

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2009-CP-01387**

HARRISON LEWIS, JR.

APPELLANT

VS.

AZHAR PASHA

APELLEE

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

BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUESTED

**CHARLES W. WRIGHT, JR. (MSB No. [REDACTED])
L. BROOKS HOOPER (MSB No. [REDACTED])
CHARLES W. WRIGHT, JR., PLLC
POST OFFICE BOX 1677
1208 22ND AVENUE
MERIDIAN, MS 39302-1677
(601) 693-6555**

ATTORNEYS FOR APPELLEE

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2009-CP-01387**

HARRISON LEWIS, JR.

APPELLANT

VS.

AZHAR PASHA

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 may evaluate possible disqualification or recusal.

PLAINTIFF/APPELLANT

1. Harrison Lewis, Jr., Meridian, Mississippi.

DEFENDANT/APPELLEE

1. Azhar Pasha, M.D., Meridian, Mississippi.

COUNSEL FOR DEFENDANT

1. Charles W. Wright, Jr., Meridian, Mississippi.
2. L. Brooks Hooper, Meridian, Mississippi.

TRIAL JUDGE

1. Honorable Lester F. Williamson, Jr., Circuit Judge for the 10th Circuit District of the State of Mississippi, Meridian, Mississippi.

Respectfully submitted this the 9th day of February, 2010.

AZHAR PASHA, APPELLEE

BY:



CHARLES W. WRIGHT, JR. (MSB No. 7395)

L. BROOKS HOOPER (MSB No. 102918)

CHARLES W. WRIGHT, JR., PLLC

POST OFFICE BOX 1677

1208 22ND AVENUE

MERIDIAN, MS 39302-1677

(601) 693-6555

ATTORNEYS FOR APPELLEE

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	ii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	2
I. Nature of the Case	2
II. Course of the Proceedings	2
III. Disposition in the Court Below	2
IV. Statement of Facts	2
SUMMARY OF THE ARGUMENT	4
ARGUMENT	5
I. THE TRIAL COURT CORRECTLY SUSTAINED THE DEFENDANT’S MOTION TO DISMISS BECAUSE THE PLAINTIFF DID NOT FILE HIS COMPLAINT FOR LIBEL WITHIN THE ALLOWABLE TIME PERIOD UNDER SECTION 15-1-35 OF THE MISSISSIPPI CODE ANNOTATED.	5
II. THE TRIAL COURT CORRECTLY SUSTAINED THE DEFENDANT’S MOTION TO DISMISS BECAUSE THE PLAINTIFF DID NOT FILE HIS COMPLAINT FOR MEDICAL MALPRACTICE WITHIN THE ALLOWABLE TIME PERIOD UNDER SECTION 15-1-36(2) OF THE MISSISSIPPI CODE ANNOTATED, AND BECAUSE THE PLAINTIFF DID NOT COMPLY WITH OTHER STATUTORY REQUIREMENTS OF SECTION 15-1-36 OF THE MISSISSIPPI CODE ANNOTATED.	7
A. <i>Statute of Limitations</i>	7
B. <i>Failure to Provide Notice</i>	8
CONCLUSION	8
CERTIFICATE OF FILING	10
CERTIFICATE OF SERVICE	11

TABLE OF AUTHORITIES

CASES:

<i>Burleson v. Latham</i> , 968 So.2d 930, 932 (¶ 7) (Miss. 2007).	5, 7
<i>Hudson v. Palmer</i> , 977 So.2d 369, 379 (¶ 23) (Miss. Ct. App. 2007), <i>rehearing denied</i>	5, 6
<i>McCorkle v. McCorkle</i> , 811 So.2d 258 (¶ 15) (Miss. Ct. App. 2001).	5
<i>Price v. Clark</i> , 21 So.3d 509, 518-19 (¶ 16) (Miss. 2009), <i>rehearing denied</i>	8
<i>Staheli v. Smith</i> , 548 So.2d 1299, 1303 (Miss. 1989).	6
<i>Thomas v. Warden</i> , 999 So.2d 842, 846 (¶ 15) (Miss. 2008), <i>rehearing denied</i>	8

STATUTES:

Miss. Code Ann. § 15-1-35 (West, WESTLAW through 2009 legislation).	1, 4-6
Miss. Code Ann. § 15-1-36(2) (West, WESTLAW through 2009 legislation).	1, 4, 7
Miss. Code Ann. § 15-1-36(15) (West, WESTLAW through 2009 legislation).	1, 4, 8
Miss. Code Ann. § 15-1-59 (West, WESTLAW through 2009 legislation).	6, 7
Miss. Code Ann. § 15-1-67 (West, WESTLAW through 2009 legislation).	6, 7

STATEMENT OF THE ISSUES

- I. Whether the trial court correctly sustained the Defendant's Motion to Dismiss because the Plaintiff did not file his complaint for libel within the allowable time period under Section 15-1-35 of the Mississippi Code Annotated.
- II. Whether the trial court correctly sustained the Defendant's Motion to Dismiss because the Plaintiff did not file his complaint for medical malpractice within the allowable time period under Section 15-1-36(2) of the Mississippi Code Annotated, and because the Plaintiff did not comply with the notice requirement of Section 15-1-36(15) of the Mississippi Code Annotated.

