

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-CA-00506 COA**

**M. L. DYKES, INDIVIDUALLY AND ON BEHALF
OF THE WRONGFUL DEATH BENEFICIARIES OF
LEROY THOMAS DYKES**

APPELLANT

v.

**SANTHOSH K. REDDY, M.D., AND FORREST
COUNTY GENERAL HOSPITAL**

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED,
PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	02/09/96
TRIAL JUDGE:	HON. RICHARD MCKENZIE
COURT FROM WHICH APPEALED:	FORREST COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	KENNETH WOMACK
ATTORNEYS FOR APPELLEES:	R. WEB HEIDELBERG JOE D. STEVENS
NATURE OF THE CASE:	CIVIL - WRONGFUL DEATH
TRIAL COURT DISPOSITION:	SUMMARY JUDGMENT GRANTED TO APPELLEES
DISPOSITION:	AFFIRMED - 01/13/98
MOTION FOR REHEARING FILED:	1/27/1998
CERTIORARI FILED:	
MANDATE ISSUED:	

BEFORE BRIDGES, C.J., COLEMAN, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Summary judgment was granted to Forrest County General Hospital, one of several defendants in this medical malpractice action. The plaintiff, M. L. Dykes, appeals alleging that material facts remain because discovery had not yet been completed and "evidence may be forthcoming." Summary judgment was not sought until two years after the complaint was filed, and thus ample time for discovery had passed. We affirm.

STATEMENT OF FACTS

Leroy Dykes was referred by his personal physician to the radiology group at Forrest County General Hospital. Dykes needed an MRI performed on his knee. As the MRI procedure commenced, Dykes's daughter, who had accompanied him, advised one of the staff that Mr. Dykes had a pacemaker. The procedure was stopped. It is alleged that subsequent health problems relating to his pacemaker resulted from the exposure to the electromagnetism of the MRI machine. Approximately a year later Mr. Dykes died.

Suit was brought against Dr. Santhosh K. Reddy, who was the physician treating Mr. Dykes and who ordered the MRI study. Also joined was Forrest County General Hospital and "Defendants A-Z" who are "other health care providers who were involved in the preparation for or performance of the MRI study. . . ." Subsequently joined as defendants were the Hattiesburg Radiology Group, P.A., and Brian Highnote, who was the radiology group's employee who actually performed the MRI.

The hospital moved for summary judgment on the grounds that the radiology group was completely independent of the hospital. By affidavit and other evidence the hospital showed that the radiology group was a general partnership of physicians over which the hospital had no control or ownership, and did not share in the profits or the losses. Summary judgment was granted for the hospital, while the suit continued against the remaining parties. The court certified that there was no just reason to delay entry of a final judgment under Rule 54(b). From that judgment Dykes has appealed.

DISCUSSION

The parties agree that two cases handed down by the Mississippi Supreme Court on May 22, 1985, control the outcome of this appeal. They cannot agree, unsurprisingly, on how the rules established in those decisions are to be applied.

To understand the discussion of those precedents, we first set out the undisputed facts of this case. The Hattiesburg Radiology Group, P.A., had a contract to operate at the Forrest County General Hospital. The radiology group contractually had "full responsibility" for the operation of the hospital's radiology department, including training and supervision of technicians. The technician who began the MRI on Mr. Dykes was not an employee of the hospital, but only of the radiology group.

Mr. Dykes was a patient of Dr. Reddy. It was Dr. Reddy who ordered the MRI and referred him to the radiology group. It is not clear how the referral was made. The plaintiffs allege that Dr. Reddy merely referred Dykes to the hospital's radiology department, and that as a consequence he had no idea that the independent radiology group was at the hospital. Regardless, it is evident that Dykes was specifically referred to radiology at the hospital.

We next turn to the two 1985 supreme court opinions. Until 1985 there was no vicarious or respondeat superior liability for a hospital for acts of negligence that may have occurred within its building. There was certainly liability when agents and employees of the hospital were liable. In a lengthy opinion by Justice Robertson that surveyed the thoughtful case law from other states, the court announced a new rule.

Where a hospital holds itself out to the public as providing a given service, in this instance, emergency services, and where the hospital enters into a contractual arrangement with one or more physicians to direct and provide the service, and where the patient engages the services of

the hospital without regard to the identity of a particular physician and where as a matter of fact the patient is relying upon the hospital to deliver the desired health care and treatment, the doctrine of respondeat superior applies and the hospital is vicariously liable for damages proximately resulting from the neglect, if any, of such physicians. By way of contrast and distinction, where a patient engages the services of a particular physician who then admits the patient to a hospital where the physician is on staff, the hospital is not vicariously liable for the neglect or defaults of the physician.

