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, ARTHUR SPROLES, M.D.

Appeal from
Harrison County Circuit Court
First Judicial District
Trial Court Case Number A2401-2007-100
The Honorable Jerry O. Terry, Sr.

ORAL ARGUMENT REQUESTED

Respectfully submitted: ARTHUR SPROLES, 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. Dian n Hans, Plaintiff

2. David Hans, Plaintiff

3. Robert Homes, Esquire, Attorney for Plaintiffs

4. Memorial Hospital at Gu lfport, Defendant

5. James Lo vette, M.D., Defendant

6. Arthur Sproles, M.D., De fendant

7. Patricia K. Simpson, Esquire, Attorne y 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 Arthur Sproles, M.D. the with sixty (60) days pre-suit notice as required by Miss. Code Ann. § 11-1-36 prior to initiating a cause of action based on medical malpractice. As a result thereof, the trial court properly dismissed the action without prejudice albeit Plaintiffs' efforts to cure the violation by sending a notice of claim letter after suit had been filed and then amending their original complaint.

STATEMENT OF THE CASE

On March 29, 2007, Plaintiffs' initial Complaint was filed in the First Judicial District of Harrison County, Mississippi, Cause No. A-2401-2007-100, alleging medical malpractice against the healthcare provider defendants, Memorial Hospital at Gulfport, James Lovette, M.D., Arthur Sproles, M.D., and John Doe. The Complaint states that on April 6, 2006, Diann Hans presented to the Emergency Department of the hospital with complaints of abdominal pain and alleges that the care and treatment provided was untimely and substandard. The Complaint further alleges that the Defendants treated Diann Hans in a negligent manner and failed to exercise that degree of skill, diligence and care which other licensed physicians and accredited hospitals would have rendered under similar circumstances. Allegations are made against the hospital contending that it did not properly determine the extent of Plaintiff's injury or recognize the urgent need for treatment of the appendicitis. The Complaint also claims that the hospital failed to follow the instruction of Mrs. Hans' treating physician and failed to locate the on-call surgeon in a timely manner. The claims of David Hans are derivative in nature. All defendants vigorously deny any breach of the standard of care and deny that the Hanses claimed injuries are related to her medical treatment.

Process was issued, and on March 30, 2007, Memorial Hospital and Dr. Sproles were both served with a Summons, Complaint, and Plaintiffs' Combined Discovery. (R.24-27). On April 25, 2007, Dr. Sproles filed a Motion to Dismiss based on Plaintiffs' failure to provide pre-suit notice. (R.28-53). On May 2, 2007, a belated notice of claim letter was sent to Dr. Sproles and Dr. Lovette in an attempt to cure the procedural defect. On May 30, 2007, the Agreed Order of Dismissal Without Prejudice was entered dismissing Dr. Sproles, in

which Plaintiffs acknowledged their failure to provide pre-suit notice. (R.65). On July 16, 2007, Dr. Lovette was dismissed without prejudice on the same basis pursuant to a "Notice of Partial Dismissal." (R.67).

On March 14, 2008, another letter providing notice of Plaintiffs' claims was sent to Dr. Sproles. Plaintiffs' Motion to Amend Complaint and for Expedited Hearing Thereon was filed on March 20, 2008. (R.306-315). Although both physician defendants had been previously dismissed in May, 2007, the caption appearing on Plaintiffs' Motion to Amend included not only Memorial Hospital at Gulfport as a named Defendant, but also improperly included Dr. Lovette and Dr. Sproles as named Defendants. (R.308). Additionally, acting without agreement of the Defendant Memorial Hospital at Gulfport or permission of the trial court as required by Rule 15(a) of the Mississippi Rules of Civil Procedure, Plaintiffs unilaterally edited the caption by changing the "John Doe" Defendant to "John Doe I" and added "John Doe II" as an additional Defendant. The caption on the Motion is exactly the same as that which appears on the attached First Amended Complaint. (R.308). Plaintiffs' Motion to Amend states "the primary changes made by the proposed amendment are to add defendants Dr. Arthur Sproles and Dr. James Lovette, to more specifically describe the facts and injuries alleged," however, the Motion fails to mention Plaintiffs' intent to add an additional John Doe defendant. (R.306). The sole Defendant, Memorial Hospital at Gulfport, filed an objection to the Motion to Amend, and subsequent to a hearing on the issue, an Order was entered on March 25, 2008 allowing the amendment. (R.339). On March 26, 2008, the First Amended Complaint was filed. (R.340-347)

Drs. Lovette and Sproles filed their separate Motions to Dismiss First Amended Complaint on or about April 25, 2008 and May 2, 2008, respectively. (R.423-436, 437-494).

