

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CHARLES STEPHEN ANDREWS, II

APPELLANT

VS.

CAUSE NO. 2007-TS-01390

SALVADOR ARCEO, M.D.

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

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 the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Hon. Judge William E. Chapman, III
Rankin County Circuit Court Judge
P.O. Box 1626
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2. Charles Stephen Andrews, II
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SO CERTIFIED, this the 25th day of January, 2008.


M. JUDITH BARNETT (MSB)

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STATEMENT OF THE ISSUES

1. Whether the Plaintiff complied with Miss. Code Ann. Section 15-1-36 so as to preclude summary judgment in this matter
2. Whether Defendant waived his right to raise the issue of notice by entering an appearance, filings an Answer and conducting discovery.
3. Whether the Dismissal With Prejudice was proper.

STATEMENT OF THE CASE

On March 7, 2006, after duly serving written notice pursuant to Mississippi Code Ann. Section 15-1-36(15), Plaintiff filed his Complaint initially against River Oaks Hospital, Inc., Karen B. Shackleford, M.D., and Andrew S. Anfanger, M.D., in the Circuit Court of Rankin County, Mississippi in Cause No. 2006-67-C, for injuries he sustained as a result of his treatment beginning on August 13, 2004 at River Oaks Hospital. (R. 153).

On or about May 16, 2006, fourteen days after Counsel for the Defendant hand-delivered two letters to Plaintiff's counsel, one from Mr. Becker and one from Dr. Anfanger, which informed Plaintiff's counsel that Dr. Anfanger was not the treating physician for Plaintiff (despite his name appearing on the records) and that Dr. Arceo was the physician who treated Plaintiff on the dates relevant to the Complaint, Plaintiff filed a Motion to Amend Amended Complaint to dismiss Andrew S. Anfanger, M.D. as a Defendant and add Salvador Arceo, M.D. as a Defendant in Cause No. 2006-67-C. (R. 177-179).

On May 25, 2006, an Agreed Order allowing the Plaintiff to amend the Complaint to substitute Salvador Arceo, M.D. for Andrew Anfanger, M.D., was entered by the Court in Cause No. 2006-67-C. (R. 182).

On July 3, 2007, an Agreed Order of Dismissal Without Prejudice was entered in in Cause No. 2006-67-C. (R. 181).

On July 3, 2006, Plaintiff filed a new Complaint in the instant cause in the Circuit Court of Rankin County, Mississippi in Cause No. 2006-184-C, against River Oaks Hospital, Inc., Karen B. Shackleford, M.D., and Salvador Arceo, M.D., and John Does 1-5 for injuries he sustained as a result of his treatment beginning on August 13, 2004 at River Oaks Hospital. (R. 10).

On August 18, 2006, Defendant, Salvador Arceo, M.D., filed the "Separate Answer of the Defendant, Salvador Arceo, M.D." (R. 32).

On August 22, 2006, Defendant, Salvador Arceo, M.D., filed and served Interrogatories, Requests for Production of Documents and Request for Admission to the Plaintiff. (R. 38).

On October 23, 2006, Plaintiff filed his Responses to Defendant, Salvador Arceo, M.D.'s, Request for Admissions. (R. 44).

On January 8, 2007, Defendant, Salvador Arceo, M.D., filed the Separate Motion of the Defendant, Salvador Arceo, M.D., to Dismiss for Failure to State a Claim, to Strike Untimely Responses to Requests for Admissions; and for Summary Judgment for Said Defendant. (R. 52).

On January 22, 2007, Plaintiff filed the Plaintiff's Response to Defendant, Salvador Arceo, M.D.'s Motion to Dismiss for Failure to State a Claim to Strike Untimely Responses to Request for Admissions; and for Summary Judgment for Said Defendant. (R. 125).

On February 5, 2007, Defendant, Salvador Arceo, M.D., filed Reply of the Defendant, Salvador Arceo, M.D. to Plaintiff's Response to Motion. (R. 170).

On April 23, 2007, a hearing was had in the Circuit Court of Rankin County, Mississippi wherein the Honorable William E. Chapman, III, granted the Separate Motion of the Defendant, Salvador Arceo, M.D., to Dismiss for Failure to State a Claim, to Strike Untimely Responses to Requests for Admissions; and for Summary Judgment for Said Defendant. (R.T. Volume 3).

On April 23, 2007, a Partial Final Judgment as to the Defendant, Salvador Arceo, M.D. and an Opinion and Order was rendered by the Court. (R. 225).

