO FILE THIS ACTION AS REQUIRED PURSUANT TO MISS. CODE ANN. § 15-1-36(15).**

- II. THE STATUTE OF LIMITATIONS BEGAN TO RUN NO LATER THAN AUGUST 16, 2004, AND EXPIRED ON AUGUST 16, 2006.**

STATEMENT OF THE CASE

Nature of the Case

This is a case alleging medical malpractice, where Charles Stephen Andrews, II, Plaintiff below / Appellant (hereinafter "Andrews") contends that Dr. Salvatore Arceo, the Defendant below / Appellee (hereinafter "Dr. Arceo"), failed to meet the standard of care in the treatment of Andrews' right knee. The trial court awarded summary judgment for Andrews' failure to provide Dr. Arceo with notice of the intention to file an action against him as required by section 15-1-36(15) of the Mississippi Code. MISS. CODE ANN. §15-1-36(15) (Rev. 2003). In addition, the trial court held that the two year medical malpractice statute of limitations was applicable, as codified in section 15-36-2, and had expired. MISS. CODE ANN. §15-36-2 (Rev. 2003).

Course of the Proceedings

The Complaint in this case was filed on July 3, 2006, alleging medical negligence against River Oaks Hospital, and Drs. Karen Shackleford and Salvatore Arceo. Vol. 1, p. 10. The claims against River Oaks Hospital and Dr. Karen Shackleford are pending. Dr. Arceo served his Answer on August 17, 2006. Vol. 1, p. 32. On August 22, 2006, Dr. Arceo served Andrews with Interrogatories, Request for Production of Documents, and Request for Admissions. Vol. 1, p. 38. On October 23, 2006, Andrews served Responses to Dr. Arceo's Request for Admissions. Vol. 1, p. 44. On January 5, 2007, Dr. Arceo served Itemization of Undisputed Facts, Motion to Dismiss for Failure to State a Claim, Motion to Strike Untimely Responses to Requests for Admissions, and for Summary Judgment. Vol. 1, p. 52. Also on January 5, 2007, Dr. Arceo served Andrews with Notice of Hearing for January 22, 2006, on Dr. Arceo's Motion to Strike Untimely Responses to Requests for Admission, and for Summary Judgment. Vol. 1, p. 47. On January 16, 2007, Andrews

filed Motion for Additional Time to Respond to Dr. Arceo's Motion to Dismiss for Failure to State a Claim, Motion to Strike Untimely Responses to Requests for Admissions, and for Summary Judgment. Vol. 1, p. 118. Said Motion was granted by Order dated January 25, 2007, and extended time for Andrews' filing until January 23, 2007. Vol. 2, p. 169. On January 15, 2007, Andrews served Responses to Dr. Arceo's Interrogatories and Request for Production of Documents. Vol. 1, p. 121. Dr. Arceo served Re-Notice of Hearing on January 17, 2007, for a hearing date on March 5, 2007, on his Motion to Strike Untimely Responses to Requests for Admission, and for Summary Judgment. Vol. 1, p.123. Andrews served Response to Dr. Arceo's Motion to Dismiss for Failure to State a Claim, Motion to Strike Untimely Responses to Requests for Admissions, and for Summary Judgment on January 22, 2007. Vol. 1, p. 125. Dr. Arceo served on February 2, 2007, Reply to Plaintiff's Response to Motion to Dismiss. Vol. 2, p. 170. On March 28, 2007, Dr. Arceo served Re-Notice of Hearing for April 23, 2007. Vol. 2, p. 222. Said hearing was held on that date. Vol. 3, p. 1. On April 23, 2007, the court granted Partial Summary Judgment as to Dr. Arceo, from which Andrews filed Notice of Appeal on April 30, 2007. Vol. 2, p. 225-26, 230. Andrews filed Designation of the Record on August 10, 2007, and Certificate of Compliance on August 23, 2007. Vol. 2, p. 234, 237.

