

**IN THE CIRCUIT COURT OF BOLIVAR COUNTY, MISSISSIPPI  
SECOND JUDICIAL DISTRICT**

**CELICIA JONES, Administratrix of the  
Estate of MAURICE JONES, JR. Deceased**

**PLAINTIFF**

**VS.**

**CAUSE NO. 2010-0030**

**PHC-CLEVELAND d/b/a  
BOLIVAR MEDICAL CENTER,  
DR. MICHAEL PORTNER, and  
FRESENIUS MEDICAL CORP.**

**DEFENDANTS**

**ORDER DISMISSING DR. MICHAEL PORTNER**

**THIS CAUSE** comes before the court on motion of the defendant, Dr. Michael Portner, seeking the dismissal of the above styled action. This action is based upon allegations of medical malpractice. The instant motion is premised upon Portner's claim that the plaintiff failed to properly serve any pre-suit notice as required by Miss. Code Ann. §15-1-36(15). The plaintiff urges that such notice was properly served. A hearing was held on this motion on Monday, November 9, 2010. At the conclusion of that hearing the court allowed *limited* additional discovery to allow the parties to gather additional evidence bearing upon this issue. The court held a second hearing on Tuesday, March 22, 2011, wherein the court received such evidence. The court has carefully reviewed the court file, the motion and response, the testimony and other evidence offered by the parties, and all applicable law and is prepared to enter its ruling.

1. As indicated above, this is an action involving allegations of medical malpractice. As

such, pursuant to Miss. Code Ann. §15-1-36 (15)<sup>1</sup>, at least sixty (60) days prior to filing the instant action the plaintiff was obliged to serve the defendant with notice advising as to the legal basis of the claim, the type of loss sustained and the specific nature of the injuries suffered.

2. The plaintiff urges that such a “notice of claim” was served upon the defendant by delivering a copy of the same to the defendant’s office manager at the “office” of the defendant on February 12, 2010. *See* Response of Plaintiff, ¶3. Indeed, the sworn return of the process server for the plaintiff indicates that such notice was served upon a “Jennifer Burns<sup>2</sup>” on February 12, 2010. *See* last page of Ex. 1 to Plaintiff’s Response to defendant’s Second Motion to Dismiss.

3. The defendant, Dr. Michael Portner, asserts that the location where the plaintiff claims to have delivered such notice was not his office. In addition, the individual to whom the notice is claimed to have been delivered, Ms. Jennifer Barnes, asserts that she has no recollection regarding the delivery of any such papers. *See* Dep. of Jennifer Barnes, pp. 55 - 57.

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<sup>1</sup>Miss. Code Ann. §15-1-36(15): “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.”

<sup>2</sup>The court is aware that the name of the actual office manager at the location where the notice is claimed to have been served is Jennifer Barnes. However, because of the nature of the ruling herein, such is not material.

4. Without doubt, the service of the pre-suit notice required under Miss. Code Ann. §15-1-36 is mandatory. “When drafting Miss. Code Ann. Section 15-1-36(15), the Legislature did not incorporate any given exceptions to this rule which would alleviate the prerequisite condition of prior written notice. Simply stated, “shall” is mandatory, while “may” is discretionary. [The plaintiff’s] failure to send notice of her intent to sue clearly violates the mandatory instructions concerning notice in Miss. Code Ann. Section 15-1-36(15).” Price v. Clark, 21 So. 3d 509, 519 (¶19) (Miss. 2009) (internal citations omitted) (Emphasis added).

5. The service of the pre-suit notice is governed by M.R.C.P. 5(b). “[T]he ‘mechanics’ of Rule 5 of the Mississippi Rules of Civil Procedure apply when notice is mandated as a preliminary step to filing a lawsuit, such as the notice required under Section 15-1-36.” Brewer v. Wiltcher, 22 So. 3d 1188, 1190-91 (¶8) (Miss. 2009) (citing Proli v. Hathorn, 928 So. 2d 169, 173, 175 (Miss. 2006). *See also* Brocato v. Mississippi Publishers Corp., 503 So. 2d 241 (Miss. 1987).

6. M.R.C.P. 5(b) dictates upon whom service of a pre-suit notice such as involved here shall be served, as follows:

**(b)(1) Service: How Made.** Whenever under these rules service is required or permitted to be made upon a party who is represented by an attorney of record in the proceedings, the service shall be made upon such attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him; or by transmitting it to him by electronic means; or by mailing it to him at his last known address, or if no address is known, by leaving it with the clerk of the court, or by transmitting it to the clerk by electronic means. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof;

or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by electronic means is complete when the electronic equipment being used by the attorney or party being served acknowledges receipt of the material. If the equipment used by the attorney or party being served does not automatically acknowledge the transmission, service is not complete until the sending party obtains an acknowledgment from the recipient. Service by mail is complete upon mailing.

Even assuming for purposes of this motion that the notice was delivered as evidenced by the return of the process server, the critical inquiry which must be made is whether the location where such notice was delivered was the “office” of the defendant as required under the rule.

