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' Brief

Submitted by:

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REQUEST FOR ORAL ARGUMENT

Appellants request oral argument.

CERTIFICATE OF INTERESTED PERSONS

I, Robert Homes, Attorney for Appellants, certify that the following persons or entities have an interest in the outcome of the case. These representations are made so that the Justices of this Court may evaluate possible disqualification or refusal.

Diann & David Hans, Appellants

Memorial Hospital at Gulfport, Appellee

Dr. Arthur Sproles, MD, Appellee

Dr. James Lovette, MD, Appellee

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STATEMENT OF JURISDICTION

The Court has jurisdiction of this appeal under Mississippi Code §9-3-9, and Rules 3 & 4 of the Mississippi Rules of Appellate Procedure (hereinafter MRAP).

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REFERENCES

"Plaintiffs" or "the Hanses" means the Appellants
"The Hospital" means Appellee, Memorial Hospital at Gulfport
"The Doctors" means Appellees Sproles and Lovette
"Defendants" or "the Hospital and the Doctors" means Appellees
"R-#" refers to a page of the Appeal Record
"T-#:#" refers to a page:line of the Transcript of hearings below
"MRCP" means the Mississippi Rules of Civil Procedure

STATEMENT OF ISSUES AND ASSIGNMENT OF ERRORS

1. Whether Plaintiffs' claims against the Defendants Lovette and Sproles were filed timely.

2. Whether the Circuit Court erroneously granted the Defendants Lovette's and Sproles' Motions to Dismiss.

3. Whether the Defendant Memorial Hospital met the test for summary judgment under MRCP Rule 56 (i.e., whether there was "no genuine issue of material fact" and whether the Hospital was "entitled to judgment as a matter of law").

4. Whether the reports of Plaintiffs' medical expert, Dr. Hale, established negligence and proximate cause against Memorial Hospital.

5. Whether the Circuit Court erroneously granted the Defendant Memorial Hospital's Motion for Summary Judgment.

6. Any other issue inherent in Plaintiff-Appellants' Statement of the Case.

STATEMENT OF THE CASE

This is a suit for personal injuries sustained by Diann Hans, and loss of consortium by her husband David Hans, as a result of medical malpractice by the Defendants Memorial Hospital at Gulfport, Dr. Arthur Sproles, and Dr. James Lovette.

The primary Plaintiff in this case is Diann Hans, who sustained personal injuries due to the Defendants' medical malpractice, the claim of her husband, David, being only for loss of consortium resulting from Diann's injury. Since no factual or

legal issue involving the loss of consortium claim is directly involved in this appeal, and since that claim is dependent on Diann's primary claim and was dismissed only because Diann's claim was dismissed, this Brief will focus only on the facts and law relative to Diann's claim.

The suit was dismissed as to all Defendants when the Circuit Court in separate Orders granted various motions (to be described shortly, under Statement of Proceedings Below) filed by Defendants. This appeal is taken from the Orders and resulting Judgments of Dismissal.

1. Underlying facts

Diann Hans began feeling bad in the afternoon of April 5, 2006; she left work early and went home. The pain and nausea increased throughout the night. At about 8:30 the next morning, April 6, she left home with her mother and went to an Urgent Care facility, but there discovered that clinic had not yet reopened after Hurricane Katrina. (R-408)

She then phoned the office of Dr. Jim Gaddy, her OBGYN doctor, and was advised to come to his office, where she arrived at approximately 9:25 a.m. Dr. Gaddy determined that Diann was suffering from appendicitis and sent her across the street to Memorial Hospital. He told Diann it was urgent and to go immediately and nowhere else, and he called the hospital himself to let them know she was coming and of his diagnosis. (R-408)

As instructed, Diann immediately went to the Hospital's emergency room (hereinafter the ER) and there was told that Dr. Gaddy had called. She was taken to a trauma room, given pain

medication, an IV and antibiotics, and blood was drawn. At 12:30 p.m. an ultrasound was performed and Diann was advised by the nurse that "they could almost guarantee me it was my appendix". At 2:30 p.m. she was told by the ER physician, Dr. Bell, that she needed a CT Scan. The CT Scan was done at 6:30 p.m. Dr. Bell visited her in the trauma room and advised that the CT Scan indicated it was "probably" the appendix. At 10:00 p.m. she was told by a nurse they could not reach the doctor who was on call, who she said was Dr. Lovette. The nurse also said that she was upset because she could not get in touch with him, and that her supervisor was aware of the trouble they were having in getting in touch with the doctor. (R-408)

It turned out that Dr. Lovette never could be contacted by the ER staff, who finally contacted Dr. Sproles by telephone, and he agreed to assume responsibility for Mrs. Hans as a patient. Dr. Sproles did not come to the Hospital to see Mrs. Hans, but simply told the ER personnel that he would be there in the morning to perform the surgery.

Later, when through discovery in the lawsuit a copy of the ER's appropriate "Call List" was produced by the Hospital, Dr. Lovette was listed as being on call for the date in question, April 6, 2006. Also listed that week was Dr. Paul Mace.

