IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2010-TS-00490

RICHARD COMPERE AND JAMES A. BOBO — APPELLANTS

VS.

BRYAN LANTRIP AND ST. DOMINIC-JACKSON MEMORIAL HOSPITAL — APPELLEES

APPEAL FROM THE CIRCUIT COURT OF
THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI

BRIEF OF APPELLEES

ORAL ARGUMENT NOT REQUESTED

PREPARED AND SUBMITTED BY:

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VS.

BRYAN LANTRIP AND ST. DOMINIC-JACKSON MEMORIAL HOSPITAL **APPELLEES**

CERTIFICATE OF INTERESTED PERSONS

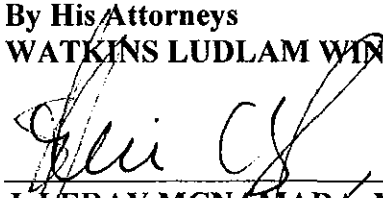
The undersigned counsel of record for the Appellees certify that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Richard Compere;
2. James A. Bobo;
3. Akers & Bobo, PLLC;
4. Bryan Lantrip, M.D.;
5. J. Leray McNamara;
6. Stephanie C. Edgar;
7. Watkins, Ludlam, Winter & Stennis, P.A.;
8. St. Dominic—Jackson Memorial Hospital;
9. Sharon F. Bridges;
10. Jonathan R. Werne;
11. Lane W. Staines;
12. Brunini, Grantham, Grower & Hewes, PLLC; and
13. The Honorable W. Swan Yerger

Respectfully submitted,

BRYAN LANTRIP, M.D.

By His Attorneys
WATKINS LUDLAM WINTER & STENNIS, P.A.



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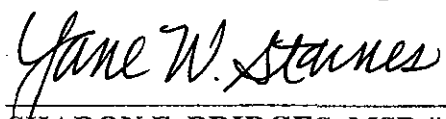

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I.
STATEMENT OF THE CASE

The appeal of the dismissal of these lawsuits is unnecessary. Bryan Lantrip, M.D. ("Dr. Lantrip") and St. Dominic-Jackson Memorial Hospital ("St. Dominic") do not contest that Richard Compere ("Mr. Compere") could have re-filed his initial lawsuit, which was dismissed without prejudice. The second case was dismissed with prejudice because the first lawsuit was pending. While Dr. Lantrip and St. Dominic understand James Bobo's ("Mr. Bobo's") appeal of the award of sanctions, the dismissal of the case and constitutionality of Miss. Code Ann. § 15-1-36(15) need not be addressed by the Court.

Miss. Code Ann. § 15-1-36(15) provides: "No action based upon the health care provider's negligence may be begun unless a defendant has been given at least sixty (60) days prior written notice of the intention to begin the action. No particular form of notice shall be required, but it shall notify the defendant of the legal basis of the claim and the type of loss sustained." Mr. Compere filed the initial lawsuit alleging medical negligence against Dr. Lantrip and St. Dominic. R. at 6. However, in filing this lawsuit, Mr. Compere failed to wait the requisite sixty (60) days and instead filed his lawsuit either two (2) or four (4) days before the sixty (60) days expired. R. at 6, 16, 106 and 107. For that reason, based upon case law at the time, the initial case was dismissed without prejudice.

Following is a table outlining both the relevant dates and events in this litigation:

DATE	EVENT
January 6 or 8, 2009	Pre-Suit Notice Mailed. R. at 106-107.
March 4, 2009	First Lawsuit Filed and assigned to Honorable Swan Yerger ("Judge Yerger"). R. at 6 .
March 25, 2009	St. Dominic's Motion to Dismiss Filed. R. at 24.
May 11, 2009	Compere's Motion for Partial Summary Judgment Filed. R. at 80.

