

**IN THE SUPREME COURT OF MISSISSIPPI  
NO. 2008-IA-00602-SCT**

**DR. HENDRICK KUIPER, AND  
RIVER REGION MEDICAL  
CORPORATION/MEDICAL FOUNDATION**

**APPELLANTS**

**VS.**

**JOSEPH TARNABINE AND  
MARGARET TINA BRANAN  
CO-EXECUTORS ON BEHALF OF THE ESTATE  
OF MARTHA JONES TARNABINE**

**APPELLEES**

**APPEAL FROM THE CIRCUIT COURT  
OF WARREN COUNTY, MISSISSIPPI**

**BRIEF OF APPELLANTS**

**ORAL ARGUMENT NOT REQUESTED**

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**ATTORNEYS FOR APPELLANTS**

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**APPELLEES**

**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualifications or recusal.

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Vicksburg, MS 39183

River Region Medical Corporation  
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Vicksburg, MS 39183

River Region Medical Foundation  
2100 Hwy. 61N  
Vicksburg, MS 39183

Triad Hospitals, Inc.  
5800 Tennyson Parkway  
Plano, TX 75204

St. Paul Insurance Company  
143 LeFleurs Square  
Jackson MS 39211-5525

Hendrik Kuiper, M.D.

1901 Mission 66  
Vicksburg, MS 39189

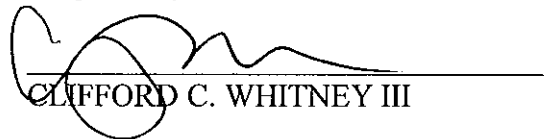
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Margaret Tina Branan  
Addresses listed in Appellees' Brief

THIS THE 21<sup>st</sup> DAY OF FEBRUARY, 2009.

Respectfully submitted,



CLIFFORD C. WHITNEY III

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## **STATEMENT OF ISSUES**

- I. Whether Defendants are entitled to summary judgment in this medical malpractice case due to Plaintiffs' failure to present any affidavit or sworn statement by an expert.
- II. Whether Defendant, River Region Medical Corporation/Medical Foundation, is entitled to a dismissal due to the failure by Plaintiffs to name the correct defendant in the summons or to serve the correct registered agent.

## **STATEMENT OF THE CASE**

### **I. Nature of Case, Course of Proceedings and Disposition Below.**

This case relates to the death of Martha Jones Tarnabine on September 30, 2001. Her wrongful death beneficiaries (the "Tarnabines") contend that the patient's death was caused by the medical negligence of Dr. Kuiper in the diagnosis and treatment of an infection in an incision made during surgery on Mrs. Tarnabine at "River Region Hospital" in Vicksburg.<sup>1</sup> The Tarnabines filed a Complaint (E. 4-7) on December 31, 2002, against Dr. Kuiper and "River Region Medical Foundation D/B/A River Region Medical Center."

On September 27, 2007, Defendants filed a Motion for Summary Judgment on grounds that include the fact that the Tarnabines do not have an expert opinion to support the elements of their medical malpractice claim. The hearing on the summary judgment motion was held on January 10, 2008. In the 3-1/2 months between the filing of the motion and the hearing, the Tarnabines never filed any response or any affidavit, expert or otherwise. Circuit Judge Patrick nevertheless held that this is a "case in which both parties, the Plaintiffs and the Defendants, should be allowed to go forward and present their case on the merits at trial." March 20, 2008, Order (E. 39-40), ¶ A.

River Region Medical Corporation/River Region Medical Foundation ("River Region") also

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<sup>1</sup> The correct hospital was in fact Parkview Medical Center, which is now closed.

moved to dismiss the case based on defective process and service of process. The trial court heard this motion at the hearing on January 10, 2008, as well. Plaintiffs never responded to the Motion to Dismiss or submitted any proof that process or service of process were valid. Nevertheless, the trial court denied the Motion to Dismiss in its Order of March 20, 2008.

