

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2010-CA-01103

KATHY LEE

APPELLANT

VS.

CIVIL ACTION NO. 2008-575LT

G & K SERVICES, CO.

APPELLEES

**ON APPEAL FROM THE CIRCUIT COURT OF LINCOLN COUNTY,
MISSISSIPPI
(CIVIL ACTION NO. 2008-575LT)**

REPLY BRIEF OF APPELLANT

**ELISE B. MUNN, MSB [REDACTED]
BERRY & MUNN, P.A.
P.O. DRAWER 768
HAZLEHURST, MS 39083
Telephone: (601) 894-4150
Facsimile: (601) 894-4717**

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REPLY ARGUMENT

- 1. Appellee's unsupported assertions should be stricken and not considered by the Court and its contention that fear of contracting disease through needstick is "irrational" is baseless.**
- 2. Appellant has an injury for which she does not seek unspecified open-ended damages for fear of disease but rather only a "window of anxiety".**

REPLY ARGUMENT

Appellee's unsupported assertions should not be considered by the Court and its contention that fear of contracting disease through needstick is "irrational" is baseless.

G & K, throughout its brief, makes references to matters not in the record to provide innuendo, such as footnote 5 (discussion of a deposition G & K did not make part of the record), and makes assertions that are unsupported by the record, such as footnote 3 ("G & K thoroughly inspects all garments before they are distributed") and as discussed further below. The practice is improper and, frankly, unfair. Kathy Lee would implore the Court to not consider these unsupported assertions. Additionally, these matters have nothing to do with the basis upon which the lower court ruled and the question before the Court in this appeal—whether Mississippi law allows for damages of the sort sought by Kathy Lee.

G & K chose not to utilize its own expert and did not provide any affidavits or sworn testimony in support of its motion for summary judgment. However, in the Brief of Appellee, G & K cites to "facts" and "statistics" that are not properly supported or sponsored by an expert. Specifically, at page 4-5 of its brief, Appellee cites statistics about HIV transmission to which there is no cite to the record or to any source. At page 11, G & K cites to a CDC website but only gives part of the statement. The full statement is as follows with the omitted parts underlined: "While it is possible to get infected with HIV if you are stuck with a needle that is contaminated with HIV, there are

no documented cases of transmission outside of a health-care setting.”¹ The Court should not consider incomplete and unsupported statistics cited without the benefit of expert analysis.

Additionally, G & K states that “fear of contracting HIV or hepatitis B from a needlestick is irrational”. Brief of Appellee, page 12. If it is irrational to fear contracting these diseases, then why is the protocol, as identified by Dr. Nitzkin, to test the patient for six months post-stick? R. 204. Furthermore, if there is no risk associated with a needlestick of unknown origin, consider whether any rational person would knowingly allow himself to be so stuck? It is plain common sense that it is a rational fear. Even taking one of the numbers given by G & K—30% on the high end of getting Hepatitis B from a needle infected with same, is enough to make the fear a rational one.

Appellant has an injury for which she does not seek unspecified open-ended damages for fear of disease but rather only a “window of anxiety”.

G & K spends a fair amount of time in its brief discussing the *Leaf River* and *Paz* decisions. *Leaf River Forest Products, Inc. v. Ferguson*, 652 So.2d 648 (Miss. 1995); *Paz v. Brushed Engineered Materials, Inc.*, 901 So. 2d 1 (Miss. 2007). *Leaf River* is cited for the proposition that there must be a physical injury to recover emotional distress damages. Brief of Appellee, page 7. *Paz* is cited for the proposition that Mississippi does not recognize a medical monitoring cause of action. Brief of Appellee, page 8.

This case is distinguishable in that Kathy Lee suffered a physical injury—a needle puncture. Part of the medical treatment for such an injury is to be tested for six months

¹ <http://www.cdc.gov/hiv/resources/qa/transmission.htm>. Cited by G & K at page 11 of Brief of Appellee and cited herein solely to document the incomplete statement made by G & K.

for a communicable disease. Attendant to such treatment is emotional distress in awaiting the results of those tests. Kathy Lee does not seek an *ad infinitum* period of medical monitoring for effects of some substance to which she was exposed in a non-invasive manner. She was stuck by a needle of unknown origin and containing unknown substances. There is a definite test, a finite amount of time, and a definite answer. Allowing recovery in this limited situation is not opening a "Pandora's Box" of speculative claims. In fact, it is in accordance with the public policy consideration that negligent parties not escape the consequences of their actions. If G & K is right, there is no remedy for a person negligently punctured with a needle unless he or she acquires HIV or hepatitis even though he or she must await six months to be sure of that fact.