Dr. Michael Moses was responsible for preparing the Call List in question. He and Lovette later claimed that they had agreed to a change in the Call List after the original had been sent to the Hospital for the month of April, 2006. The agreed change would have substituted Dr. Moses for Dr. Lovette on April

6. However, the Hospital ER never received the amended Call List, and according to the original one Dr. Lovette still remained listed as being on call for April 6. It was never determined definitively who made the mistake, whether it was Dr. Moses for not sending the amended Call List to the Hospital, or the Hospital for not receiving the amended list and forwarding it to the ER. (T-8:27)

Mrs. Hans was finally admitted as an inpatient to the Hospital and taken to a hospital room at approximately 1:15 a.m. on April 7. On the way to the room, the nurse who had told her earlier about the problem contacting Dr. Lovette, helped push her stretcher down the hall to exit the ER, and told Diann she would be the first patient to be operated on that morning, at 6:30 a.m. (R-409)

In the morning of April 7 at 8:30 a.m. Dr. Sproles came to Diann's room and told her that he had just heard of her problem and that he would be performing her surgery "soon". At 10:50 a.m. Diann was taken to be prepped for surgery. (R-409)

After the surgery Dr. Sproles came to the waiting room at 1:40 p.m. and spoke with David Hans, telling him that Diann had made it through surgery and everything was "fine". Diann was returned to her room at 4:30 p.m. that afternoon and was told by a nurse that her appendix had ruptured and "they had everything out on the table". (R-409)

When Dr. Sproles came to see Diann in her room the next morning, April 8, she asked if the nurse was correct and had her appendix ruptured. He told her "No" and that the nurses did not

know what happened. After he left, in talking with her mother about things, Diann began to feel that something wasn't right, because she had a tube in her nose, oxygen, IV, a drain on her right side, and a large vertical bandage, about 6" x 12", on her stomach, and she didn't think all that was normal for a simple appendectomy. She asked Dr. Sproles about that when he returned to her room the next day, April 9, and again asked him if her appendix had ruptured or not. At first he said "No," but on further questioning, admitted that "Well, your appendix did rupture, but stayed capulet" and left the room before she could ask what that meant. (R-409)

During another conversation with Dr. Sproles the following day, April 10, he asked Diann why Dr. Gaddy had let her lay in his office all day. She replied that she had not been at Dr. Gaddy's office all day, but at the hospital ER. He also asked if anyone had discussed "life flight" with her; they hadn't. (R-409)

Mrs. Hans was finally discharged on April 14, 2006, but on the way home, fluid started gushing out of the surgical incision and when it didn't stop David brought her back to the ER later that evening. They told her she had an abscess under the incision and would need more surgery. She was re-admitted into the Hospital, but the next morning Dr. Sproles came and told her the problem was not an "abscess" but an "aurora" and to go home again. (R-409)

Since that time Mrs. Hans's injuries have continued to affect her life significantly. She has had continuing pain and

related medical problems, and has lost a job she had previously held for more than 20 years as a result of her injuries.

2. Proceedings in Circuit Court

On March 29, 2007, the Hanses filed suit in Harrison County Circuit Court (R-16) against Memorial Hospital, Dr. Lovette, and Dr. Sproles. At that time a "Notice of Consultation" (R-21) was also filed as required by Miss. Code §11-1-58, confirming that Plaintiffs' counsel had conferred with a qualified expert who had found the suit warranted.

Memorial Hospital is a "governmental entity" (R-17) and prior to filing suit Plaintiffs' counsel had sent the Hospital the administrative claim letter required by the Miss. Tort Claims Act, Miss. Code §11-46-11. (R-19) However, through oversight, the 60-day notice letters required by Miss. Code §15-1-36(15) were not sent to the individual Defendants, Sproles and Lovette.

All Defendants were served with Summons and Complaint, and on March 30, 2007, the Defendant Memorial Hospital filed its Answer to the Complaint. (R-54)

Dr. Sproles did not answer the Complaint, but on April 25, 2007, he filed a Motion to Dismiss it on the grounds that the 60-day Notice required by Miss. Code §15-1-36(15) had not been sent to him. (R-28) No hearing was necessary on that motion, because Plaintiffs agreed to an Order dismissing the Complaint as to Dr. Sproles without prejudice which was entered on May 30, 2007. (R-65) Although Dr. Lovette never filed his own motion to dismiss, Plaintiffs (recognizing their failure to send the required 60-day Notice letter to him also) voluntarily dismissed the Complaint as

to him on July 16, 2007, by filing a "Notice of Partial Dismissal Without Prejudice." (R-67)

Answers to written discovery were exchanged between Plaintiffs and Memorial Hospital (R-68, 115, 273, 274, 348, 643), and the Plaintiffs were deposed (R-242, 245).

Meanwhile, Plaintiffs sent the 60-day Notices required by Miss. Code §15-1-36(15) to the two individual Defendants, Sproles and Lovette (R-345) thereby curing the problem which had prompted their dismissal previously. Then, well after the 60 days had expired, on March 20, 2008, Plaintiffs moved to amend their Complaint (R-396) to add their claims against the two doctors back into the lawsuit. That motion was granted by Order of March 25, 2008 (R-339) and Plaintiffs' First Amended Complaint (R-340) adding Sproles and Lovette as Defendants was filed on March 26, 2008. The two doctors were served with Summons and Complaint on April 1 & 9, 2008 respectively (R-501).

On May 14, 2008, Plaintiffs noticed the depositions of Dr. Sproles and Dr. Lovette, along with the other two doctors who had by then been found to be involved, Dr. Moses and Dr. Mace. (R-523) The depositions were scheduled for June 25, 2008, but all four doctors filed Motions for Protective Order seeking to cancel their depositions. (R-531, 572) Those motions were eventually noticed for hearing on July 25, 2008. (R-583, 590, 606)

Meanwhile, Memorial Hospital, on March 10, 2008, had filed a Motion for Summary Judgment (R-276), which on April 21, 2008, was replaced with an Amended Motion for Summary Judgment (R-361). In addition to filing formal oppositions to both the original and

amended motions (R-349, 495), Plaintiffs on July 24, 2008 filed an Affidavit from Dr. William Hale of Yale University Medical School stating his opinions that both the Hospital and Dr. Sproles were negligent in causing Diann Hans' injury.