STATEMENT OF THE CASE

I. Nature of the Case

On May 26, 2009, the Plaintiff brought an action alleging libel and medical malpractice against the Defendant, based on information contained in the Defendant's report to the Social Security Administration in March of 2006. (R.E. 3-8; R. 2-7; Tr. 5-6).

II. Course of the Proceedings

The Complaint in this action was filed on May 26, 2009. (R.E. 3-8; R. 2-7). On June 10, 2009, the Defendant filed his Motion to Dismiss, Answer and Affirmative Defenses. (R.E. 9-14; R. 10-15).

On July 27, 2009, the Defendant's Motion to Dismiss was brought for hearing before the Honorable Lester F. Williamson, Jr., Circuit Judge for the 10th Circuit District of the State of Mississippi. (Tr. 3). At that hearing, the Defendant's Motion to Dismiss was granted and the case was dismissed. (R.E. 15-18; R. 17; Tr. 24-25). On August 12, 2009, the Plaintiff filed his Notice of Appeal, appealing the dismissal of his case to this Court. (R.E. 19-20; R. 18-19).

III. Disposition in the Court Below

This case was dismissed on July 27, 2009. (R.E. 15-18; R. 17; Tr. 24-25).

IV. Statement of Facts

On March 14, 2006, the Defendant, Dr. Pasha, conducted an examination on the Plaintiff for the Social Security Administration in connection with the Plaintiff's claim for Social Security Disability Benefits [hereinafter disability benefits]. (R.E. 3-14; R. 2-7, 10-15; Tr. 12). The Defendant was hired by the Social Security Administration, and not the Plaintiff. (Tr. 12). Prior to the administration of the examination on the Plaintiff, the Defendant received medical records and information from the Social Security Administration. (R.E. 9-14; R. 10-15). This information showed that the Plaintiff had been treated and had a history of alcohol abuse and

smoking, and was included in the report that the Defendant sent to the Social Security Administration on March 15, 2006. (R.E. 3-14; R. 2-7, 10-15; Tr. 5-7). The Plaintiff alleges that the report sent by the Defendant to the Social Security Administration was libelous and formed the basis of a medical malpractice claim because it included that information. (R.E. 3-8; R. 2-7; Tr. 13).

The Defendant was denied disability benefits in 2006, and alleges that it is because of the Defendant's report. (Tr. 7-8). However, the Plaintiff acknowledged that in 2006, he was not informed of the reason for his denial and he did not make any effort to find out the reason for his denial. (Tr. 9-10, 22). Plaintiff also claims to have been denied disability benefits in 2007 and 2008, and that in 2007, he was informed that the basis for his denial was the Defendant's report. (Tr. 8, 10). After he allegedly discovered that he was denied disability benefits because of the Defendant's report in 2007, the Plaintiff made no effort to obtain a copy of the report and admitted that the Defendant nor anything else prevented him from obtaining the report. (Tr. 11, 13). The Plaintiff also acknowledged that he had access to all of the records at one of his Social Security hearings and could have looked at them, but he did not because Social Security did not send the records to him. (Tr. 13). Plaintiff contended it was not his job to find out why he was denied. (Tr. 22). The Plaintiff is currently receiving disability benefits. (Tr. 11).

On May 26, 2009, more than three (3) years after the examination and report, the Plaintiff filed the action from which this case was appealed in the Circuit Court of Lauderdale County, Mississippi. (R.E. 3-8; R. 2-7). Plaintiff admitted that he did not follow the statute requiring that he give notice of his medical malpractice claim. (Tr. 14). Plaintiff also stated that he had no idea of the alleged libelous statement of the Defendant in 2006. (Tr. 16). However, the Plaintiff then contended that in 2006, the statement was published to "millions of people" because he had the ability to access medical records from his computer. (Tr. 18).

SUMMARY OF THE ARGUMENT

- I. The trial court correctly sustained the Defendant's Motion to Dismiss because the Plaintiff did not file his complaint for libel within the allowable time period under Section 15-1-35 of the Mississippi Code Annotated.
- II. The trial court correctly sustained the Defendant's Motion to Dismiss because the Plaintiff did not file his complaint for medical malpractice within the allowable time period under Section 15-1-36(2) of the Mississippi Code Annotated, and because the Plaintiff did not comply with the notice requirement of Section 15-1-36(15) of the Mississippi Code Annotated.

