IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
DOCKET NO. 2008-CA-00173

DAVID J. CALDWELL, D.M.D — APPELLANT

VS.

GLEN C. WARREN, SR., M.D.,
RIVER OAKS HOSPITAL, INC.,
MISSISSIPPI NEUROSURGERY AND
SPINE CENTER, PLLC — APPELLEES

Appeal From the Circuit Court of Rankin County, Mississippi

BRIEF OF APPELLEES

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

David J. Caldwell, D.M.D.	-	Appellant
Glen C. Warren, Sr., M.D.	-	Appellee
Mississippi Neurosurgery and Spine Center	-	Appellee
Christopher H. Neyland	-	Attorney of Record for Appellant
James A. Becker, Jr.	-	Attorney of Record for Appellee
Anastasia G. Jones	-	Attorney of Record for Appellee
Judge William E. Chapman, III	-	Rankin County Circuit Court Judge

Respectfully submitted, this the 24th day of July, 2008.

Respectfully Submitted,
GLEN C. WARREN, SR., M..D.,
MISSISSIPPI NEUROSURGERY AND SPINE CENTER,PLLC

By: Anastasia G. Jones
JAMES A. BECKER, JR. [redacted]
ANASTASIA G. JONES [redacted]

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STATEMENT OF THE CASE

I. NATURE OF THE CASE

The Appellant, David J. Caldwell, D.M.D. (hereinafter "Caldwell"), filed the Complaint on August 15, 2005, alleging medical malpractice against Dr. Glen C. Warren, Sr. (hereinafter "Dr. Warren"), Mississippi Neurosurgery and Spine Center, PLLC (hereinafter "Clinic"), and another defendant in the Circuit Court of Rankin County. Vol. 1, p. 11. Dr. Glen C. Warren and Mississippi Neurosurgery and Spine Center, PLLC, were dismissed pursuant to Opinion and Order of the trial court and Caldwell appeals. Vol. 1, p. 288.

II. COURSE OF PROCEEDINGS

The Complaint in this case was filed on August 15, 2005, as a medical malpractice claim against several defendants, including Dr. Warren and the Clinic. Vol. 1, p. 11; R.E. Exhibit B. On November 8, 2005, Dr. Warren, through counsel, served Interrogatories and Requests for Production of Documents to Plaintiff. Vol. 1, p. 22. On November 7, 2005 and May 16, 2006, Dr. Warren and the Clinic, respectively, served their Answer and Motion to Dismiss, asserting various defenses including that the Complaint should be dismissed because Plaintiff had filed an identical Complaint against the same defendants in the same court on August 12, 2005. Vol. 1, pp. 24, 39, 135; R.E. Exhibit C. On January 30, 2006, the Clinic served Interrogatories and Requests for Production of Documents to Plaintiff. Vol. 1, p. 37. On June 6, 2006, Plaintiff served Responses to Interrogatories and Requests for Production of Documents of Dr. Warren. Vol. 1, p. 47.

On February 2, 2007, Dr. Warren and the Clinic served Motion for Summary Judgment or in the Alternative Motion to Dismiss. Vol. 1, p. 49. On February 15, 2007, Plaintiff filed Motion for Time to respond to Motion for Summary Judgment filed by Dr. Warren and the Clinic. Vol. 1,

p. 152. On February 28, 2007, Plaintiff filed Supplemental Responses to Interrogatories and Requests for Production of Documents and Response to Motion for Summary Judgment or in the Alternative, Motion to Dismiss, and finally named an expert, however, there was no affidavit included with said Responses. Vol. 2, pp. 157, 159.

On March 3, 3007, a hearing was held on the Motion for Summary Judgment and on March 19, 2007, the court entered an Order taking the arguments of the hearing under advisement and setting a second and supposedly final hearing date for April 16, 2007. Vol. 2, p. 163. On April 4, 2007, Dr. Warren and the Clinic filed Supplemental Motion for Summary Judgment. Vol. 2, p. 164. On April 16, 2007, the second hearing was held on the matter and Plaintiff filed Motion for Extension of Time to respond to Supplemental Motion for Summary Judgment. Vol. 2, pp. 172, 287. The court entered an Order following the hearing of April 16 setting a third and final hearing date for April 23 and giving Plaintiff until April 19 to respond to Supplemental Motion for Summary Judgment. Vol. 2, p. 287. Plaintiff filed Response to Supplemental Motion for Summary Judgment on April 19, 2007. Vol. 2, p. 266. The affidavit, opinion, and curriculum vitae of the expert were filed with the court on April 19, 2007. Vol. 2, pp. 268 - 70. The third hearing was held on April 23 and the court entered its Opinion and Order and Partial Final Judgment on May 8, 2007, which dismissed the Complaint and granted dismissal and/or summary judgment as to Dr. Warren and the Clinic. Vol. 2, pp. 288, 293; R.E. Exhibit A.