On April 30, 2007, Plaintiff filed his Notice of Appeal. (R. 230).

FACTS

On August 13, 2004, the Plaintiff presented to the ER at River Oaks at approximately

5:40 p.m., complaining of pain in his left knee and leg. The Plaintiff had a motorcycle fall upon him, injuring his leg. Defendant Salvador Arceo, M.D., was the emergency room physician upon Plaintiff's presentation to the emergency room. Dr. Arceo ordered x-rays, which showed a comminuted displaced fracture of the medial and central tibial plateau without depression. These films revealed fragments displaced into the joint space, and a large hemorrhagic joint effusion. No fractures of the femur, fibula or patella were identified. After Dr. Arceo received the radiological interpretation, he prescribed a knee brace (or "knee immobilizer"). Dr. Arceo failed to advise the Plaintiff to elevate and ice his leg in order to avoid edema, swelling, or further compression to the leg, and failed to instruct or advise the Plaintiff to avoid placing weight on the leg, so as to avoid the potential and serious complication of compartment syndrome.

At approximately 10:42 a.m. on the following day, Saturday, August 14, 2004, Plaintiff Andrews presented again to ROH's emergency room with severe left leg pain. Plaintiff was seen this time by Dr. Shackleford. Plaintiff's condition included muscular weakness and severe edema to his injured leg that was immobilized by Dr. Arceo.. Plaintiff was administered Dilaudid, and instructed by Dr. Shackleford to make an appointment to see Dr. LaiTy Field on the following Monday (August 16, 2004). Dr. Shackleford did not order new films or other studies of the Plaintiff's injured and immobilized leg, and did not examine the leg for edema and swelling indicative of compartment syndrome. It is also apparent from the ROH chart for this ER visit that Dr. Shackleford made no orthopedic consult. No other instructions were provided to the Plaintiff and no leg injury-specific assessment or tests were conducted by Dr. Shackleford or any other physician in the ROH ER, despite the fact that the Plaintiff was exhibiting distinct symptoms of compartment syndrome.

By the following Monday, August 16, 2004, the pressure and swelling in the Plaintiff's

leg was creating such severe pain that Andrews appeared at Mississippi Sports Medicine & Orthopedic Center and begged for an appointment with Dr. Gene Barrett. In consequence, Dr. Barrett examined and immediately hospitalized the Plaintiff at the Mississippi Baptist Medical Center (MBMC) for a fasciotomy after having diagnosed him with compartment syndrome. The compartment syndrome was so substantial and severe that it required skin grafts and extensive hospital care. The compartment syndrome, which necessitated the fasciotomy by Dr. Barrett, was a direct and proximate result of the negligence of Drs. Arceo and Shackleford in their sub-standard treatment of the Plaintiff's leg injury. The conduct of these physicians deviated from the applicable standard of care, constituting negligence which proximately resulted in unnecessary injury including compartment syndrome. Both Shackleford and Arceo deviated from the standard of care by failing to obtain an orthopedic consult relative to the nature and extent of the injury and findings from the x-rays, and in failing to advise Plaintiff to elevate and ice his leg, and avoid use of the leg, to avoid compartment syndrome. Additionally, Defendant Shackleford failed to recognize and diagnose compartment syndrome upon Plaintiff's presentation for the second time at the ROH ER on August 14, 2004.

Defendant's continued negligence proximately resulted in injury to Plaintiff including having to undergo fasciotomy, skin grafts, and the subsequent occurrence of deep venous thrombosis (DVT) and consequent physical impairment to Plaintiff.

SUMMARY OF THE ARGUMENT

On May 25, 2006, when the Agreed Order was entered by the Court allowing the Plaintiff to amend the Complaint to substitute Salvador Arceo, M.D. for Andrew Anfanger, M.D., in Cause No. 2006-67-C, Plaintiff was not required to provide Andrew Anfanger, M.D. with a sixty day notice pursuant to Miss. Code Ann. Section 15-1-36 since he was being substituted into the action for a John Doe Plaintiff. (R. 182).

In that Defendant, Salvador Arceo, M.D.'s, attorney and legal representative was provided with not only Plaintiff's medical records but also a copy of the Motion to Amend Complaint to name Dr. Arceo as a Defendant and the letter from Dr. Anfanger stating that Dr. Arceo was the treating physician for the Plaintiff, Defendant was provided "written notice" in several forms, by and through his legal counsel.

