IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
2009-CA-01308

MICHAEL A. TODD, M.D., ET. AL.
Appellant

Versus

CLAUDE CLAYTON
Appellee

ON APPEAL FROM THE CIRCUIT COURT OF TISHOMINGO COUNTY, MISSISSIPPI

BRIEF OF APPELLEE, CLAUDE F. CLAYTON, JR.

Oral Arguments Not Requested

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MICHAEL A. TODD, M.D., ET. AL. — APPELLANT

VS.

CLAUDE CLAYTON — APPELLEE

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 disqualification or recusal.

1. Jack F. Dunbar and Jonathan S. Masters, attorneys for appellee, Claude F. Clayton, Jr., Esq.
2. Michael A. Todd, M.D., Michael A. Todd, M.D., P.A., and Pathology Lab, Inc., Appellants.
3. Claude F. Clayton, Jr., Appellee.
4. Estate of Judith Antoinette Clark, Jeffery Lee Clark, Ashley Nicole Clark and Justin Myles Clark, Plaintiffs in underlying case.
5. Judge Thomas J. Gardner, III, Circuit Court Judge.

Respectfully submitted,

Jonathan S. Masters, Esq.
One of the attorneys of Record for
Claude F. Clayton, Jr., Appellee

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STATEMENT OF THE CASE

Antoinette Clark contacted attorney Claude Clayton concerning a possible medical malpractice claim. (R. 1328; R.E. Tab 1) Antoinette Clark and Patsy Clark, a registered nurse, advised Mr. Clayton that Antoinette's cervical cancer was probably present when her hysterectomy was performed in 2000. (R. 1328; R.E. Tab 1) Antoinette understood from her then treating physicians at the West Clinic and M.D. Anderson that the cancer was present at the time of her hysterectomy. (R.1328; R.E. 1) At that time they suspected that the cervical cancer should have been discovered and treatment initiated.

Between September 15, 2002 and December 21, 2002, Mr. Clayton investigated the claim. (R. 1329; R.E. Tab 1) In this investigation, and in discussions with a consulting expert, Mr. Clayton learned that the cervical cancer was probably present in 2000 because it requires more than five years to develop. (R. 1329; R.E. Tab 1) As a result, Mr. Clayton's consulting expert advised that the pathologist probably missed invasive cancer in 2000 when Antoinette underwent her hysterectomy. (R. 1329; R.E. Tab 1)

Antoinette died from the cancer on September 15, 2002. (R. 1329; R.E. Tab 1)

Relying on this investigation, Mr. Clayton filed suit on behalf of Antoinette Clark's Estate and heirs, against Dr. Michael Todd, and others, on December 31, 2002. (R. 1330; R.E. Tab 1)

Antoinette's medical chart was further reviewed by a consulting oncologist at Mr. Clayton's request. (R. 1330; R.E. Tab 1). This consulting expert similarly concluded that invasive cervical cancer was probably present when the hysterectomy was performed. (R. 1330; R.E. Tab 1) Moreover, in December of 2003, Mr. Clayton consulted Dr. Sohelia Korourian. (R. 1330; R.E. Tab 1) Dr. Korourian stated that the confluent pattern and hemorrhaging in the slides would have made her investigate further and that she would have stated in the pathology report that the basement membrane was not intact and micro invasive process could not be excluded. (R. 1330; R.E. Tab 1)

Several years into the litigation, on January 14, 2004, co-defendant, Dr. Patrick Hsu was deposed. (R. 1332; R.E. Tab 1) Dr. Hsu testified that even if Dr. Todd had reported micro invasive carcinoma, he would not have altered Antoinette's treatment. (R. 1331; R.E. Tab 1) As a result of Dr. Hsu's testimony, for the first time, an issue arose as to whether Dr. Todd's omission was a proximate contributing cause of Antoinette Clark's death.

Nevertheless, a few months later, April 22, 2004, Mr. Clayton agreed to dismiss Dr. Todd provided the court find that co-defendant Dr. Hsu would be precluded from apportioning fault to Dr. Todd after his dismissal. (R. 1331; R.E. Tab 1) Eventually, on January 27, 2005 an Order was entered by the Court dismissing the case as to Dr. Todd. (R. 574; R.E. Tab 3)

Eighteen months following his dismissal, Dr. Todd moved for sanctions pursuant to Rule 11 and the Litigation Accountability Act of 1988, Miss. Code Ann. §11-55-1 *et. seq.* (R. 752; R.E. Tab 6)

