

IN THE SUPREME COURT OF MISSISSIPPI

FERDINAND MCAFEE

APPELLANT

VS.

CIVIL ACTION NO. 2010-CA-01282

RODRIGO GALVEZ, MD, AND
BRENTWOOD ACQUISITION, INC.

APPELLEES

APPEAL FROM CIRCUIT COURT OF RANKIN COUNTY, MISSISSIPPI

BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUESTED

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BRENTWOOD ACQUISITION, INC.

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 Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Ferdinand McAfee, Appellant
2. Brandon I. Dorsey
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Post Office Box 13427
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3. Whitman B. Johnson, III
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5. Rodrigo Galvez, M.D.
405 Rollingwood Drive
Jackson, Mississippi 39211
6. Brentwood Acquisition, Inc. d/b/a
Brentwood Behavioral Healthcare of Mississippi
3531 Lakeland Drive
Jackson, Mississippi 39216
7. Honorable William E. Chapman, III
Rankin County Circuit Court Judge
Post Office Box 1885
Brandon, Mississippi 39043

Dated this the 4th day of February, 2011.

Respectfully submitted,

Brentwood Acquisition, Inc.

BY:

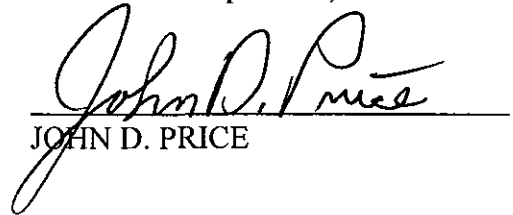

JOHN D. PRICE

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I. STATEMENT OF THE CASE

A. Nature of the Case:

This is a medical malpractice case against a physician and a hospital.

B. Course of Proceedings and Disposition of Case:

Both Defendants filed Motions for Summary Judgment with supporting affidavits. When the Plaintiff failed to respond to the Motions, the trial court ordered that the Plaintiff file a response. In disregard of the Court's Order, the Plaintiff failed to file a response to the Motions and failed to appear at the hearing. The Court granted summary judgment to both Defendants.

C. Statement of the Facts:

On July 19, 2006, a Jackson police officer encountered McAfee on the streets and encouraged McAfee to seek help at Brentwood or a similar mental health facility. McAfee accepted the police officer's suggestion and voluntarily presented himself at Brentwood on July, 19, 2009. R. 64.

Once McAfee was admitted to Brentwood, he was uncooperative and refused to talk. He became agitated and threw chairs. Dr. Galvez, admitting psychiatrist, found McAfee to be a danger to himself and others. Consequently, McAfee was placed on a 72 hour legal hold. R. 122. On the third day of his admission, McAfee climbed a fence and eloped from Brentwood. McAfee was promptly apprehended by Flowood Police Department and was returned to the mental health facility. After the 72 hour legal hold expired, McAfee was discharged, at his insistence, against medical advice. R. 122.

After his discharge against medical advice, Plaintiff sued his treating psychiatrist, Rodrigo Galvez, M.D., and Brentwood alleging he was "negligently diagnosed as a paranoid schizophrenic." R. 8. The allegation of negligent diagnosis is not supported by an affidavit of a physician. The unsupported allegation is rebutted by the Affidavit of Dr. Galvez. R. 37.

As damages, the Plaintiff alleges that his employer became aware of the diagnosis, and as a result, his employer terminated his employment. R. 8. Contrary to the allegations of the Complaint, McAfee resigned his position with WAPT. McAfee's handwritten resignation letter states:

Effective today, 9/25/06 I am resigning my position at WAPT. I am and will be eternally grateful for all that I've learned during my tenure here. I feel that my personal and professional paths will forever be strengthened as a result of the kindness I have been shown.

Ferdinand McAfee voluntarily resigned from WAPT. R. 129. Mr. McAfee's employment with WAPT was not terminated because of the diagnosis of mental illness. R. 130-131.

Plaintiff's unsupported allegation that his employer learned of the diagnosis of paranoid schizophrenia from either Dr. Galvez or Brentwood is also false. The affidavit from McAfee's employer establishes that McAfee personally provided his employer a copy of the medical record which contained the diagnosis. R. 130-131.

II. SUMMARY OF ARGUMENT

In this medical malpractice case, the Plaintiff failed to designate an expert witness, failed to respond to either Defendant's Motion for Summary Judgment, and failed to appear at the hearing of the Motion for Summary Judgment. Now, Plaintiff has filed an Appellant's Brief which contains no citation to the record. The Plaintiff has failed to meet his burden as a non-moving party to set forth specific facts showing that there is a genuine issue for trial.

