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

LINDA BREWER — PETITIONER

VS.

JASON WILTCHER — RESPONDENT

REPLY BRIEF OF APPELLANT LINDA BREWER ON APPEAL FROM THE CIRCUIT COURT OF RANKIN COUNTY, MISSISSIPPI

ORAL ARGUMENT NOT REQUESTED

Stephen P. Kruger [redacted]
Jan F. Gadow
PAGE, KRUGER & HOLLAND, P.A.
10 Canebrake Blvd., Ste. 200
P.O. Box 1163
Jackson, MS 39215
(601) 420-0333
(601) 420-0033 facsimile
Counsel for Appellant,
Linda Brewer

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES - State **PAGES**

CASES - Federal **PAGES**

STATUTES

RULES

STATEMENT OF THE ISSUE

Whether the trial court erred in denying Brewer's Motion to Dismiss/for Summary Judgment for lack of the pre-suit notice required by Miss. Code Ann. Section 15-1-36(15) when there is no proof that such notice was mailed, delivered, or received.

I. REITERATION OF PARTICULARLY RELEVANT, UNDISPUTED FACTS

Wiltcher filed his Complaint for medical negligence against Brewer and the Clinic on July 21, 2008. (C.P. 6-8) Brewer and the Clinic promptly filed a Motion to Dismiss on August 22, 2008, based on Wiltcher's failure to provide pre-suit notice 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 Section 15-1-36(15) and offering only unsworn assertions that his pre-suit notice had been placed in the United States mail on May 11, 2008. (C.P. 25-26) Wiltcher's Response consists merely of an unsworn, unsupported and inadmissible assertion that pre-suit notice of claim was mailed. (C.P. 27, 37-39)

At the October 13, 2008 hearing, Wiltcher's counsel admitted that he did not recall actually signing the notice of claim letter, that he does not keep signed copies in the normal course of his practice, 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. (T. 6-8) There is also no proof from counsel's assistant that the notice letter was actually mailed, so Wiltcher has offered no competent proof that the pre-suit notice letter was in fact mailed to or received by Brewer. (T. 4-9)

In considering Brewer's Motion to Dismiss,[1] the trial court discounted Wiltcher's failure of proof of pre-suit notice mailed to or received by Brewer, despite that Wiltcher bore the burden of proof, and denied Brewer's Motion by Judgment entered on October 30, 2008. (T. 12; C.P. 40) This interlocutory appeal followed.

[1]Which was properly treated as one for summary judgment because matters outside the pleadings were presented and considered. (C.P. 40)

II. THE LOWER COURT ERRED IN DENYING BREWER'S MOTION TO DISMISS FOR LACK OF PRE-SUIT NOTICE REQUIRED BY MISS. CODE ANN. § 15-1-36(15) BECAUSE THERE IS NO PROOF THAT SUCH NOTICE WAS MAILED, DELIVERED, OR RECEIVED.

Miss. Code Ann. Section 15-1-36(15) provides that no medical negligence action filed after January 1, 2003[2], can be initiated unless the plaintiff first gives the defendant at least sixty (60) days prior written notice of the plaintiff's intent to file suit. Strict compliance is required and it is the plaintiff's responsibility to provide this mandatory, jurisdictional notice to the defendant. ***Williams v. Skelton,*** 6 So.3d 428, 430 (¶ 7) (Miss. 2009); ***Andrews v. Arceo,*** 988 So.2d 399, 402 (¶ 14) (Miss. App. 2008); ***Saul v. Jenkins,*** 963 So.2d 552, 554 (¶ 6) (Miss. 2007) (citing ***Arceo v. Tolliver,*** 949 So.2d 691, 695 (Miss. 2006) (citing ***Pitalo v. GPCHP-GP, Inc.,*** 933 So.2d 927, 928-29 (Miss. 2006))). As a jurisdictional pre-requisite to filing suit, pre-suit notice of claim is, in effect, an essential element of Wiltcher's case. *See, e.g.,* ***Williams,*** 6 So.3d at 439 (¶ 7); ***Andrews,*** 988 So.2d at 402 (¶¶ 14-15). It follows that, in response to Brewer's Motion, Wiltcher bears the burden of presenting sufficient proof to establish every element of his claim, including the required statutory pre-suit notice. ***Scales v. Lackey Memorial Hospital,*** 988 So.2d 426, 431 (¶ 10) (Miss. App. 2008) (citing ***Galloway v. Travelers Ins. Co.,*** 515 So.2d 678, 684 (Miss. 1987)). He has indisputably failed to do so. (C.P. 25-32)

