

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2008-CA-01617

DIANN HANS, and her husband DAVID HANS

APPELLANTS

VERSUS

MEMORIAL HOSPITAL AT GULFPORT,
JAMES LOVETTTE, ARTHUR SPROLES
AND JOHN DOE

APPELLEES

BRIEF OF APPELLEE, JAMES LOVETTE M.D.

Appeal from
Harrison County Circuit Court
First Judicial District
Trial Court Case Number A2401-07-100
The Honorable Jerry O. Terry, Sr.

ORAL ARGUMENT REQUESTED

Respectfully submitted: JAMES LOVETTE, M.D.

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certify that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Diann Hans, Plaintiff
2. David Hans, Plaintiff
3. Robert Homes, Esquire, Attorney for Plaintiffs
4. Memorial Hospital at Gulfport, Defendant
5. James Lovette, M.D., Defendant
6. Arthur Sproles, M.D., Defendant
7. Patricia K. Simpson, Esquire, Attorney for Memorial Hospital at Gulfport
8. William E. Whitfield, Esquire, Attorney for James Lovette, M. D.
9. Karen K. Sawyer, Esquire, Attorney for James Lovette, M. D.
10. George F. Bloss, Esquire, Attorney for Arthur Sproles, M. D.
11. Mary Margaret Kuhlmann, Esquire, Attorney for Arthur Sproles, M. D.
12. The Honorable Jerry O. Terry, Sr., Trial Judge

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STATEMENT OF THE ISSUES

Plaintiffs failed to provide James Lovette, M.D. with the sixty day pre-suit notice which is required by §15-1-36(15), M.C.A. in order to commence an action based upon a health care provider's alleged professional negligence. Therefore, the trial court properly dismissed this action on those grounds, notwithstanding that Appellant Hans attempted to cure the fatal flaw by sending a belated notice letter and subsequently amending the original Complaint.

STATEMENT OF THE CASE

On March 29, 2007, Diann Hans and her husband David filed a medical malpractice action in the Circuit Court of Harrison County in the First Judicial District located in Gulfport, Cause No. A2401-07-100. That initial Complaint identified three Defendants as Memorial Hospital at Gulfport, James Lovette and Arthur Sproles. There was one additional unidentified "John Doe" defendant. (R.16-21).

The substance of the Complaint is generally that Mrs. Hans went to the hospital with abdominal pain and was provided care that was allegedly performed in an untimely and negligent manner. The Complaint further states that the Defendants allegedly failed to exercise that degree of skill, diligence and care that other licensed physicians and accredited hospitals would have exercised under like or similar circumstances. The hospital was allegedly negligent in providing emergency care for Mrs. Hans' appendicitis.

The hospital is further alleged to have failed to follow the instructions of Mrs. Hans' gynecologist who referred her to the hospital. Additionally the hospital allegedly failed to contact the "on call" physician to perform emergency surgery on Mrs. Hans in a timely manner.

While the Complaint includes Mr. Hans as a Plaintiff, the Complaint includes no claims for his damages, only for injuries to Mrs. Hans.

Summons was issued for all named Defendants at the time the Complaint was filed in March 2007. The return on the summons for Dr. Sproles and the hospital was filed, but not for Dr. Lovette. (R.24-27).

Plaintiffs have acknowledged that no pre-suit notice was given to Dr. Lovette (or Dr.

Sproles).¹ Consequently, a “Notice of Partial Dismissal” was filed by the plaintiff on July 16, 2007 which voluntarily dismissed Dr.Lovette pursuant to Rule 41. (R.67).²

The next year, Hans pursued a Motion to Amend the Complaint. The chronology is unclear, but according to the record, Hans filed a Motion to Amend the Complaint on March 20, 2008. (R.306-315). A Notice of Hearing was filed on March 24, 2008, setting the Motion for hearing on March 26, 2008. (R.338). However, an Order (R.339) was entered on March 25, 2008 allowing the amendment which was actually filed on March 26, 2008. (R.340-347).

After service of summons upon him, Lovette filed his Motion to Dismiss on April 25, 2008. (R.423-436). This Motion was promptly pursued and argued at two hearings on July 25, 2008 and again on August 22, 2008. By Order dated August 27, 2008, the Court dismissed the action against Lovette. (R.670-671).

Thereafter, Appellant Hans filed a Notice of Appeal on September 23, 2008. (R.682).

¹Letters dated May 2, 2007 and March 14, 2008 were belatedly sent to Drs. Lovette and Sproles.

²Dr. Sproles was dismissed without prejudice by agreed order dated May 30, 2007. (R.65).