On May 18, 2007, Plaintiff filed Motion to Reconsider and for Rule 54(b) Certification, to which Dr. Warren and the Clinic responded on May 25, 2007. Vol. 2, p. 294, Vol. 3, p. 300. A hearing was scheduled on the Motion to Reconsider for August 27, 2007, and the court entered Order Overruling Plaintiff's Motion to Reconsider and Final Judgment for Defendants on August 29, 2007. Vol. 3, pp. 305, 307.

On October 26, 2007, Plaintiff filed Motion to File Out of Time Appeal and a hearing on the motion was held on November 19, 2007. Vol. 3, pp. 309, 314. Dr. Warren and Clinic filed Motion to Strike and Response to Plaintiff's Motion to File Out of Time Appeal on November 16, 2007. Vol. 3, p. 316. On November 27, 2007, the court entered Order which granted Plaintiff's Motion to File Out of Time Appeal. Vol. 3, p. 320.

Plaintiff subsequently filed Notice of Appeal on November 30, 2007. Vol. 3, p. 321.

III. STATEMENT OF THE FACTS

Plaintiff filed the Complaint in this case on August 15, 2005, alleging medical negligence against Dr. Warren, the Clinic, and other defendants, regarding a surgical procedure Dr. Warren performed on Plaintiff at River Oaks Hospital on July 17, 2003. Vol. 1, p. 11; R.E. Exhibit B. Prior to filing the Complaint of August 15, 2005 (Cause No. 2005-195-C), Plaintiff, on August 12, 2005, had filed an identical complaint (Cause No. 2005-194-R) to the Complaint filed on August 15. Vol. 1, p. 135; R.E. Exhibit C. Service of process was completed for the Complaint of August 15, and a motion for extension of time to serve process was filed for the prior complaint of August 12. Brief of Appellee, pp. 9, 14; Vol. 2, pp. 159, 161 (¶¶ 7,8).

On November 8, 2005, Dr. Warren, through counsel, served Interrogatories and Requests for Production of Documents to Plaintiff. Vol. 1, p. 22. On June 6, 2006, seven months after such discovery requests were propounded to Plaintiff and almost ten months after Plaintiff filed his first Complaint, Plaintiff served Responses to Interrogatories and Requests for Production of Documents of Dr. Warren. Vol. 1, p. 47. In response to Dr. Warren's request for Plaintiff to "identify all experts whom you intend to call as a witness at the trial of this cause and/or who has rendered a preliminary opinion of negligence against Dr. Warren upon which you have relied in filing this

complaint," Plaintiff responded that "No such expert has been retained at this time." Vol. 1, p. 128.

It was almost another nine months, and only after Dr. Warren and the Clinic filed Motion for Summary Judgment or in the Alternative Motion to Dismiss, that Plaintiff finally named Dr. John Frenz as an expert, on February 28, 2007, when he filed his Supplemental Responses to Interrogatories and Requests for Production of Documents and Response to Motion for Summary Judgment or in the Alternative, Motion to Dismiss. Vol. 1, p. 49; Vol. 2, pp. 157, 159.

It is uncontested that Dr. Frenz, Plaintiff's only expert, surrendered his license to practice medicine in the State of Mississippi in February 2002, and that his license was reinstated on March 20, 2006, with restrictions, by Order of the Mississippi Board of Medical Licensure (hereinafter, "Board of Licensure"). Vol. 2, pp. 178, 197, 202, 206, 221, 230. Even though Dr. Frenz's license has been reinstated, the Board of Licensure has prohibited Dr. Frenz from the practice of neurosurgery, which was the field in which he purported to testify as an expert, as he stated in his opinion that it was based on more than thirty years experience as a neurosurgeon. Vol. 2 , p. 271; R.E. Exhibit J. Neurosurgery is also the area in which Dr. Frenz was determined by the Board of Licensure to be deficient in medical knowledge. Vol. 2, pp. 202-203 (¶ 9), 206-207; R.E. Exhibit H, pp. 202-203 (¶ 9); R.E. Exhibit I, pp. 206-207.

SUMMARY OF THE ARGUMENT

The Opinion and Order of the trial court, should be affirmed for summary judgment on the basis of all three issues upon which it relied because:

1. The trial court erred in granting Caldwell's motion to file an out of time appeal.

2. Caldwell's only medical expert is not qualified to testify as an expert pursuant to the regulations of the State Board of Medical Licensure because he has a restricted license to practice medicine in the State of Mississippi; in addition, he is not qualified pursuant to M.R.E. 702;

3. Caldwell failed to timely designate an expert;

4. Caldwell, by having filed an identical complaint prior to filing the Complaint which instigated this lawsuit, has violated the prohibition against claim splitting, and this action was properly dismissed consistent with the doctrine of priority of jurisdiction.

STANDARD OF REVIEW

The standard of review for a trial court's grant of a motion for summary judgment or a motion to dismiss is the de novo standard. *Monsanto v. Hall*, 912 So.2d 134, 136 (Miss.2005).

ARGUMENT

I. WHETHER THE TRIAL COURT ERRED IN GRANTING CALDWELL'S MOTION TO FILE AN OUT OF TIME APPEAL.

An appellate court is without jurisdiction to consider a case where a party has failed to timely file a notice of appeal and where the party has not demonstrated excusable neglect for the failure to timely file a notice of appeal. *Pinkston ex rel. Pinkston v. Mississippi Dept. of Transp.*, 757 So.2d 1071, 1074 (¶ 8)(Miss.App. 2000).