Dr. Arceo waived the issue of notice pursuant to Miss. Code Ann. Section 15-1-36 when he participated in the litigation of this matter.

The trial court erred in dismissing this action as to Salvador Arceo, M.D., with prejudice since the statute of limitations as to Dr. Arceo would not expire until May 2, 2008.

STANDARD OF REVIEW:

“An appeal from summary judgment is reviewed de novo.” *Almond v. Flying J Gas Co.*, 957 So.2d 437, 439 (Miss. App. 2007) (citing *Jacox v. Circus Circus Miss., Inc.*, 908 So.2d 181, 183(¶ 4) (Miss.Ct.App.2005) (citing *Cossitt v. Alfa Ins. Corp.*, 726 So.2d 132, 136(¶ 19) (Miss.1998))).

Summary judgment is only proper “if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Webb v. Jackson*, 583 So.2d 946, 949 (Miss. 1991) (quoting *Mink v. Andrew Jackson Casualty Ins. Co.*, 537 So.2d 431.433 (Miss. 1988), see also Miss. R. Civ. P. 56(c). “All that is required of an opposing party to survive a motion for summary judgment is to establish a genuine issue of material fact by the means available under the rule.” *Lowery v. Guaranty Bank and Trust Company*, 592 So.2d 79, 81 (Miss.1991) (citing *Galloway v. Travelers Insurance Co.*, 515 So.2d 678, 682 (Miss.1987)). “The evidentiary matters are viewed in the light most favorable to the nonmoving party.” *Lowery v. Guaranty Bank and Trust Company*, 592 So.2d 79, 81 (Miss.1991). “Where material facts are disputed, or where different interpretations or inferences may be drawn from undisputed material facts, summary judgment is inappropriate.” *Rankin v. Clements Cadillac, Inc.*, 903 So.2d 749 (Miss. 2005)(citing *Johnson v. City of Cleveland*, 846 So.2d 1031, 1036 (Miss.2003)).

ARGUMENT:

I. Plaintiff Provided Notice to Defendant, Salvador Arceo, M.D., Within the Meaning of Miss. Code Section 15-1-36(15).

The relevant procedural history in this matter is reiterated for clarification and argument

below.

On March 7, 2006, after duly serving written notice pursuant to Mississippi Code Ann. Section 15-1-36(15), Plaintiff filed his first Complaint initially against River Oaks Hospital, Inc., Karen B. Shackleford, M.D., and Andrew S. Anfanger, M.D., in the Circuit Court of Rankin County, Mississippi in Cause No. 2006-67-C, for injuries he sustained as a result of his treatment beginning on August 13, 2004 at River Oaks Hospital. (R. 153).

On May 2, 2006, Jim Becker, Counsel for Dr. Anfanger and Dr. Arceo, hand-delivered two letters to Plaintiff's counsel, one from Mr. Becker and one from Dr. Anfanger, which informed Plaintiff's counsel that Dr. Anfanger was not the treating physician for Plaintiff (despite his name appearing on the records) and that Dr. Arceo was the physician who treated Plaintiff on the dates relevant to the Complaint.

On or about May 16, 2006, based on the information provided by Attorney Becker and Dr. Anfanger, Plaintiff filed a Motion to Amend Amended Complaint to dismiss Andrew S. Anfanger, M.D. as a Defendant and add Salvador Arceo, M.D. as a Defendant in Cause No. 2006-67-C. (R. 177-179).

On May 25, 2006, an Agreed Order allowing the Plaintiff to amend the Complaint to substitute Salvador Arceo, M.D. for Andrew Anfanger, M.D., was entered by the Court in Cause No. 2006-67-C. (R. 182).

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sustained as a result of his treatment beginning on August 13, 2004 at River Oaks Hospital. (R. 10).

On August 18, 2006, Defendant, Salvador Arceo, M.D., filed the "Separate Answer of the Defendant, Salvador Arceo, M.D." (R. 32).

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On October 23, 2006, Plaintiff filed his Responses to Defendant, Salvador Arceo, M.D.'s, Request for Admissions. (R. 44).

On January 8, 2007, Defendant, Salvador Arceo, M.D., filed the Separate Motion of the Defendant, Salvador Arceo, M.D., to Dismiss for Failure to State a Claim, to Strike Untimely Responses to Requests for Admissions; and for Summary Judgment for Said Defendant. (R. 52).