Statement of the Facts

Dr. Salvatore Arceo treated Andrews in the emergency room at River Oaks Hospital on August 13, 2004, when he injured his knee in a motorcycle accident. Vol. 1, p. 101. It is this incident which gives rise to Andrews' claim for medical negligence.

Prior to filing the Complaint for this case on July 3, 2006, Andrews had filed another complaint on March 7, 2006, for this same alleged injury. Vol. 2, p. 153. That complaint did not

name Dr. Arceo as a defendant as the treating physician in the emergency room. Vol. 2, p. 153. It named Dr. Andrew Anfanger as a defendant because he had mistakenly been identified as the emergency room physician who treated Andrews at River Oaks Hospital when he presented at the emergency room on the date of the motorcycle accident. Vol. 2, p. 177; R.E. p. 177. Dr. Anfanger received the 60 day written notice of intent to sue, dated May 30, 2005, as required by section 15-1-36(15) of Mississippi Code Annotated, and Mr. James Becker was engaged to represent Dr. Anfanger in April 2006. Vol. 1, p. 141. Mr. Becker notified Andrews' counsel by letter on May 2, 2006, that Dr. Anfanger did not treat Andrews on the date of his motorcycle accident, August 13, 2004. Vol. 2, p. 177; R.E. p. 177. The hospital record states that Dr. Anfanger was the attending physician when Andrews was admitted to River Oaks Hospital on August 13, 2004, at 17:40. Vol. 1, p. 101. However, it was established prior to the filing of the Complaint of July 3, 2006, and the record also shows, that Dr. Anfanger did not treat Andrews and that it was Dr. Arceo who actually examined Andrews on August 13, 2004, at 18:10. Vol. 1, p. 89; R.E. p. 89; Vol. 2, p. 178; Vol. 3, p. 4.

On May 25, 2006, the court entered an Agreed Order to amend the complaint and substitute Dr. Arceo for Dr. Anfanger. Vol. 2, p. 182. Dr. Arceo did not retain Mr. Becker as his counsel until June 23, 2006, when Mr. Becker notified Dr. Arceo that the complaint was being amended to substitute him as a defendant. Vol. 2, p. 183; R.E. p. 183.

However, the complaint was not amended; instead, the circuit court entered an Agreed Order of Dismissal Without Prejudice on July 3, 2006. Vol. 2, p. 181. On that same date Andrews filed the Complaint in this case naming Dr. Arceo as a defendant, alleging medical negligence against Dr. Salvatore Arceo, River Oaks Hospital, and Dr. Karen Shackleford. Vol. 1, p. 10. Dr. Arceo filed

his Answer and served Andrews with discovery on August 22, 2006. Vol. 1, pp. 32, 38.

It is undisputed that Dr. Arceo never received a 60 day written notice of intent to sue, as required by section 15-1-36(15) of Mississippi Code Annotated. Andrews admitted that no notice was given in his untimely responses to Dr. Arceo's Requests for Admissions. Vol. 1, pp. 81-82; R.E. pp. 81-82.

Other facts will be brought forth as necessary to support the issues presented therein.

SUMMARY OF THE ARGUMENT

Andrews argues that the requirement of a sixty day written notice of intent to sue Dr. Arceo, set forth by Mississippi Code Annotated section 15-1-36(15), was not necessary in this case because Dr. Arceo's counsel, Mr. Becker, was aware that Dr. Arceo was the doctor that Andrews intended to sue. Andrews also argues that Dr. Arceo waived the notice requirement by serving discovery on him. Dr. Arceo asserts that the Mississippi Supreme Court has construed the notice statute to require strict compliance, even under circumstances where discovery has proceeded in a case.

ARGUMENT

I. THE ORDER OF THE TRIAL COURT GRANTING SUMMARY JUDGMENT SHOULD BE AFFIRMED BECAUSE ANDREWS FAILED TO PROVIDE 60 DAYS' WRITTEN NOTICE TO DR. ARCEO OF HIS INTENT TO FILE THIS ACTION AS REQUIRED PURSUANT TO MISS. CODE ANN. § 15-1-36(15).