As mentioned above, the Hospital's Amended Motion was set for hearing on July 25, 2008 (R-585), the same day as the Motions for Protective Order filed by Dr. Sproles, Dr. Lovette, Dr. Mace, and Dr. Moses. On the day set for hearings on (a) Memorial Hospital's Amended Motion for Summary Judgment and (b) the four doctors' Motions for Protective Orders, Circuit Judge Jerry Terry took up the Hospital's Motion first and granted it without ever reaching or considering the doctors' Motions for Protective Order. (T-25) Thus, the Hospital was granted summary judgment without Plaintiffs being allowed to depose the four doctors involved.

On August 1, 2008, Plaintiffs filed a Motion for Rehearing of the Court's granting of summary judgment to the Hospital (R-660). Meanwhile, the two doctors who had been named as Defendants along with the Hospital -- Drs. Sproles and Lovette -- had filed Motions to Dismiss claiming that Plaintiffs' suit against them was untimely and in violation of the 60-day Notice requirement of Miss. Code §15-1-36(15).

The two doctors' motions, along with Plaintiffs' Motion for Rehearing of the Hospital's summary judgment, were set for hearing the same day, August 18, 2008. (R-662) At the hearing, Judge Terry denied the Plaintiffs' Motion for Rehearing (T-49),

and later by written order granted the doctors' Motions to Dismiss. (R-670)

Orders and Judgments of Dismissal were entered on August 27, 2008 and September 3, 2008 (R-670, 673) and Plaintiffs' Notice of Appeal was filed on September 23, 2008. (R-682).

ARGUMENT

Appellants' argument will be in two parts: (1) Discussion of Lovette's and Sproles' Motions to Dismiss, and (2) Discussion of Memorial Hospital's Motion for Summary Judgment.

Summary

The Motions to Dismiss filed by the individial Defendants, Sproles and Lovette, will be discussed first. Their motions sought dismissal based on Miss. Code §15-1-36(15) (hereinafter referred to as the Claim Notice Statute). That statute requires that at least 60 days before a medical malpractice suit is filed against a medical provider, the provider must be sent a Claim Notice. Plaintiffs failed to send the required Claim Notices to the two doctors initially, and dismissed them from the suit. Later, more than 60 days after sending them the required notices, they were re-joined as Defendants. Thus, the Claim Notice Statute was fully complied with, and the Motions to Dismiss filed by the two doctors should have been denied.

The Motion for Summary Judgment filed by Defendant Memorial Hospital should also have been denied. The Motion claimed that Plaintiff's medical expert, Dr. Hale, had not identified any act or omission of negligence on the part of the Hospital, nor

indicated that any such negligence proximately caused or contributed to Plaintiff's injury. Those arguments were without merit, as Dr. Hale's reports clearly establish both negligence and proximate cause.

1. The Doctors' Motions to Dismiss

The sole basis of Dr. Lovette's and Dr. Sproles' Motions to Dismiss is the "60-day notice of claim" requirement of the "Claim Notice Statute", Miss. Code §15-1-36(15). The motions admit that each doctor received, not one, but two Notice of Claim letters (dated May 2, 2007 and March 14, 2008 respectively), yet their attorneys still find a way to argue that they should be dismissed because of the Claim Notice Statute.

In this Memorandum we will refer to the subject statute, Miss. Code §15-1-36(15), as the "Claim Notice Statute", and the two "60-day claim notice letters" involved as "Claim Notices."

After discussing the standard of review related to the Motions to Dismiss, Plaintiffs will discuss each of the two claim Claim Notices and their relationship to the Plaintiffs' Complaint and Amended Complaint. For that, we need to consider two separate sets of facts, relating to the two Claim Notices.

(a) Standards of Review

The granting of a motion to dismiss by the trial court is reviewed *de novo* on appeal. On such a motion the allegations of the Complaint must be accepted as true, and the Court must resolve any factual conflicts in Plaintiffs' favor. See: ***Stripling v. Jordan Production Co.***, 234 F.3d 863, 869 (5th Cir.

2001); ***Durham v. Katzman, Wasserman and Bennardini***, 375 F.Supp. 2d 495, 498 (S.D. Miss. 2005).

(b) The Claim Notice Statute

Miss. Code §15-1-36(15) states in pertinent part:

> "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. . . . 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 . . . ."

(c) The First Claim Notice

On April 6, 2006, the injury in suit occurred during treatment of the Plaintiff Dianne Hans at Gulfport Memorial Hospital. On March 29, 2007, Plaintiffs' original Complaint was filed, naming Drs. Lovette and Sproles as Defendants (along with Memorial Hospital). Shortly afterward, Plaintiffs' counsel was informed by Dr. Sproles' attorney, that Plaintiffs' counsel had overlooked the requirements of the Claim Notice Statute.

Plaintiffs' counsel therefore voluntarily dismissed Sproles and Lovette from the suit on May 30, 2007 and July 16, 2007, respectively. Plaintiffs' counsel and Sproles' counsel jointly agreed to an Order dismissing Sproles, without prejudice. Plaintiffs' counsel then issued his own voluntary dismissal of Lovette, since an Order of dismissal was not required under MRCP Rule 41(a)(1)(i).

Meanwhile, on May 2, 2007, Plaintiffs' counsel sent each of the doctors the required Claim Notice, as should have been done in the first place.

On March 25, 2008, well after the expiration of the required 60 days following the Claim Notices sent on May 2, 2007, the Circuit Court granted Plaintiffs' Motion to Amend their original Complaint, naming Dr. Sproles and Dr. Lovette as Defendants again, this time in compliance with the Claim Notice Statute.

On March 26, 2008, pursuant to the Order allowing the amendment, Plaintiffs filed their Amended Complaint, adding Lovette and Sproles as Defendants. This was still within the time allowed for suing them under the applicable 2-year statute of limitations for medical malpractice actions, which was due to expire on April 6 or 7, 2008. On April 1 and 9, 2008, Lovette and Sproles where served with the Amended Complaint.

