IN THE MISSISSIPPI SUPREME COURT

APPEAL NO. 2008-CA-01617

DIANN & DAVID HANS,

Plaintiff-Appellants

VERSUS

MEMORIAL HOSPITAL AT GULFPORT,
ARTHUR SPROLES, and JAMES LOVETTE

Defendant-Appellees

Appeal from the Circuit Court
for Harrison County,
First Judicial District
Jerry O. Terry, Circuit Judge
Cause No. A2401-2007-00100

Appellants' Reply Brief

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REFERENCES

"Plaintiffs" or "the Hanses" means the Appellants
"Defendants" or "the Hospital and the Doctors" means Appellees
"R-#" refers to a page of the Appeal Record
"E-#" refers to a tab of the Record Excerpts
"MRCP" means the Mississippi Rules of Civil Procedure

ARGUMENT

Appellants will reply separately to (1) Lovette's and Sproles' Briefs, and (2) Memorial Hospital's Brief.

1. Reply to the Lovette and Sproles Briefs

Plaintiff-Appellants, Diann and David Hans, have appealed from Circuit Court Orders dismissing their claims against the Defendants Lovette and Sproles. The only basis for the Orders was the lower Court's holding that Plaintiffs had failed to comply with Miss. Code §15-1-36(15).

As we did in our original Appellants' Brief, we will refer to the subject statute, Miss. Code §15-1-36(15), as the "Claim Notice Statute", and notice letters sent pursuant to the statute as "Claim Notices."

In their Appeal Briefs, Lovette and Sproles repeat, with only two minor additions, the arguments they made in Circuit Court in support of their Motions to Dismiss. Those arguments have already been addressed in our Appellants' Brief. The only two additional matters raised in their Appeal Briefs are (a) the citation of the recent case of ***Thomas v. Warden***, 999 So.2d 842 (Miss. 2008), and (b) the argument that Plaintiff's second suit against the two doctors and others should somehow correct the improper dismissal of the first one.

(a) Thomas v Warden

The opinion in ***Thomas v. Warden***, supra, was cited in the Appellee Briefs of both Lovette and Sproles. Sproles' Brief claims that this recent case "declared that strict compliance

[with the Claim Notice Statute] is required." (Sproles's Brief, p. 8.) Lovette's Brief argues that ***Thomas*** held that where there is a failure to give 60 days' "prior written notice of the intention to begin the action, the lawsuit was not lawfully filed and was of no legal effect." (Lovette's Brief, pp. 7-8) Both of these statements are correct as far as they go, but neither has any bearing on the situation in the case at bar.

The sole question in the instant case, with respect to the Claim Notice Statute, is whether commencement of "the action" as used in the statute includes commencing the action against the defendant doctor by adding him or her to an existing lawsuit against another provider, or whether it requires a whole new lawsuit. As we argued in our Appellants' Brief, the only reasonable interpretation is that adding the defendant to an existing suit is, in fact, "beginning" an action against that defendant.

Nothing in the ***Thomas*** opinion changes or affects that issue in this case. The case, like the others discussed in our Appellants' Brief, involved issues of whether a Claim Notice had been sent to the defendant or the timeliness of such. Those issues are not present in the case at bar, where it is undisputed that Claim Notices were sent to both Lovette and Sproles months before they were added as Defendants in Plaintiffs' First Amended Complaint.

Thomas involved a situation in which the only "action" against the Defendant, Dr. Warden, was filing a suit against him less than 60 days (59 days, to be exact) after a Claim Notice was

sent to him. The Claim Notice in that case was mailed on September 6, 2005, and Warden was sued on November 4, 2005, one day too early. The Court did hold that "strict compliance" with the Claim Notice Statute was required, and that the full 60 days' delay was required. However, that holding has nothing to do with the case at bar. In this case, as stated above, Dr. Lovette and Dr. Sproles were re-sued long after the 60 days had elapsed following the mailing of the second Claim Notices to them. The Claim Notice Statute was indeed "strictly" complied with in this case.