7. The defendant, Dr. Portner, is a nephrologist, a physician specializing in disorders of the kidney. Patients with kidney disorders often are required to undergo dialysis. The location where the plaintiff asserts the notice was served is 222 North Pearman Street, Cleveland, Mississippi, a building occupied by Fresenius Medical Group. It is a location where patients are provided kidney dialysis services. The Fresenius Medical Group provides such services for patients of at least three doctors, including the defendant.

8. Dr. Portner testified that he maintains his medical office at 803 1<sup>st</sup> Street, Cleveland, Mississippi. In his deposition, Dr. Portner testified that he is at the 803 1<sup>st</sup> Street location once a week, on Wednesdays. *See* Dep. of defendant Portner, p. 13. His activities at this location include seeing, examining and consulting with patients and providing other general medical services one would expect to receive at the office of a physician. He has maintained this office at this location for approximately six to seven years. From an evidentiary standpoint, this testimony

was undisputed. According to the evidence, on those occasions when the defendant was at the offices of Fresenius Medical Group, he was making rounds, visiting patients who were then undergoing dialysis and checking to make certain that all was well with the patient, much the same as when a doctor makes rounds at a hospital.

9. It is also undisputed that the defendant makes no financial contributions to the Fresenius Medical Group facility nor to the staff that work at that location. Likewise, the defendant has no financial interest in the success or failure of the Fresenius Medical Group. While he is entitled to receive compensation for his visits while at that location, such compensation comes from Medicaid / Medicare and is not tied to the financial success of that business.

10. Neither this court nor the parties have been able to locate any case law to guide this court in defining the term “office” as that term is used under M.R.C.P. 5(b). As such, this court will borrow from and be guided by language from cases dealing with statutory construction. Where the language being considered is not ambiguous, the court is not to resort to statutory interpretation, but rather apply the language according to its *plain meaning*. Mississippi Com’n on Judicial Performance v. Osborne, 876 So. 2d 324, 332 (¶35) (Miss. 2004).

11. That portion of the rule which is involved here deals with what constitutes *delivery* of the notice, as follows:

Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at **his office with his clerk or other person in charge thereof**;

M.R.C.P. 5(b)(1) (**Emphasis added**).

12. In the context of what occurred here, in order for there to have been proper service of the subject notice, the notice had to have been left at the doctor's office with the doctor's clerk or other person in charge. In the opinion of this court, the offices of Fresenius Medical Group do not constitute the "office" of the defendant as that term is used under M.R.C.P. 5(b). A common sense approach dictates that the word "office", as used in M.R.C.P. 5(b), denotes a location where the defendant would maintain some type of regular hours – a location where, during such hours, one would reasonably expect to find either the defendant or someone that answers directly to the defendant, such as a clerk or office manager.

13. To be sure, M.R.C.P. 5(b) is relatively liberal in its definition of delivery. The notice may be left at the office with a clerk or other person in charge, or, failing that, simply left in a conspicuous place within the office. M.R.C.P. 5(b)(1). In the view of this court, to facilitate the intent of the rule, however, the location where the notice may be left must be a location where the defendant, or someone under his direct control, might reasonably be expected to be found with regularity.

14. While the Fresenius Medical Group location is a location where the defendant visits often, he also visits and performs the same duties at other dialysis facilities located in Belzona, Indianola and Greenwood, Mississippi. In addition, the defendant makes rounds at various hospitals in the area. A finding that the Fresenius Medical Group location at 222 North Pearman Street constitutes an "office" sufficient for purposes of M.R.C.P. 5(b) would also mean that such notice could have been left at any of these other dialysis locations, despite whether it was expected that the doctor would be visiting these locations or not. If none of the doctor's patients


were receiving dialysis treatment at the Fresenius Medical Group location, presumably the doctor would have no reason to visit that location. Thus, the doctor's appearance at a particular dialysis location is dependent not upon the doctor, but rather upon his caseload of patients receiving treatment at that location, if any.

15. By analogy, it would be like serving a notice upon an attorney by delivering it to the county administrator at the county courthouse. While attorneys are often found at the courthouse, perform work at the courthouse, make money while at the courthouse and would certainly be expected to be at the courthouse from time to time, the courthouse is not the attorney's office. In the same way, Fresenius Medical Group is not the office of the doctor.

16. Having determined that the notice in this case was not properly served under M.R.C.P. 5(b), this court is compelled to dismiss this case without prejudice for "failure to provide pre-suit notice as required under Mississippi Code Annotated section 15-1-36(15)." Hans v. Memorial Hosp. at Gulfport, 40 So. 3d 1270, 1273 (¶5) (Miss. Ct. App. 2010)

**IT IS THEREFORE ORDERED and ADJUDGED** and for the reasons stated above, this cause is hereby **DISMISSED** without prejudice.

**SO ORDERED and ADJUDGED** this the 29 day of March, 2011.

  
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CIRCUIT JUDGE