Based on the foregoing events, this suit against Lovette and Sproles, initiated against them by adding them as Defendants in Plaintiffs' Amended Complaint on March 26, 2008 -- well after the passage of 60 days from delivery of the Claim Notices sent on May 2, 2007, and still within the 2-year statute of limitations -- complied with the Claim Notice Statute.

How counsel for Defendant doctors are able to make any argument for escaping the obvious consequences of the foregoing is a rather amazing example of defense counsel's ingenuity.

Doctor Lovette's argument in Circuit Court was to say that even though the doctors were dismissed from the original Complaint, they were still "hanging around" in this suit because their names still appeared written into the original Complaint:

> "Lovette would show that a 'non-suit' (or stipulation of dismissal) was filed by the Plaintiff on May 30, 2007, ostensibly dismissing the claim against this defendant, yet the claim itself remained ensconsed within the body of the complaint." (R-424)

Lovette's argument, in effect, was that some "ghost-like" presence remained after Lovette was originally dismissed from the suit, which somehow maintained the doctors' status as actual Defendants such that their re-joinder later was not really the filing of a new suit against them, but the same old one that had never been completely "dismissed." This argument is totally without merit.

Dr. Sproles was dismissed from this lawsuit without prejudice on May 30, 2007 (R-65). Dr. Lovette was dismissed without prejudice on July 16, 2007. (R-67) As of the dates of those dismissals, the two doctors were no longer Defendants, and had no "ghost persona" that somehow "hung around" in this suit just because of the original wording of the Complaint which at that point no longer included them as Defendants. They were later re-sued by being named as Defendants again in the Amended Complaint. The fact that they were initially included as Defendants incorrectly cannot obscure the fact that their initial improper inclusion was cured by their dismissal without prejudice. Their later re-joinder as Defendants by the Amended Complaint was then perfectly proper pursuant to the first Claim Notices and the Claim Notice Statute.

Dr. Sproles's attorneys went a small step further in their argument in Circuit Court. Instead of advancing Dr. Lovette's argument that the doctors remained "defendants" in spite of their earlier dismissal, Dr. Sproles's attorneys pointed to the wording of the Claim Notice Statute itself, which they said required

"pre-suit" notice. This argument, while it makes more sense than Lovette's, is just as misplaced.

Dr. Sproles argues that "Plaintiff is attempting to cure by amendment that which is prohibited by statute, a failure to give pre-suit notice. This is still the same suit."

The argument is a clever one, but false. It attempts to confuse "this suit" with "this suit against Dr. Sproles". Once Dr. Sproles was dismissed (without prejudice) from this suit, this suit was no longer a suit against Dr. Sproles. The Plaintiffs' Claim Notice to Sproles, sent in May, 2007 after his dismissal from this case was a "pre-suit" notice to him, because he was not sued again until the filing of the Amended Complaint against him in 2008.

If this suit had been one against Dr. Sproles and Dr. Lovette only, then their dismissal without prejudice as of July, 2007, would have ended and terminated this suit completely. But what Dr. Sproles is overlooking, and hopes this Court and Plaintiffs may overlook, is that Memorial Hospital was also a Defendant. Thus, the dismissal of Drs. Sproles and Lovette did not dismiss "this suit" against the Hospital. But it did dismiss "this suit" against the two doctors.

If taken to its logical extreme, Sproles' argument would work havoc on any litigation in this State involving more than one medical defendant. Sproles' attorneys would have this Court require the Plaintiffs to dismiss their entire suit -- including their claim against Memorial Hospital -- before they could give a valid Claim Notice to Sproles or Lovette. But dismissing Memorial

Hospital would effectively abandon the Plaintiffs' claims against that entity; as a "governmental entity" suit against the Hospital had to be filed within one year, and that year had already passed; thus, dismissal of the suit against the Hospital, whether with or without prejudice, would have terminated that claim since it could not be re-filed within the limited time allowed by the one-year statute of limitations in Tort Claim cases.

The cases cited by Defendants Sproles and Lovette in Circuit Court do not contradict the unassailable logic of the foregoing.

In ***Veal v. J. P. Morgan Trust Co.***, 955 So.2d 843 (Miss. 2007), cited by Dr. Lovette below, there is nothing that remotely supports Defendants' argument. The case only holds that an Amended Complaint adding a party who is not already a defendant (whether actual or fictitious) can be filed only with leave of Court and a written Court order. (Specifically, ***Veal*** held that the existing Defendants' permission for the filing under MRCP Rule 15 is insufficient by itself, due to certain provisions in Rule 22.)

In that regard, ***Veal*** does not rebut Plaintiffs' position, but affirmatively supports it. Plaintiffs in this case did not rely on any permission from the existing Defendant (Memorial Hospital) for filing the Amended Complaint, but moved for leave of Court to file the Amended Complaint; their motion was vigorously opposed by the existing Defendant, the Hospital, but was granted by the Court after a hearing.

Dr. Sproles' Motion cited the following decisions: ***Pitalo v. GPCH-GP, Inc.***, 933 So.2d 927 (Miss. 2006); ***Arceo v. Tolliver***, 949

So.2d 691 (Miss. 2006); and ***Nelson v. Baptist Memorial Hospital - North Mississippi, Inc.***, 972 So.2d 667 (Miss. App. 2007), cert.den. 973 So.2d 244 (Miss. 2008). None of these cases supports the Defendants' Motions either.

In reviewing the three cases referred to above, it is unnecessary to read the first two; only ***Nelson*** needs study, since the opinion in that case explains the first two.

In ***Nelson***, the Court summarized ***Pitalo*** as follows:

> "The plaintiff in ***Pitalo*** filed a complaint in September, 2003 and an amended complaint in June, 2004, but she never sent the required notice to the defendants." 972 So.2d pp 15.