Attempting to apply the "strict compliance" rule to the issue in this case (which involves only the interpretation of the word "action") only leads to absurdity. The two doctors were sent second Claim Notices, and then long after the expiration of the required 60 days' delay, they were sued (a second time) by adding them as Defendants to this case, which remained pending due to the presence of the other Defendant, Memorial Hospital. To hold that the doctors could not be sued again by adding them to this case, would be to twist the language of the statute beyond all fair and reasonable construction. "Before commencing the action" in the context of the statute obviously means "before commencing the action *against the particular defendant in question*."

(b) The existence of the second suit does not "fix" the improper dismissal of the first

In part IV of Sproles' Brief, he argues that "no damage resulted from dismissal of the First Amended Complaint" in this case. (Sproles Brief, p. 10) The argument is based on the fact

that Plaintiffs sent a second Claim Notice to Lovette and Sproles, and filed a second lawsuit against them, separate and apart from the lawsuit involved in this case.

The reason for the second lawsuit was explained in detail in part 1(d) of the Argument in our original Brief. (Appellants' Brief, pp. 18-20) There we explained that after the filing of the first suit, Plaintiffs' counsel learned that two other doctors (in addition to Lovette and Sproles) needed to be sued regarding this matter, namely Dr. Mace and Dr. Moses. We had never sent Claim Notices to those two doctors, and had to do that before suing them. Since the end of the 2-year statute of limitations period was approaching, we tried to expedite matters (avoiding the filing of another motion to amend the first suit, and the delays that would entail) by filing a new suit against Mace and Moses, and we also decided to join in that new suit all of the Defendants we had sued in the first lawsuit, i.e., Memorial Hospital, Dr. Lovette, and Dr. Sproles. Accordingly, the sent "first-time" Claim Notices to Dr. Mace and Dr. Moses, and a second set of Claim Notices to Sproles and Lovette. After the 60 days' delay required by the Claim Notice Statute had expired, we filed the new suit, naming all four doctors and the hospital as Defendants. Our intention was to move to consolidate the two lawsuits after service of process on the second suit was completed.

What we began as a means of expediting and consolidating the claims against all four doctors involved seems now to have become the vehicle for Sproles and Lovette to perpetuate the error

committed when their Motion to Dismiss the first suit, the instant one, was granted. Sproles now argues that the Plaintiffs' action against them is, despite the dismissal of the first suit, "still viable through the filing of their second lawsuit." (Sproles' Brief, p. 10) Sproles further argues:

> "None of the physician defendants in [the second suit] have challenged the lawsuit on the grounds of expiration of the statute of limitations or failure to provide pre-suit notice. . . . There is no reason for the Hanses to pursue the physician defendants in the first action when they are currently pursing [sic] their claims via the second civil action." (Sproles' Brief, p. 11)

The problem with this argument is that there is no guarantee that Sproles and Lovette will not, at some future time, see fit to attack the second suit as they have attacked the first. They say that they have not yet "challenged" the second suit on the two grounds they mention. That doesn't mean they might not do so in the future. At the present time, they have filed nothing in the second suit to waive their rights to raise such defenses. Their claim that they haven't yet challenged the second suit on those grounds also doesn't mean that they may not find some other ground to attack the second suit which would not be applicable to the first suit.

There is a right way and a wrong way for Sproles and Lovette to attack the existence of the two suits against them. Dismissing the first one for no reason other than the existence of the second is the wrong way.

As stated above, consolidation of the two suits would avoid any problem of duplicate litigation. Normally, when a second suit is filed, it is the second one that is stayed, not the first. That would be another possible approach, and it would only

involve staying the second suit, not dismissing it outright. Or, as a third alternative, the first suit could be stayed until the second is concluded, so that during the prosecution of the second suit any rights of the Plaintiffs due to the filing of the first suit would remain protected.

If, as we contend, the first suit against Sproles and Lovette was improperly dismissed, the correct solution is to reinstate it, then allow the parties to deal with the completely separate issues presented by the existence of the two suits. And such issues can be easily and quietly resolved without any difficulty, and without endangering or unnecessarily risking future unjust injury to any party.

2. Reply to the Memorial Hospital Brief

Plaintiff-Appellants, Diann and David Hans, have also appealed from the Circuit Court's Order dismissing their claims against the Defendant Memorial Hospital at Gulfport (hereinafter MEMORIAL HOSPITAL or THE HOSPITAL or MHG) by way of summary judgment.