The Law

It has been established in Mississippi by statute, in section 15-1-36(15) of the Mississippi Code,¹ and affirmed by the Supreme Court, that a plaintiff may not begin an action against a

¹ Section 15-1-36(15) states, "No action based upon the health care provider's professional negligence may be begun unless the defendant has been given at least sixty (60) days' prior written notice of the intention to begin the action. No particular form of notice is required, but it shall notify the

healthcare provider based on professional negligence until the plaintiff gives the provider sixty days written notice of his intent to bring suit. MISS. CODE ANN. §15-1-36(15) (Rev.2003). Service of this notice will extend the time to commence an action by sixty days if the notice is served within sixty days of the expiration of the statute of limitations. *Id.* Under these circumstances this serves to toll the statute of limitations for sixty days. Because the statute of limitations to initiate a lawsuit against a medical provider is two years from the alleged negligent act, this additional sixty days essentially allows for a statute of limitations of two years and sixty days. MISS. CODE ANN. §15-1-36(2) (Rev. 2003); *Pope v. Brock*, 912 So.2d 935, 939 (¶¶ 19-20) (Miss.2005).

In *Pitalo v. GPCH-GP, Inc.*, the Mississippi Supreme Court affirmed a trial court's dismissal of a medical malpractice claim when the plaintiff failed to serve the statutorily required notice, pursuant to §15-1-36(15), at least sixty days before initiating the action. *Pitalo v. GPCH-GP, Inc.*, 933 So.2d 927, 929 (¶¶ 6-7) (Miss.2006). The plaintiff in *Pitalo* filed a complaint in September 2003 and an amended complaint in June 2004, but she never sent the required notice to the defendants. *Id.* at 928(¶ 3). The Supreme Court stated that "the Legislature did not incorporate any exceptions to the rule which would alleviate the prerequisite condition of prior written notice" and that the failure to send the notice was an "inexcusable deviation" from the requirements under §15-1-36(15) of the Mississippi Code. *Pitalo v. GPCH-GP, Inc. Id.* at 929 (¶¶ 5,9). Relying on *Pitalo*, the Supreme Court later held in *Arceo v. Tolliver* that notice provided to the defendant after the original complaint and two amended

defendant of the legal basis of the claim and the type of loss sustained, including with specificity the nature of the injuries suffered. If the notice is served within sixty (60) days prior to the expiration of the applicable statute of limitations, the time for the commencement of the action shall be extended sixty (60) days from the service of the notice for said health care providers and others. This subsection shall not be applicable with respect to any defendant whose name is unknown to the plaintiff at the time of filing the complaint and who is identified therein by a fictitious name. MISS. CODE ANN. § 15-1-36(15)(Rev. 2003).

complaints had been filed did not comply with section 15-1-36(15) and ruled that dismissal without prejudice was proper. *Arceo v. Tolliver*, 949 So. 2d 691, 692-93 (¶ 3) (Miss. 2006).

Arceo v. Tolliver relied on *Walker v. Whitfield Nursing Center, Inc.*, 931 So. 2d 583, 589 (Miss., 2006), as well as on *Pitalo*, in regard to construing the notice requirement of section 15-1-36(15).