The parties stipulated that the sanction's dispute would be submitted for a decision on the briefs, and "on the record" as it then existed, which included an affidavit of Claude F. Clayton, Jr. (R. 1328; R.E. Tab 1, 1376-1377; R.E. Tab 4, and 1419; R.E. Tab 5) And after considering those briefs and Mr. Clayton's uncontradicted affidavit, the court denied Dr. Todd's motion finding that the Rule 11 motion was untimely and that Clayton's client's reasonable hope of success on their claims precluded sanctions under the Litigation Accountability Act. (R. 1382; R.E. Tab 2)

SUMMARY OF THE ARGUMENT

The standard of review on the Court's ruling on a motion for sanctions is whether the trial judge abused his or her discretion. The trial judge did not abuse his discretion in denying Dr. Todd's sanctions request. And in the absence of "clear error," the Court's opinion should not be overturned on appeal.

A reasonable hope of success on the underlying claims precludes sanctions under the Litigation Accountability Act (LAA) and Rule 11. The undisputed affidavit submitted by Mr. Clayton provides that he investigated the claims, consulted with experts, and invested substantial time and resources into the litigation. In short, Mr. Clayton had a reasonable hope of success.

Moreover, Dr. Todd's Rule 11 motion was filed eighteen months too late. Rule 11 motions must be filed within the 10-day deadline prescribed by Rule 59(e), *M.R.C.P.* Dr. Todd's request for Rule 11 sanctions was filed well after the ten-day limit.

Finally, Dr. Todd agreed that the issues now on appeal would be decided ". . . on the record as it is presently constituted." Considering that record, Judge Gardner denied Dr. Todd's motion for sanctions. Ignoring that agreement, Dr. Todd now argues he was not allowed the very discovery he agreed to forego. Dr. Todd's agreement to resolve this matter on the record waived his efforts to undertake additional

discovery[1].

[1] Justice Pierce's March 30, 2010 order has already rejected Dr. Todd's attempt to expand the record and include items regarding the attempted discovery.

ARGUMENT

I.
TRIAL JUDGE DID NOT ABUSE HIS DISCRETION BY DENYING THE MOTION FOR SANCTIONS AGAINST CLAUDE CLAYTON

A determination regarding the denial of sanctions is left to the discretion of the trial judge. *In re Spencer*, 985 So.2d 330, ¶19 (Miss. 2009). This is true for claims under Rule 11, *M.R.C.P.*, as well as under the Litigation Accountability Act. (LAA) *See, Miss. Code Ann.* §11-55-7; M.R.C.P. 11(b). "In the absence of a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of relevant factors, the judgment of the court's imposition will be affirmed." *In re Spencer* at ¶19 (citing, *Wyssbrod v. Wittjen*, 798 So.2d 352, 357 (Miss. 2001)).

The trial court reviewed the record, including Mr. Clayton's uncontradicted affidavit. Based on that review, Judge Gardner denied Dr. Todd's Motion for sanctions. And without a determination that Judge Gardner 'committed a clear error of judgment' that ruling should be affirmed.

II.
CLAUDE CLAYTON POSSESSED A REASONABLE HOPE OF SUCCESS IN THE UNDERLYING LITIGATION

A reasonable hope of success precludes sanctions under the LAA

and Rule 11. *Smith v. Malouf*, 597 So.2d 1299 (Miss. 1992); *Leaf River Forrest Products, Inc. v. Deakle*, 661 So.2d 188 (Miss. 1995); *Choctaw, Inc. v. Campbell-Cherry-Harrison-Davis and Dove*, 965 So.2d 1041; and *Tricon Metals & Services, Inc. v. Topp*, 537 So.2d 1331 (Miss. 1989). As demonstrated by Mr. Clayton's affidavit and the record, Judge Gardner was justified in finding that Mr. Clayton had a reasonable hope of success on the underlying claims.

The LAA permits sanctions when a claim or defense is asserted without "substantial justification. . . ." *Miss. Code Ann.* §11-55-5. "Without substantial justification" includes any claim which is frivolous, groundless or vexatious." *Miss. Code Ann.* §11-55-3(a). "Frivolous" is, in turn, defined to mean any claim made "**without hope of success.**" *In re Spencer*, 985 So.2d 330, ¶26 (Miss. 2009) (citations omitted)(emphasis added).