It is easy to see why the Supreme Court in ***Pitalo*** dismissed that plaintiff's case -- she never sent the required Claim Notice at all -- either before, during, or after she filed her original or amended complaints. That, of course, is not the situation in the case at bar.

The Court in ***Nelson*** described ***Tolliver*** as follows:

> "Relying on its decision in ***Pitalo***, the supreme court recently ruled that dismissal without prejudice was proper when a plaintiff failed to serve notice on a defendant at least sixty days before commencing an action. . . . Although Tolliver filed a complaint and two amended complaints throughout June and July, 2004, the court noted that it was not until November, 2004 that she tried to provide the defendants with the statutorily required notice." 972 So.2d at pp 16.

Here again, it is easy to see why the Court in ***Tolliver*** dismissed that plaintiff's case -- she never sent the required Claim Notice before filing any of her original or amended complaints as required by the Claim Notice Statute. Again, that is not the situation here.

In ***Nelson***, the Court explained the situation in its own case as follows:

> "The Nelsons filed a complaint on July 9, 2003, prior to the expiration of the statute of limitations on July 14, 2003. . . . Prior to filing the complaint, the Nelsons did not provide sixty days notice to the Hospital, Clinic, and Doctors as required by Mississippi Code section 15-1-36(15). . . .
>
> "On November 3, 2003 [the trial] Judge entered an order granting an additional 90 days to serve process. The Nelsons then sent notice of the suit on November 10. After waiting sixty days, the Nelsons filed an amended complaint . . . and then they served process on the Hospital, Clinic, and Doctors." 972 So.2d at pp 3 & 4

In ***Nelson***, the Plaintiffs failed to send the required Claim Notices to the medical providers prior to the expiration of the statute of limitations. (As the Court noted, the statute of limitations expired on July 14, 2003, and the Claim Notices weren't sent until November 10, 2003.) Here again, that is not the situation in the case at bar; Plaintiffs in the case at bar sent Claim Notices to Sproles and Lovette in May, 2007, long before the expiration of the limitations period. Moreover, Plaintiffs then sued Sproles and Lovette in their Amended Complaint on March 26, 2008, and served them with process on or about April 1 & 9, 2008 (R-501), all before the expiration of the limitations period (as extended by the Claim Notice Statute).

In ***Nelson***, the first trial Judge who handled the case, in Novmeber, 2003 -- after the limitations period had already expired in July that year -- granted the plaintiffs more time to serve process on the defendants. But he did not grant, and couldn't grant, the plaintiffs more time, after the expiration of the limitations, to send the required Claim Notices. Thus, the

Court of Appeals was correct in affirming dismissal of the Nelsons' suit.

Nothing in ***Nelson*** holds that medical providers can't be sued by adding them as Defendants to an on-going suit against another party, such as Memorial Hospital in this case. All ***Nelson*** holds is that you can't do that unless you have sent the required Claim Notices to those providers (1) at least 60 days before adding them, and (2) before the expiration of the Statute of Limitations period.

Thus, neither ***Pitalo***, ***Tolliver***, or ***Nelson*** supports the Motions to Dismiss filed by Drs. Sproles and Lovette, and their motions should have been denied.

The foregoing fact situation, relative to the first Claim Notice, is clear enough, and supports the joinder of Drs. Lovette and Sproles as Defendants as of the date of filing the Plaintiffs' Amended Complaint against them.

(d) The Second Claim Notice

A second set of facts -- related to a second set of Claim Notices -- now needs to be considered; that second set of facts may have been what has confused counsel for the two doctors into thinking that somehow the first set of facts didn't comply with the Claim Notice Statute.

On March 14, 2008, Plaintiffs' counsel sent Dr. Lovette and Dr. Sproles a second Claim Notice letter. The reason for this second Claim Notice is related to the situation that two additional doctors now needed to be joined in the lawsuit, namely Drs. Mace and Moses.

Because undersigned counsel knew (a) about the involvement of Drs. Moses and Mace, (b) the need to join them as Defendants, and thus (c) the importance of sending them Claim Notices before suing them -- we therefore sent the second Claim Notice letter to them before seeking to join them in this suit.

Since we were sending new Claim Notices to Mace and Moses, we thought it appropriate to send the same Notice letter to Drs. Lovette and Sproles (even though they had already been sent the first Claim Notice sufficient to permit their re-joinder in this suit).

Thus, we sent the same new Claim Notice letter (dated March 14, 2008) to all four doctors. That notice was not necessary for the suit against Sproles and Lovette, since they had already been sent the first Claim Notice as discussed above; but it was necessary in order to allow Plaintiffs to sue Drs. Moses and Mace. The 60-day period following the second Claim Notice was due to expire on or about May 13, 2008. Plaintiffs intended to join Moses and Mace as Defendants at that time.

The sending of the second Claim Notice to all four doctors gave the two doctors already joined in the suit, Lovette and Sproles, an excuse to complain that we shouldn't have sued them prior to the expiration of 60 days following the second Claim Notice of March 14, 2008. That argument conveniently overlooks the first Claim Notice to both Sproles and Lovette. Once 60 days had passed following the first Claim Notice, suit was proper against them, as long as they were joined prior to the expiration of the original 2-year statute of limitations, which they were.

Somehow, counsel for Drs. Lovette and Sproles have become enamored of the idea that delivery of the second Claim Notice gives them a right to confuse and confound the simple fact situation reviewed in subpart (c) above regarding the first Claim Notice. It doesn't. The ingenuity of defense counsel in that regard is outstanding, but not their logic.

(e) Summary of this part

Although Dr. Sproles and Dr. Lovette had initially been made Defendants in this case, they were dismissed entirely from this suit as of July, 2007. They were sent the required 60-day Claim Notice letters, and long after the expiration of the 60 days following those notices, they were sued by joining them again as Defendants in Plaintiffs' First Amended Complaint. Nothing in the Claim Notice Statute requires or permits them to be dismissed for failure to comply timely and properly with that statute.