On August 29, 2007, the Circuit Court of Rankin County filed the Order Overruling the Plaintiff's Motion to Reconsider and Final Judgment as to Defendants Glen C. Warren, Sr., M.D. and Mississippi Neurosurgery Spine Center (hereinafter "Order"). Vol. 3, p. 307. On October 26, 2007, 58 days later, Plaintiff served Motion to File an Out of Time Appeal, arguing that Plaintiff's counsel did not learn that said Order had been filed until October 18, 2007, when counsel contacted the Rankin County Circuit Clerk. Vol. 3, p. 309. On November 16, 2007, Dr. Warren and the Clinic filed Motion to Strike and Response to Plaintiff's Motion to File Out of Time Appeal. Vol. 3, p. 316. The court entered an Order which granted Caldwell's Motion to File Out of Time Appeal on November 27, 2007. Vol. 3, p. 320.

The Mississippi Rules of Appellate Procedure state that notice of appeal must be filed with the clerk of the trial court within 30 days after the date of entry of the order being appealed. M.R.A.P. 4(a). The date of the entry of the Order being appealed is August 29; therefore, Caldwell should have filed within 30 days of that date, or by September 28.

Rule 4(a) provides: "The trial court may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time otherwise provided by this rule." Rule 4(g), however, states that "the motion shall be granted only upon a showing of excusable

neglect." M.R.A.P. 4(g). Caldwell has failed to show excusable neglect, as the only reason given for filing Motion to File an Out of Time Appeal is that counsel did not learn that said Order had been filed until October 18, 2007, when counsel contacted the Rankin County Circuit Clerk.

The comment to Rule 4(g) states that mere failure to learn of the entry of the judgment is generally not a ground for showing excusable neglect and that counsel in a case taken under advisement has a duty to check the docket regularly. M.R.A.P. 4(g). Failure of a party to receive notice that a ruling has been entered is no excuse for a party's failure to timely file a notice of appeal, nor is it considered excusable neglect. *Pinkston ex rel. Pinkston v. Mississippi Dept. of Transp.*, 757 So.2d at 1073; *Harlow v. Grandma's House, Inc.*, 730 So.2d 73, 76 (Miss. 1998).

It is the defendant who has the burden of proving excusable neglect. *City of Jackson v. Calcote*, 910 So. 2d 1103, 1109 (¶ 15) (Miss. App. 2005); *Harlow v. Grandma's House, Inc.*, 730 So.2d at 76 (¶ 16). Caldwell presented no evidence to prove excusable neglect. Though Caldwell attached an affidavit from his law partner, David Brewer, to his Motion to File an Out of Time Appeal, the affidavit only states that Brewer did not receive the court's Order in the mail. Vol. 3, pp. 309, 312. Though the purpose of the affidavit may be to show that Caldwell never received the court's order, the affidavit does not provide evidence of excusable neglect, since the failure to receive notice that a ruling has been entered is not considered excusable neglect. *Pinkston ex rel. Pinkston v. Mississippi Dept. of Transp.*, 757 So.2d at 1073; *Harlow v. Grandma's House, Inc.*, 730 So.2d at 76.

Furthermore, the Mississippi Supreme Court has stated that lenient construction of "excusable neglect" would convert the 30-day period for appeal into a 60-day period, which was not intended. *Matter of Estate of Ware,* 573 So.2d 773, 775 (Miss. 1990). The Mississippi Supreme Court has declared unequivocally that the "mandatory" 30-day rule will be "strictly enforced" and

that "appeals not perfected within thirty days will be dismissed, period." *Tandy Electronics, Inc. v. Fletcher*, 554 So.2d 308, 310 (Miss.1989).

Because Caldwell presented no evidence to demonstrate excusable neglect, he has failed to meet his burden and the trial court was in error in granting his Motion to File Out of Time Appeal; as a result, an appellate court is without jurisdiction to consider the case. *Pinkston ex rel. Pinkston v. Mississippi Dept. of Transp.*, 757 So.2d at 1073 (¶ 8).

II. SUMMARY JUDGMENT SHOULD BE AFFIRMED BECAUSE CALDWELL'S EXPERT IS NOT QUALIFIED TO TESTIFY AS AN EXPERT PURSUANT TO THE REGULATIONS OF THE MISSISSIPPI BOARD OF MEDICAL LICENSURE AND M.R.E. 702.

A. Caldwell's Expert Is Not Qualified Pursuant to the Regulations of the Mississippi State Board of Medical Licensure Because He Has a Restricted License to Practice Medicine.