## **II. Statement of Facts.**

### **A. Lack of Affidavit to Oppose Summary Judgment.**

Defendants' Motion for Summary Judgment asserted that Plaintiffs have the burden on summary judgment to come forward with sworn expert opinions to support the elements of their case, in order to defeat summary judgment. Motion, ¶ 3 (E. 26-38). Plaintiffs failed to meet this burden, in that they never filed any response to the Motion for Summary Judgment, let alone any expert affidavits to support their claims. The Plaintiffs later admitted that they do not even have an expert to support their allegations. Plaintiffs' Response to Admissions, Response No. 1 (E.41-44).

At the hearing on the Motion for Summary Judgment, counsel for Dr. Kuiper and River Region again emphasized Plaintiffs counsel "doesn't even address the question of – we file a Summary Judgment Motion and she doesn't produce anything to rebut or to establish the burden of proof elements that she has in this case with expert affidavit [sic]. And the cases are very clear that absent that the Defendant is entitled to summary judgment." Trans. at 11 (E. 55). However, in denying the Motion, the trial judge did not mention the absence of an expert affidavit, stating only that "in the Court's view this is a case in which both parties, the Plaintiffs and the Defendants, should be allowed to go forward and present their case on the merits at trial." Order, ¶ A. The court's ruling from the bench was no more specific about why the case should be allowed to go to trial without any expert opinions to support Plaintiffs' claims. Trans. at 15 (E. 49).



**B. Invalid Process and Service of Process.**

An entity supposedly representing the hospital is named as a defendant in the body of the Complaint (E. 4-7), under the name “River Region Medical Foundation D/B/A River Region Medical Center.” The caption refers to another name -- “River Region Medical Corporation/Medical Foundation.” The Summons (E. 11) contains yet another name -- “River Region Health Systems/Medical Foundation D/B/A River Region.” No summons was issued to genuine corporations named River Region Medical Corporation or River Region Medical Foundation.

The return of service (E. 12-13) states that the Summons was served on April 14, 2003, by a Hinds County Deputy Sheriff on the hospital’s registered agent, Corporation Services Co., through a person named Danny Perry. However, there is no entity named River Region Health Systems/Medical Foundation, as named in the Summons. The hospital where the surgery occurred was Parkview Medical Center, which was owned by Vicksburg Healthcare, LLC. The LLC has not been named as a party to this case. River Region Medical Corporation managed the hospital. Trans. at 7-8 (E. 53-54); Excerpt of Transcript of Testimony of Hospital Administrator, Philip Clendinin, at court hearing of July 17, 2005, which was introduced as an exhibit at the hearing of January 10, 2008 (Trans. at 52-56) and is attached as Appendix 1 hereto.<sup>2</sup>

Corporation Services Co. is not the registered agent of Vicksburg Healthcare, LLC or River Region Medical Corporation. The records of the Mississippi Secretary of State are attached as Exhibit “A” to the Motion to Dismiss (E. 13-22) and show the registered agent of Vicksburg Healthcare, LLC. or River Region Medical Corporation to be CSC of Rankin County, Inc. River

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<sup>2</sup> For some reason, the January 10, 2008, hearing exhibit was not included in the appeal record, although it was designated to be included (E. 52-56). Therefore, we have attached the exhibit as Appendix 1 to this Brief.

Region Medical Foundation is a non-profit charitable foundation having no ownership interest or management role in the hospital. The Articles of Incorporation of River Region Medical Foundation are attached as Exhibit "B" to the Motion (E. 16-25). Corporation Services Co. is the registered agent of River Region Medical Foundation, but the summons in the case was not addressed to River Region Medical Foundation. In short, neither the process or service of process in this case were addressed to the right corporation or registered agent.