2. The Hospital's Motion for Summary Judgment

As discussed in our Summary of the Proceedings Below, Memorial Hospital filed its original Motion for Summary Judgment on March 10, 2008 (R-276), and later amended it with the filing of its Amended Motion for Summary Judgment. (R-361) The Circuit Court granted the Amended Motion by Summary Judgment of dismissal on September 3, 2008.

Plaintiffs' discussion of the Hospital's Motion, which we submit was erroneously granted below, will be set forth in the following parts: (a) summary of the applicable standards of review, (b) review of the grounds for the Hospital's two motions, (c) summary of Dr. Hale's expertise, (d) discussion of Dr. Hale's

opinions and how they rebut the Hospital's Motion, (e) timeliness of Dr. Hale's affidavit, (f) the ER Call List issue, (g) the doctors' depositions, and (h) summary of this part of the Brief.

(a) Standards of Review

The granting of summary judgment by the trial court is reviewed *de novo* on appeal. ***Delahoussaye v. Mary Mahoney's, Inc.***, 696 So. 2d 689, 690 (Miss. 1997); ***Germany v. Denbury Onshore, LLC***, 984 So.2d 270 (Miss. 2008).

Summary judgments deny the right to jury trial to the litigants and therefore are reserved only for cases where there is clearly no fact issued to be tried:

> "Trial judges must be sensitive to the notion that summary judgment may never be granted in derogation of a party's constitutional right to trial by jury. Miss. Const. Art 3, §31 (1890)." ***Mississippi Moving & Storage Co. v. Western Electric Co., Inc.***, 498 So.2d at 342, second column.

Summary judgment may be granted only where there is absolutely no issue of material fact to be decided, in which all parties agree on all material facts, and the moving party is entitled to a judgment "as a matter of law". MRCP Rule 56(c). The official comment to Rule 56, often quoted with approval by this Court, states:

> "A motion for summary judgment lies only when there is no genuine issue of material fact; summary judgment is not a substitute for the trial of disputed fact issues. Accordingly, the court cannot try issues of fact on a Rule 56 motion; it may only determine whether there are issues to be tried. Given this function, the court examines the affidavits or other evidence . . . simply to determine whether a triable issue exists, rather than for the purpose of resolving that issue. [The summary judgment procedure] cannot be used to deprive a litigant of a full trial of genuine fact issues." (emphasis supplied)

Cf. ***Mississippi Moving & Storage Co. v. Western Electric Co., Inc.***, 498 So.2d 340, 342 (Miss. 1986); ***New Orleans Great Northern RR. Co. v. Hathorn***, 503 So.2d 1201, 1202 (Miss. 1987); ***Lowery v. Guaranty Bank & Trust Co.***, 592 So.2d 79, 81 (Miss. 1991).

A heavy burden rests on the moving party to prove, not just that his version of every material fact is "true", but that the opposing party cannot even reasonably dispute any one of them.

On a motion for summary judgment, just as with a motion for directed verdict, the party opposing the motion is entitled to the benefit of any and all doubts regarding the facts, and all favorable inferences to be drawn therefrom; all evidence must be viewed in the light most favorable to him and against the moving party. ***Collins v. Tallahatchie County***, 876 So. 2d 284, 286-87 (Miss. 2004); cf. ***Lowery*** and ***Mississippi Moving & Storage***, ***supra***.

For all these reasons, in dealing with the Hospital's Motion for Summary Judgment, this Court must start out by assuming the truth of the facts as we have stated them under the heading "Underlying Facts" above. Those facts are not only established by the depositions and other pleadings on file, but any doubts regarding them must be resolved in Plaintiffs' favor.

Based on the foregoing, this case presents a set of simple issues to be decided by the jury insofar as Memorial Hospital is concerned: (1) Was the delay between Diann Hans's arrival at the ER and her surgery unreasonable? (2) Did the delay cause injury to Mrs. Hans? (3) Was Memorial Hospital at least partly responsible for the delay? All of these questions are answered in

the affirmative by the reports and affidavit of Plaintiff's medical expert, Dr. William Hale, as discussed in part 2(d) of the Argument below.

(b) The basis of the Hospital's Motions

Memorial Hospital filed its original Motion for Summary Judgment in March, 2008. At that time, the Plaintiffs had not yet re-joined Drs. Sproles and Lovette as defendants, and had not yet submitted expert opinion regarding the Hospital's negligence. The Hospital's first motion reflected these deficiencies.

Thus, the Hospital's original motion sought summary judgment for the following reasons: (1) Plaintiffs' failure (up to that time) to provide expert testimony in support of their claims of malpractice, (2) Plaintiffs' alleged failure to provide evidence of breach of the standard of care, and (3) Plaintiffs' alleged failure to provide evidence of causation (i.e., evidence that "any act or omission of the Hospital proximately caused Plaintiffs' damages"). (R-276-277)

The Hospital's original motion was never heard. In April, 2008, the Hospital filed its Amended Motion for Summary Judgment, which was the version of the motion that was eventually granted.

By the time the Amended Motion was filed, Plaintiffs had identified their medical expert, Dr. William Hale, the Chief of Gastroenterology and Hepatology at Norwalk Hospital in Connecticut and on the staff of the Yale University Medical Center. He had rendered opinions that both the Hospital and Dr. Sproles failed to follow accepted medical practice and were negligent in causing Mrs. Hans's injuries.

