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**DEC 01 2008**

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-CT-00095-SCT

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SUPREME COURT  
COURT OF APPEALS

ZEONIA WILLIAMS, INDIVIDUALLY AND  
ON BEHALF OF THE WRONGFUL DEATH  
HEIRS OF ANTHONY WILLIAMS, DECEASED

APPELLANTS/PETITIONERS

VS.

DEBORAH SKELTON, M.D. AND  
STEVEN J. PATTERSON, M.D.

APPELLEES/RESPONDENTS

**SUPPLEMENTAL BRIEF OF RESPONDENTS  
DEBORAH SKELTON, M.D. AND STEVEN J. PATTERSON, M.D.  
IN SUPPORT OF AFFIRMING THE MISSISSIPPI COURT OF APPEALS**

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COME NOW the respondents/defendants Stephen J. Patterson, M.D., and Deborah Skelton, M.D., and, pursuant to MISSISSIPPI RULE OF APPELLATE PROCEDURE 17(h), file this Supplemental Brief requesting this Court to uphold the ruling of the Court of Appeals and of the trial court below.

### **INTRODUCTION**

The lower court correctly dismissed this action after finding that Ms. Williams had not complied with the notice requirements of MISS. CODE ANN. § 15-1-36(15). (R. 81-82). The Mississippi Court of Appeals properly affirmed this decision on April 22, 2008, in *Zeonia Williams, Individually and on Behalf of the Wrongful Death Heirs of Anthony Williams, Deceased v. Skelton, et al.*, No. 2007-CA-00095-COA (¶7). Thereafter, the Court of Appeals denied Ms. Williams' Motion for Rehearing, and she petitioned this Court for Writ of Certiorari. This court granted certiorari on November 12, 2008.

### **ARGUMENT**

In addition to the arguments made in *Response of Deborah Skelton, M.D., to Petition for Writ of Certiorari of the Appellant*, the decision of the Court of Appeals should be affirmed because there has been no change in Mississippi law since its decision and because the defect in Ms. Williams' complaint was not cured by the fact that the lower court allowed her to file an amended complaint. Further, because the trial court did not address Ms. Williams' allegation that her amended complaint cured the defect in her original complaint, this argument is not properly before the Court. Accordingly, respondents respectfully request that this Court affirm the decision of the Court of Appeals and the decision of the lower court dismissing this action.

## **I. Mississippi Law Has Not Changed Since the Court of Appeal's Decision**

There has been no change in Mississippi law that would justify this Court's overturning the decision of the Court of Appeals. The underlying decision follows this Court's precedent concerning this Court's strict construction of MISS. CODE ANN. § 15-1-36(15). *Pitalo v. GPCH-GP, Inc.*, 933 So.2d 927, 929 (Miss. 2006); *Arceo v. Tolliver*, 949 So.2d 691 (Miss. 2006); and *Nelson v. Baptist Memorial Hosp.-North Miss., Inc.*, 972 So.2d 667 (Miss. App. 2007). Moreover, one of the most recent opinions of this Court addressing pre-suit requirements, *Wimley v. Reed*, repeated that this Court will enforce the requirement in MISS. CODE ANN. § 15-1-36(15) for plaintiffs to give notice before commencing a medical negligence action. *See Wimley v. Reed*, 991 So. 2d 135, 139 (¶19) (Miss. 2008) ("[T]he Legislature promulgated, and we have enforced, Section 15-13-6(15)'s requirement of notice prior to bringing a medical-negligence claim."). In this case, Ms. Williams failed to comply with the clearly established and strictly enforced notice requirements of MISS. CODE ANN. § 15-1-36(15). The trial court's dismissal of this matter was proper and consistent with this Court's precedent. Accordingly, this Court should affirm the Court of Appeals' decision affirming the lower's court's judgment of dismissal.

## **II. Permission to File an Amended Complaint Did Not Cure the Defect of the Original Complaint**

In her Petition for Certiorari, Williams argues that the filing of an Amended Complaint had the effect of curing her failure to give sixty days notice since the Amended Complaint was filed, indeed, more than sixty days after the notice of claim. This argument ignores the clear language of M.R.C.P. 15(c):

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.

Further, under the Rule stated in 15(a), Williams was no longer allowed to simply amend her Complaint on her own terms. Dr. Patterson had already filed an answer on November 8, 2005. Thus, leave of court was required in order for the amended complaint to be filed. Ms. Williams filed her Amended Complaint on November 9, 2005, but the trial court did not grant permission for the Amended Complaint to be filed until December 16, 2005. Comparing the Amended Complaint to the original Complaint shows that, indeed, Williams described in more detail the same medical treatment which is the conduct, transaction or occurrence set forth in the original pleading. Thus for purposes of determining whether the sixty day notice requirement was met, the trial court properly focused on the filing of the original Complaint on July 22, 2005, as the relevant date for the commencement of the action.

This very argument was made and rejected in *Bunton v. King*, No. 2007-IA-00621-SCT (9/25/2008). The notice requirement there was that of the Mississippi Tort Claims Act (MTCA). Like MISS. CODE ANN. § 15-1-36(15), the MTCA requires notice in advance of filing suit – ninety days, instead of the sixty-day requirement for medical malpractice suits. There, as here, when the defendants moved to dismiss the case for failure to comply with the notice requirement, the plaintiffs claimed that the filing of an amended complaint, which changed the party defendants, cured the defect in meeting the notice requirement. The trial court in *Bunton* agreed, but this Court reversed, holding that the notice requirement was jurisdictional.

