

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

**LINDA BREWER**

**PETITIONER**

**VS.**

**JASON WILTCHER**

**RESPONDENT**

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**BRIEF OF APPELLANT  
LINDA BREWER  
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 disqualification or recusal, the undersigned counsel of record certifies that the following listed persons/entities have an interest in the outcome of this case:

Linda Brewer, Appellant;

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

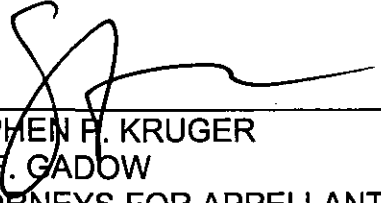
Jason Wiltcher, Appellee;

Doug Wade, Esq., Attorney for Appellee;

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

Honorable Samac Richardson, trial court judge.

THIS, the 13<sup>th</sup> day of April, 2009.

  
\_\_\_\_\_  
STEPHEN P. KRUGER  
JAN F. GADOW  
ATTORNEYS FOR APPELLANT

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**STATEMENT REGARDING ORAL ARGUMENT**

Appellant submits that the facts and legal arguments are adequately presented in the briefs and appellate 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 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. STATEMENT OF THE CASE**

Jason Wiltcher ("Wiltcher") filed his Complaint on July 21, 2008<sup>1</sup>. (C.P. 6-8) Brewer filed her Motion to Dismiss on August 25, 2008, based solely on Wiltcher's failure to provide any notice of claim, as required by Miss. Code Ann. Section 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) Because she is entitled to dismissal at this procedural stage, Brewer filed a Petition for Interlocutory Appeal, pursuant to M.R.A.P. 5, which this Court granted by Order entered January 15, 2009. (C.P. 46) As a matter of law, Brewer is entitled to dismissal with prejudice from the underlying action based on Wiltcher's failure to provide pre-suit notice in compliance with the clear language of Miss. Code Ann. Section 15-1-36(15).

## **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, allegedly 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 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 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 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) 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, again denying any pre-suit notice and pointing out that Wiltcher's Response is merely an unsworn, unsupported and inadmissible assertion that pre-suit notice of claim was mailed. (C.P. 37-39)

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) However, Wiltcher's counsel admitted that he did not recall actually signing the notice of claim letter and that he does not keep signed copies in the normal course of his practice. (T. 6-7) More importantly, Wiltcher's counsel conceded 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) There is also no proof from counsel's assistant that the notice letter was actually mailed. In sum, Wiltcher has offered no competent proof that the pre-suit notice letter was either mailed or received. (T. 4-9)

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 alleged notice was addressed only to Brewer and not to the Clinic. (T. 12) As to Brewer, the trial court discounted Wiltcher's failure of proof of pre-suit notice and denied the Motion, by Judgment entered on October 30, 2008. (T. 12; C.P. 40)

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<sup>1</sup> Substantively, the case against Brewer is without merit. However, she opted not to address the substantive issues in the trial court at the time she filed her Motion to Dismiss because it is clear that, procedurally, Wiltcher's claims against Brewer cannot proceed due to the lack of pre-suit notice of claim.

### III. SUMMARY OF THE ARGUMENT

Mississippi law clearly and unambiguously provides that a plaintiff must provide 60 days' written notice to the defendant, of the plaintiff's intent to file suit, before a medical negligence action may be filed. Miss. Code Ann. § 15-1-36(15). Strict compliance with this pre-suit notice provision is required, making such notice in effect an element of Wiltcher's claim against Brewer. Wiltcher has failed to provide any proof establishing that he provided pre-suit notice of claim to Brewer; therefore, Brewer is entitled to judgment as a matter of law. The trial court erred in finding otherwise and this Court must reverse.

### IV. **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.**

This Court reviews denial of a motion to dismiss or for summary judgment under a *de novo* standard. **Arceo v. Tolliver**, 949 So.2d 691, 694 (¶ 6) (Miss. 2006) (citing **Monsanto v. Hall**, 912 So.2d 134, 136 (Miss. 2005)). Summary judgment is proper when there is no genuine issue of material fact and judgment is warranted as a matter of law. **Scales v. Lackey Memorial Hospital**, 988 So.2d 426, 431 (¶ 10) (Miss. App. 2008) (citing **Mink v. Andrew Jackson Cas. Ins. Co.**, 537 So.2d 431, 432-33 (Miss. 1988)). The party opposing the motion must present sufficient proof to establish each element of his claim. **Scales**, 988 So.2d at 431 (¶ 10) (citing **Galloway v. Travelers Ins. Co.**, 515 So.2d 678, 684 (Miss. 1987)). More than a scintilla of colorable evidence is required. **Suddith v. University of Southern Mississippi**, 977 So.2d 1158, 1166 (¶ 9) (Miss. App. 2007)(citations therein omitted). Specifically, when a party is opposing summary judgment, if he fails to present sufficient proof to establish any element of his claim, then all other

facts are immaterial and the moving party is entitled to judgment as a matter of law.

**Scales**, 988 So.2d at 431 (¶ 10) (citing **Galloway**, 515 So.2d at 684).

Miss. Code Ann. Section 15-1-36(15) provides that no medical negligence action filed after January 1, 2003<sup>2</sup>, 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. Specifically, this subsection 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.