May 13, 2009	Dr. Lantrip's Motion for Summary Judgment Filed. R. at 194.
June 1, 2009	Hearing held on pending motions before Judge Yerger after which Judge Yerger takes all motions under advisement. R. at 429.
July 1, 2009	Second Lawsuit Filed and assigned to Honorable Tomie Green ("Judge Green"). R. at 276 and 478.
July 13, 2009	Order entered denying Compere's Motion for Partial Summary Judgment. R. at 273.
July 13, 2009	Provisional Order entered granting Dr. Lantrip and St. Dominic's Motions for Summary Judgment (No Final Judgment Entered). R. at 307.
July 23, 2009	*Price v. Clark,* 21 So.3d 509 (Miss. 2009) decision handed down.
July 24, 2009	Dr. Lantrip's counsel advises both Judge Yerger and Judge Green of the *Price* decision by letter. R. at 431.
August 6, 2009	Judge Green transfers second lawsuit to Judge Yerger. R. at 592.
August 13, 2009	Second lawsuit is re-assigned to Judge Yerger. R. at 597.
August 14, 2009	Judge Yerger communicates with counsel for the parties and advises that he will hold his order in abeyance until the *Price* decision becomes final. R. at 431.
January 27, 2010	Judge Yerger enters Opinion and Order on Motion for Summary Judgment dismissing first lawsuit without prejudice, second lawsuit with prejudice and sanctioning James Bobo for filing the second lawsuit. R. at 275.

Subsequent to the trial court entering its Opinion and Order on the Motion for Summary Judgment, Appellant's counsel, James Bobo ("Mr. Bobo"), filed a number of different motions, all of which viciously attacked the characters of Judge Yerger, Judge Yerger's law clerk and opposing counsel. R. at 301[Motion to Reconsider and Amend and Alter Judgment and Memorandum of Authorities], 310 [Motion to Recuse and Memorandum of Authorities] and 337 [Motion to Strike and Rebuttal of Lantrip's Response and Memorandum of Authorities]. These motions were denied in due course, and this appeal followed. R. at 428, 437, 438, 441 and 447.

II.
STATEMENT OF ISSUES

A. Whether the trial court recognized and preserved Richard Compere's right to re-file his lawsuit?

B. Whether the trial court abused its discretion in sanctioning James Bobo for forum shopping?

C. Whether Miss. Code Ann. §15-1-36(15) is constitutional?

III.
SUMMARY OF THE ARGUMENT

The trial court did not err in dismissing Mr. Compere's first lawsuit without prejudice as this is precisely the remedy required by *Price v. Clark*, 21 So. 3d 509 (Miss. 2009). The trial court's dismissal of the second, identical lawsuit with prejudice is or should be of no consequence. Hope or reasonable belief in the success of the second, identical lawsuit was lacking from its inception. Thus, sanctions against Mr. Bobo were proper. Finally, it is not necessary for this Court to reach the issue of whether Miss. Code Ann. § 15-1-36 (15) is constitutional because despite what Mr. Compere claims, his claim for medical negligence remains viable in light of the trial court's dismissal of the first lawsuit without prejudice. Regardless, however, as this Court has previously held on several occasions, Miss. Code Ann. § 15-1-36(15) is constitutional.

IV.
ARGUMENT

A. The trial court expressly recognized Mr. Compere's right to re-file his lawsuit.

Mr. Compere focuses only upon the trial court's dismissal of his second lawsuit with prejudice and argues that because of this dismissal, he is prevented from re-filing the lawsuit. Curiously, Mr. Compere omits one very important occurrence in this "procedural morass" he created. Mr. Compere says almost nothing about the fact that Judge Yerger dismissed the first, original case without prejudice, meaning of course, that this case can be re-filed. Specifically, in addressing the first lawsuit, the trial court stated:

> Pursuant to the Mississippi Supreme Court's ruling in *Price v. Clark*, the filing of a complaint tolls the statute of limitations for a period of at least 120 days, even if the Plaintiff has failed to comply with statutorily mandated pre-suit notice requirements. *Price v. Clark*, 21 So. 3d 509, 522 (Miss. 2009). Specifically, the *Price* court stated that "a properly served complaint—albeit a complaint that is wanting of proper pre-suit notice—should still serve to toll the statute of limitations until there is a ruling from the trial court." *Price* at 522. Accordingly, the Defendants are entitled to a dismissal, but because of the tolling provision in *Price*, **the dismissal should be without prejudice.**

R. at 278, Emphasis added. Mr. Compere's lawsuit remains viable and, indeed, could have been re-filed at any point in the previous year, without the necessity of this appeal. In fact, all involved, save for Appellants, recognize that this case can be re-filed. Judge Yerger explicitly so held in ruling upon Appellant's Motion to Recuse. Judge Yerger ruled, "[T]he Court has issued its final opinion on the merits and the original Complaint has been dismissed without prejudice, permitting Plaintiff to amend and re-file, pursuant to M.R.C.P. 15." R. at 436. For these reasons, the appeal of these dismissals is unnecessary.

B. The trial court did not abuse its discretion in sanctioning Mr. Bobo for forum shopping.

1. The Second Lawsuit was Improper.

To justify his decision to file a new, identical cause of action while dispositive motions were pending in the first action, Mr. Bobo relies upon four cases, each of which are distinguishable from the case at bar. First, Mr. Compere cites *Lee v. Lee*, 232 So. 2d 370 (Miss. 1970), for the proposition that a new, identical cause of action can be filed while a lawsuit with the same facts, issues and claims is pending in another jurisdiction. However, in *Lee*, while a divorce action was pending in Forrest County when the wife filed a separate divorce action in Jackson County, the Forrest County chancellor had made no indication regarding his final ruling at the time the second complaint was filed.

By contrast, Mr. Bobo goes so far as to admit that, "Counsel for the Plaintiff left the in chambers meeting with the trial judge on June 1, 2009, with the clear impression that the trial judge was going to dismiss the First Complaint with prejudice." R. at 303. This admission evidences counsel's intent in filing the new, identical lawsuit. He was unhappy with the anticipated outcome in the original lawsuit, and therefore, chose to shop elsewhere for what he perceived to be a more favorable outcome.

Mr. Bobo also relies upon *Parmley v. Pringle*, 976 So. 2d 422 (Miss. App. 2008), in support of his argument that it was perfectly acceptable to file a new, identical cause of action when the original action remained open and active. *Parmley* is distinguishable in that there is no indication in the Mississippi Court of Appeals' opinion that plaintiff's two cases were assigned to different judges. Also, unlike the case at bar, there were no dispositive motions before the trial court at the time Parmley filed his second, identical claim.

In addition, Mr. Bobo cites *Caldwell v. Warren*, 2 So. 3d 751 (Miss. App. 2009) and *Holmes v. Nelson*, 956 So. 2d 278 (Miss. App. 2006), as support for the propriety of filing

subsequent complaints. However, Mr. Bobo's explanation of the *Caldwell* opinion is curiously devoid of the very necessary fact that the second lawsuit was the only case which was ever served upon the defendants. Therefore, the trial court could not legally proceed under the first complaint because it lacked personal jurisdiction over the parties.

A similar situation was involved in *Holmes* because the plaintiff timely served the defendants in only the second case. Again, the Mississippi Court of Appeals' opinion in *Holmes* is logical in that the trial court could not legally proceed under the first complaint because it lacked personal jurisdiction over the parties. In contrast to both *Caldwell* and *Holmes*, Dr. Lantrip and St. Dominic were served with process for both lawsuits. Thus, two trial courts had personal jurisdiction over the Appellees for the same action with the same claims at the same time.