On January 22, 2007, Plaintiff filed the Plaintiff's Response to Defendant, Salvador Arceo, M.D.'s Motion to Dismiss for Failure to State a Claim to Strike Untimely Responses to Request for Admissions; and for Summary Judgment for Said Defendant. (R. 125).

On February 5, 2007, Defendant, Salvador Arceo, M.D., filed Reply of the Defendant, Salvador Arceo, M.D. to Plaintiff's Response to Motion. (R. 170).

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On April 23, 2007, a Partial Final Judgment as to the Defendant, Salvador Arceo, M.D. and an Opinion and Order was rendered by the Court. (R. 225).

a. Defendant, Salvador Arceo, M.D., Was Not Entitled to the Statutory Sixty Day Notice Since He Was Being Substituted as a John Doe Defendant.

On May 25, 2006, when the Agreed Order was entered by the Court allowing the Plaintiff to amend the Complaint to substitute Salvador Arceo, M.D. for Andrew Anfanger, M.D., in Cause No. 2006-67-C, Plaintiff was not required to provide Andrew Anfanger, M.D. with a sixty day notice since he was being substituted into the action for a John Doe Plaintiff. (R. 182).

Miss. Code 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 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 Section 15-1-36(15) (emphasis added).

Since Salvador Arceo, M.D., was a defendant who, up until May 2, 2006, was unknown to the Plaintiff at the time of the filing of the Complaint in Cause No. 2006-67-C, the notice requirement of 15-1-36(15) was inapplicable to him at that time.

b. If Defendant, Salvador Arceo, M.D., Was Entitled to Notice Upon the Plaintiff's Filing of the New Complaint, He Received Written Notice Through His Counsel

James Becker, Counsel for Salvador Arceo, M.D., and for Andrew S. Anfanger, M.D., admitted that he had been actively involved in the case since April of 2006 when he was contacted by Western Litigation Services, who managed claims for the insurance carrier of Dr. Andrew S. Anfanger. (R. 170).

Counsel for the Defendant admitted that he visited Plaintiff's counsel's office to retrieve a copy of the Plaintiff's medical records for "review and evaluation." (R. 171).

It was James Becker, Counsel for Salvador Arceo, M.D., and for Andrew S. Anfanger, M.D., who on May 2, 2006, hand-delivered two letters to Plaintiff's counsel, one from Mr. Becker and one from Dr. Anfanger, which informed Plaintiff's counsel that Dr. Anfanger was not the treating physician for Plaintiff (despite his name appearing on the records) and that Dr. Arceo was the physician who treated Plaintiff on the dates relevant to the Complaint. (R. 177-178).

James Becker admitted that he was engaged as the attorney for Dr. Arceo on or about June 23, 2006. (R. 183). By that time, Mr. Becker has already identified his own client, Dr. Arceo, as the proper Defendant, has already received a copy of the Plaintiff's medical records from Plaintiff's counsel, and had been provided with copies of all pleadings including the Motion to Amend Complaint to include his client and dismiss Dr. Anfanger.

Miss. Code Section 15-1-36(15) requires that the "defendant has been given at least sixty (60) days prior written notice of the intention to begin the action." Miss. Code Section 15-1-36(15) further states that "[n]o particular form of notice is required, but it shall notify the defendant of the legal basis of the claim and the type of loss sustained, including with specificity the nature of the injuries suffered."

In that Defendant, Salvador Arceo, M.D.'s, attorney and legal representative was provided with not only Plaintiff's medical records but also a copy of the Motion to Amend Complaint to name Dr. Arceo as a Defendant and the letter from Dr. Anfanger stating that Dr. Arceo was the treating physician for the Plaintiff, Defendant was provided "written notice" in several forms, by and through his legal counsel.

c. Defendant Waived the Issue of Notice When He Participated In the Litigation of This Matter.

“If a defendant enters an appearance in a proceeding *in personam* without limiting the purposes for which he appears, it is a general appearance.” *Maupin v. Dennis*, 252 Miss. 496, 500; 175 So.2d 130,131 (Miss. 1965) (citations omitted). “Mississippi does not recognize ‘special appearances’ except where a party appears solely to object to the court’s jurisdiction over her person on grounds that she is not amenable to process.” *Isom v. Jernigan*, 840 So.2d 104, 107 (Miss. 2003) (*quoting Mladinich v. Kohn*, 250 Miss. 138, 156, 164 So.2d 785, 791 (1964)). “One waives process and service, however, upon making a general appearance” *Id.* (*Citing Arrow Food Distributors, Inc. v. Love*, 361 So.2d 324, 327 (Miss.1978); *Sandifer v. Sandifer*, 237 Miss. 464, 115 So.2d 46 (1959)).