Walker v. Whitfield Nursing Center contemplated section 11-1-58 (1) of the Mississippi Code, which requires that an attorney's certificate of consultation with a qualified medical expert be filed with the complaint. *Walker v. Whitfield Nursing Center*, 931 So. 2d at 589 (¶ 19); MISS. CODE ANN. § 11-1-58 (Supp. 2007). *Walker* held that the time requirement provided by section 11-1-58 is "mandatory" and that the record is to be examined to determine "compliance or non-compliance" only. *Id.* at 589 (¶¶ 17, 20). The Supreme Court in *Walker* does not compromise the time requirement of the relevant statute and is unequivocal that the referenced documentation of expert consultation must accompany the plaintiff's complaint. *Id.* at 590 (¶ 24). Furthermore, because the language of section 11-1-58 is not ambiguous, *Walker* reiterated, and *Arceo v. Tolliver* affirmed, that when interpreting a statute that is not ambiguous, the Mississippi Supreme Court will apply the plain meaning of the statute. *Id.*; *Arceo v. Tolliver*, 949 So.2d at 695 (citing *Claypool v. Mladineo*, 724 So.2d 373, 382 (Miss.1998)).

The Supreme Court in *Arceo v. Tolliver* held that compliance with the requirements of the statutes regarding medical malpractice claims are mandatory, and affirmed the *Walker* court for granting the medical provider's motion for summary judgment based on plaintiff's failure to comply

with the provisions of section 11-1-58. *Arceo v. Tolliver*, 949 So.2d at 697; MISS. CODE ANN. §11-1-58 (Supp. 2007).

Thus, *Pitalo*, *Arceo v. Tolliver*, and *Walker* are in agreement and mandate that the notice requirement of section 11-1-58 requires strict compliance. *Arceo v. Tolliver*, 949 So. 2d at 697; *Pitalo v. GPCH-GP, Inc.*, 933 So. at 2d 929 (¶¶ 5,9); *Walker v. Whitfield Nursing Center*, 931 So. 2d at 589 (¶ 19).

Notice was not Waived

Mr. Becker notified Andrews' counsel by letter on May 2, 2006, that the doctor who was named as the defendant in the complaint filed on March 7, 2006, had not treated Andrews. Vol. 2, p. 177; R.E. p. 177. At that time Andrews could have filed a notice of claim pursuant to section 15-1-36(15) on Dr. Arceo because the statute of limitations for medical negligence had not yet expired.² MISS. CODE ANN. §15-1-36(15). However, Andrews did not do so and never did.

Dr. Arceo retained Mr. Becker as his counsel on June 23, 2006. Vol. 2, p. 183; R.E. p. 183. Andrews argues that because Mr. Becker was subsequently hired to represent Dr. Arceo that written notice was waived because Mr. Becker was his agent. However, Andrews cites no case law to support this because there is no case law which supports the contention that the sixty day written notice requirement of section 15-1-36(15) can be waived. To the contrary, the cases clearly indicate

² Dr. Arceo treated Andrews at the River Oaks Hospital emergency room on August 13, 2004, which is the date of the alleged negligence. Because the statute of limitations to initiate a lawsuit against a medical provider is two years from the alleged negligent act, the statute would not expire until August 13, 2006. MISS.CODE ANN. § 15-1-36(2).

that written notice is mandatory. *Pitalo v. GPCH-GP, Inc.*, 933 So. 2d at 929 (¶¶ 5,9); *Walker v. Whitfield Nursing Center*, 931 So. 2d at 589; *Arceo v. Tolliver*, 949 So.2d at 697.

Furthermore, though Mr. Becker was retained by Dr. Arceo, Mr. Becker had no authority from either Dr. Arceo or his insurance carrier, Western Litigation Services, to waive the notice provisions or service of process. Vol. 2, p. 184; R.E. p. 184.

Andrews also argues that the notice requirement was waived because Dr. Arceo had served discovery on Andrews. However, the fact that discovery had ensued and depositions had been taken did not preclude the court in *Walker v. Whitfield Nursing Center* from concluding that an attorney's certificate of consultation must be filed with the complaint. *Walker v. Whitfield Nursing Center*, 931 So. 2d at 589 (¶ 19); MISS. CODE ANN. §11-1-58. *Walker* held that the time requirement was "mandatory" and that the record is to be examined to determine "compliance or non-compliance" only. *Id.* at 589 (¶¶ 17, 20).

