Serial: 196487

IN THE SUPREME COURT OF MISSISSIPPI

No. 2013-IA-02068-SCT

JOHN H. MALLETT, M.D., STEPHEN C. JONES, M.D., BILOXI OBGYN CLINIC, P.A., RONNIE ALI, D.O., DOUGLAS MCBRIDE, M.O., PARAGON CONTRACTING SERVICES, INC., AND GPCH-GP, INC., d/b/a GARDEN PARK MEDICAL CENTER

v.

AMY DYE AND TODD DYE

EN BANC ORDER

Four of the justices of this Court are of the opinion that the judgment of the Circuit Court of the First Judicial District of Harrison County should be affirmed, and four are of the opinion that it should be reversed; consequently, that judgment must be, and is, affirmed. *See* ***Rockett Steel Works v. McIntyre***, 15 So. 2d 624 (Miss. 1943). This result was first dictated by Chief Justice Marshall for the United States Supreme Court, as follows:

> ***No attempt will be made to analyze [the parties' arguments and cited cases], or to decide on their application to the case before us, because the Judges are divided respecting it.*** Consequently, the principles of law which have been argued cannot be settled; but the judgment is affirmed, the court being divided in opinion upon it.

Etting v. Bank of United States, 24 U.S. 59, 78, 6 L. Ed. 419 (1826) (emphasis added).

Four decades later, Justice Field addressed the effect of affirmance by a divided court in ***Durant v. Essex Co.***, 74 U.S. 107, 19 L. Ed. 154 (1868).

> There is nothing in the fact that the judges of this court were divided in opinion upon the question whether the decree should be reversed or not, and, therefore, ordered an affirmance of the decree of the court below. The judgment of affirmance was the judgment of the entire court. The division of opinion between the judges was the reason for the entry of that judgment; *but the reason is no part of the judgment itself*.

Durant, 74 U.S. at 110 (emphasis added).

Subsequently, the U.S. Supreme Court reaffirmed this principle.

> It is obvious that that which has been done must stand unless reversed by the affirmative action of a majority. *It has therefore been the invariable practice to affirm, without opinion, any judgment or decree which is not decided to be erroneous by a majority of the court sitting in the cause*. . . . [A]n affirmance by an equally divided court is . . . a conclusive determination and adjudication of the matter adjudged; but the principles of law involved not having been agreed upon by a majority of the court sitting *prevents the case from becoming an authority for the determination of other cases, either in this or in inferior courts*.

Hertz v. Woodman, 218 U.S. 205, 212-14, 30 S. Ct. 621, 622-23, 54 L. Ed. 1001 (1910) (emphasis added).

We followed this same principle in ***Beecham v. State***, 108 So. 3d 394 (Miss. 2012), holding that "as the judgment of the Court of Appeals has not been decided to be erroneous by a majority of the justices sitting in this case, we affirm, *without opinion*, the judgment of the Court of Appeals." ***Beecham***, 108 So. 3d at 394 (emphasis added).[1]

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[1] While this Court remains silent on the case *sub judice* and stands on the Order entered which affirms the circuit court, today's objection posits today's Order "ignores the law" and "violates the statute." This Order honors the law, a legal principle announced one year shy of 180 years ago, and the Mississippi Rules of Civil Procedure which govern all proceedings in circuit courts. *See* Miss. R. Civ. P. 1, 2, 19, 42, 81, *inter alia*. Would the objectors be so adamant had the trial judge faced the same decision in a wrongful death suit? *See* ***Long v. McKinney***, 897 So. 2d 160, 174 (Miss. 2004) (Court held "in wrongful death litigation, all claims shall be joined in one suit.").

Accordingly, as the judgment of the trial court has not been decided to be erroneous by a majority of the justices sitting in this case, we affirm, without opinion, the judgment of the Circuit Court of the First Judicial District of Harrison County, and we remand this case for further proceedings consistent with this court's judgment of affirmance.

SO ORDERED, this the 20th day of May, 2015.

/s/ Michael K. Randolph

MICHAEL K. RANDOLPH,
PRESIDING JUSTICE

DICKINSON, P.J., OBJECTS TO THE ORDER WITH SEPARATE WRITTEN STATEMENT JOINED BY PIERCE AND COLEMAN, JJ.

WALLER, C.J., NOT PARTICIPATING.

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v.

AMY DYE AND TODD DYE

DICKINSON, PRESIDING JUSTICE, OBJECTING TO THE ORDER WITH SEPARATE WRITTEN STATEMENT:

¶1. It should come as no surprise that four justices on this Court refuse to join this order which ignores the law[2] by permitting Amy and Todd Dye to proceed with a medical malpractice lawsuit against Dr. John Mallett, Dr. Stephen Jones, and Biloxi OBGYN Clinic (the "Biloxi Defendants") in the First Judicial District of Harrison County. Section 11-11-3 clearly states that

> *any* action against a licensed physician, . . . including any legal entity which may be liable for their acts or omissions, for malpractice, negligence, error, omission, mistake, breach of standard of care . . . *shall be brought only* in the county in which the alleged act or omission occurred.[3]

¶2. This order violates the statute by allowing this medical negligence lawsuit against the Biloxi Defendants to proceed in the First Judicial District of Harrison County, even though

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[2] The four justices who join this order are quick to point out their view that the *form* of the order is in compliance with the law, but they fail to address how their clear violation of Section 11-11-3 could be in compliance with the law.

[3] Miss. Code Ann. § 11-11-3 (Rev. 2004) (emphasis added).

it is undisputed that they did not commit any negligent act or omission there. Section 11-1-53 provides that "[i]n Harrison County . . . all civil actions shall be commenced in each of the two (2) judicial districts against defendants as if each district were a separate county."[4] Again, those who have joined this order provide no explanation as to why they do not follow the statute.

¶3. It is true that proceeding with this lawsuit in faithful compliance with Section 11-11-3 would require two lawsuits; one against the Gulfport defendants in Harrison County's First Judicial District, and the other against the Biloxi defendants in its Second. But any displeasure or concern with this statutorily required result should be directed to the Legislature, not by judicially amending the statute, which is precisely what today's order accomplishes.

PIERCE AND COLEMAN, JJ., JOIN THIS SEPARATE WRITTEN STATEMENT.

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[4] Miss. Code Ann. § 11-1-53 (Rev. 2014).