### **SUMMARY OF THE ARGUMENT**

#### **I. Defendants Are Entitled to Summary Judgment, Because Plaintiff Failed to Present an Affidavit or Other Sworn Expert Testimony in Support of Their Claims.**

To avoid summary judgment, a plaintiff in a medical negligence case is obligated to present an expert affidavit opining that the defendant violated the standard of care and that his negligence caused the plaintiff's injuries. Here, the Plaintiffs failed to respond at all to the Motion for Summary Judgment, let alone did they put forward any expert testimony – sworn or otherwise – to support their claim. There can be no doubt that this fundamental omission requires the entry of summary judgment for the Defendants.

#### **II. Naming the Wrong Defendant in the Summons and Serving the Wrong Registered Agent Rendered Process and Service of Process Invalid.**

The Summons supposedly addressed to the hospital defendant in this case was addressed to a non-existent entity with a different name than the named Defendant. The process was therefore invalid. The same is true of the service of process, which was made on a person who was not the registered agent of the owner or manager of the hospital. Therefore, at a minimum, the claims against the hospital should have been dismissed.

## ARGUMENT

### I. Standard of Review.

This Court applies a *de novo* standard of review to the grant of a motion for summary judgment. *Windham v. Latco of Mississippi, Inc.*, 972 So.2d 608, 610 (Miss. 2008). The same standard applies to the review of motions to dismiss for insufficiency of process and service of process. *Fletcher v. Limeco Corp.*, 996 So.2d 773, 776 (Miss. 2008).

### II. Argument on Issues.

#### A. Lack of Expert Affidavit Is Grounds for Summary Judgment.

In a medical malpractice case, the plaintiff must establish the applicable standard of care of the physician, the physician's breach of the applicable standard of care, and proximate cause, all through competent expert testimony. *Palmer v. Biloxi Regional Medical Center, Inc.*, 564 So.2d 1346, 1354-1355 (Miss. 1990).<sup>3</sup> In the face of a motion for summary judgment, just as at trial, the plaintiff must produce sworn expert opinions in order to establish a prime facie case. *Hill v. Warden*, 796 So.2d 276, 279-280 (Miss. App. 2001). Therefore, in order to survive a summary judgment motion, the plaintiff must file an expert affidavit supporting the elements of his or her claim. *Smith ex rel. Smith v. Gilmore Memorial Hosp., Inc.*, 952 So.2d 177, 180 (Miss. 2007). If the plaintiff does not file an expert affidavit or deposition in response to the defendant's motion, a summary judgment will be entered against him, and the defendant himself is not required to present expert affidavits refuting the elements of the plaintiff's case. *Langley ex rel. Langley v. Miles*, 956 So.2d 970, 976 (Miss. App. 2006).

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<sup>3</sup> Of course, in *res ipsa loquitur* and similar cases, expert testimony may not be required. However, it has never been suggested – and could not be suggested – that this is one of those cases. The present case involves complex medical issues which clearly require expert testimony.

This Court should conduct a de novo review of the lower court's summary judgment decision to consider whether the plaintiff presented sufficient evidence to create issues of fact for trial. *Callicutt v. Professional Services of Potts Camp, Inc.*, 974 So.2d 216, 219 (Miss. 2007). In the present case, the Tarnabines did not present any sworn expert affidavit or other testimony to support the elements of their medical malpractice claim. In fact, the Plaintiffs admitted in their admission responses that they do not have an expert to support their case. Circuit Judge Patrick should have granted summary judgment based on this fundamental defect in the Plaintiffs' case. The trial court's failure to do so warrants a reversal and rendering of judgment in favor of Defendants.

**B. Insufficient Process and Service of Process.**

The Tarnabines have created total confusion about the name of the hospital involved in this case. They claimed that the procedure in question occurred at River Region Hospital, when it in fact occurred at Parkview Medical Center. River Region Medical Center did not even open until after the procedure in question occurred.