In summary, Mr. Bobo improperly simplifies the trial court's rationale for imposing sanctions. Mr. Bobo argues that filing a second, identical lawsuit while the first case remains pending has never before resulted in sanctions in Mississippi's jurisprudence. Indeed, he even resorts to the argument that other lawyers have done the same thing and avoided sanctions. R. at 302. However, Mr. Bobo ignores his outright admission, that his sole intent in filing the second, identical cause was to obtain a more favorable result. R. at 303.

2. The Trial Court Properly Awarded Sanctions.

Judge Yerger awarded both Dr. Lantrip and St. Dominic fees incurred in defending the second lawsuit as sanctions against Mr. Bobo. R. at 275. An award of sanctions under either the Litigation Accountability Act of 1988 or Miss. R. Civ. P. 11, is reviewed for an abuse of discretion. *Foster v. Ross*, 804 So. 2d 1018 (Miss. 2002). Stated another way, an award of sanctions will be affirmed "[i]n the absence of a 'definite and firm commitment that the court

below committed a clear error of judgment in the conclusion it reached upon weighing of relevant factors.'" *Wyssbrod v. Wittjen*, 798 So. 2d 352, 357 (Miss. 2001).

The Litigation Accountability Act of 1988 provides as follows:

> [I]n any civil action commenced or appealed in any court of record in this state, the court shall award, as part of its judgment and in addition to any other costs otherwise assessed, reasonable attorney's fees and costs against any party or attorney if the court, upon the motion of any party or on its own motion, finds that an attorney or party brought an action, or asserted any claim or defense, that is without substantial justification. . .

Miss. Code Ann. § 11-55-5(1). This statute clearly contains a mechanism which enables a trial court, on its own initiative, to award sanctions when they are deemed necessary. "Frivolous" as used in both the Litigation Accountability Act of 1988 and Miss. R. Civ. P. 11, is determined by whether a party has any hope of success on a claim. *Nationwide Mutual Ins. Co. v. Evans*, 553 So. 2d 1117 (Miss. 1989). Further, this Court has held that sanctions are appropriate when there is no basis in fact or evidentiary support to drag a defendant into court. *Eatman v. City of Moss Point*, 809 So. 2d 591 (Miss. 2000). Also, where a party's claim is clearly barred by the doctrine of collateral estoppel because of a ruling in another case, any claim involving the same facts and allegations as the original claim is considered frivolous and warrants an award of sanctions. *Richardson v. Audubon Ins. Co.*, 948 So. 2d 445 (Miss. App. 2006).

In the case at bar, Mr. Bobo had no hope or reasonable belief in success with the second lawsuit because it was wholly improper from the beginning. Mr. Bobo lacked any basis in fact or evidentiary support to drag Dr. Lantrip and St. Dominic into court again because Dr. Lantrip and St. Dominic had already been served with process in the original action. In other words, Dr. Lantrip and St. Dominic were already before the court and there was, consequently, no need to drag them back through the process a second time merely because Mr. Bobo held out superficial belief that a more favorable result might be obtained from a different jurist.

To reiterate, while the trial court had not yet officially ruled on the Appellees' pending motions when Mr. Bobo filed the second lawsuit, Mr. Bobo freely acknowledges that he left the June 1, 2009 hearing "with the clear impression that the trial judge was going to dismiss the First Complaint with prejudice." R. at 276 and 303. Recall that St. Dominic and Dr. Lantrip had sought a dismissal with prejudice based on the expiration of the statute of limitations.1 R. at 194. For this reason, the companion doctrines of res judicata and collateral estoppel should apply to this case. Put another way, Mr. Bobo apparently foresaw that the case would be dismissed with prejudice, so rather than following the normal appellate process, he chose to ignore and blatantly defy the authority of the sitting trial judge and shop for what he felt would be a more favorable opinion elsewhere within the same judicial district.

In sum, there was simply no justifiable, legitimate reason behind Mr. Bobo's decision to re-file the same lawsuit before another judge. If the trial court had dismissed Mr. Compere's original action with prejudice, Mr. Compere could have appealed the trial court's decision. By contrast, if the trial court had dismissed Mr. Compere's original action without prejudice, Mr. Compere would have been allowed to re-file his action pursuant to Miss. R. Civ. P. 12 or Miss. Code Ann. § 15-1-69. Under either set of circumstances, the second lawsuit lacked any justification, let alone substantial justification.

