IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2008-IA-01899-SCT

LINDA BREWER	FILED	PETITIONER
VS.	JUN 17 2009	
JASON WILTCHER	OFFICE OF THE CLERK SUPREME COURT COURT OF APPEALS	RESPONDENT

BRIEF OF APPELLEE
JASON WILTCHER
ON APPEAL FROM THE CIRCUIT COURT OF RANKIN COUNTY, MISSISSIPPI,

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ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

LINDA BREWER **PETITIONER**

VS.

JASON WILTCHER **RESPONDENT**

In order that the Justices of the Supreme Court or the Judges of the Court of Appeals may evaluate possible disqualifications or recusal, the undersigned counsel of record certifies that the following listed persons/entities haven interest in the out of this case:

Linda Brewer, Appellant;

Stephen P. Kruger, Jan F. Gadow, Page, Kruger & Holland, P.A.
Attorneys for Appellant;

Jason Wiltcher, Appellee;

Doug Wade, Esq., Attorney for Appellee;

Louis Guichet III, Guichet Law Firm, PLLC, Attorney for Appellee;

Honorable Samac Richardson, trial court judge.

THIS, the 17th of June, 2009.

DOUG WADE
LOUIS J.GUICHET, III
ATTORNEYS FOR APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

Appellee submits that the facts and legal arguments are adequately presented in the briefs and appellee record and the decisional process of this Court would not be significantly aided by oral argument. M.R.A.P. 34 (a) (3).

STATEMENT OF THE ISSUE

Whether the trial court erred in denying Brewer's Motion to Dismiss/for Summary Judgment when there is proof of pre-suit notice required by Miss. Code Ann. § 15-1-36(15) and when there is ***no proof*** *that the notice was not received by the Defendant.*

I. STATEMENT OF THE CASE

Jason Wiltcher ("Wiltcher") filed his complaint on July 21, 2008. (C.P. 6-8) Brewer filed her Motion to Dismiss on August 25, 2008, based solely on her claim that Wiltcher did not provide any notice of claim, as required by Miss Code Ann. § 15-1-36(15). (C.P. 12-14) Following oral argument on October 13, 2008, the Rankin County Circuit Court denied Brewer's Motion by Judgment entered on October 30, 2008. (T. 1; C.P. 40) Brewer filed a petition for an Interlocutory Appeal, pursuant to M.R.A.P. 5, which this Court granted by order entered January 15, 2009.

II. STATEMENT OF RELEVANT, UNDISPUTED FACTS

Jason Wiltcher presented to Pelahatchie Medical Clinic on August 21, 2006, complaining of an earache. (C.P. 7) Brewer, a Nurse Practitioner and employee of the Clinic, gave Wiltcher a Decadron injection. (C.P. 6-7) While in the clinic waiting room, Wiltcher fainted and fell, suffering physical and mental injuries, which he claims are the result of Brewer's medical negligence. (C.P. 7)

Wiltcher filed his Complaint against Brewer on July 21, 2008, but did not have the Pelahatchie Medical Clinic served with a process of the Court. (C.P. 6-8) Brewer and the Clinic promptly filed a Motion to Dismiss on August 22, 2008, based on their claim that he did not file notice of his intent to file suit against them as required by Miss. Code Ann. § 15-1-36(15). (C.P. 12-14) Wiltcher filed his response to the motion on October 2, 2008, acknowledging the applicability of § 15-1-36(15) and stated that his pre-suit notice had been placed in the United States mail on May 11, 2008. (C.P. 25-26) Attached to Wiltcher's response is a copy of an unsigned letter from his Attorney to Linda Brewer, dated May 11, 2008, advising of the intent to sue. (C.P. 27) Brewer and the Clinic filed a reply on October 10, 2008, denying any pre-suit notice and pointing out that Wiltcher's Response of an unsworn, unsupported and

inadmissible assertion that the pre-suit notice of claim was mailed. (C.P.37-39) At no time did the Defendants deny they had received the pre-suit letter.

At the October 13, 2008 hearing, Wiltcher's counsel testified that he dictated the notice of claim, corrected it, and told his assistant to send it out. (T. 5-6) Wiltcher's counsel stated that he did not recall actually signing the notice of claim letter and that he did not keep signed copies in the normal course of his practice. (T. 6-7) Wiltcher's counsel also stated that he has *no personal knowledge that the notice was ever actually mailed and no personal knowledge that it was ever actually received* by Brewer or by the Clinic. (T. 7-8) Again, there is no proof in the record that the notice letter was not received. The Rankin County Circuit Judge stated on page 12, lines 2 through 4, "Your client is not here to say", "I didn't get it." "So, it's kind of the same thing to me."