The legislature of the State of Mississippi, has relinquished the responsibilities for the licensure of physicians to the State Board of Medical Licensure. MISS. CODE ANN. § 73-43-11(b)-(c) (Rev. 2004). [1] The State Board of Medical Licensure passed Regulation XXXII, which governs

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[1] Section 73-43-11 states: The State Board of Medical Licensure shall have the following powers and responsibilities:

(a) Setting policies and professional standards regarding the medical practice of physicians, osteopaths, podiatrists and physician assistants practicing with physician supervision;

(b) Considering applications for licensure;

(c) Conducting examinations for licensure;

(d) Investigating alleged violations of the medical practice act;

(e) Conducting hearings on disciplinary matters involving violations of state and federal law, probation, suspension and revocation of licenses;

(f) Considering petitions for termination of probationary and suspension periods, and restoration of revoked licenses;

(g) To promulgate and publish reasonable rules and regulations necessary to enable it to discharge its functions and to enforce the provisions of law regulating the practice of medicine;

(h) To enter into contracts with any other state or federal agency, or with any private person, organization or group capable of contracting, if it finds such action to be in the public interest and in the furtherance of its responsibilities; and

(i) Perform the duties prescribed by Sections 73-26-1 through 73-26-5.

medical expert activities by physicians and which became effective on July 1, 2006.[2] Exhibit C; R.E. Exhibit D.

Paragraph C of Regulation XXXII defines medical expert activities as including, among other things, the production of a written medical expert opinion in the form of a report or affidavit regarding the issues in a legal matter or claim for injuries that is then pending in a court which involves a person located within the State of Mississippi, or an event alleged to have occurred within the State of Mississippi. Exhibit C, ¶ C(6); R.E. Exhibit D, ¶ C(6).

The expert qualifications set forth in Paragraph D of Regulation XXXII require that any physician participating in a medical expert activity regarding a pending legal matter in a Mississippi court must hold a current, unrestricted medical license in Mississippi or another state or foreign jurisdiction, and must have the qualifications to serve as a medical expert on the issues in question by virtue of knowledge, skill, experience, training, and education. Exhibit C, ¶ D(1); R.E. Exhibit D, ¶ D(1).

Thus, Regulation XXXII of the State Board of Medical Licensure, requires that a physician who testifies as an expert in a legal matter hold an unrestricted medical license.

Caldwell designated Dr. John A. Frenz as his only medical expert. In October, 2001, during the pendency of an investigation against him by the Mississippi State Board of Medical Licensure, Dr. Frenz resigned all medical and staff privileges at Rankin Medical Center, which was communicated to the Board on or about October 5, 2001. Vol. 2, pp. 174, 175, 178, 187; R.E.

MISS. CODE ANN. § 73-43-11(b)-(c).

[2] A copy of the text of said Regulation XXXII is available at the website for the State Board of Medical Licensure at www.msbml.ms.us/updates.htm. Also a copy of said Regulation is in Appellee's Record Excerpts, Exhibit D.

Exhibit F, pp. 174-75; R.E. Exhibit G, p. 178. Charges were filed by the Board and on February 13, 2002, Dr. Frenz surrendered his license to practice medicine in the State of Mississippi. Vol. 2, pp. 183, 184, 191, 197, 206; R.E. Exhibit I, p. 205.

In the proceedings of September 15, 2005, regarding said license revocation and surrender, Dr. Frenz was found to have "... uneven medical knowledge with gaps primarily in more complicated spinal and intracranial topics", and "... having been evaluated to be incompetent in the practice of medicine or surgery". Vol. 2, p. 203 (¶¶ 9, 10); R.E. Exhibit H, pp. 202-203 (¶¶ 9, 10). It was also determined that there were deficiencies in his medical knowledge, specifically in the areas of spinal and intra cranial topics. Vol. 2, pp. 206, 207. By Order of the Mississippi Board of Medical Licensure dated September 15, 2005, it was determined that should Dr. Frenz later be granted a Mississippi license to practice medicine, the license would be restricted and subject to limitations, among the restrictions that he would no longer be able to practice neurosurgery.[3] Vol. 2, pp. 208, 209; R.E. Exhibit I, pp. 208, 209.

Dr. Frenz was absent from the clinical practice of medicine from October 2001 until his license was reinstated on March 20, 2006. Vol. 2, p. 207; R.E. Exhibit I, p. 207. When his Mississippi license was reinstated, it was reinstated as a restricted license. Vol. 2, pp. 208, 209, 263; R.E. Exhibit , pp. 208, 209.

Dr. Frenz was found by the Alabama State Board of Medical Examiners to have committed

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[3] Among the restrictions to Dr. Frenz's license are: (1) an agreement that Dr. Frenz would return to either the Professional Recovery Center in Kansas City, Missouri, or to Dr. Abel for polygraph examinations at six month intervals over the next two years with further follow ups as may be appropriate; (2) that Dr. Frenz would not be permitted to practice solo; (3) that Dr. Frenz would be required to have on site follow-up with Professional Recovery Center every two years and afterwards, based on progress, (4) that Dr. Frenz would continue AA/Caduceus Group meetings; (5) and that Dr. Frenz would no longer practice neurosurgery. Exhibit D, Records of the Mississippi State Board of Medical Licensure attached to letter of March 7, 2007 by H. Vann Craig, M.D., Executive Director. Vol. 2, pp. 207, 208.

fraud in renewing his Alabama license on or about January 2, 2002. Vol. 2, p. 175; R.E. Exhibit F, p. 175. Records of the Alabama State Board of Medical Examiners reveal that it revoked his medical license on March 31, 2003 and did not reinstate it until January 23, 2007. Vol. 2, p. 221, ¶¶ 4, 5; pp. 174-82. It is further noted that regardless of his return to "competency", he was found to be guilty of fraud in applying for or procuring a license to practice in the State of Alabama and was determined to be unable to practice medicine with reasonable skill and safety to patients by reason of illness, excessive use of alcohol, or as a result of any physical or mental condition. Vol. 2, p. 182; R.E. Exhibit G, p. 182.