***Hardy v. Brantley*, 471 So. 2d 358, 371 (Miss. 1985).**

That same day the court decided a case that the hospital states factually fits the last part of the *Brantley* quote which concerns the referral by a physician to a specific doctor at a hospital. ***Trapp v. Cayson*, 471 So. 2d 375 (Miss. 1985).** In *Trapp* a patient was treated by his personal physician, who then referred him for radiology services. As the court stated, the "record is not clear as to whom he ordered the arteriogram from, but it is reasonable to infer that he ordered it from Dr. Trapp or Radiology of Tupelo, P.A., since the latter is the only radiological clinic in Tupelo." ***Id.* at 384.** In our case, though we do not have any actual referral document or other evidence, it is conceded that Mr. Dykes's personal physician referred him with some sort of formal or informal designation to the radiology group at the hospital.

Trapp, which found no vicarious liability of the hospital, is as factually close as a precedent normally can be, even to being the same sort of services (radiology) that were acquired through referral and the same imprecision in the record as to exactly how the referral was done. Yet Dykes claims some distinctions that allows the case against the hospital to continue. Dykes points out that discovery was not yet completed. Dykes argues that it is possible that hospital personnel had an obligation to screen patients by asking questions that would have uncovered the fact of a pacemaker. There is no evidence in the record regarding whether hospital employees served that function. What evidence there is shows that the hospital had no control over the "operations of the radiology department" and could not direct the "manner in which they perform their services."

Trapp again appears factually similar. There nurses may have obtained the patient's signature on a consent form. However, the nurses did not explain the form or the risks; the independently employed physician did so. The court stated its "opinion that the nurses, in obtaining Cayson's signature to the consent instrument and witnessing same, did not impose liability" on the hospital. ***Id.* at 384.** The paperwork function of acquiring a signature, but having no role in the patient's understanding of what was being signed, rightly does not create liability.

This case law permits the argument that had a hospital employee been tasked with acquiring relevant information on Mr. Dykes before the MRI procedure began, liability might arise. The hospital's affidavit denies that any hospital "employee participated in or performed the MRI procedure or any part thereof on Mr. Dykes." Sixteen months after the complaint was filed, the circuit court clerk gave notice that the case would be dismissed for failure to prosecute, but Dykes responded that informal discovery was proceeding. The court agreed the suit could continue. The record reveals that even after that ruling no discovery notices or requests were filed.

At some stage a party may not respond to summary judgment just by stating that additional facts may be uncovered. Speculation is not evidence. As Justice Sullivan wrote for the court, summary

judgment will not be denied in order that discovery may be pursued if the litigant has already been dilatory. *Marx v. Truck Renting & Leasing Ass'n*, 420 So. 2d 1333, 1344 (Miss. 1987). In that case, five months had passed during which time the litigant "did not attempt to avail himself to the mechanisms of discovery." *Id.*, (citing *Aviation Specialties, Inc. v. United Technologies Corp.*, 568 F. 2d 1186, 1189 (5th Cir. 1978)) (failure to conduct discovery case for six months after complaint filed). Dykes made no attempt by affidavit or otherwise to show that discovery had been sought and had in some way been thwarted. **M.R.C.P. 56 (f)**. Two years after the suit was filed, Dykes in essence wanted more time to seek his first formal discovery. The *Marx* court refused an appellant's plea for more time to find answers when after five months of a suit's existence, the litigant "sought no orders for production of documents, submitted no interrogatories and deposed no witnesses" *Marx*, 520 So. 2d at 1344. That describes this suit, except that it was twenty-six months that had passed. In another case the court held that eight months was sufficient time "to uncover any existing evidence of significant and probative value" *McQueen v. Williams*, 587 So. 2d 918, 924 (Miss. 1991); see also *Erby v. North Mississippi Medical Center*, 654 So. 2d 495, 502 (Miss. 1995). At the trial level Dykes's sole request for more time was this: "As discovery unfolds, the plaintiff should be allowed time to inquire into this issue and further develop the facts."

More discovery time was not required. Thus, if the hospital by affidavit and other evidence presented adequate evidence to dispute the claim against it, which was then unrebutted factually, it was entitled to judgment. The hospital stated that it had no participation in any part of the MRI procedure. Dykes's response in the trial court was to state that such lack of involvement might constitute a negligent omission. One way to read that statement is that it disputes the holding in *Trapp*, i.e., Dykes argues that the failure of a hospital to participate creates liability. *Trapp* clearly contemplates a hospital's right to withdraw totally from radiology services.

