

IN THE SUPREME COURT OF MISSISSIPPI
NO: 2007-CA-01762

RUBY LEE

APPELLANT

v.

MEMORIAL HOSPITAL AT GULFPORT

APPELLEE

APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY MISSISSIPPI
1st Judicial District
Cause No.: A2401-2006-394

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

COUNSEL FOR THE APPELLANT


ROBERT W. SMITH 
Attorney at Law
528 Jackson Avenue
Ocean Springs, MS 39564
Tel. 228 818-5205
FAX 228 818-5206
rwsmithatty@bellsouth.net

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6. *Thornburg v. Magnolia Regional Health Center*,
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STATUTES

1. Miss. Code Ann. (1972), Section 11-46-11 2, 4, 5

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1. 28 Am Jur 2d, Estoppel & Waiver § 158 3

FACTS

Appellee's statement of facts is incorrect when it states that the notice of claim failed to include the time and place of the injury and the names of the persons involved. Review of the notice clearly shows the injury occurred at Memorial Hospital at Gulfport (MHG), between July 26, 2005 (date of surgery) and August 8, 2005 (date of discovery of injury) due to lack of reasonable care of the multiple MHG employees who were caring for her during that time.

Plaintiff was an elderly post-surgery patient who was discovered to have multiple unexplained sternum fractures.

While Plaintiffs' notice did not include her residence address, MHG had the address on multiple medical records and billing documents. There was no liquidated amount of this personal injury claim as medical care was ongoing; MHG was notified that medical specials exceeded \$100,000.

ARGUMENT

I. THE § 11-46-11(1) NINETY DAY INVESTIGATIVE PERIOD IS NOT JURISDICTIONAL

Appellee makes the following statements in its brief:

MHG argues that the ninety day notice requirement is a jurisdictional pre-requisite that must be satisfied before a claimant can institute a tort lawsuit against a government entity. [No citation of authority]

Appellee Brief, pp 2-3

The notice requirement is a hard edged mandatory rule and is jurisdictional. [No citation of authority]

Appellee Brief, p 10

It is MHG's position that failure to provide the statutory notice as required by the MTCA deprives the court of subject matter jurisdiction over this case. [No citation of authority]

Appellee Brief, p 11

The reason that Appellee cites no authority for its statements is that no authority exists. Quite simply put, waiting ninety days after notice to file suit is not a jurisdictional prerequisite to filing suit. *Thornburg v. Magnolia Regional Health Center*, 741 So.2d 220 (Miss. 1990).

Appellee's only argument against the binding precedent of *Thornburg* is that the decision interprets § 11-46-11 as it existed prior to 1999. (See Appellee's Brief, pp 7-8) The response is, so what? The statute both before and after 1999 had a ninety day notice provision. The notice provision language has not changed. Waiting ninety days after notice was not jurisdictional before or after 1999.

In short, the Appellee's failure to cite any authority for its naked argument that waiting

ninety days is somehow jurisdictional precludes this court from reviewing the argument. See, *AmSouth Bank v. Gupta*, 838 So.2d 205, 210 (Miss. 2002); *Smith v. Dorsey*, 599 So.2d 529, 532 (Miss. 1992). Moreover, even if the court were to adopt Appellee's argument that "notice" is jurisdictional, it certainly does not follow that "ninety-days" is jurisdictional.

II. WAIVER IS NOT A MATTER OF STATUTORY LANGUAGE

Appellee states at page 7 of its brief:

The MTCA on its face does not provide any provision for a government entity to waive the ninety day notice requirement.

The response is, so what? Waiver is not and never has been a matter of statutory language. It is absolutely irrelevant whether the legislature addresses or fails to address the subject of waiver. Waiver is a factual inquiry.