Dr. Frenz's license was also revoked in the States of Ohio, Pennsylvania, and surrendered in Wisconsin and Alabama, as shown by the public records from said States. Vol. 2, pp. 217, 218, 225, 250. To the knowledge of Appellees, his license has not been reinstated in Ohio, Pennsylvania, or Wisconsin. In addition, Dr. Frenz is on the list of physicians excluded from receiving reimbursement for providing Medicare and Medicaid services nationwide and remained on the list at least until September 8, 2006. Vol. 2, p. 211.

Thus, Caldwell has failed to show that Dr. Frenz has an unrestricted license to practice medicine and pursuant to Regulation XXXII of the State Board of Medical Licensure, he may not testify as an expert witness in a legal proceeding regarding a medical matter.

B. Caldwell's Expert Is Not Qualified to Testify As an Expert Pursuant to M.R. E. 702.

Mississippi law requires the trial court to act as a gatekeeper to ensure that proposed testimony satisfies Rule 702 of the Mississippi Rules of Evidence.[4] To satisfy Rule 702, the

[4] Rule 702, as amended, provides: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or

proponent of expert testimony must demonstrate that the witness is "qualified as an expert by knowledge, skill, experience, training, or education" with regard to the topics of proposed testimony.

Though it is not required that a doctor be a specialist in a particular branch within a profession in order to testify as an expert, the general rule in medical malpractice actions is that a doctor may testify if he is familiar with the standards of a particular specialty even though he may not practice the specialty himself. *West v. Sanders Clinic for Women, P.A.*, 661 So.2d 714, 719 (Miss. 1995); *Brown v. Mladineo*, 504 So.2d 1201 (Miss.1987), quoting McCormick on Evidence § 13 (3d ed. 1984). It is the scope of the witness' knowledge and not the artificial classification by title that governs the threshold question of admissibility. *West,* 661 So. 2d at 719.

The Complaint filed in this cause concerns treatment beginning with an admission of June 17, 2003, at River Oaks Hospital for a two level anterior cervical discectomy and fusion with bank bone and the application of an anterior locking plate, and for a second surgery on October 3, 2003, to remove the screws and locking plate from Dr. Caldwell's neck. Vol. 1, pp. 2, 3 (¶¶ 5, 9); R.E. Exhibit B, pp. 2, 3 (¶¶5, 9). During this entire period, Dr. John A. Frenz was unable and incompetent in his practice of medicine, particularly on the spine, was incompetent and untrustworthy, and is still not permitted, according to the records of the Mississippi Board of Medical Licensure, to practice neurosurgery, his specialized area of practice. Vol. 2, pp. 206, 207, 209; R.E. Ex I, pp. 206, 207, 209. Thus, the scope of his knowledge was insufficient to meet the threshold necessary for him to qualify to testify as an expert in the field of neurosurgery. *West,* 661 So. 2d at 719.

Dr. Frenz is therefore not competent to render an opinion, as he was evaluated by the

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otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. Miss. R. Evid. 702 (as amended May 29, 2003).

Mississippi Board of Medical Licensure to be incompetent to practice medicine or surgery in August 2005 and had been absent from clinical practice since 2001. Vol. 2, p. 203 (¶¶ 9, 10); p. 207. He is not competent to opine as to the standard of care existing in 2003 or on spinal surgery, as he was prohibited from practice during that time and therefore not familiar with the standards at that time. *West*, 661 So. 2d at 719. In the proceedings regarding his license revocation and license surrender, he was found to have "... uneven medical knowledge with gaps primarily in more complicated spinal and intracranial topics", and "... having been evaluated to be incompetent in the practice of medicine or surgery". Vol. 2, p. 203 (¶ 9); R.E. Exhibit H, p. 203 (¶ 9). It is apparent that Dr. Frenz is not qualified as an expert by knowledge, skill, or familiarity with regard to the topics of proposed testimony to satisfy Rule 702. *West,* 661 So. 2d at 719.

Even when his license was reinstated in March 2006, it was restricted and he was bound to submit at six month intervals to polygraph examinations, was prohibited from solo practice and could no longer practice neurosurgery. Vol. 2, pp. 207, 208.

In the document provided as Dr. Frenz's expert opinion dated February 20, 2007, by Caldwell in his belated Response to Interrogatories, Dr. Frenz claims he is a neurosurgeon and attempts to give opinions as to the standard of care existing in 2003 and spinal surgery in particular. Vol. 2, pp. 271-81; R.E. Exhibit J, p. 271. Dr. Frenz is incompetent to give such statement or render such opinions as he is not qualified to testify pursuant to the requirements of M.R.E. 702. All of the opinions given in his rambling letter are particularly in the field in which he was found to be incompetent.