The Hospital's Amended Motion for Summary Judgment, which was the version of the motion granted by the Court below, was based on attacking the affidavit of Plaintiffs' medical expert, Dr. William Hale. The Hospital's attack on Dr. Hale's affidavit was, in turn, based on only three arguments: (1) that Dr. Hale didn't have the necessary experience to render opinions regarding emergency room care, and (2) that Dr. Hale failed to identify a specific breach of the standard of care, and (3) that Dr. Hale

failed to establish that any such breach proximately caused Mrs. Hans's injuries. (R-362; see Appellants' Brief, p. 24)

As discussed in our Appellants' Brief, each of those claims by the Hospital is clearly rebutted by a simple review of Dr. Hale's affidavit and the two letter/reports which were attached thereto and made a part thereof. (Appellants' Brief, pp. 24-28)

In its Appellee's Brief, the Hospital raises a few issues which were not discussed in our Appellants' Brief for one reason or another, or applies new arguments to issues which we did review previously. We will address those issues separately below.

(a) The Hospital's claim that Dr. Hale's affidavit was a "last minute submission"

The Hospital's Brief claims that Dr. Hale's affidavit was a "last minute submission" filed the day before the hearing on the Hospital's Amended Motion for Summary Judgment. (Hospital's Brief, p. 5) This is both (1) not exactly true, and (2) immaterial.

The Hospital's "last minute" charge is not quite true because Plaintiffs had provided the Hospital with a copy of the affidavit some two weeks prior to the hearing, as stated in our first Brief. (Appellants' Brief, pp. 28-29) Moreover, the charge is immaterial in any event, because the filing of the affidavit the day before the hearing complied fully with MRCP Rule 56(c), which allows the filing of affidavits opposing motions for summary judgment the day before the hearing.

(b) The Hospital's claim that Dr. Hale's affidavit didn't say that he had reviewed any records

The Hospital's Brief claims that Dr. Hale's affidavit

> "does not identify any facts related to this case. There is no mention that he reviewed the medical records of Diann Hans or that he reviewed any depositions, discovery responses, or any documents to formulate his opinions." (Hospital's Brief, p. 7)

This claim suffers from three problems. First, it is simply incorrect. Second, it raises an issue which the Hospital never raised in Circuit Court. Third, on a motion for summary judgment all available inferences must be viewed in the light most favorable to the motion's opponent and the clear inference from Dr. Hale's affidavit taken as a whole is that he did review the ER records in question.

The incorrectness of the Hospital's claim is apparent from the very first sentence of Dr. Hale's first report, which was attached to his affidavit as Exhibit A. (R-652, E-6th tab), where Dr. Hale states:

> "I have had the opportunity to review the information you supplied regarding the medical care received by Mrs. Dian Hans when she presented to Memorial Hospital with acute appendicitis on April 6, 2006."

Thus, the Hospital's claim that there is no mention of Dr. Hale reviewing "any documents" is plainly false. Moreover, it is obvious from Dr. Hale's report, and his detailed discussion and findings regarding the Hospital ER's acts and delays, that he had read the hospital ER record itself, which, of course, was among the materials supplied to him by Plaintiffs' undersigned counsel.

The Hospital's claim on this point was never raised in Circuit Court. The Hospital, in briefing and arguing its Amended Motion for Summary Judgment never once mentioned, argued, or claimed that Dr. Hale had not reviewed the pertinent ER records. The Hospital's Motion was not based on any such ground.

The Plaintiffs responded in Circuit Court to the Hospital's Motion for Summary Judgment by covering each argument or issue raised by the Hospital in support of its Motion. The Hospital never disputed the fact that Dr. Hale had reviewed the ER record; the Plaintiffs cannot be blamed for not rebutting something the Hospital never argued in the first place.

A third reason why the Hospital's argument on this issue should be rejected is based on the general, universal rule that on a motion for summary judgment all available inferences must be drawn in favor of the motion's opponent. If there is no specific statement in Dr. Hale's reports that he reviewed the Hospital ER record, it can certainly be inferred, both from common sense and the contents of the report itself, that he did review that record, and that inference must be drawn in favor of the Plaintiffs and against the Hospital, especially since the Hospital never based its Motion for Summary Judgment on the issue to begin with.