Because matters outside the pleadings were presented and considered, the trial court treated Brewer's and the Clinic's Motion to Dismiss as one for Summary Judgment. (C.P. 40) The trial court granted the Motion as to the clinic because the notice was addressed only to Brewer and not to the Clinic. (T. 12) As to Brewer, the trial court found that notice was sent as required and entered judgment in favor of the Plaintiff.

III. SUMMARY OF THE ARGUMENT

Miss. Code Ann. § 15-1-36 (15) states that no action may be begun unless the Defendant has been given at least sixty (60) days prior written notice. The code also states the requirement as to the substance of the notice. In addition, the notice is to be served sixty (60) days prior to the expiration of the applicable statute of limitations. There is no other requirement contained in the statute relating to notice. On page 5 of the trial court transcript lines 23 through 28, Doug Wade Attorney for Plaintiff, testified that he followed the procedure contained in the statute in giving the required notice. Therefore, there was an

issue to be determined by the trial court as to whether the required notice was given. The trial court resolved the issue in favor of the Plaintiff.

IV. THE LOWER COURT DID NOT ERR IN OVERRULING BREWER'S MOTION TO DISMISS FOR LACK OF PRE-SUIT NOTICE REQUIRED BY MISS. CODE ANN. § 15-1-36 (15) BECAUSE THERE IS PROOF THAT THE NOTICE WAS SENT AND BREWER DID NOT DENY THAT IT WAS RECEIVED.

Miss. Code Ann. § 15-1-36(15) states:

> 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. No particular form of notice is required, but it shall notify the defendant of the legal basis of the claim and the type of loss sustained, including with specificity the nature of the injuries suffered. 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 for said health care providers and others. This subsection shall not be applicable with respect to any defendant whose name is unknown to the plaintiff at the time of filing the complaint and who is identified therein by a fictitious name.

Mississippi law provides that a notice must be served at least sixty (60) days prior written notice of the intention to begin the action. The statute further provides no particular form is required, but it shall notify the Defendant of the legal basis of the claim and the type of loss sustained, including with specificity the nature of the injuries suffered by Miss. Code Ann. §15-1-36(15). Appellee gave notice as required by the statutes and the receipt of the notice by appellant was not denied. The trial court did not err in overruling appellant's Motion to Dismiss.

The Trial Court found in its ruling that the required letter addressed to Linda Brewer was introduced into evidence by Plaintiffs counsel. Further, it found that the letter was mailed to her business address. Attorney Doug Wade testified that the letter was mailed to Ms. Brewer as indicated in the letter on May 11, 2008.

Mr. Wade further testified that the letter was read back to him for corrections. When it was corrected, he signed the original and told her to put it in the mail being the ordinary course of practice. In addition, the Court stated your client is not here to say, "I didn't get it."

M.R.C.P. Rule 5(b) states that service by mail is complete upon mailing.

M.R.C.P. Rule 406. Habit; routine practice.

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

M.R.C.P. Rule 56 (c) Summary Judgment. Motion and Proceedings Thereon.

> The motion shall be served at least ten (10) days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact. Under the comments of Rule 56 is found this language: A motion for a 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.

In *Dennis v. Searle*, 457 So. 2d 941 (Miss. 1984) is found the following language.

> "The trial court must review carefully all of the evidentiary matters before it--- admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. The evidence must be viewed in the light most favorable to the party against whom the motion has been made. If in this view the

moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his favor. Otherwise the motion should be denied. 444 So.2d at 362.

Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says just the opposite. Issues of fact, as a matter of proper construction of Rule 56, also exist where there is more than one reasonable interpretation that may be given undisputed testimony, where materially differing but nevertheless reasonable inferences may be drawn from the uncontradicted facts, or where the purported establishment of the facts has been sufficiently incomplete or inadequate that the trial judge cannot say with reasonable confidence that the full facts of the matter have been disclosed.

Yet, if we are to give substantial deference to findings made by a trial judge sitting without a jury because that judge has had the opportunity to smell the smoke of the battle, *Culbreath v. Johnson,* 427 So.2d 705, 708 (Miss.1983), we expect that he or she will in fact have smelled that smoke. Put more legalistically, Rule 56 means the same and should be construed the same whether the motion for summary judgment is filed in circuit court or chancery court, whether the case is to be heard by a jury or is to be tried to the court without a jury."

V. CONCLUSION

The trial court correctly ruled that notice was sent by Appellee to Appellant based on oral testimony and documentary evidence introduced at the hearing on Appellant's motion. It was established that there was a genuine issue of material fact existing between Appellee and Appellant and the trial court properly dismissed Appellants motion.

THIS, the 17th day of June, 2009.

Respectfully submitted,

JASON WILTCHER, APPELLEE

BY: _____
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CERTIFICATE OF SERVICE

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RANKIN COUNTY CIRCUIT COURT JUDGE
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THIS, the 17th day of June, 2009.

DOUG WADE
LOUIS J. GUICHET, III