The Hospital's Amended Motion changed the first basis for its original Motion, from a claim that Plaintiffs had failed to identify an expert, to the claim that Dr. Hale didn't have the necessary experience to render his opinions because he had never practiced "emergency room medicine." (R-362) The Amended Motion also reiterated the second and third grounds for the Hospital's original motion -- claiming that Dr. Hale's reports failed to identify any specific breach of the standard of care by the Hospital, and failed to establish that any such breach proximately caused Mrs. Hans's injuries. (R-362)

Two hearings were held relative to the Hospital's Amended Motion for Summary Judgment, the first being on the Hospital's Motion, the second on the Plaintiffs' Motion for Reconsideration of the Circuit Judge's action in granting the Hospital's Motion at the first hearing.

At both hearings, the Hospital seemed to abandon the argument that Dr. Hale wasn't qualified to give opinions in this case, that issue was never raised. But the Hospital did continue to base its Amended Motion on the second and third grounds discussed above: the claim that Dr. Hale had not identified any breach of the standard of care by the Hospital, nor indicate that any such breach proximately caused Plaintiff's injury. (T-3-7, 22-25)

(c) Dr. Hale's expertise

As just mentioned, the Hospital apparently abandoned at the hearings the argument in its Amended Motion that Dr. Hale was unqualified to give opinions in this case. Not only is Dr. Hale's

specialty squarely within the realm of appendicitis, but in his second report (R-654), he made clear his own expertise regarding emergency room care in particular. He said:

> "Transferring a patient to a different in-hospital service or between hospitals is a standard part of clinical medicine and occurs on a daily basis. It is not unique to the Emergency Department. As a consulting gastroenterologist, I both initiate and receive transfers regularly. In all instances, both the referring and accepting parties must be clearly informed as to relevant clinical details and be confident that the receiving service has an appropriate and timely medical plan for the patient once the transfer is effected. (R-655)

(d) Dr. Hale's opinions

Dr. Hale issued two letter/reports which were incorporated in his sworn affidavit filed prior to the hearing on the Hospital's Amended Motion. The first was dated March 24, 2008, the second May 22, 2008.

In his first report, Dr. Hale stated:

> "Although the diagnosis of appendicitis was suspected clinically and confirmed radiologically in an appropriately prompt fashion, there was a significant delay before she was evaluated by a surgeon, Dr. Arthur Sproles and a further delay before an appendectomy was performed. These delays were negligent and unreasonable and were the result of failure to follow accepted medical practice. In my opinion it is more likely than not that these delays resulted in perforation of the appendix and that this perforation, and the resulting peritoneal contamination, led to the development of a wound abscess [and] adhesions." (R-653) emphasis added

Dr. Hale's reports, incorporated in his sworn affidavit, clearly established a prima facie case against the Hospital, both for the Hospital's negligence, and regarding causation.

i. Negligence

The Hospital claimed that Dr. Hale had failed to identify any act or omission of the Hospital that constituted a breach of the standard of care. It is hard to see how the Hospital's claim has any merit, in view of the express statements of Dr. Hale. He specifically stated that the "significant delays" involved "were

negligent and unreasonable and were the result of failure to follow accepted medical practice."

The Hospital's argument the Complaint "fails to allege any specific act or omission by an employee of MHG that caused damages to Plaintiff" is absurd. Contrary to the Hospital's claim, the Complaint does allege, and Dr. Hale's reports affirm, that the Hospital was guilty of the lengthy and unreasonable delay in Mrs. Hans's surgery. If the Hospital is claiming that the Plaintiffs must "identify" a particular "employee of MHG" that committed some specific act or omission, that claim is irrelevant. The Plaintiffs are not required to allege that any particular employee committed a particular wrong, but only that the Hospital, as an entity, did.

Moreover, the primary thrust of Plaintiffs' allegations against the Hospital is that it and its employees failed to do something, and it is ludicrous to argue, as the Hospital does, that the Plaintiffs are required to name each and every employee in the ER who "failed" to treat Mrs. Hans. On that basis, the Complaint would have to name each and every ER employee on duty at the times in question!

The Hospital's argument that some "specific" act or omission of negligence must be shown is also misplaced and illogical. Dr. Hale's report very clearly charges the Hospital with not just a "single omission", but a prolonged one -- the failure to attend to Plaintiff Diane Hans during a long and unreasonable series of delays. It is not necessary to identify a "single omission", but if the Hospital needs one, we can simply say that the Hospital "omitted" to attend to the patient, and properly transfer her

care to Dr. Sproles, numerous times -- once for each second the "omission" and "delay" continued.

It is absurd to require a "single omission" in any case. If a defendant "omitted" something, he, she or it simply omitted it. A negligent "omission" is not like a negligent "act", in the sense that a specific negligent act can be identified, while a negligent "omission" is a more general thing, continuing over a period of time, and not subject to any specific identification of any particular period of the delay.

The Hospital argued that Dr. Hale exonerated it by stating that the "diagnosis of appendicitis was . . . confirmed . . . in an appropriately prompt fashion." But while the doctor admitted the diagnosis was not negligently delayed, he said the surgery was. It was the delay in surgery -- not the diagnosis -- that Dr. Hale said was negligent, and he blamed the Hospital for it.

ii. Causation

The Hospital claimed that Dr. Hale failed to establish that any act or omission of the Hospital proximately caused Mrs. Hans's injury. That claim is also without merit. The doctor's first report clearly and unequivocally stated that "more likely than not" the delays (which he said consistited negligence on the Hospital's part) "resulted in perforation of the appendix" and all the injuries that followed from that and which he listed specifically.

The only way the Hospital's argument regarding causation would make any sense would be to hold that "proximate cause" can only be a direct cause, not an indirect one. In this case, the

causation was "indirect" -- the Hospital was the cause of the unreasonable delay, and the delay caused Mrs. Hans's injury. Under black letter law, to which there can be no legitimate dispute, that kind of causation constitutes "proximate cause". See ***Marshall Durbin, Inc. v. Tew***, 362 So.2d 601 (Miss. 1978), appeal after remand, 381 So.2d 152 (Miss. 1980); ***Meridian Star v. Kay***, 207 Miss. 78, 41 So.2d 30 (1949). Cf. ***Palsgraff v. Long Island RR Co.***, 248 N.Y. 339, 162 N.E. 99 (1928).