ARGUMENT

I. THE TRIAL COURT CORRECTLY SUSTAINED THE DEFENDANT'S MOTION TO DISMISS BECAUSE THE PLAINTIFF DID NOT FILE HIS COMPLAINT FOR LIBEL WITHIN THE ALLOWABLE TIME PERIOD UNDER SECTION 15-1-35 OF THE MISSISSIPPI CODE ANNOTATED.

“When reviewing a trial court’s grant or denial of a motion to dismiss ... this Court applies a de novo standard of review.... When considering a motion to dismiss, the allegations in the complaint must be taken as true and the motion should not be granted unless it appears beyond doubt that the plaintiff will be unable to prove any set of facts in support of his claim.” *Burleson v. Latham*, 968 So.2d 930, 932 (¶ 7) (Miss. 2007).

Mississippi Code Annotated Section 15-1-35 provides that: “All actions ... for libels, shall be commenced within one (1) year next after the cause of such action accrued, and not after.” “An action for libel or defamation generally accrues at the time of the first publication.” *Hudson v. Palmer*, 977 So.2d 369, 379 (¶ 23) (Miss. Ct. App. 2007) (citing *McCorkle v. McCorkle*, 811 So.2d 258 (¶ 15) (Miss. Ct. App. 2001)).

The report that the Plaintiff alleges to be libelous was made and submitted to the Social Security Administration on March 15, 2006, as a result of the disability examination of the Plaintiff which occurred on March 14, 2006. (R.E. 3-14; R. 2-7, 10-15; Tr. 5-7, 12) However, Plaintiff’s Complaint was filed on May 26, 2009, which is more than three (3) years after the allegedly libelous report was submitted to the Social Security Administration. (R.E. 3-8; R. 2-7).

Plaintiff argued at trial that he did not discover the report until March of 2009, and in his brief argues that the statute of limitations should be tolled due to his failure to discover the report. (Tr. 4, 6-7, 9; Brief of Appellant). The Mississippi Supreme Court has held there is an exception to the one year statute of limitations for defamation actions “when ‘because of the secretive or inherently undiscoverable nature of the publication the plaintiff did not know, or with reasonable diligence could not have discovered that he had been defamed’ the statute of

limitations would not begin to run until such conditions had been met.” *Hudson*, 977 So.2d at 379 (¶ 23) (quoting *Staheli v. Smith*, 548 So.2d 1299, 1303 (Miss. 1989)).

This exception could not apply in this case because the alleged publication was not secretive or inherently undiscoverable, as at any time after the report was submitted in March of 2006, the Plaintiff acknowledged that he could have gone by the Defendant’s office, signed a consent and obtained a copy of the report. (Tr. 11). Further, when Plaintiff was denied disability benefits in 2006, 2007 or 2008, he acknowledged that he could have made an inquiry with the Social Security Administration and obtained a copy of the report. (Tr. 13). Thus, Plaintiff’s allegations would not fall within the exception to the one-year statute of limitations because the report was not secretive or inherently undiscoverable, and with reasonable diligence the Plaintiff would have discovered the report during the limitations period. Further, Plaintiff testified that this report was published to millions of people in 2006, so with reasonable diligence, he could have obtained the report at that time. (Tr. 18).

Plaintiff also acknowledged that the Defendant did nothing to prevent him from accessing the allegedly libelous report. (Tr. 11). Thus, no fraudulent concealment was present to cause Mississippi Code Annotated Section 15-1-67 to extend the limitations period. Plaintiff also did not contend that he was under the disability of infancy or unsound mind to cause Mississippi Code Annotated Section 15-1-59 to extend the limitations period.

Therefore, Plaintiff failed to file his claim within the limitations period provided in Mississippi Code Annotated Section 15-1-35, and therefore, his claim for libel was properly dismissed.

II. THE TRIAL COURT CORRECTLY SUSTAINED THE DEFENDANT'S MOTION TO DISMISS BECAUSE THE PLAINTIFF DID NOT FILE HIS COMPLAINT FOR MEDICAL MALPRACTICE WITHIN THE ALLOWABLE TIME PERIOD UNDER SECTION 15-1-36(2) OF THE MISSISSIPPI CODE ANNOTATED, AND BECAUSE THE PLAINTIFF DID NOT COMPLY WITH THE NOTICE REQUIREMENT OF SECTION 15-1-36(15) OF THE MISSISSIPPI CODE ANNOTATED.

The standard of review for the trial court's grant of a motion to dismiss is *de novo*.¹

Burleson, 968 So.2d at 932 (¶ 7).