Therefore the trial court's grant of summary judgment to Dr Arceo for Andrews' failure to comply with the sixty day notice provision of §15-1-36 should be affirmed. MISS. CODE ANN. § 15-1-36(15). R. 225, 226.

II. THE STATUTE OF LIMITATIONS BEGAN TO RUN NO LATER THAN AUGUST 16, 2004, AND EXPIRED ON AUGUST 16, 2006.

The statute of limitations to initiate a lawsuit against a medical provider is within two years from the date of the alleged negligent act or with reasonable diligence might have been first known or discovered the negligence. MISS. CODE ANN. § 15-1-36(2). "The two-year statute of limitations does not commence running until the patient discovers or should have discovered that he has a cause

of action." *Smith v. Sanders*, 485 So.2d 1051,1052 (Miss.1986) (citing *Pittman v. Hodges*, 462 So.2d 330, 332-334 (Miss.1984)).

Andrews argues that the statute of limitations did not begin to run until May 2, 2006, the date counsel received Mr. Becker's letter informing her that the wrong doctor had been named in the complaint. Vol. 2, p. 177; R.E. p. 177. However, the River Oaks Hospital records clearly state that Dr. Arceo examined Andrews on August 13, 2004, the date Andrews presented to the emergency room following his motorcycle accident. Vol. 1, p. 89; R.E. p. 89. These records were always available to Andrews and he had a responsibility to exercise due diligence to identify the role Dr. Arceo had in his treatment. *Joiner v. Phillips*, 953 So.2d 1123, 1127 (Miss. App. 2006).

Failure to exercise due diligence on behalf of Andrews is characteristic of the manner in which Andrews pursued his claim not only in his failure to identify the treating physician and in his failure to provide the sixty day notice, but also in his failure to appear at a hearing³ and in his failure to respond to Dr. Arceo's Interrogatories and Request for Production of Documents. Vol. 3, p. 3. Though Andrews responded to Dr. Arceo's Request for Admissions, the Responses were untimely, as the Request for Admissions was served on August 23, 2006, and Response was served on October 21, 2006. M.R.C.P. 36(a). Vol. 1, pp. 71, 82.

Because Andrews was treated at River Oaks Hospital on August 13, 2004, and he allegedly experienced complications requiring hospitalization on August 16, 2004, the statute of limitations

³ The court made every effort to accommodate Andrews, granting time for responding to Dr. Arceo's motions and rescheduling hearing dates, for which counsel failed to appear. Vol. 2, p. 169; Vol. 3, p. 3.

began to run at the latest on August 16, 2004, and expired on August 16, 2006. There is no authority to support Andrews' argument that the statute of limitations did not begin to run until May 2, 2006.

CONCLUSION

Because the Mississippi Supreme Court has held that compliance with the sixty day notice statute for medical malpractice claims is mandatory, the trial court's grant of summary judgment to Dr. Arceo for Andrews' failure to comply with the sixty day notice provision of section 15-1-36(15) should be affirmed. MISS. CODE ANN. §15-1-36(15).

Andrews' claim that the statute of limitations did not begin to run until his counsel was informed that he had sued the wrong doctor is without support since the medical records clearly indicate that Dr. Arceo had treated Andrews. Andrews had a responsibility to exercise due diligence to identify the role Dr. Arceo had in his treatment. *Joiner v. Phillips*, 953 So.2d at 1127. The statute of limitations for this claim therefore expired on or about August 16, 2006, the date that he was aware of medical complications.

Respectfully submitted,

SALVADORE ARCEO, M.D.

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CERTIFICATE OF SERVICE

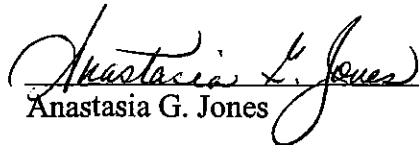
I, Anastasia Jones, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing to:

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This the 25th day of February, 2008.


Anastasia G. Jones