Defendants' Motions to Dismiss were heard by the trial court on July 25, 2008 and August 22, 2008. By order dated August 27, 2008, both Dr. Sproles and Dr. Lovette were dismissed from cause number A-2401-07-100. (R.670-671). Appellants' Notice of Appeal was filed on September 23, 2008. (R.682).

On May 19, 2008, the Hanses filed a second cause of action styled "Diann Hans, and her husband, David Hans v. James Lovette, Arthur Sproles, Michael Moses, Paul Mace, and Memorial Hospital at Gulfport, Cause No. A-2401-2008-154, First Judicial District, Harrison County, Mississippi."(R.596-603). Other than adding the two additional physicians, this Complaint states the same facts, contains the same allegations of medical negligence, and asserts the same injuries and damages as the First Amended Complaint in Cause No. A-2401-2007-100. With regard to the Complaint filed in Cause No. A-2401-2008-154, Dr. Sproles has not raised and does not intend to raise any defense based on statute of limitations or failure to provide requisite notice. The hospital has been dismissed on the same grounds as in Cause No. A-2401-2007-100, and the remaining parties are actively engaged in discovery.

SUMMARY OF THE ARGUMENT

Plaintiffs acknowledged in the Agreed Order of Dismissal Without Prejudice that they failed to provide a notice of claim letter prior to filing the lawsuit styled "Diann Hans and her husband David Hans, Plaintiffs v. Memorial Hospital at Gulfport, James Lovette, Arthur Sproles and John Doe, Defendants", Cause Number A2401-07-100 in the Circuit Court of Harrison County, Mississippi, First Judicial District. This fact is undisputed. The dismissal of the Hanses from this cause of action without prejudice for failure to comply with the pre-suit notice requirements of § 15-1-36(15) M.C.A. was proper. The Hanses' failure to provide pre-suit notice was fatal to the cause of action filed against Dr. Sproles and Dr. Lovette. Plaintiffs' belated post-suit notice letters and amendment to the Complaint were insufficient to cure the original flaw, and the trial court correctly dismissed the First Amended Complaint as filed against Drs. Sproles and Lovette without prejudice.

The Hanses' second civil action was filed after the provision of the requisite pre-suit notice, and Dr. Sproles asserts no statute of limitations defense and no notice defense. The ongoing second civil action renders this appeal moot as to Dr. Sproles.

ARGUMENT OF ARTHUR SPROLES, M.D.

I. PRE-SUIT NOTICE WAS NOT PROVIDED TO DR. SPROLES

Mississippi Code Annotated Section 15-1-36 (15) (Rev. 2003) mandates that a medical malpractice action may not be filed unless the defendant receives at least sixty (60) days prior written notice of the intent to file a lawsuit, stating allows:

> No action based upon the health 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 bring 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.

MISS. CODE ANN. 15-1-36 (15). (emphasis added).

In the May 30, 2007Agreed Order of Dismissal Without Prejudice, Plaintiffs acknowledged their failure to comply with the sixty (60) notice requirement. Plaintiffs' failure to comply with § 15-1-36 (15) is not in dispute.

II. A MEDICAL MALPRACTICE PLAINTIFF IS REQUIRED BY § 15-1-36 M.C.A. TO PROVIDE SIXTY DAYS WRITTEN NOTICE PRIOR TO COMMENCING AN ACTION

The Mississippi Supreme Court was required to interpret the meaning of Miss. Code Ann. § 15-1-36 (15) in *Pitalo v. GPCH-GP, Inc.*, 933 So. 2d 927 (Miss. 2006). This Court determined that the provision of pre-suit notice is mandatory and that failure to provide pre-suit notice requires dismissal of the action. In *Pitalo*, the plaintiff filed a medical negligence claim against physician and the hospital. Both defendants filed motions to dismiss, based in part on the plaintiff's failure to provide pre-suit written notice as required by Miss. Code Ann. § 15-1-36 (15) and the plaintiff's failure to file the required certificate as required by Miss. Code Ann. § 11-1-58 (Rev. 2002). *Id.* The trial court granted both defendants' motions to dismiss. *Id.* On appeal, the *Pitalo* Court affirmed the trial court's dismissal of the action and determined that notice of intent to sue prior to the filing of a medical negligence

complaint is mandatory and failure to provide such notice requires dismissal of the action. *Id.* at 929.