C. Miss. Code Ann. §15-1-36(15) is constitutional.

Mr. Compere asserts that Miss. Code Ann. § 15-1-36(15) is unconstitutional. As previously stated, this Court is not required to address the constitutionality of Miss. Code Ann. § 15-1-36(15) because the trial court's dismissal of the original action without prejudice obviates any perceived constitutional violation.

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1 Specifically, St. Dominic and Dr. Lantrip argued that because proper notice was not given, the Complaint had no legal effect sufficient to toll the statute of limitations. *Price v. Clark*, 21 So. 3d 509 (Miss. 2009), decided approximately one month after the hearing before Judge Yerger, negated this argument.

Regardless, this Court has previously addressed and ruled upon all of Mr. Compere's constitutionality arguments. In addressing these identical arguments, this Court has held:

> These arguments are without merit. While it is true that the rules governing litigation in Mississippi courts are within this Court's purview, Section 15-1-36(15)'s notice requirement is a pre-suit prerequisite to a claimant's right to file suit. The statute clearly provides that "no action . . . may be begun" until the notice requirement is met. The Legislature's authority to make law gives way to this Court's rule-making authority when the suit is filed, not before.

Thomas v. Warden, 999 So. 2d 842, 847 (Miss. 2008). Further, in *Wimley v. Reid*, this Court explicitly recognized the constitutionality of Miss. Code Ann. § 15-1-36 (15) and held that the "Legislature has authority to establish presuit requirements as a condition precedent to filing particular kinds of lawsuits." 991 So. 2d 135, 139 (Miss. 2008). Perhaps most germane to this appeal is this Court's following explanation in *Arceo v. Tolliver*:

> "There is no absolute right of access to the courts. All that is required is a *reasonable* right of access to the courts–a reasonable opportunity to be heard." *Wayne v. Tenn. Valley Auth.*, 730 F. 2d 392, 403 (5th Cir. 1984) (cited with approval in *Townsend [v. Estate of Gilbert]*, 616 So. 2d 333, 337 (Miss. 1993)). 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 for the unfortunate death of her daughter, she 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 v. Tolliver, 949 So. 2d 691, 697 (Miss. 2006). Based on the aforementioned illustrations, Mr. Compere's argument regarding unconstitutionality lacks any merit.

V.
CONCLUSION

With the exception of the Appellees, no party to this case, including the trial judge, believes that Mr. Compere has no right to legally re-file his lawsuit. In fact, the trial court's specific instructions regarding Mr. Compere's right to re-file his case effectively moots this portion of this appeal.

Mr. Bobo filed a frivolous lawsuit within the meaning of both the Litigation Accountability Act and Miss. R. Civ. P. 11 when he filed the second lawsuit while the original case remained pending before a different judge in the same jurisdiction. Further, Mr. Bobo admits that he chose this course of action because he had a clear impression that the trial judge would not rule in his favor. This is an explicit example of forum shopping, and should be punishable. Mr. Bobo's conduct more than justified the trial court's decision to sanction him.

Finally, while this Court is not required to address the constitutionality of Miss. Code Ann. § 15-1-36(15), this portion of the statute is constitutional as this Court has explained on several prior occasions.

THIS the 1st day of February, 2011.

Respectfully submitted,

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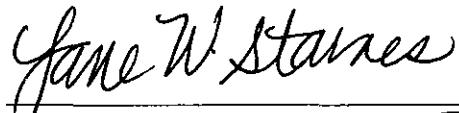

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CERTIFICATE OF SERVICE

The undersigned counsel for Appellees certify that they have this day served by United States Mail, postage prepaid, a true and correct copy of the foregoing document to the following:

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