The curriculum vita provided by Caldwell would infer that Dr. Frenz has practiced continuously since 1986 in Rankin County in general neurological surgery. Vol. 2, p. 284. This is deceitful and an attempt to mislead as to the fact that his practice certainly stopped in 2002 and was not reinstated until 2006.

There is no identification of hospital privileges, and on information and belief, he has had no surgical privileges anywhere since he resigned all medical and staff privileges at Rankin Medical Center in 2001, prior to the surrender of his license in February 2002. Vol. 2, pp. 174 (¶ 1), 175 (¶ 3), 178 (¶ 3,a-b), 187 (¶ ¶ 8,9).

Because Dr. Frenz had no license to practice medicine at all from 2002 - 2006, and did not practice medicine or surgery from 2001 - 2006, he could not have been familiar with the standard of care in July 2003, the date the incident of alleged malpractice occurred, and would not be qualified to testify as to the standard of care at that time. Furthermore, Dr. Frenz is not qualified as an expert by knowledge or skill to meet the requirements of Rule 702.

III. WHETHER SUMMARY JUDGMENT SHOULD BE AFFIRMED FOR FAILURE TO TIMELY DESIGNATE AN EXPERT.

The law in Mississippi is well settled that to survive summary judgment in a case alleging medical malpractice, the plaintiff may not rest upon his own allegations but must present expert medical opinions that the defendant failed in some particular respect to meet the appropriate standard of care for physicians of like practice. *See Stallworth v. Sanford,* 921 So. 2d 340, 342 (Miss. 2006); *Travis v. Stewart*, 680 So. 2d 214, 218 (Miss. 1996); *Drummond v. Buckley*, 627 So. 2d 264, 268 (Miss. 1993); *Palmer v. Biloxi Regional Medical Center, Inc.*, 564 So. 2d 1346, 1355 (Miss. 1990); *Phillips v. Hull*, 516 So. 2d 488, 491 (Miss. 1987); *Kilpatrick v. Mississippi Baptist Medical Center*, 461 So. 2d 765, 768 (Miss. 1984).

In *Stallworth v. Sanford*, the plaintiff filed a medical malpractice action against several physician defendants in May 2004 (although plaintiff actually had notice of her claim and retained counsel two years before that). *See Stallworth*, 921 So. 2d at 343. The defendants served the plaintiff with interrogatories in June 2004, asking the plaintiff to identify a medical expert who could

substantiate her claims. *Id.* Plaintiff failed to respond, and the trial court granted the defendants' summary judgment motion in October 2004. *Id.* at 342. At the hearing on the defendants' motion for summary judgment, the plaintiff submitted an affidavit explaining why she had not been able to obtain an expert and stating that a potential expert had been located and requested additional time, pursuant to Rule 56(f) of the Mississippi Rules of Civil Procedure, to obtain an affidavit from the potential expert. *Id.* Her request for additional time was denied. *Id.* On appeal, the Mississippi Supreme Court affirmed the trial court's grant of summary judgment, holding that "Rule 56(f) is not designed to protect litigants who are lazy or dilatory" and that plaintiff had ample time to locate an expert. *Id.* at 343.

Likewise, in *Kilpatrick v. Mississippi Baptist Medical Center*, the trial court dismissed a medical malpractice action against one of the doctor defendants approximately ten months after the case was filed because the plaintiff had failed, as shown by his discovery responses, to designate an expert witness. *See Kilpatrick*, 461 So. 2d at 767. The Mississippi Supreme Court affirmed the dismissal holding that the plaintiff had ample time to furnish the defendant the name of an expert but had not done so. *Id.*

Summary judgment was also affirmed in *Hill v. Warden*, 796 So.2d 276, 281 (Miss.App. 2001) on similar facts.

Likewise in the instant case, Plaintiff filed his complaint on August 15, 2005, over two years after Plaintiff first had notice of a potential claim. Vol. 1, pp. 11,12 ¶ 5; R.E. Exhibit B. Dr. Warren propounded interrogatories to Plaintiff on November 8, 2005, asking Plaintiff to "identify all experts whom you intend to call as a witness at the trial of this cause and/or who has rendered a preliminary opinion of negligence against Dr. Warren upon which you have relied in filing this complaint." Vol.

1, p. 66. On June 6, 2006, seven months after the interrogatories were served on Plaintiff and almost ten months after Plaintiff filed his complaint, Plaintiff responded to Dr. Warren's interrogatories stating in response to the request for experts that "**No such expert has been retained at this time.**" Vol. 1, pp. 72, 79, 80. Eight months after Plaintiff submitted such response and over one year and five months after Plaintiff filed his complaint (and over three years after Plaintiff first had notice of his possible claim), Plaintiff still had not identified an expert to substantiate his claim of medical negligence.[5] Therefore, under *Stallworth*, *Kilpatrick,* and the other cases cited above, the trial court's Order granting summary judgment for Caldwell's failure to timely designate an expert should be affirmed.