In *Arceo v. Tolliver*, 949 So. 2d 691 (Miss. 2006), the Mississippi Supreme Court confirmed its position that the pre-suit notice provision contained in Miss. Code Ann. § 15-1-36 (15) is mandatory and failure to provide the required prior notice will result in dismissal. In *Tolliver*, Tommie Tolliver was admitted to St. Dominic's Hospital in Jackson, Mississippi, on July 9, 2002, and she died four days later. *Id.* On June 2, 2004, a complaint for medical negligence was filed against Dr. Arceo and the Hospital. *Id.* First and second amended complaints were filed on June 25, 2004 and July 23, 2004, respectively. *Id.* Plaintiff failed to provide pre-suit notice as required by Miss. Code Ann. § 15-1-36 (15) for any of the complaints. Dr. Arceo's motion to dismiss and/or for summary judgment based on failure to provide notice was denied by the trial court. On appeal, the *Tolliver* Court relied on *Pitalo* in finding that the plaintiffs' failure to provide pre-suit notice required dismissal of the cause of action against the defendants. The Court reversed and rendered the trial court's ruling, and dismissed the action without prejudice. *Id.*

In the case of *Nelson v. Baptist Memorial Hospital-North Mississippi, Inc.*, 972 So.2d 667 (Miss. App. 2007), *cert. den.* 973 So. 2d 244 (Miss. 2008), the Mississippi Court of Appeals addressed the requirement of pre-suit notice as required by Miss. Code Ann. § 15-1-36 (15). On July 9, 2003, the plaintiffs filed a complaint alleging medical negligence against Baptist Memorial Hospital and other health care provider defendants for the July 14, 2001 alleged wrongful death of their infant son. *Nelson*, 972 So. 2d at 669. The Nelsons failed to provide sixty days notice to the defendants prior to filing the complaint. Prior to the expiration of the 120 days for service of process, the plaintiffs moved for and were granted

an additional ninety (90) days to serve process. *Id.* Plaintiffs immediately sent notice of claim letters to the defendants, waited sixty (60) days, filed an amended complaint with a certificate of consultation, and then served process on the defendants. *Id.*

The original trial judge, Judge Howarth, subsequently recused himself and was replaced by another judge, Judge Lackey. *Id.* The hospital filed a motion to reconsider the order entered by Judge Howarth granting the plaintiffs additional time to serve process, which was joined by the remaining defendants. *Id.* On reconsideration, Judge Lackey vacated the initial order for lack of good cause, found that the plaintiffs had failed to provide the required sixty days prior notice, and dismissed the case with prejudice. *Id.* On appeal, the *Nelson* Court relied on both *Pitalo* and *Tolliver* in affirming Judge Lackey's dismissal and found that the plaintiffs' failure to provide notice before filing their **initial** complaint was an 'inexcusable deviation' from the requirements of § 15-1-36 (15). The Court further determined that the dismissal should have been without prejudice, stating "[D]ismissal without prejudice prevents the plaintiff from being barred from filing a new suit on the same cause of action." *Id.* at 674.

The Mississippi Supreme Court has recently declared that strict compliance is required with regard to the statutory requirement of sixty days (60) prior written notice as contained in § 15-1-36 (15). *Thomas v. Warden*, 999 So. 2d 842, 846 (Miss. 2009). On September 6, 2005, the plaintiff, Thomas, sent notice of suit letters to the health care provider defendants. Plaintiff's complaint was filed on November 4, 2005. Dr. Warden and the hospital filed a motion to dismiss on the grounds that the plaintiff failed to comply with the notice provision contained in § 15-1-36 (15). The *Thomas* Court cites to both *Pitalo* and *Arceo* in finding that based on the plaintiff's failure to provide "'sixty (60) days' prior

written notice of the intention to begin the action,' this lawsuit was not lawfully filed, and it is of no legal effect." *Id.*

III. THE TRIAL COURT PROPERLY DISMISSED THE FIRST AMENDED COMPLAINT

Application of the above discussed case law and the facts presently before the Court requires dismissal of Plaintiffs' First Amended Complaint. It is significant that the language employed by the legislature in § 15-1-36 (15) M.C.A. refers to an "action". "No action may be begun" and "intention to bring an action." Further, the language used by the *Nelson* Court, "dismissal without prejudice prevents the plaintiff from being barred from filing a new suit on the same cause of action" suggests that on dismissal without prejudice a plaintiff may file a new suit under a new cause of action number. Rules 2 and 3(a) of the Mississippi Rules of Civil Procedure provide that the filed complaint is the "civil action." *See* Comment to Rule 3(a).