SUMMARY OF THE ARGUMENT

It is undisputed that Plaintiffs Hans failed to send a notice letter to the Defendant physicians prior to initiating this medical malpractice lawsuit styled “Diann Hans and her husband David Hans, Plaintiffs v. Memorial Hospital at Gulfport, James Lovette, Arthur Sproles and John Doe, Defendants” docketed as Cause No. A2401-07-100 in the Circuit Court of Harrison County, Mississippi.

The failure of Hans to comply with the pre-suit notice requirement set forth in §15-1-36(15) M.C.A. clearly entitled Dr. Lovette, as well as Dr. Sproles, to be dismissed from this case by the trial court judge, the Honorable Judge Jerry Terry.

Despite Hans’ attempt to avoid the inevitable outcome by sending belated notice letters and amending the Complaint, the trial court properly granted Drs. Lovette and Sproles’ Motions to Dismiss this action.

ARGUMENT OF JAMES LOVETTE, M.D.

I. NO PRE-SUIT NOTICE WAS GIVEN TO DR. LOVETTE

Hans does not dispute her failure to provide the necessary pre-suit notice to these two physicians, Drs. Sproles and Lovette. The record confirms this as is clearly acknowledged in Plaintiffs' Opposition to Defendant Lovette's Motion to Dismiss filed May 13, 2008 (R.514):

On March 29, 2007, Plaintiffs' original Complaint was filed, naming Dr. Lovette as one of the Defendants (along with Memorial Hospital, and Dr. Sproles). Shortly afterwards, Plaintiffs' counsel was informed by Pete Bloss, acting as Dr. Sproles' attorney, that the Complaint against Lovette and Sproles was defective because Plaintiffs' counsel had overlooked the requirement for the 60-day Claim Notice to the two doctors under the Claim Notice Statute. Plaintiffs' counsel therefore voluntarily dismissed Sproles and Lovette from the suit on May 30, 2007 and July 16, 2007 respectively. Bloss send (sic) Plaintiffs' counsel a proposed Order dismissing his client, Sproles, without prejudice, which undersigned counsel agreed to. Plaintiffs' counsel then issued his own voluntary dismissal of Lovette, since an Order of dismissal was not really required under MRCP 41(a)(1)(i). Copies of the two dismissal pleadings are attached as Exhibits A and B respectively.

Meanwhile on May 2, 2007, we sent each of the doctors the required Claim Notice, **as we should have done in the first place.**

So, as Hans explained in the foregoing pleading, it is conceded that no pre-suit notice was given. Hans admitted that the notice letters were "post-suit." By the time the first notice letter was written in May 2007, of course, this lawsuit had already been filed.

II. §15-1-36(15), M.C.A. REQUIRES 60 DAYS PRIOR WRITTEN NOTICE BEFORE COMMENCING AN ACTION BASED UPON A HEALTH CARE PROVIDER'S PROFESSIONAL NEGLIGENCE

Effective January 2003, §15-1-36(15), M.C.A., imposes a pre-suit notice requirement on certain actions against health care providers. The pertinent language of the statutory sub-section is as follows:

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. ...

The statute is clearly worded and the requirement for the notice to be given in a time frame of at least sixty days before the action "may be begun" is not ambiguous. Rule 3(a), M.R.C.P. specifies that a civil action is commenced by the filing of the Complaint.

This Complaint was filed March 29, 2007. The first notice letter is dated May 2, 2007.³ One needs no calendar to determine unequivocally that this action was "begun" without sixty days notice.

III. DISMISSAL OF THE LAWSUIT BY THE TRIAL COURT WAS PROPER

The necessity of the pre-suit notice has been addressed by the Court in several cases. In Pitalo v. GPCH-GP, INC. d/b/a Garden Park Medical Center and Dr. Ronald Graham, No.2005-CA-00012-SCT, 933 So.2d 927 (Miss.2006), the failure of the Plaintiff to give the pre-suit notice as required by §15-1-36(15) was proper grounds for the dismissal of Pitalo's action against the Defendants. In the opinion, the Court acknowledged that it must apply the plain meaning of a statute when interpreting one that is unambiguous. *Id.* at ¶5. The Court further noted that when it construes a statute, it must seek the intention of the legislature and adopt the interpretation which will "meet the real meaning" of the Legislature. *Id.* at ¶5. Pitalo's failure to send the notice of her intent to sue the medical providers warranted the dismissal of her claim because it was an "inexcusable deviation" from the Legislature's requirements. *Id.* at ¶7. Just like Pitalo, Hans

³ Implicitly anticipating the appropriate dismissal of the Amended Complaint in this case, after Dr. Lovette's Motion to Dismiss was filed, the Plaintiffs subsequently filed a separate, second lawsuit based on the same occurrence. It was filed on May 19, 2008 in the Circuit Court of Harrison County, First Judicial District, as Civil Action No.A-2401-2008-154 styled "Diann Hans and her husband David Hans, Plaintiffs v. James Lovette, Arthur Sproles, Michael Moses, Paul Mace and Memorial Hospital at Gulfport, Plaintiffs."

also failed to do what was required by the statute and the dismissal of her case by Judge Terry was proper.