IV. WHETHER SUMMARY JUDGMENT SHOULD BE AFFIRMED ON THE ISSUES OF PRIORITY OF JURISDICTION AND CLAIM SPLITTING.

Though summary judgment or dismissal should be affirmed on the basis of the first two issues heretofore discussed, the trial court granted summary judgment on the basis of claim splitting and priority of jurisdiction as well.

Caldwell filed the Complaint in this case on August 15, 2005 (Cause No. 2005-195-C). Vol. 1, p. 11; R.E. Exhibit B. However, on August 12, 2005, he had filed another complaint (Cause No. 2005-194-R) which was identical to the Complaint filed on August 15. Vol. 1, p. 87; R.E. Exhibit C. The prior complaint was filed in the same court and named the same parties. By having filed an identical complaint prior to filing the Complaint which instigated this lawsuit, Caldwell has violated the prohibition against claim splitting, and this action was properly dismissed consistent with the

[5]This failure is in spite of Plaintiff's counsel's affidavit attached to the complaint stating that an expert had been consulted. Vol. 1, p. 20.

doctrine of priority of jurisdiction. Caldwell's appellate brief attempts to justify his reasons for filing two complaints in terms of the lack of clarity in the notice provision of section 15-1-36 (15)[6] in regard to when a complaint should be filed when the sixtieth day of notice falls on a weekend. Brief of Appellee, p. 13. He supports his contention by asserting that there was no guidance on the issue because there was no case law construing the issue at the time he filed either complaint, and this is the primary basis of his appeal.

However, the law has been clear since long before Caldwell filed either complaint, as provided in the Mississippi Rules of Civil Procedure, that in computing time in regard to rules or statutes, when the last day falls on a Saturday or Sunday that that day will not be included in the computation.[7] Miss. R. Civ. P. 6(a); *Nelson v. James*, 435 So.2d 1189, 1191 (Miss.1983).

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[6] Section 15-1-36 (15) of the Mississippi Code 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 ANN. § 15-1-36(15) (1972, as amended).

[7] Miss.R.Civ.P. 6(a) provides: In computing any period of time prescribed or allowed by these rules, by the local rules of any court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or any other day when the courthouse or the clerk's office is in fact closed, whether with or without legal authority, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, a legal holiday, or any other day when the courthouse or the clerk's office is closed. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

Thus, Caldwell's attempt to blame his woes on the lack of clarity in the notice provision is misplaced and cannot justify his error. Ignorance of the law is not justification for failure to avoid error. Miss. R. Civ. P. 60 (b); *Stringfellow v. Stringfellow*, 451 So.2d 219, 221 (Miss.1984).

A. Prohibition Against Claims Splitting

Under Mississippi law, a plaintiff may not maintain two separate actions based on the same claim. *See General Acceptance Corporation v. Holbrook* , 189 So. 2d 923, 925 (Miss. 1966). It is fundamental that a plaintiff may not ignore a prior action and bring a second on the same state of facts while the original is pending. *Lee v. Lee*, 232 So. 2d 370, 373 (Miss. 1970). Under these circumstances the second action will be dismissed. *Id.* Dismissal upon the ground of a former suit pending is based on comity, convenience, and orderly procedure in the trial of contested issues, as courts recognize that no one should be harassed and oppressed by two suits for the same cause of action and the same remedies. *General Acceptance Corporation v. Holbrook*, 189 So. 2d at 925. The concept has recently been reaffirmed by the Supreme Court in *Channel v. Loyacono,* where the Supreme Court recognized that unnecessary piecemeal litigation induces a strain on the courts' time and is a hardship upon defendants. *Channel v. Loyacono*, 954 So.2d 415, 424 (Miss. 2007).

Recently, in *Wilner v. White*, the Mississippi Supreme Court reiterated in clear, unambiguous terms the rule of law in Mississippi against splitting claims among multiple lawsuits. *Wilner v. White*, 929 So. 2d 315, 320 (Miss. 2006). In *Wilner*, a medical malpractice action, the plaintiff filed an amended complaint naming additional defendants before being granted leave of court to do so. The amended complaint was filed on the last day of the statute of limitations, and the issue was whether the claims against the additional defendants were timely since leave of court

had not been granted for filing the amended complaint. The circuit court dismissed the amended complaint. *Id.*

The Court of Appeals reversed the circuit court, reasoning that the plaintiff could have filed a new, separate action against the new defendants, which would have been timely, and then moved to consolidate the two actions, in which case there would be no statute of limitations issue. However, the Supreme Court reversed the Court of Appeals, and stated that the long-standing principle of law which prohibits splitting a cause of action into two different actions would have been violated in assuming that Wilner could have named new parties in a separate complaint, and that to suggest that a party could take this course of action would encourage parties in the future to ignore the law. *Id.* at 320.