While the Court dismissed Dr. Todd's Rule 11 claim on the basis of untimely filing of the Motion for Sanctions, the Court's ruling that Mr. Clayton had a "reasonable hope of success" in dismissing the Litigation Accountability Act claim also supports a dismissal of the Rule 11 claim on the merits, as the standard for both claims prohibits sanctions upon a finding that there is a "reasonable hope of success." Rule 11 only allows sanctions "[i]f any party files a motion or pleading which, in the opinion of the court, is frivolous or is filed for the purpose of harassment or delay." Rule 11, *M.R.C.P.* The term "frivolous" takes the same definition

under the LAA as it does under Rule 11. *In re Spencer,* 985 So.2d 330, 338 (Miss. 2008). Likewise, sanctions under Rule 11 are available, "only when, objectively speaking, the pleader or movant has ***no hope of success.***" *Id.* (citing, *City of Madison v. Bryan,* 763 So.2d 162, 168 (Miss. 2000), quoting, *Tricon Metals Servs., Inc. v. Topp,* 537 So.2d 1331, 1335 (Miss. 1989)(emphasis added)).

The record upon which the Court ruled, supports the finding that Claude Clayton had a reasonable hope of success in asserting the claims against Dr. Todd. (R. 1328; R.E. Tab 1) Indeed, Mr. Clayton's uncontradicted affidavit reflects the information possessed along with the steps undertaken to investigate the claim. At that time, Mr. Clayton obtained the relevant medical records and consulted with experts. The consulting experts opined that invasive cervical cancer was probably present at the time of the hysterectomy because it requires more than five years to develop. As a result, the consulting experts concluded that Dr. Todd probably missed invasive cancer in 2000. (R. 1329; R.E. Tab 1) *Jackson County School Bd. v. Osborn,* 605 So.2d 731 (Miss. 1993) (sanctions denied where party made reasonable efforts to determine the validity of the action before filing). Not only was Mr. Clayton's investigation appropriate, but it exceeded the applicable law. The lawsuit was filed on December 31, 2002, before "tort reform" became effective. As such, there were no statutory prerequisites of pre-suit investigation nor the requirement of filing a medical malpractice claim

without a 60-day notice or certificate of consultation.

Moreover, as stated in his affidavit, Mr. Clayton spent in excess of $16,000 of his own funds and 565 hours of his and his staff's time in the prosecution of the claim, substantial evidence in itself that Mr. Clayton believed he had a "hope of success." (R. 1331; R.E. Tab 1)

What's more, Mr. Clayton's hope of success continued after the initial filing. As Mr. Clayton's affidavit provides, additional experts continued to consult and support the negligence allegations against Dr. Todd. (R. 1330; R.E. Tab 1)

It was not until Dr. Hsu's deposition in January of 2004 that a proximate cause question arose. (R. 1331; R.E. Tab 1) In that deposition Dr. Hsu testified that even had Dr. Todd properly noted cancer it would not have altered his treatment. (R. 1331; R.E. Tab 1) Such testimony hindered the ability to establish proximate cause (though there remained an issue surrounding a failure to report invasive cancer as opposed to micro invasive cancer). After further review of the case and consultation with his clients, Mr. Clayton confessed Dr. Todd's summary judgment on April 22, 2004. (R. 1331; R.E. Tab 1) There was some delay following that acknowledgment. The delay, however, stemmed from a concern that Dr. Hsu would seek to apportion fault to Dr. Todd. (R. 1331; R.E. Tab 1) During this time, there were no additional filings or discovery directed to Dr. Todd. (R. 3-4; Tab 8, see also, Vol. IV of the Record.) The legal wrangling which took place in the interim, as

illustrated by the docket, involved apportionment issues with Defendant Dr. Hse, not Dr. Todd. (R. 3 -4; Tab 8) And following Dr. Todd's dismissal the record reveals that Dr. John Currie, a gynecological oncologist at Vanderbilt University, ultimately opined that Dr. Todd indeed missed the invasive carcinoma. (R. 614; R.E. Tab 7(pages 67-68 of deposition), and 1339; R.E. Tab 9).

There was no abuse of discretion in denying sanctions as Judge Gardner found that Mr. Clayton had a 'hope of success' on his clients' claims. And that hope bars sanctions under both Rule 11 and the LAA.

III.
DR. TODD'S RULE 11 MOTION WAS UNTIMELY

Requests for sanctions under Rule 11 are motions to amend judgments and are controlled by Rule 59(e), *M.R.C.P. Russell v. Lewis Gro. Co.*, 552 So.2d 113 (Miss. 1989). *Russell v. Lewis Gro. Co.*, 552 So.2d 113, 117 (Miss. 1989). Rule 59(e) provides:

> A motion to alter or amend the judgment shall be filed not later than ten days after entry of the judgment.