Wiltcher's primary strategy on appeal appears to be an effort to shift the burden of proof from himself to Brewer, to wit: "there is no proof in the record that the notice letter was not received" (Wiltcher's brief, p. 4); and Brewer "is not here [at the hearing] to say, 'I didn't get it.'" (Wiltcher's brief, pp. 4, 6) Unfortunately for Wiltcher, the law requires the non-movant to present sufficient proof to establish every element of his

[2]Wiltcher filed his Complaint on July 21, 2008. (C.P. 6-8)

claim in order to defeat a motion for summary judgment. *See* ***Andrews,*** 988 So.2d at 402 (¶ 14); ***Scales,*** 988 So.2d at 431 (¶ 10) (citing ***Galloway,*** 515 So.2d at 684). In the case at bar, this requires that Wiltcher prove he provided Brewer with the mandatory, jurisdictional pre-suit notice. There is no corresponding burden placed on Brewer.

While Brewer has no burden to *prove* she did not receive pre-suit notice, she has in fact denied receipt of same, specifically in her Motion to Dismiss. (C.P. 12-14) Wiltcher's allegation that "receipt of the notice by appellant was not denied" is apparently an attack on the veracity of either Brewer and/or her counsel. Because Brewer's denial of receipt of pre-suit notice was made via her Motion to Dismiss rather than through testimony at the hearing on her Motion is of no import. The bottom line is that Brewer's motion identifies the deficiency in Wiltcher's evidence, which is a proper basis for summary judgment. *See* ***Maxwell v. Baptist Memorial Hospital-DeSoto, Inc.,*** 2008 WL 2170726, at *5 (¶ 15) (Miss.App. 2008) (citing ***Celotex Corp. v. Catrett,*** 477 U.S. 317, 325 (1986)). That deficiency is Brewer's non-receipt of statutorily required pre-suit notice. Brewer, as the movant, bears the burden of *persuading* the trial court that there is no genuine issue of material fact, regarding this deficiency, to be determined by the trier of fact and that she is entitled to judgment as a matter of law. ***Maxwell,*** 2008 WL 2170726, at *5 (¶¶ 15-16) (citations therein omitted). She is not required to provide affidavits supporting her claim. ***Id,*** at *5 (¶ 15) (citing M.R.C.P. 56(b)). Brewer's Motion accomplished this task – she established that she did not receive pre-suit notice. There can be no genuine issue of material fact concerning this matter because only Brewer has this knowledge; no other party can claim that Brewer did or did not receive pre-suit notice.

In order to rebut and prevent summary judgment, Wiltcher is required to produce significant, probative evidence showing that there is a genuine issue of material fact to be determined concerning Brewer's receipt of pre-suit notice. ***Maxwell,*** 2008 WL 2170726, at *5 (¶ 16) (citation therein omitted). Wiltcher's response consists of his attorney's testimony that he dictated a notice of claim, corrected it, and told his assistant to send it out. (T. 5-6) However, Wiltcher's counsel admitted that he has *no personal knowledge that the notice was ever actually mailed to or received* by Brewer. (T. 6-8) There is also no proof from counsel's assistant that the notice letter was actually mailed to or received by Brewer. *There is absolutely no evidence to the effect that Brewer received pre-suit notice.* Instead, the evidence that she did *not* receive such notice is undisputed. With a complete failure of proof on this essential "element" of Wiltcher's claim, all other facts are immaterial and Brewer is entitled to summary judgment. ***Scales,*** 988 So.2d at 431 (¶ 10) (citing ***Galloway,*** 515 So.2d at 684). *See also* ***Maxwell,*** 2008 WL 2170726, at *6 (¶ 17) (citing ***Celotex,*** 477 U.S. at 323). Restated, the lack of pre-suit notice received by Brewer is fatal to Wiltcher's suit and dismissal/summary judgment is appropriate. ***Andrews,*** 988 So.2d at 403 (¶ 15); ***Forest Hill Nursing Center v. Brister,*** 992 So.2d 1179, 1188 (¶ 30) (Miss. 2008) (citing ***Arceo,*** 949 So.2d at 694-95) (citing ***Pitalo,*** 933 So.2d at 928-29)); ***Arceo,*** 949 So.2d at 697 (¶ 14). *See also* ***Thomas v. Warden,*** 999 So.2d 842, 845 (¶ 14) (Miss. 2009) (citing ***Pitalo,*** 933 So.2d at 929); ***Williams,*** 6 So.3d at 439 (¶ 7).