In the case at bar, Defendant, Salvador Arceo, M.D., not only filed an Answer to the Complaint (R. 32), but also filed and served Interrogatories, Requests for Production of Documents and Request for Admission to the Plaintiff. (R. 38). Participating in Discovery and filing an Answer to the Complaint is participation in litigation that amounts to a general appearance.

Furthermore,, Defendant, Salvador Arceo, M.D., waited until January 8, 2007 to file the Separate Motion of the Defendant, Salvador Arceo, M.D., to Dismiss for Failure to State a Claim, to Strike Untimely Responses to Requests for Admissions; and for Summary Judgment for Said Defendant. (R. 52). This was more than six (6) months after the Complaint in this matter was filed. Additionally, the matter was not heard by the Court until April 23, 2007, more than fifteen (15) months after the filing of the Complaint. As such, Dr. Arceo waived the issue of

notice when he participated in the litigation of this matter.

II. The Court Erred in Dismissing the Action Against Salvador Arceo, M.D. With Prejudice

In the Partial Final Judgment as to the Defendant, Salvador Arceo, M.D. and the Opinion and Order rendered on April 23, 2007, the Court dismissed Salvador Arceo, M.D. from the proceedings and further found that the two year statute of limitations had run against Dr. Arceo thus requiring a dismissal with prejudice. (R. 226).

Because the Plaintiff did not learn of the identity of Dr. Arceo until May 2, 2006, when Counsel for the Defendant hand-delivered two letters to Plaintiff's counsel, one from Mr. Becker and one from Dr. Anfanger, which informed Plaintiff's counsel that Dr. Anfanger was not the treating physician for Plaintiff (despite his name appearing on the records) and that Dr. Arceo was the physician who treated Plaintiff on the dates relevant to the Complaint, the Plaintiff's cause of action against Dr. Arceo did not accrue until May 2, 2006.

Miss. Code Section 15-1-36(2) states:

For any claim accruing on or after July 1, 1998, and except as otherwise provided in this section, no claim in tort may be brought against a licensed physician, osteopath, dentist, hospital, institution for the aged or infirm, nurse, pharmacist, podiatrist, optometrist or chiropractor for injuries or wrongful death arising out of the course of medical, surgical or other professional services unless it is filed within two (2) years from the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered, and, except as described in paragraphs (a) and (b) of this subsection, in no event more than seven (7) years after the alleged act, omission or neglect occurred:

(a) In the event a foreign object introduced during a surgical or medical procedure has been left in a patient's body, the cause of action shall be deemed to have first accrued at, and not before, the time at which the foreign object is, or with reasonable diligence should have been, first known or discovered to be in the patient's body.

(b) In the event the cause of action shall have been fraudulently concealed from

the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence should have been, first known or discovered.

Dr. Arceo's name appeared nowhere in the medical records of the Plaintiff. The treating physician is noted on the records as Dr. Anfanger. Dr. Arceo's handwriting, as identified by Dr. Anfanger in his letter, appears on the medical records, but the Plaintiff had no way to determine this fact until it was revealed by Dr. Anfanger on May 2, 2006.

As such, the trial court erred in dismissing this action as to Salvador Arceo, M.D., with prejudice since the statute of limitations as to Dr. Arceo would not expire until May 2, 2008.

CONCLUSION

For all of the above and foregoing reasons, Appellant requests that this Honorable Court reverse the Judgment granting the Defendant's Motion for Summary Judgment rendered by the Circuit Court of Rankin County, Mississippi.

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

CHARLES STEPHEN ANDREWS, II

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CERTIFICATE OF SERVICE

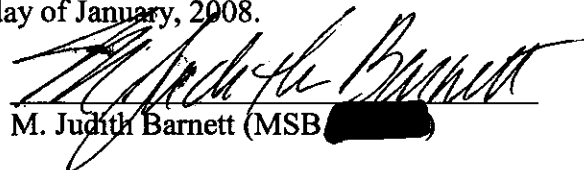

I, M. Judith Barnett, do hereby certify that I have this day caused one (1) true and correct copy of the Brief for the Appellant to be forwarded, via United States Mail, postage prepaid, and addressed as indicated below to the following:

Hon. Judge William E. Chapman, III
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This service effective this, the 25th day of January, 2008.


M. Judith Barnett (MSB )