III. ARGUMENT

The argument in the Appellant's Brief consists of a single paragraph which contains no citations to the record and no citations to authority to support the argument. An issue is procedurally barred pursuant to Rule 28(a)(30) of the Mississippi Rules of Appellate Procedure when the

Appellant fails to cite to relevant authority or to cite to the facts in the record. *O'Hara v. Robinson*, 904 So.2d 1110 (Miss. Ct. App. 2004). In his Brief, the Plaintiff represents to this Court that he identified an expert witness and "tendered in his response to pleadings that such expert opined that Defendant breached the applicable standard of care." Appellant's Brief at 5. Notably, the Plaintiff does not cite the record to support this representation. The reason he does not cite the record to support this representation is because the record does not support it.

On April 27, 2010, Brentwood Acquisition, Inc. filed a Motion for Summary Judgment. R. 43. The Motion was scheduled for hearing on May 10, 2010. R. 41. At the May 10th hearing, the trial court found that the Plaintiff had failed to file a response to the Motion. Upon finding that the Plaintiff had not responded to the Motion, the trial court continued the hearing to June 28, 2010 and ordered the Plaintiff to file a response to the Motion for Summary Judgment by June 10, 2010. R. 140.

After being afforded a second chance by the trial court, the Plaintiff failed to respond to the Motion for Summary Judgment. R. 143. What's more, when the June 28th hearing date arrived, Plaintiff failed to appear at the hearing of the Motion for Summary Judgment.

An adverse party may not rely upon mere allegations in his pleadings but must set forth specific facts, by affidavit or otherwise, demonstrating that there is a genuine issue for trial. Rule 56 provides that the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, should be entered against him." Miss. R. Civ. P. 56(e).

Plaintiff's failure to respond to the Defendants' Motion for Summary Judgment and identify expert testimony to establish the elements of negligence against Brentwood and Dr. Gupta is fatal to Plaintiff's claim. The Mississippi Supreme Court has held that "the time must arrive in every case

where the [Plaintiff] must demonstrate that there is a genuine issue for trial or have summary judgment entered against him.” *Travis v. Stewart*, 680 So.2d 214, 219 (Miss. 1996) (quoting *Bourne v. Tomlinson Interest, Inc.*, 456 So.2d 747, 749 (Miss. 1984)). In medical malpractice cases, that time comes when the Plaintiff fails to identify an expert whose testimony can establish the medical negligence of the Defendant. *Id.*

Settled Mississippi law requires that a Plaintiff must present expert medical testimony to establish the elements of negligence in a medical malpractice action. See *Coleman v. Rice*, 706 So. 2d 696, 698 (Miss. 1997); *Travis v. Stewart*, 680 So.2d 214, 218 (Miss. 1996); *Barner v. Gorman*, 605 So. 2d 805, 809 (Miss. 1992); *Erby v. North Miss. Med. Ctr.*, 654 So.2d 495, 500 (Miss. 1995); *Palmer v. Anderson Infirmary Benevolent Ass’n*, 656 So.2d 790, 795 (Miss. 1995). The Plaintiff must present expert testimony establishing the applicable standard of care, breach of that standard and injuries proximately resulting from the breach. *Phillips v. Hull*, 516 So.2d 488, 491 (Miss. 1987). In *Phillips v. Hull*, the Mississippi Supreme Court held that, absent expert testimony, a Plaintiff’s claim for medical malpractice will fail. 516 So.2d at 491. The Court in *Phillips* upheld the trial court’s grant of summary judgment in favor of the Defendant surgeon because the Plaintiffs failed to submit affidavits of medical experts to support their allegations. *Id.* at 490-91.

The Mississippi Supreme Court also upheld summary judgment in favor of the Defendant in *Palmer v. Biloxi Regional Medical Center, Inc.*, holding “in a summary judgment proceeding, the Plaintiff must rebut the Defendant’s claim (*i.e.* that no genuine issue of material fact exists) by producing supportive evidence of *significant* and *probative* value; this evidence must show that the Defendant breached the established standard of care and that such breach was the proximate cause of her injury.” 564 So.2d 1346, 1355 (Miss. 1990). Expert testimony is required to establish the applicable standard of care, breach of that standard, and injury proximately resulting from the breach,

and the Plaintiff's failure to present such testimony entitled Brentwood to summary judgment.

III. CONCLUSION

There are no genuine issues of material fact. Accordingly, the Summary Judgment in favor of Brentwood Acquisition, Inc. should be affirmed.

Dated this the 4th day of February, 2011.

Respectfully submitted,

Brentwood Acquisition, Inc.

BY:


JOHN D. PRICE

CERTIFICATE OF SERVICE

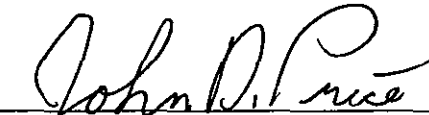
I, John D. Price, do hereby certify that I have this day, by United States mail, postage prepaid,
a true and correct copy of the above and foregoing document to following counsel:

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