Because the notice requirement is jurisdictional, the circuit court never obtained subject-matter jurisdiction. The Kings' argument that their amended complaint should relate back to the date of the original filing and that the amended complaint cured the ninety-day-notice problem is without merit. The circuit court never had jurisdiction over the original complaint. Therefore, the trial court erred when it failed to grant Bunton's motion to dismiss.

*Id.* at 5.

Applying that analysis here yields the same result. Without jurisdiction over the original complaint, the amended complaint cannot “relate back” and the entire claim remains subject to dismissal.

Further, Ms. Williams’ Amended Complaint does not relate back to her original complaint because that complaint is a nullity. The Legislature in MISS. CODE ANN. § 15-1-36(15) set forth a specific prerequisite – notice – to filing a medical malpractice action, with which Ms. Williams did not comply. This Court has held that the notice requirements of § 15-1-36(15) are mandatory. *Arceo v. Tolliver*, 949 So. 2d 691, 697 (¶13) (Miss. 2006); *Saul v. Jenkins*, 963 So. 2d 552, 554 (¶6) (Miss. 2007). Further, Mississippi federal courts have held that failure to comply with the notice requirement of § 15-1-36(15) requires dismissal. *Redmond v. AstraZeneca Pharmaceuticals*, 492 F. Supp. 2d 575, 577 (S.D. Miss. 2007). Similarly, this Court has held that compliance with the 10-day notice requirement of MISS. CODE ANN. § 95-1-5 in libel cases is a necessary preliminary step which must be satisfied before suit may be filed. *Brocato v. Mississippi Publishers Corp.*, 503 So. 2d 241, 243 (Miss. 1987); *See also Pannell v. Associated Press*, 690 F. Supp. 546, 550 (N.D. Miss. 1988) (holding that based upon the Mississippi Supreme Court’s decision in *Brocato*, case should be dismissed for failure to comply with notice requirement of statute); *Proli v. Hathorn*, 928 So. 2d 169, 173 (¶11) (Miss. 2006) (stating that although the Court’s decision in *Brocato* “concerns a libel action it is analogous [a case involving § 15-1-36] because the applicable statute has a requirement to provide notice prior to filing suit”). Because Ms. Williams did not comply with the necessary preliminary step of notice as required by law, she lacked standing to file her original complaint, and it is a nullity. An amended complaint cannot relate back to a nullity. *Tolliver v. Mladineo*, 987 So. 2d 989, 995-996 (¶16) (Miss. App. 2007).

In *Davis v. Meridian & Bigbee Railroad Co.*, 161 So. 2d 171, 171-172 (Miss. 1964), Davis was a foreign administrator of an estate who filed suit against Meridian & Bigbee in Mississippi but failed to comply with the requirement of Sec. 622, Miss. Code 1942, which required foreign administrators to attach “a certified copy of the record of the appointment and qualification of the executor.” The lower court refused to allow Davis to amend his complaint and dismissed the suit because he failed to comply with the statute’s requirement. *Davis*, 161 So. 2d at 172. On appeal, the Mississippi Supreme Court affirmed the dismissal and held that an amendment would not have related back to the original suit because Davis lacked standing to sue. *Id.* Like the plaintiff in *Davis*, Ms. Williams “had no right to file the suit [under Mississippi law] and an amendment . . . could not validate the unauthorized filing of the suit.” *Davis v. Meridian & Bigbee Railroad Co.*, 161 So. 2d 171, 173 (Miss. 1964). Therefore, this Court should affirm the decision of Court of Appeals holding that the trial court correctly dismissed this matter for failure to comply with the notice requirements of MISS. CODE ANN. § 15-1-36(15).

### **III. This Court Should Not Address Arguments or Rulings Not Made Below**

Williams now attempts to raise and develop this argument concerning the implication of her Amended Complaint, where it has not been developed or ruled upon prior to this stage of the litigation. Where the trial court did not rule on a particular issue or even address it, this Court need not do so either. *Johnson v. Rao*, 952 So.2d 151, 159 (Miss. 2007).

### **IV. Supplemental Briefs**

In this supplemental brief, respondents have attempted to address additional issues they believe may be pertinent to the Court. However, this Court’s order does not state its reasons for granting certiorari, and there may be other issues the Court would like addressed. MISSISSIPPI

RULE OF APPELLATE PROCEDURE 17(h) allows the Court to request supplemental briefs on any of the issues under review. Given the limited and narrow issues briefed and ruled upon previously, both in the trial court and at the Court of Appeals, if there is some other issue that the Court now wishes to address, both respondents would welcome the chance to brief such questions directly.

### **CONCLUSION**

In summary, the decision of the Court of Appeals should be affirmed because there has been no change in Mississippi law since its decision and Ms. Williams' Amended Complaint did not cure the fatal defect of date of filing of her original Complaint. Additionally, because the trial court did not address Ms. Williams' allegation that her amended complaint cured the defect in her original complaint, this argument is not properly before the Court. Accordingly, respondents/defendants Stephen J. Patterson, M.D., and Deborah Skelton, M.D., respectfully request that this Court affirm the decision of the Court of Appeals and the decision of the lower court dismissing this action.

This the 1<sup>st</sup> day of December, 2008.

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CERTIFICATE OF SERVICE

I do hereby certify that I have caused this day to be mailed, via United States Mail, postage prepaid, a true and correct copy of the foregoing document to the following:

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This the 1<sup>st</sup> day of December, 2008.



Rebecca Lee Wiggs