Dykes also pointed to contract language that the hospital could insist on the termination of radiology group employees. That limited right does not override the explicit contract denial of a hospital obligation to supervise. The only manner in which the hospital's termination right might benefit Dykes is if Dykes could show that the allegedly negligent employee had previously failed to meet the standards of care, that the hospital should have been aware, and that the hospital should have insisted on the employee's termination. None of that was even suggested, much less proved.

The point upon which Dykes contested summary judgment is in fact a disagreement with *Trapp* itself. It is argued that Dykes did not know the radiology group was independent of the hospital and it was the hospital's reputation that caused him to go there. In fact, *Trapp* instructs that contractual division of responsibility between a hospital and an independent operating group will be upheld when the patient is referred to that group by the patient's own physician. This was not an emergency room, self-referral situation such as in *Hardy*, in which as a consumer of medical services a patient determines based on a variety of factors including perhaps reputation that a certain hospital will be used. That a patient who is referred to a radiology group is not privy to the contractual terms governing that group's operation is irrelevant, as it was the referring doctor's decision that chose the provider of the service and not the patient's.

On appeal, however, Dykes raises with us a narrow reading of the hospital's affidavit that he at most raised only elliptically in his written materials below (we have no transcript of any oral argument). He argues that the affidavit does not explicitly deny involvement in asking questions of a patient before

the procedure began. Perhaps the hospital was being quite precise with its words, but it was certainly a reasonable reading of the affidavit that the hospital was denying a connection to all MRI procedures, including the processing of a patient. The only evidence before the court in ruling on the motion was that what occurred here was exactly the same as what occurred in *Trapp*. Dykes's arguments below in his brief or his own affidavit did not mention the speculative participation of hospital employees as the ones who asked the in-processing questions.

Summary judgment is a valuable tool to determine whether facts are in dispute or only the legal implications of undisputed facts. Summary judgment should not be granted strictly on affidavits that deny liability unless the affidavits reasonably can be read to deny liability completely. If liability is fully denied, it is for the plaintiff to show a dispute in some of the assertions through competing affidavits or other competent evidence. As Rule 56 states, judgment should be granted for either side only if all the evidence on the motion indicates that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." M.R.C.P. 56 (c). Only addressing some of the facts necessary for judgment, even if no affidavits in opposition were filed, would not show that the moving party "was entitled to judgment. . . ."

A fair reading of the hospital's affidavit was that it fully denied liability and was based on assertions of fact from personal knowledge. Nothing in evidence disputed that. The only argument below was that there might be evidence of a negligent omission by the hospital that would be uncovered as "discovery unfolds. . . ." After much less than the two years that passed here, the supreme court has held that additional time for discovery was unnecessary. In fact, it was not even requested other than obliquely. We find that the trial court properly discharged its responsibilities.

**THE JUDGMENT OF THE CIRCUIT COURT OF FORREST COUNTY IS AFFIRMED.
ALL COSTS ARE ASSESSED TO THE APPELLANT.**

**BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, HERRING, HINKEBEIN,
AND PAYNE, JJ., CONCUR.**

DIAZ, J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY KING, J.

DIAZ, J., DISSENTING:

I respectfully dissent from the majority opinion. Summary judgment is a powerful tool which "should be used wisely and sparingly." *Martin v. Simmons*, 571 So. 2d 254, 258 (Miss. 1990). It should only be granted when "there is no genuine issue as to any material fact." M.R.C.P. 56(c). In the case under consideration, the appellant's father died after an MRI was performed on his knee at Forrest County General Hospital. The appellant argues that there was a genuine issue of material fact as to whether the hospital was liable for the actions of the radiology department. The hospital responds that the radiology group and the hospital are completely separate legal entities and that the hospital

has no control over the actual services rendered by the group. The trial court apparently accepted the hospital's viewpoint and concluded that summary judgment should be granted in favor of the hospital. At the time the court dismissed the appellant's lawsuit, discovery had not yet been completed. The trial judge failed to consider that perhaps evidence would be revealed through discovery which would disclose the hospital's breach of duty to the decedent. It is for this reason that "[w]e urge caution in the granting of summary judgment." *Martin*, 571 So. 2d at 258. The appellant should have been allowed to bring forth evidence in support of his claim. The trial court's failure to provide him with this opportunity was clearly error. Therefore, I would reverse the trial court's grant of summary judgment and direct the court to allow the appellant to gather and present evidence of the hospital's wrongdoing.

KING, J., JOINS THIS SEPARATE OPINION.