(c) The Hospital's claim that Dr. Hale's affidavit did not establish his competence to testify regarding ER care

The Hospital's Brief claims that Dr. Hale's affidavit "does not identify any training, experience, or education on behalf of Dr. Hale that would illustrate that he is competent to testify regarding . . . ER medicine." (Hospital Brief, p. 7)

Contrary to the Hospital's claim, Dr. Hale's own affidavit, in his second report attached as Exhibit B thereto, does establish his expertise. Moreover, Plaintiffs' Answers to the Hospital's Interrogatories supplied the Defendant with a copy of

Dr. Hale's CV and fully identified his competence to deal with all issues related to appendicitis, which was within his specialty as a board certified physician and surgeon, and Chief of Gastroenterology and Hepatology at Norwalk Hospital in Norwalk, CT, near the Yale Medical Center where he also practices.

The Hospital's Brief admits that its motion for summary judgment did not act as a "Daubert challenge." (Hospital Brief, p. 8) The Hospital raised the issue of Dr. Hale's expertise, or alleged lack thereof, in its supporting Memorandum in Circuit Court, but didn't believe its own argument even merited mention during its oral argument on the motion.

(d) The Hospital's claim that Dr. Hale's affidavit didn't articulate the requisite "standard of care"

This is the Hospital's argument at pages 10-12 of its Brief. The argument is without merit for two reasons. First, Dr. Hale specifically stated in his affidavit/reports that it was the unreasonable delay which caused Mrs. Hans' injuries, that the delay was negligent, and that it was the fault of both the Hospital and Dr. Sproles. Second, and what really defeats the argument completely, is the Hospital's misunderstanding of Dr. Hale's opinion regarding the Hospital's negligence. As discussed in our Appellant's Brief, the Hospital's misunderstanding is based on confusing "diagnosis" with "surgery."

Dr. Hale reported that the Hospital ER "diagnosed" Mrs. Hans' appendicitis in an "appropriately prompt fashion." But he went on to say that the ER was then guilty of negligence in

delaying the surgery which Mrs. Hans needed due to that diagnosis. The Hospital focuses only on the "diagnosis" part of Dr. Hale's report, and completely omits any discussion of the "delay in surgery" part.

(e) The Hospital's claim that Dr. Hale's affidavit didn't identify "who" in the ER caused the delay

The Hospital's Brief argues that

> "Nothing in the exhibits to Hale's affidavit specifies who caused a delay or how any alleged delay was caused." (Hospital Brief, p. 12)

This argument, we respectfully suggest, is absurd in the sort of situation involved in this case. Dr. Hale stated that there was an unreasonable delay in Mrs. Hans's surgery; both of his reports made it clear that both the Hospital and Dr. Sproles were responsible for the delay. It was completely unnecessary to define any particular ER employee who "caused" the delay. As discussed in our Appellant's Brief, it was entirely sufficient that the ER as a whole caused or allowed it. (Appellants' Brief, p. 26)

Equally meaningless is the Hospital's charge that the affidavit didn't specify "how" the delay was caused. A delay is caused by delaying. The delay itself was obvious from the ER and Hospital records; Mrs. Hans did not receive surgery for her obvious appendicitis which the Hospital properly "diagnosed" until more than 24 hours had passed since she reported to the ER. That fact was never denied or contested by the Hospital, it was a "given." That delay, said Dr. Hale, was unreasonable, negligent, and constituted a failure to follow accepted medical practice.

(f) The Hospital's claim that Appellants didn't provide "authority" in support of their arguments

The Hospital claims that "Hans provides no authority in support of her contention that Dr. Hale was qualified . . . or that the affidavit . . . established a prima facie case against MHG." (Hospital Brief, p. 13)

Here the Hospital confuses factual issues with legal ones. The legal issue in this case was whether the Hospital met the test for summary judgment. The Appellants cited numerous cases regarding that issue, and regarding the test for and details regarding summary judgment.