Dr. Hale also removed any doubt about the Hospital's responsibility, not just Dr. Sproles', for the delays which caused Mrs. Hans's injuries, saying:

> "The Emergency Department physicians had a duty to ensure that the patient's care met minimum standards. . . . By allowing [the] patient to be transferred from the Emergency Department without a personal evaluation of the patient by the surgeon . . . the Emergency Department did not complete an appropriate disposition of this patient and exposed her to unnecessary risk. . . .
>
> "Additionally, the hospital bears further responsibility for the delay in obtaining surgical consultation because of their administrative failure to provide updated on-call information to the Emergency Department." (R-654)

A proximate cause need not be the only cause. There may be multiple "proximate causes" for an injury, and each is a proximate cause if it is a "substantial contributing factor" in bringing about the injury. ***City of New Albany v. Barkley***, 510 So.2d 805 (Miss. 1987).

(e) Dr. Hale's affidavit

Dr. Hale's affidavit (R-651) was a sworn statement by Dr. Hale incorporating his two letter/reports discussed above. The affidavit was filed the day before the hearing on the Hospital's Amended Motion, in compliance with MRCP Rule 56(c) which allows

the filing of affidavits in connection with motions for summary judgment as late as the day before the hearing.

While the affidavit was filed the day before the hearing, Dr. Hale's letter/reports were filed much earlier. His first report was served on the Hospital with Plaintiffs' Second Supplemental Answers to the Hospital's Interrogatories, on March 31, 2008. (T-5:13) His second report was served on the Hospital with Plaintiffs' First Comprehensive Amended and Supplemental Answers to the Hospital's Interrogatories, on July 18, 2008 (T-14:17). The Hospital had no reason to complain about late notice regarding Dr. Hale's opinions.

(f) The Call List

As mentioned in our Statement of Facts above, there seems to have been a problem with the Call List which the Hospital's ER relied on in attempting to get a surgeon to attend to Mrs. Hans. The Hospital never made this problem a ground for its motion, or relied on it in any way. Plaintiffs' Responses to the Hospital's Motion and Amended Motion (R-349, 495), and the comments of Plaintiffs' counsel at the hearing on the Amended Motion (T-19:23) contain the Plaintiffs' position regarding the Call List issue. For the sake of completeness it should be discussed briefly.

The Call List used by the Hospital on the day Mrs. Hans' reported to the ER -- April 6, 2006 -- listed Dr. James Lovette as being on call for the type of internal medical problem at issue in this case. The Hospital records indicate that the ER attempted to contact Dr. Lovette approximately 13 times without

success before finally contacting Dr. Sproles. (T-8:9) This problem in reaching Dr. Lovette contributed to the "substantial" and "unreasonable" delay referenced by Dr. Hale in his reports.

While the Hospital's Motion for Summary Judgment was never based on blaming Dr. Lovette for any part of the delay in Mrs. Hans' surgery, or attempting to shift part of the blame to him, Plaintiffs felt it was important to get to the bottom of the problem. Dr. Moses was in charge of preparing the rough draft of the Call List and sending it to the Hospital. If Moses or Lovette had changed the Call List and sent the changes to the Hospital, the Hospital's ER apparently never received the changes. In order to investigate this issue, Plaintiffs noticed the depositions of Dr. Lovette, Dr. Moses, and Dr. Mace (whose name appeared on the ER's version of the Call List for the week, but not the day, in question). Plaintiffs also noticed Dr. Sproles deposition, partly for the same purpose, and for other reasons related to other issues in the case discussed previously above. The depositions had been scheduled for June 25, 2008 (R-523), but all four doctors filed Motions for Protective Order and refused to appear for their depositions until the motions were heard, which they never were. (R-531)

The doctors' Motions for Protective Order were set for hearing on the same day as Memorial Hospital's Amended Motion for Summary Judgment. (T-26:4) However, the Circuit Judge never heard those motions, dismissing Memorial Hospital by summary judgment before the motions were heard. (T-25:22) In the absence of the

depositions, the "Call List problem" was never investigated in this case.

(g) The Doctors' depositions

As just stated above, Plaintiffs noticed the depositions of the four doctors involved, but those depositions were delayed and not taken before the hearing on the Hospital's Amended Motion for Summary Judgment because the Doctors filed Motions for Protective Order seeking to prevent their depositions. Thus, the Court granted the Hospital's Motion without allowing the Plaintiffs to take the discovery which they had already noticed and attempted, and which had been thwarted by the four doctors.

(h) Summary

Dr. Hale's reports place a large part of the blame for the negligent delays in Mrs. Hans's surgery on the Hospital, and expressly relate her injuries to those negligent delays. There was no merit whatever to the Hospital's Motion, and it should have been denied.

As mentioned in part 2(a) of this Brief, on a motion for summary judgment, all facts and evidence must be viewed in the light most favorable to the opponent of the motion, in this case the Plaintiffs. On such a motion, all possible inferences must be drawn in favor of the motion's opponent. When the facts and inferences are thus viewed, there is no possible basis for the Circuit Court's grant of summary judgment in this case, and that summary judgment ought to be reversed.

CONCLUSION

Based on the foregoing, Plaintiffs request that this Court reverse (1) the Dismissal Order issued by the Court below dismissing Drs. Sproles and Lovette as Defendants in this case, and (2) the summary judgment issued by the Court below dismissing Memorial Hospital, and remand the case for the trial on the merits to which all parties are entitled, and for such further relief as may be proper at law or in equity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

This 7th day of April, 2009.

ROBERT HOMES JR.

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