In reaching its decision the Supreme Court also overruled the Court of Appeals' prior decision in *King v. American RV Centers, Inc.*, 862 So. 2d 558 (Miss. App. 2003), to the extent that *King* could be interpreted as allowing a party to split causes of action. The Court stated that the ruling in *King* "encourages exactly what we have already stated is not allowable under Mississippi law--the splitting of a cause of action." *Wilner*, at 320.

It is well established that Mississippi is among the majority of states which does not allow splitting a cause of action. *Harrison v. Chandler-Sampson Ins., Inc.*, 891 So. 2d 224, 234 (¶30) (Miss. 2005); *Kimball v. Louisville & N. R. Co.* , 48 So. 230, 231 (Miss. 1909); *Alexander v. Elzie*, 621 So. 2d 909, 910 (Miss. 1992).

The August 15 Complaint filed by Caldwell in the instant case (Cause No. 2005-195-C) asserts the same claims as, and in fact is identical to the earlier complaint filed in this Court on August 12 in Civil Action No. 2005-194-R. Vol. 1, pp, 11, 87; R.E. Exhibits B,C. Though

Caldwell argues that he did not intend to maintain two separate actions and as evidence asserts that he only served process in the Complaint for this action, he attempted to preserve the viability of the complaint filed on August 12 by filing a motion for extension of time to serve process for that complaint. Brief of Appellee, pp. 9, 14; Vol. 2, pp. 159, 161, ¶¶7, 8. Though Caldwell asserts that he did not intend to maintain two separate actions, he was clearly attempting to preserve the viability of both complaints, which is contrary to the rule which prohibits claim-splitting. Such filing of multiple, identical actions is prohibited by the rule against claim-splitting, and in such a situation the earlier-filed action should take precedence and the later-filed action should be dismissed, pursuant to the doctrine of priority of jurisdiction, which is discussed below. *Lee v. Lee*, 232 So. 2d at 373; *General Acceptance Corporation v. Holbrook*, 189 So. 2d at 925.

B. Priority of Jurisdiction

In *Smith v. Holmes*, 921 So. 2d 283 (Miss. 2005), the parents of a deceased child each filed separate wrongful death actions in the same circuit court. The circuit court dismissed the later-filed action holding that only one wrongful death action is allowed under the wrongful death statute. The Supreme Court affirmed and stated that it was fundamental law that a plaintiff could not ignore a prior action and bring a second, independent action on the same facts, parties and subject matter while the original action was pending. Under the circumstances the second action would be dismissed. *Smith v. Holmes*, 921 So. 2d at 286; *Lee v. Lee*, 232 So.2d at 373.

Although the Supreme Court's decision in *Smith v. Holmes* was based in part on the specific language of the wrongful death statute, the Court relied on the *Lee* case, a divorce action, for the "fundamental" principle that a plaintiff cannot ignore a pending action and bring a second action on the same claim. In *Lee*, a pre-Rules of Civil Procedure case, a wife filed separate

divorce actions in two different counties, and the Supreme Court held that the chancery court of the county where the second action was filed should have sustained the husband's plea in abatement as to the later-filed action and allowed the court having jurisdiction over the earlier-filed action to determine the matter. *Lee v. Lee*, 232 So.2d at 373.

In another pre-Rules case, *General Acceptance Corporation v. Holbrook*, which involved multiple suits in the same court to collect on a foreign judgment, the Court commented that "Abatement of an action upon the ground of a former suit pending is predicated upon comity, convenience, and orderly procedure in the trial of contested issues. No one should be harassed and oppressed by two suits for the same cause of action and the same remedies." *General Acceptance Corporation v. Holbrook*, 189 So. 2d at 925. The pendency of a prior suit between the same litigants and involving the same subject matter is a bar unless adequate relief is not attainable in the prior suit. *Abiaca Drainage Dist. of Leflore, Holmes, and Carroll Counties v. Albert Theis & Sons*, 187 So. 200, 201 (Miss. 1939).

The fact that the Supreme Court, in its *Smith v. Holmes* opinion, relied on *Lee v. Lee*, which in turn relied on the *Holbrook* and *Abiaca Drainage* opinions, demonstrates that these principles are still fully applicable despite the adoption of the Rules of Civil Procedure.

Because Plaintiff in the instant case has filed two separate actions using an identical complaint, Plaintiff has violated the prohibition on claim splitting and, consistent with the doctrine of priority of jurisdiction, this action should be dismissed in favor of the first filed action pending, Civil Action No. 2005-194-R.

CONCLUSION

The trial court's Order granting summary judgment should be affirmed because: (1) there is no jurisdiction to hear this case because Caldwell failed to file a timely notice of appeal; (2) Caldwell's only medical expert is not qualified to testify pursuant to the regulations of the State Board of Medial Licensure and M.R.E. 702 and there is no question of fact; (3) Caldwell failed to timely designate his expert; and (4) Caldwell has violated the prohibition against claim splitting and this action was properly dismissed consistent with the doctrine of priority of jurisdiction.

For the aforementioned reasons, the Order of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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Carol B. Swilley
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Brandon, MS 39043

Honorable William E. Chapman
Rankin County Circuit Court
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This the 24th day of July, 2008.

Anastasia Jones
Anastasia Jones