The Hanses' original complaint was cause of action No. A-2401-2007-100. It was dismissed without prejudice, and since the statute of limitations had not expired, the Hanses, pursuant to Mississippi law, were entitled to file a new lawsuit under a new cause number. Instead, Plaintiffs filed a First Amended Complaint which brought Dr. Sproles and Dr. Lovette back into the same lawsuit, Cause No. A-2401-2007-100, from which they had been previously dismissed. Dr. Sproles contends that the relevant case law prohibits the Hanses from dismissing him from the original complaint (the "civil action") and then later adding him back to the original civil action by means of an amended complaint. **This is still the same action, and pre-suit notice was not given in this action**. Plaintiffs here attempt what has previously been rejected by our appellate courts - to cure their failure to provide pre-suit

notice by providing notice of the claim thirty-four (34) days after the original complaint was filed and then filing an amended complaint.

IV. NO DAMAGE RESULTED FROM DISMISSAL OF THE FIRST AMENDED COMPLAINT

In *Caldwell v. Warren*, 2 So. 3d 751 (Miss.Ct.App. 2009), the plaintiff filed two complaints against Dr. Warren for alleged medical malpractice. Due to concerns regarding the expiration of the statute of limitations, the first complaint was filed on Friday, August 12, 2005, two days prior to the expiration of the sixty day notice period. The second complaint was filed on Monday, August 15, 2005, after the expiration of the sixty day notice period and, as ultimately determined on appeal, within the statute of limitations. Although the complaints had different cause numbers, they were virtually identical and were based on the same cause of action. *Id.* at 755-756. The trial court dismissed the second complaint and allowed the first complaint to remain. On appeal, the *Caldwell* Court determined that the language of §15-1-36(15) is clear and required dismissal of the first complaint and that the second complaint should have survived the motion to dismiss. *Id.* at 756.

Diann and David Hans cannot demonstrate any injury or prejudice from the dismissal of the First Amended Complaint. They currently have an on-going second civil action which includes as defendants both Dr. Sproles and Dr. Lovette, alleges the same facts and issues, and seeks the same damages as in the First Amended Complaint. As in *Caldwell*, the Hanses' First Amended Complaint failed to comply with §15-1-36(15) and was properly dismissed. Similarly, the Hanses' medical malpractice cause of action against Dr. Sproles and Dr. Lovette is still viable through the filing of their second lawsuit alleging medical malpractice by these doctors, Cause No. A-2401-2008-154. The Hanses state the same facts, raise the same legal issues and seek the same damages as in the First Amended Complaint in

Cause No. A-2401-2007-100. None of the physician defendants in Cause No. A-2401-2008-154 have challenged the lawsuit on the grounds of expiration of the statute of limitations or failure to provide pre-suit notice. Plaintiffs have demonstrated no injury or prejudice, resulting from the dismissal of the First Amended Complaint. Therefore, the Hanses have failed to state a reason which would require this Court's review. Plaintiffs are trying to drive a square peg into a round hole, while holding the round peg in the other hand. There is no reason for the Hanses to pursue the physician defendants in the first action when they are currently pursing their claims via the second civil action.

CONCLUSION

The clear, unambiguous purpose of Miss. Code Ann. § 15-1-36 (15) as interpreted by our state appellate courts in *Nelson*, *Tolliver*, *Pitalo* and *Thomas* would be defeated if Dr. Sproles is allowed to be brought back into the original action after dismissal for failure to provide pre-suit notice. The Hanses' post-suit notice and the filing of an amended complaint cannot cure the deficiency of the original action filed against Dr. Sproles and Dr. Lovette, and the First Amended Complaint was correctly dismissed. Furthermore, the Hanses have failed to demonstrate that the dismissal of the First Amended Complaint has caused any prejudice, injury or otherwise thwarted their ability to pursue their claims against the two physicians. The reversal of the trial court's dismissal of the First Amended Complaint would fail to provide any benefit to the Hanses as they have Dr. Sproles properly in court in the pending second action.

CERTIFICATE OF SERVICE

I, the undersigned, of the firm of Watkins Ludlam Winter & Stennis, PA , do hereby certify that I have mailed, postage prepaid, by United States Mail, a true and correct copy of the above and foregoing **Brief of Appellee, Arthur Sproles, M.D.** to counsel of record as follows:

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THIS the 7th day of May, 2009.

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