Plaintiffs next misstated the name of the owner of the hospital in the Complaint as "River Region Medical Foundation D/B/A River Region Medical Center," when River Region Medical Foundation is a non-profit charitable foundation and does not own or operate the hospital. Parkview Medical Center was in fact owned by an entity named Vicksburg Healthcare, LLC, which has not been named as a party to this case. Another entity named River Region Medical Corporation managed the hospital.

Not only did the Tarnabines sue the wrong entity, but their Summons is not even addressed to the entity named in the Complaint. The Summons is directed to a fictional entity denominated as "River Region Health Systems/Medical Foundation D/B/A River Region." In other words, the

Summons fails to hale into court the same party whom the Plaintiffs have sued, which was itself the wrong entity to begin with.

The next stage in the cascade of errors surrounding process occurred when the Tarnabines served the wrong resident agent. The return of service states that the Summons was served by a Hinds County Deputy Sheriff on Corporation Services Co., through a Danny Perry, on April 14, 2003. Corporation Services Co. is not the registered agent of Vicksburg Healthcare, LLC or River Region Medical Corporation, who owned and operated Parkview Medical Center. Corporation Services is the resident agent of River Region Medical Foundation, which again has nothing to do with ownership or management of the hospital.

It is axiomatic that a defective summons does not confer jurisdiction over a party. 62B *Am. Jur. 2d* Process § 86. It is equally obvious that attempted service of a corporation through a person who is not an authorized agent to receive process is void. *Schustz v. Buccaneer, Inc.*, 850 So.2d 209, 212-213 (Miss. App. 2003). The Summons in this case was defective on its face, because it did not name the same defendant as named in the Complaint and instead named a non-existent entity – “River Region Health Systems/Medical Foundation D/B/A River Region.” Service was likewise defective for the fundamental reason that it was made upon a supposed agent, who was not the authorized agent of the owner/operator of the hospital.


At the hearing on the Motion to Dismiss and in his Order, Circuit Judge Patrick stated with regard to the defective service issue that “I find it inconsistent that the Defendant would be saying that he was not served and he was not a party while at the same time saying he wants to take advantage of Rule 36 which requires a party, someone who is a party to ask for a request for admissions.” Trans. At 15 (E.49), Order ¶ B (E.48-51). The problem with the trial court’s reasoning

is that the Requests for Admissions (were **not** filed by River Region; they were filed by Dr. Kuiper, who has not contested service of process. See Notice of Service of Discovery (E.14-15) River Region has not conducted any discovery or otherwise litigated this case, other than to challenge process and service of process. We therefore respectfully submit that it was error for the trial court to fail to dismiss River Region.

### **CONCLUSION**

The Tarnabines did not file an expert affidavit to contest Dr. Kuiper's and River Region's Motion for Summary Judgment in this medical malpractice case, and therefore it was error for the trial court not to grant summary judgment to Defendants. At a minimum, River Region was not properly named in the Summons and was served through the incorrect resident agent, requiring a dismissal of the claims against the hospital. This Court should reverse the trial court and render judgment in favor of Defendants accordingly.

Respectfully submitted,  
DR. HENDRICK KUIPER AND RIVER REGION  
MEDICAL CORPORATION/MEDICAL  
FOUNDATION

BY:   
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**CERTIFICATE OF SERVICE**

I, Clifford C. Whitney III, one of the attorneys for Defendants, River Region Medical Corporation and River Region Medical Foundation, do hereby certify that I have this day mailed, postage prepaid, by United States Mail, via facsimile and/or hand-delivered a true and correct copy of the above and foregoing document to the following counsel of record and to the trial court:

Marcie Southerland, Esq.  
1120 Jackson Street  
Vicksburg MS 39183

The Hon. Isadore Patrick  
P.O. Box 351  
Vicksburg, MS 39181-0351

This the 17 day of February, 2009.