Miss. Code Ann. Section 15-1-36(15) (Rev. 2003). Strict compliance is required. **Williams v. Skelton**, 2008 WL 1795415, at \*1 (¶ 5) (Miss. App. 2008). It is the plaintiff's responsibility to provide this mandatory, jurisdictional notice to the defendant. **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))).

A trial court's denial of a defendant's motion to dismiss or for summary judgment when there is no pre-suit notice is error because the plaintiff's failure to give the required notice in compliance with this subsection is fatal to the continuation of his lawsuit. **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). Dismissal of the lawsuit and/or summary judgment in favor of the defendant is appropriate when the plaintiff fails to comply with Miss. Code Ann. § 15-1-36(15). **Williams**, 2008 WL 1795415, at \*2 (¶ 6). Brewer's Motion seeks dismissal based on Wiltcher's failure to provide the statutorily required pre-suit notice of claim. (C.P. 12-13) As a jurisdictional pre-requisite to filing suit, the pre-suit notice of claim is in effect an element of Wiltcher's case. See **Andrews**, 988 So.2d at 402 (¶ 14). It follows that, in response to Brewer's Motion, Wiltcher bears the burden of presenting sufficient proof to establish that he provided the required statutory pre-suit notice. **Scales**, 988 So.2d at 431 (¶ 10) (citing **Galloway v. Travelers Ins. Co.**, 515 So.2d 678, 684 (Miss. 1987)). He has failed to do so. (C.P. 25-32)

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). Brewer filed her Motion to Dismiss based on Wiltcher's failure to notify her of the intent to sue before he filed his Complaint. Wiltcher's counsel admitted that he has no recollection of signing the notice letter and no personal knowledge that the notice letter was ever mailed to or received by Brewer. (T. 6-7) These facts are undisputed. 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 he complied with Miss. Code Ann. § 15-1-36(15) and provided Brewer with the mandatory, jurisdictional pre-suit notice. There is no genuine issue of material fact and judgment is warranted as a matter of law. **Scales**,

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<sup>2</sup> Wiltcher filed his Complaint on July 21, 2008. (C.P. 6-8)

988 So.2d at 431 (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).

In this case, the parties agree that Miss. Code Ann. Section 15-1-36(15) applies to require the 60 days pre-suit notice, but *there is no evidence in the record to establish that such notice was either mailed or received*. When there is no notice, denial of the defendant's motion to dismiss or for summary judgment is error. See **Andrews**, 988 So.2d at 403 (¶ 15); **Nelson v. Baptist Mem. Hosp.-North Miss., Inc.**, 972 So.2d 667, 670, 672-73 (¶¶ 3, 17) (Miss. App. 2007); **Forest Hill**, 992 So.2d at 1187-88 (¶¶ 29-30); **Arceo**, 949 So.2d at 697 (¶ 14); **Pitalo**, 933 So.2d at 928-29 (¶¶ 1, 6, 7). Consequently, the trial court erred in discounting Wiltcher's complete failure of proof when it denied Brewer's Motion, contrary to Mississippi law.

Miss. Code Ann. § 15-1-36(15) states clearly and unambiguously that no professional negligence action against a health care provider may be begun unless the defendant has first received at least sixty days' prior written notice. Brewer did not have sixty days' prior written notice. Consequently, Brewer's motion for summary judgment must be granted and Wiltcher's Complaint dismissed. **Williams**, 2008 WL 1795415, at \*2 (¶ 6); **Andrews**, 988 So.2d at 403 (¶¶ 15, 17, 19).

While the right under our state and federal constitutions to access to our courts is a matter beyond debate, this right is coupled with responsibility, including the responsibility to comply with legislative enactments, rules, and judicial decisions. While the plaintiff in today's case had the constitutional right to seek redress in our state courts . . . [he] likewise had the responsibility to comply with the applicable rules and statutes, including section 15-1-36(15). Any different approach would render meaningless any rule or statute setting time limitations on litigants.

**Arceo**, 949 So.2d at 697 (¶ 13). Wiltcher's failure to provide Brewer with pre-suit notice of the intent to sue is "an inexcusable deviation from the Legislature's requirements for process and notice under Miss. Code Ann. Section 15-1-36(15)." **Pitalo**, 933 So.2d at 929 (¶ 7).

## **V. CONCLUSION**

Wiltcher agrees that Miss. Code Ann. § 15-1-36(15) applies to his underlying cause. The facts are undisputed and the law is clear. The statute requires 60 days' pre-suit notice of an intent to file suit, but there is no evidence in the record establishing that any such notice was mailed or received. The trial court erred by overlooking this complete failure of proof when it denied Brewer's Motion. This Court should reverse the trial court's denial of Brewer's Motion and render summary judgment in favor of Brewer.

THIS, the 13<sup>th</sup> day of April, 2009.

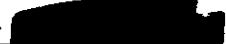

Respectfully submitted,

**LINDA BREWER, APPELLANT**

BY: 

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JAN F. GADOW

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**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:

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**ATTORNEY FOR APPELLEE**

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

THIS, the 13<sup>th</sup> day of April, 2009.



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STEPHEN P. KRUGER  
JAN F. GADOW