The issue of whether Dr. Hale's affidavit established his qualifications was a factual one. You don't need to consult any legal "authority" to see whether Dr. Hale had the medical experience or expertise necessary. The Hospital's negligence and proximate cause were also factual issues, for which no citation of authority is necessary. The facts of each case must be viewed on a case by case basis. Whether or not Dr. Hale's affidavit charged the Hospital with negligence is a simple issue of reviewing the affidavit to see if it did that or not. The same is true regarding causation, and any other factual issues in this case.

It is the Hospital which, in this case, attacks Dr. Hale's affidavit with numerous arguments which are unsupported by the facts in evidence. If the Hospital attempts to raise any legal issue regarding Dr. Hale's affidavit, it is the Hospital who is supposed to cite legal authority for its position. The Appellants

have never found any legal fault with Dr. Hale's affidavit and had no reason to cite any authority attacking same.

(g) The Hospital's claim regarding the ER "Call List"

The Hospital claims that Appellants have raised "an issue regarding a call schedule on appeal for the first time." (Hospital Brief, p. 14) This claim is a "red herring" apparently designed to confuse the real issue to which the Call List problem applies.

One of the Plaintiff-Appellants' reasons for opposing the Hospital's Amended Motion for Summary Judgment was that we had not yet taken the depositions of the four doctors involved -- Dr. Sproles, Dr. Lovette, Dr. Moses, and Dr. Mace. We pointed out, in both our memoranda and oral argument, that we needed to take those depositions before the Court ruled on the Hospital's Motion for summary judgment. We mentioned the Call List issue as one (but not all) of the matters about which we needed to depose the doctors.

As we pointed out in our Appellants' Brief, Plaintiffs had already noticed the depositions of the doctors before the hearing was scheduled on the Hospital's Motion for Summary Judgment, and scheduled the depositions for a date prior to that scheduled for the motion hearing. However, the doctors filed Motions for Protective Order and refused to appear for their depositions.

By coincidence, the doctors' Motions for Protective Order were scheduled to be heard before the same Circuit Judge, on the same day, and at the same time, as the Hospital's Motion for Summary Judgment. At the time of the hearing(s), the Court took

up the Hospital's Motion first, then granted it, without ever even considering the doctors' Motions. The result was that Plaintiffs were not allowed to depose the doctors prior to the granting of the Hospital's Motion. We specifically addressed this in oral argument and our request to take the depositions was dishonored by the Court without any reason stated. This, we submit, was a violation of MRCP Rules 1 and 56.

The Hospital focuses on the Call List as the issue involved, when in fact the real issue was whether Plaintiffs should have been allowed to take the doctors' depositions.

CONCLUSION

Plaintiffs have complied, in this instant case, with the Claim Notice Statute for suing Drs. Sproles and Lovette after the passage of 60 days following the first Claim Notices of May 2, 2007. The second Claim Notices of March 14, 2008, are superfluous (as to Drs. Lovette and Sproles) and cannot affect the Plaintiffs' compliance with the Claim Notice Statute by reason of the first Claim Notices. Plaintiffs complied fully with the Claim Notice Statute, and the Circuit Court's Order granting the doctors' Motions to Dismiss should be reversed.

The Circuit Court's order granting Memorial Hospital's Amended Motion for Summary Judgment should also be reversed. The Plaintiff-Appellants are entitled to have the Court view the facts and all available inferences in their favor. With that approach, Dr. Hale's affidavit and attached reports clearly establish a prima facie case against the Hospital. Moreover, the

Plaintiffs should have been allowed to take the doctors' depositions before the Court ruled on the Hospital's summary judgment motion.

Accordingly, Plaintiffs request that this Court reverse the summary judgment issued by the Circuit Court below dismissing Memorial Hospital, and the Dismissal Order dismissing Drs. Sproles and Lovette, and remand the case for the trial on the merits to which all parties are entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the foregoing Reply Brief by first class mail on: Patricia Simpson, Franke & Salloum, P. O. Drawer 460, Gulfport, Ms 39502, George F. Bloss III, P. O. Drawer 160, Gulfport, Ms 39502, William E. Whitfield III, P. O. Box 10, Gulfport, Ms 39502, and Hon. Jerry O. Terry, Circuit Judge, Harrison County Courthouse, Gulfport, Ms 39501.

This 24th day of June, 2009.

ROBERT HOMES JR.

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