The arguments advanced by G & K concerning the probabilities of contracting a disease via needlestick are better suited to argument concerning the value of the claim rather than operating as a total bar to recovery.

G & K asserts that a majority of states have required actual exposure for recovery. However, a close look at these cases reveals older cases brought largely out of AIDS-phobia, in a time when less was known about this disease and some segment of the general public feared even proximity to those infected². One case cited by G & K is not a needlestick at all but a suit brought by one who shared a room at a drug treatment facility

² Interestingly, "AIDS phobia" is discussed in several cases cited by G & K, including *Brzoska v. Olson* where the court said: "[P]laintiffs rely upon the degree of public misconception about AIDS to support their claim that their fear was reasonable. To accept this argument is to contribute to the phobia." 668 A.2d 1335 (Del. 1995). See also, *Babich v. Waukesha Memorial Hospital, Inc.*, 205 Wis.2d 698, 708, N.W.2d 144 (1996).

Clearly, Lee's assertions are not based on AIDS phobia but concern about the unknown origin of the needle and on sound knowledge about the six-month window. Also, the risk of exposure includes hepatitis, not just HIV/AIDS related exposure.

who was not advised his roommate had AIDS. *Bain v. Wells*, 936 S.W.2d 618 (Tenn. 1997). Brief of Appellee, page 10. Another case involves a suit by thirty-eight patients of a dentist who died in 1990 of AIDS, who feared they had been exposed to the virus during treatment despite sterilization procedures and other precautions being followed. *Brzoska v. Olson*, 668 A.2d 1355 (Del. 1995). Brief of Appellee, page 11. Another was by a patient who received a blood transfusion from the general supply rather than his designated donors who feared AIDS exposure despite the blood being screened. *Falcon v. Our Lady of the Lake*, 729 So.2d 1169 (La.App. 1st Cir. 1999). Brief of Appellee, page 11. In yet another case cited by G & K, the court observed that Plaintiff, who was negative for HIV over a year after the needlestick, still sought to recover for fear of developing AIDS—citing the seven to ten year AIDS incubation period—when it was clear that there was no further likelihood of disease based on the science that one will still test positive for the HIV virus during this period. *Burk v. Sage Products, Inc.*, 747 F.Supp. 285 (E.D. Pa. 1990). Much more is known about HIV and AIDS today. Kathy Lee's claim is not based on irrational public perception or a discriminatory view of an infected individual. She has no way to know who the person was whose blood was on that needle. Hence, no scenario can be ruled out and she had to do the testing for six months. Kathy Lee seeks damages for this window of anxiety that is inherent in the treatment necessary for the needlestick she sustained.

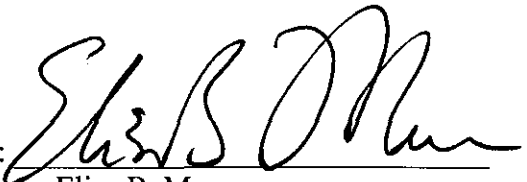
CONCLUSION

The Court should reverse the action of the lower court and hold that in a needlestick case where the needle is of unknown origin, a Plaintiff should be allowed to recover for

the window of anxiety attendant to the six months of testing for communicable disease, namely HIV and hepatitis, which is standard treatment protocol for such an injury.

Respectfully submitted,

KATHY LEE

By: 
Elise B. Munn

Elise B. Munn, MSB # [REDACTED]
BERRY & MUNN, P.A.
P.O. Drawer 768
Hazlehurst, MS 39083
Telephone: (601) 894-4150
Facsimile: (601) 894-4717
emunnn@berrymunnpa.com

CERTIFICATE OF SERVICE

I, Elise B. Munn, do hereby certify that I have caused to be mailed, via United States mail, a true and correct copy of the foregoing instrument to:

EVERETT E. WHITE, ESQ.
BAKER DONELSON BEARMAN
CALDWELL & BERKOWITZ, PC
Post Office Box 14167
Jackson, MS 39236

HONORABLE MICHAEL M. TAYLOR
LINCOLN COUNTY CIRCUIT COURT JUDGE
P.O. Box 1350
Brookhaven, MS 39601

SO CERTIFIED, this, the 8 day of August, 2011.


ELISE B. MUNN
ATTORNEY FOR APPELLANT