Wiltcher's reliance on case law concerning the impropriety of summary judgment where two parties swear to different versions of a matter and where there is more than one reasonable interpretation for undisputed evidence simply has no application here. First, the parties do not swear to different versions of any matter. Wiltcher does not

swear or even allege that Brewer received pre-suit notice, so there is no rebuttal to Brewer's claim that she did not receive such notice. Next, the undisputed evidence in the case at bar is that Brewer did not receive pre-suit notice. There is not more than one reasonable interpretation of this evidence; Brewer did not receive pre-suit notice, despite that Wiltcher may have mailed it[3].

III. CONCLUSION

Section 15-1-36(15) provides that the requisite pre-suit notice "shall notify the defendant" of the basis for the claim and type of loss sustained. The legislature did not include any exceptions to this requirement of pre-suit notice. "Simply stated, 'shall' is mandatory." ***Pitalo,*** 933 So.2d at 929 (¶ 5). A *de novo* review reveals that, following responses, supplementations, and testimony at the hearing on Brewer's Motion, Wiltcher has still offered absolutely no evidence establishing that Brewer received this mandatory, jurisdictional pre-suit notice. There is no genuine issue of material fact and judgment is warranted as a matter of law. ***Scales,*** 988 So.2d at 431 (¶ 10) (citing ***Mink,*** 537 So.2d at 432-33). The trial court's denial of Brewer's Motion, with no evidence of pre-suit notice, is error. ***Andrews,*** 988 So.2d at 403 (¶ 15); ***Forest Hill,*** 992 So.2d at 1188 (¶ 30) (citing ***Arceo,*** 949 So.2d at 694-95) (citing ***Pitalo,*** 933 So.2d at 928-29)); ***Arceo,*** 949 So.2d at 697 (¶ 14). This Court should reverse the trial court's denial of Brewer's Motion and render summary judgment in favor of Brewer.

---

3 Evidence that pre-suit notice was mailed to Brewer is minimal, at best, as Wiltcher's counsel testified only that he instructed his assistant to mail the notice he dictated, but he has no personal knowledge that it was ever actually mailed. (T. 5-8) Counsel's assistant offered no proof that the notice was actually mailed. And While M.R.E. 406 provides that counsel's testimony concerning the habit or routine practice in his office concerning mailing is admissible and relevant, M.R.E. 406 does not magically transform Wiltcher's minimal evidence of mailing to definitive evidence of mailing or to proof that Brewer actually received pre-suit notice.

THIS, the 1st day of July, 2009.

Respectfully submitted,

LINDA BREWER, APPELLANT

BY: /s/Jan F. Gadow
STEPHEN P. KRUGER
JAN F. GADOW

OF COUNSEL:

STEPHEN P. KRUGER – ([redacted]
JAN F. GADOW – ([redacted]
PAGE, KRUGER & HOLLAND, P.A.
10 Canebrake Blvd., Suite 200 [39232-2215]
Post Office Box 1163
Jackson, Mississippi 39215-1163
Telephone: (601) 420-0333
Facsimile: (601) 420-0033

CERTIFICATE OF SERVICE

I, STEPHEN P. KRUGER/JAN F. GADOW, do hereby certify that I have this day forwarded, via U.S. mail, postage prepaid, a true and correct copy of the foregoing to:

Doug Wade, Esq.
111 Belle Meade Pt., Suite A
Flowood, MS 39232

Attorney for Appellee

Louis Guichet, Esq.
111 Belle Meade Pt., Suite A
Flowood, MS 39232

Attorney for Appellee

Hon. Samac S. Richardson
RANKIN CO. CIRCUIT COURT JUDGE
Post Office Box 1885
Brandon, MS 39043-1885

THIS, the 1st day of July, 2009.

/s/Jan F. Gadow
STEPHEN P. KRUGER
JAN F. GADOW