  
\_\_\_\_\_  
CLIFFORD C. WHITNEY III

App I

## APPENDIX I



1           IN THE CIRCUIT COURT OF WARREN COUNTY, MISSISSIPPI  
2           JOSEPH TARNABINE AND MARGARET TINA BRONAN  
3           CO-EXECUTORS ON BEHALF OF ESTATE OF  
4           Martha J. Tarnabine

5                       VERSUS   Cause No. 020229-CIP

6           DR. HENDRICK KUIPER, RIVER REGION  
7           MEDICAL CORPORATION MEDICAL FOUNDATION

8           \*\*\*\*\*

9           HEARING HAD AND HEARD ON JULY 17, 2005 IN THE WARREN COUNTY  
10          CIRCUIT COURT, VICKSBURG, MISSISSIPPI, 39180.

11          \*\*\*\*\*

12          APPEARANCES:

13          JUDGE ISADORE W. PATRICK  
14                  Ninth Judicial Circuit Court  
15                  P. O. Box 351  
16                  Vicksburg, MS 39180

17          REPRESENTING THE DEFENDANT:

18                  Gene Parker, Attorney At Law  
19                  Cliff Whitney, Attorney At Law  
20                  VARNER, PARKER, AND SESSUMS  
21                  Vicksburg, MS 39180

22          REPRESENTING THE PLAINTIFF:

23                  Marcie Southerland, Attorney At Law  
24                  Vicksburg, MS 39180

25          REPORTED BY:

26                  Helen M. Martin, CSR  
27                  Official Court Reporter  
28                  P. O. Box 351  
29                  Vicksburg, MS 39180

ORIGINAL

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PHILIP CLENDENIN

after being duly sworn the witness was called to testify and testified as follows to wit:

DIRECT EXAMINATION BY MR. PARKER:

Q. State your name for the Court, please?

A. Philip Clendenin, spelled C- L - E - N - D - E -  
N - I - N.

Q. And what is your advocacy?

A. Hospital administration.

Q. Okay, at River Region?

A. Yes, River Region Health System.

Q. You are the CEO?

A. Yes, sir.

Q. I'm going to hand you this that was filed in this case, Tarnabine versus Kuiper and River Region Medical Corporation - -

BY THE COURT: Excuse me. Since we are going to have testimony, is the rule invoked or is everyone satisfied with what we have? Everybody satisfied then its alright with me.

BY MR. PARKER: Yes, invoke it, Your Honor.

BY THE COURT: All witnesses that will be in this matter, would you please step outside the courtroom at this time.

BY MR. PARKER: The Court Bailiff, Officer Riggs, is going to testify the documents at the Sheriff Office.

BY THE COURT: Documents that he actually observed or are we just talking about procedure

1 Care, LLC.

2 Q. And who is the agent of process for River Region  
3 Medical Corporation?

4 A. It is also CSC of Rankin County, Inc.

5 Q. Now, the complaint says Corporation Service  
6 Company is the agent for process for the Defendant hospital,  
7 River Regional Medical Foundation, DVA, River Region Medical  
8 Center. That's not the same agent? That's not the agent of  
9 process of either the LLC or River Region Medical  
10 Corporation, is it?

11 A. No, it is not.

12 Q. And how long has CSC of Rankin County, Inc. been  
13 the agent for process?

14 A. As long as I can remember, so for about 3 years.

15 Q. Now, at the time that this incident occurred in  
16 February 19, 2001, that treatment happened at Parkview  
17 Regional Medical Center, didn't it?

18 A. Right, in February of 2001 River Region Medical  
19 Center was not yet open so it would have been - -

20 BY MR. PARKER: Speak up a little bit.

21 A. I'm sorry. River Region Medical Center did not  
22 open until February 17, 2002.

23 Q. So at this time Parkview Regional Medical Center  
24 where this patient was treated, and that was a hospital at  
25 that time, was it not?

26 A. Yes, Parkview and Vicksburg Medical Center.

27 Q. Now, at my request, did you retrieve some  
28 documents to places where Dr. Kuiper was on April 15 of  
29 2003 when he was allegedly served the process?