Rule 59(e), *M.R.C.P.* The rule's comment further provides, "[a] motion to alter or amend must be filed within ten days after the entry of judgment; the court is not permitted to extend this time period." Rule 59(e), *M.R.C.P.*, comment. *See also, Telford v. Aloway*, 530 So2d 179 (Miss. 1988) (The ten-day time period under Rule 59 is mandatory and jurisdictional and cannot be extended by the court.) As this Court has

noted in reviewing denials of Rule 11 sanctions, "[this court] does not have authority to impose sanctions . . . because the motion for sanctions is, in effect, a motion to amend the judgment in this cause. The motion for sanctions was filed more than ten days after the entry of the judgment and therefore not timely." *Russell v. Lewis Gro. Co.*, 552 So.2d 113, 117 (Miss. 1989).

The claims were dismissed on January 27, 2005 pursuant to Dr. Todd's summary judgment motion and the Court's Order of Dismissal. (R. 574; R.E. Tab 3) Despite that dismissal, Dr. Todd's motion for sanctions was not filed until August 2, 2007. (R. 752; R.E. Tab 5) Dr. Todd's motion was filed eighteen months after summary judgment was granted – well after the ten-day deadline.

Todd's reliance on *Murphy v. Murphy*, 631 So.2d 812 (Miss. 1994), is misplaced. Specifically, that opinion raised issues surrounding subsection (a) of Rule 59, which addresses new trials. At issue here is subsection (e) of the rule which addresses motions to alter or amend. Moreover, the crux of the *Murphy* opinion centers on the best interests of the child in a child custody matter and ". . . the ability to hear and consider additional evidence is at all times within a chancellor's authority." *Murphy* at 816. *Murphy* is quite different in its procedural history, legal issues, and even the area of law involved here.

The lower court correctly cited to and relied on *Russell v. Lewis Gro. Co.* in denying the Rule 11 sanctions. Dr. Todd's motion was filed

nearly eighteen months too late. And as a result, the Rule 11 sanctions request was untimely and correctly denied.

IV.
DR. TODD ABANDONED HIS DISCOVERY REQUEST

Dr. Todd waived any objection concerning the additional discovery. This waiver occurred when he agreed to have the matter decided, ". . . on the record as it is presently constituted." Specifically, in December of 2008, the parties agreed for the sanctions dispute to be decided 'on the record.' (R. 1376-1377; R.E. Tab 4, 1382; R.E. Tab 2, and 1419; R.E. Tab 5). That agreement provided:

> It is agreed by the parties that this matter may be submitted for decision on the Briefs filed, or in the event any party chooses to submit additional arguments that must be done on or before January 15, 2009, and **based on the record as it is presently constituted.** In the event a Brief is filed the other party has ten (10) days to file a rebuttal.

(emphasis added).

The court thereafter considered "the record," and denied Dr. Todd's motion for sanctions. (R. 1382; R.E. Tab 2).

Dr. Todd's agreement consumed and included the discovery issues which may have existed. By signing the agreement, Dr. Todd abandoned those discovery efforts in favor of having the matter decided on the existing record and briefs without delay. This abandonment waives any argument about discovery now.

Dr. Todd abandoned his sanctions-related discovery when he signed the agreement. This abandonment waives any argument on appeal and should be rejected.

CONCLUSION

There was no abuse of discretion in denying Dr. Todd's sanctions request. Mr. Clayton's uncontradicted affidavit demonstrates the diligent efforts and resources used in investigating and pursuing the underlying claim. Mr. Clayton had a hope of success. And that hope precludes sanctions under Rule 11 and the LAA. Moreover, the request for Rule 11 sanctions was filed well beyond the 10 days as required for such a motion under *Russell v. Lewis Gro. Co.*, 552 So.2d 113, 117 (Miss. 1989). As such, the lower Court's rejection of sanctions against Claude Clayton should now be affirmed.

Respectfully submitted, this the 13th day of April, 2010.

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CERTIFICATE OF FILING AND SERVICE

We, Jonathan S. Masters, one of the attorneys for Appellee and Mildred Jones, actual mailer of the Brief of Appellee, certify that we have this day forwarded via regular mail the original and three copies of the foregoing Brief of Appellee to the Clerk of the Supreme Court of the State of Mississippi at 450 High Street, Jackson MS 39205-0249, and one (1) true and correct copy of the same to the following individuals:

Hon. Thomas J. Gardner, III
P.O. Drawer 1100
Tupelo, MS 38802-1100

Michael A. Todd, M.D.
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This the 13th day of April, 2010.

JONATHAN S. MASTERS

MILDRED JONES