Waiver is an act or omission on the part of the one charged with the waiver evidencing an intention to surrender the right alleged to have been waived. *28 Am. Jur. 2d Estoppel & Waiver* § 158. Nowhere in Appellee's brief did it discuss or even attempt to refute the proposition that a denial letter issued prior to the end of the ninety day investigative period waives one's right to a full ninety days to investigate. How else can a claim denial letter be interpreted other than as a clear message that the government entity has concluded its investigation and waives the remaining portion of its "right" to investigate for ninety days?

A party's failure to expend any discussion or to cite any authority in its brief again precludes appellate review. *AmSouth Bank v. Gupta, supra*.

Appellee continues to regurgitate the *University Medical Center v. Easterling*, 928 So.2d

815 (Miss. 2006) language throughout its brief that the ninety day notice requirement is “a hard-edged mandatory rule” as though this language is some kind of talisman. To repeat, *Easterling* was a case with no notice whatsoever, and thus no claim denial letter. Its language simply cannot be extracted, cut and pasted to apply here. The case sub judice is a case with notice and with a claim denial. The “hard-edged” language of *Easterling* does not obviate the doctrine of waiver.

III. § 11-46-11(3) AUTHORIZES FILING OF A COMPLAINT ONCE DENIAL IS
 RECEIVED.

The key language of § 11-46-11(3) states:

The filing of a notice of claim as required by subsection (1) shall serve to toll the statute of limitations ... during which time no action may be maintained ... unless the claimant has received a notice of claim denial. [Emphasis added]

Appellee argues that the underlined language means that once a denial letter is sent, the tolling of the statute of limitations is ended, but a claimant is required to wait still longer to file suit. In other words, the statute of limitations is now running again, but we still want to prohibit you from filing suit. Such a holding would mean that a government entity could time its denial letter to create a “window” in which the Plaintiff could file suit. If one files too early, he is out of court. If one files too late, he is out of court.

Appellee’s argument is nonsensical and illogical. Why would any legislature or any court allow a statute of limitations to continue running against a claimant who has received notice of claim denial, and at the same time bar that claimant from filing a complaint to preserve his claim?

It makes eminent good sense to read § 11-46-11(3) in conjunction with § 11-46-11(1), and hold that once a denial of claim is received, a claimant may take action. Such an outcome is implicit if not explicit in the previous rulings of this court. See, *Page v. University of Southern Mississippi*, 878 So.2d 1003, at 1007, ¶ 12 (Miss. 2004) (If the agency denies the claim, the tolling period ends immediately. The claimant is then left with the remaining days in the original one-year limitations period not used at the time the notice was received ... to file suit.)

IV. THE SUBSTANCE OF A NOTICE IS ANALYZED UNDER SUBSTANTIAL COMPLIANCE.

Appellee speaks with two tongues on the issue of substantial compliance versus strict compliance regarding notice content.

At page 10 of its brief, Appellee states, “In this case, the notice failed to substantially comply with Miss. Code Ann. § 11-46-11(2).” [Emphasis added] At page 12 of its brief, Appellee then switches gear and states, “The provision of the information in each of the seven categories in the first place is evaluated with a strict compliance standard” [Emphasis added]

If this court is to start dealing out the death penalty for lack of a claimant’s address on a tort claim notice, now is a good time to start because we acknowledge the claimant’s address was not in the body of the notice here. (RE-20; Exhibit B to Appellant’s Brief) The address was all over the medical records.

With all due respect, we do not think this is the result intended by the legislature, and it most certainly is not the result reached in the prior opinions of this court. See *Reaves ex rel Rouse v. Randall*, 729 So.2d 1237 (Miss. 1998) (Notice was substantial compliance despite no

specific damage demand, no statement of claimant's residency and no identification of witnesses.)

It is simply not correct to contend that *South Cent. Regional Med. Center v. Guffy*, 930 So.2d 1252 (Miss. 2006) threw out the substantial compliance analysis. The *Guffy* opinion specifically begins with acknowledgment that substantial compliance is still the correct test to be applied. *Guffy, supra*, at 1255 (¶ 7) *Guffy* uses language such as "guidance and clarification," not reversal of prior precedents.