A. Statute of Limitations

Mississippi Code Annotated Section 15-1-36(2) provides that: "...no claim in tort may be brought against a licensed physician ... for injuries ... arising out of the course of medical, surgical or other professional services unless it is filed within two (2) years from the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered...."

The medical negligence was alleged to have occurred on March 14 and/or 15, 2006. However, Plaintiff's Complaint was not filed until May 26, 2009, which is more than three (3) years after the alleged medical negligence. (R.E. 3-8; R. 2-7). Plaintiff acknowledged that the Defendant did nothing to prevent him from accessing the report that the Plaintiff alleges to be medical malpractice. (Tr. 11). Thus, no fraudulent concealment was present to cause Mississippi Code Annotated Section 15-1-67 or 15-1-36(2)(b) to extend the limitations period. Plaintiff did not contend that he was under the disability of infancy or unsound mind to cause Mississippi Code Annotated Section 15-1-59 or 15-1-36(3)-(5) to extend the limitations period.

Plaintiff failed to file his claim within the limitations period provided in Mississippi Code Annotated Section 15-1-36(2), and thus, his claim was properly dismissed.

¹ See discussion *supra* at pp. 6.

B. Failure to Provide Notice

The Mississippi Supreme Court has held that Mississippi Code Annotated “Section 15-1-36(15) clearly and unambiguously states that ‘[n]o 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.’ Miss. Code Ann. § 15-1-36(15) (Rev. 2003). Thus, because the defendants in this case did not have ‘sixty (60) days' prior written notice of the intention to begin the action’ this lawsuit was not lawfully filed, and it is of no legal effect.” *Thomas v. Warden*, 999 So.2d 842, 846 (¶ 15) (Miss. 2008). Thus, the sixty-day notice requirement requires strict compliance. *Id.* See also *Price v. Clark*, 21 So.3d 509, 518-19 (¶ 16) (Miss. 2009).

The Plaintiff failed to provide any notice to the Defendant, prior to filing this action. (Tr. 14). Since the Plaintiff did not provide the requisite notice to the Defendant, the Plaintiff's claim was properly dismissed.

CONCLUSION

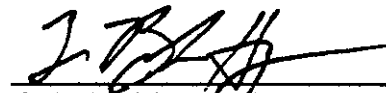
Based on the foregoing, the trial court correctly granted the Defendant's Motion to Dismiss this case. The Plaintiff's complaint was not filed within the limitations period for either of the alleged torts of libel and medical malpractice, and no facts presented by the Plaintiff provide any legal justification for his failure to file this action within the limitations period. Further, the Plaintiff failed to provide the required sixty-day notice to the Defendant to bring an action for medical malpractice.

Therefore, the trial court's decision to grant the Defendant's Motion to Dismiss should be affirmed.

RESPECTFULLY SUBMITTED, this the 9th day of February, 2010.

AZHAR PASHA, APPELLEE

BY:



CHARLES W. WRIGHT, JR. (MSB No. [REDACTED])

L. BROOKS HOOPER (MSB No. [REDACTED])

CHARLES W. WRIGHT, JR., PLLC

POST OFFICE BOX 1677

1208 22ND AVENUE

MERIDIAN, MS 39302-1677

(601) 693-6555

ATTORNEYS FOR APPELLEE

CERTIFICATE OF FILING

I, the undersigned attorney, do hereby certify that I have this day caused to be delivered,
the original and three true and correct paper copies of the Brief of Appellee, to:

Betty Sephton, Clerk
Supreme Court of the State of Mississippi
Office of the Supreme Court Clerk
Carroll Gartin Justice Building
450 High Street
Jackson, MS 39201

This the 9th day of February, 2010.



CHARLES W. WRIGHT, JR. (MSB No. [REDACTED])

L. BROOKS HOOPER (MSB No. [REDACTED])

CHARLES W. WRIGHT, JR., PLLC

POST OFFICE BOX 1677

1208 22ND AVENUE

MERIDIAN, MS 39302-1677

(601) 693-6555

ATTORNEYS FOR APPELLEE

CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that I have this date mailed, postage prepaid, by United States mail a true and correct paper copies of the foregoing Brief of Appellee to the following:

Honorable Lester F. Williamson, Jr.
Lauderdale County Circuit Court Judge
P.O. Box 86
Meridian, MS 39302-0086

Harrison Lewis, Jr.
2031 15th Avenue
Meridian, MS 39301

SO CERTIFIED, this the 9th day of February, 2010.



CHARLES W. WRIGHT, JR. (MSB No. [REDACTED])

L. BROOKS HOOPER (MSB No. [REDACTED])

CHARLES W. WRIGHT, JR., PLLC

POST OFFICE BOX 1677

1208 22ND AVENUE

MERIDIAN, MS 39302-1677

(601) 693-6555

ATTORNEYS FOR APPELLEE