Again, in Arceo v. Tolliver, No.2005-IA-00652-SCT, 949 So.2d 691 (Miss.2006), the Plaintiff's failure to provide the sixty day notice of her intention to commence a medical malpractice action necessitated its dismissal without prejudice based upon this Court's plain reading of the statute and its consistent application of other similar statutory requirements.

Following the Pitalo and Tolliver cases, the Court of Appeals affirmed the dismissal of a medical malpractice claim in Nelson v. Baptist Memorial Hospital-North Mississippi, Inc., et al, No.2005-CA-02058-COA, 972 So.2d 667 (MCA 2007). In the Nelson case, the Plaintiffs filed their medical malpractice lawsuit on July 9, 2003, but did not provide the proper pre-suit sixty day notice. Subsequently, a notice letter was sent on November 10, 2003 and an Amended Complaint was filed sixty days thereafter. The Court of Appeals' decision affirmed that the failure to send the notice before initiation of the lawsuit, despite a belated notice and amendment of the Complaint, is an "inexcusable deviation" from the requirements of the statute and warranted dismissal of the Nelson's lawsuit. Id. at ¶17.

See also, Andrews v. Arceo, No.2007-CA-01390-COA, 988 So.2d 399 (MCA. 2008), where the Court of Appeals acknowledged that the requirements such as the one in §15-1-36(15) are "to be taken seriously." Id. at ¶ 15. It was Andrews responsibility to give notice to Dr. Arceo before filing suit against him. Just like the results in Tolliver's case, Andrews' failure to provide notice to Dr. Arceo was "properly fatal" to the continuation of his lawsuit for failure to properly comply with the notice requirement.

Recently, in Thomas v. Warden, No.2006-CA-10703-SCT, 2007-CA-00821-SCT, 999 So.2d 842 (Miss.2008), the Court acknowledged that because the Defendants in that case did not

have sixty days prior written notice of the intention to begin the action, the lawsuit was not lawfully filed and was *of no legal effect*. Id at ¶15. As to Drs. Sproles and Lovette, without pre-suit notice, the Hans' lawsuit was not lawfully filed to begin with and could not be cured by later amending the Complaint. The complaint is, in essence, a void act, and an amended complaint cannot act as a legitimizing appendage to an otherwise illusory overture.

Just like Pitalo, Tolliver, Andrews, Nelson and Thomas, Mr. and Mrs. Hans were required to comply with the sixty day pre-suit notice requirement of §15-1-36(15), M.C.A. in order to commence this medical malpractice lawsuit against Dr. Lovette and Dr. Sproles. They did not. Judge Terry was clearly correct in dismissing this action.

CONCLUSION

The statutory requirement to give at least sixty days pre-suit notice before commencing a medical malpractice action is clear and unambiguous. It simply was not done in this case. Judge Jerry O. Terry properly granted the Motion to Dismiss the Amended Complaint on those grounds. Dr. Lovette respectfully submits that the trial court should be affirmed.

Respectfully submitted, this the 21st day of April, 2009.

JAMES LOVETTE, M.D.

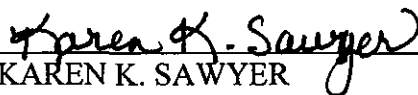
BY: Copeland, Cook, Taylor & Bush, P.A.

By: Karen K. Sawyer
KAREN K. SAWYER

CERTIFICATE OF SERVICE

I, KAREN K. SAWYER, do hereby certify that I have this day mailed, by United States Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee, James Lovette, M.D. to Robert Homes, Jr., P.O. Box 500, Gulfport, Ms. 39502; Patricia Simpson, Franke & Salloum, P.O. Drawer 460, Gulfport, Ms. 39502; George F. Bloss and Mary Margaret Kuhlmann, P.O. Drawer 160, Gulfport, Ms. 39502 and to to Honorable Jerry O. Terry, Circuit Judge, Circuit Court of Harrison County, Mississippi, at his record mailing address of Post Office Box 1461, Gulfport, Mississippi 39502;

SO CERTIFIED, this the 21st day of April, 2009.


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