When reviewed under the correct test – substantial compliance – the notice here fairly and sufficiently informs the government entity of Ms. Lee's pending claim and intent to file suit. This is especially true in a case of an elderly claimant who sues based on *res ipsa loquitur* for injuries suffered in a hospital by unknown personnel or an unknown specific date.

CONCLUSION

The purpose of a reply brief is to reply to argument and law raised by the Appellant. Here, Appellee chooses to ignore clear precedent and to fail to reply to the core of the argument. Appellee quite simply has no reply to the *Thornburg v. Magnolia Regional Health Center* case holding that a ninety day investigative period is not jurisdictional. Appellee has no reply to the argument and case cites applying the doctrine of waiver. Indeed, Appellee offers no alternative explanation for the import of a claim denial letter. Appellee has no reasoning, logic or law citation behind its argument that the ninety day investigative period cannot be waived.

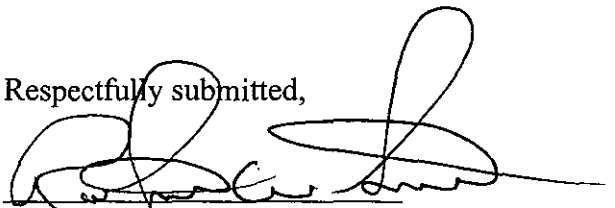
By regurgitation of language used in two cases in which there was no notice and thus no

claim denial letter, Appellee seeks to escape the plain facts that the instant case had both a notice and a denial letter.

By using the process of double speak, Appellee refers to a substantial compliance test, yet argues that a notice without an address and demand for a sum certain must be held to strict compliance and invalidated. The clear precedents of this court hold otherwise.

We respectfully request the court to review the notice letter and the denial letter herein and to reverse the ruling of the trial court and allow Ms. Lee opportunity to prove her claim.

Respectfully submitted,

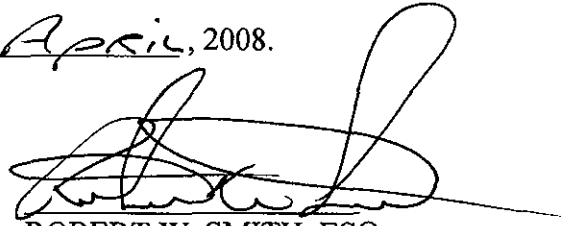


ROBERT W. SMITH, ESQ.

CERTIFICATE OF SERVICE

I, ROBERT W. SMITH, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above and foregoing Appellant's Reply Brief to Patricia Simpson, Esq., Post Office Drawer 460, Gulfport, MS 39502, and Honorable Lisa P. Dodson, Circuit Court Judge, P. O. Drawer 1461, Gulfport, MS 39502.

SO CERTIFIED, this the 8 day of April, 2008.

A handwritten signature in black ink, appearing to read 'Robert W. Smith', is written over a horizontal line.

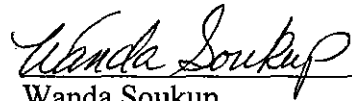
ROBERT W. SMITH, ESQ.

528 Jackson Avenue
Ocean Springs, MS 39564
228 818-5205
228 818-5206 FAX

CERTIFICATE OF SERVICE
Pursuant to Mississippi Rules of Appellate Procedure Rule 25(a)

I, Wanda Soukup, do hereby certify that I have this day mailed in the United States Mail, first class, postage prepaid, a package containing the original and three (3) copies of the above and foregoing Appellant's Reply Brief which was addressed to Betty Sephton, Clerk of the Supreme Court of Mississippi, P. O. Box 249, Jackson, MS 39205-0249

SO CERTIFIED, this the 8 day of April , 2008.


Wanda Soukup
Robert W. Smith Law Office
528 Jackson Avenue
Ocean Springs, MS 39564
228 818-5205
228 818-5206 FAX