

IN THE CIRCUIT COURT FOR ROBERTSON COUNTY, TENNESSEE

DWIGHT HENDERSON, on behalf of his )  
deceased wife, WENDELL GAIL )  
HENDERSON, and individually, )

Plaintiff, )

vs. )

NORTHCREST MEDICAL CENTER, )  
BRUCE WALLSTEDT, M.D., )  
SOUTHEASTERN EMERGENCY )  
PHYSICIANS of MEMPHIS, INC., DEANIA )  
TOWNS, PAC, and SOUTHEASTERN )  
EMERGENCY SERVICES of MEMPHIS, )  
P.C., )

Defendants. )

FILED  
LISA M. CAVENDER, CLERK

JAN 15 2010

AT 2:00 O'CLOCK P.M.  
BY S. Englander

No. 12398  
No. 74CC1-2009-CV-238  
JURY DEMAND(12)

**PLAINTIFF'S MOTION TO STRIKE PORTIONS OF DEFENDANTS',  
BRUCE WALLSTEDT, M.D., SOUTHEASTERN EMERGENCY PHYSICIANS OF  
MEMPHIS, INC., DEANIA TOWNS, PAC, AND SOUTHEASTERN EMERGENCY  
SERVICES OF MEMPHIS, P.C., ANSWER TO  
PLAINTIFF'S CONSOLIDATED AMENDED COMPLAINT**

Pursuant to Tenn. R. Civ. P. 12.06, Plaintiff, Dwight Henderson, on behalf of his deceased wife, Wendell Gail Henderson, and individually, moves this Honorable Court to strike paragraph 2 under the heading "Affirmative Defenses" in Defendants', Bruce Wallstedt, M.D., Southeastern Emergency Physicians of Memphis, Inc., Deania Towns, PAC, and Southeastern Emergency Services of Memphis, P.C. (collectively the "Defendants"), Answer to Plaintiff's Consolidated Complaint.

In paragraph 2 under "Affirmative Defenses," Defendants do not actually assert an affirmative defense. Instead, Defendants are attempting to "reserve" their rights to amend their

Answer to assert the comparative fault of Wendell Gail Henderson in the event proof at trial shows Mrs. Henderson contributed to her death.

Paragraph 2 under "Affirmative Defenses" should be stricken from Defendants' Answer as insufficient under Rule 8.03 because Defendants are required to state the facts in their pleadings that support their allegations of comparative fault of Mrs. Henderson if Defendants intend to rely on such an affirmative defense at trial. Also, Tennessee's pleading rules do not provide a party with a "right" to reserve the ability to later assert an affirmative defense. Under Rule 8.03, Defendants must either plead the affirmative defense of comparative fault against Mrs. Henderson or choose not to.

Additionally, Defendants' pleading in paragraph 2 under "Affirmative Defenses" is effectively an impermissible, preemptive use of Rule 15.02. Defendants will not be able to successfully invoke Rule 15.02 at trial to assert fault against Mrs. Henderson because there is no possibility that both parties can or will consent, either expressly or impliedly, to Mrs. Henderson's fault being an issue at trial, as would be required under the rule. Plaintiff does not now, nor will he in the future, consent to Defendants asserting affirmative defenses at trial that have not been properly pled pursuant to Rule 8.03.

Plaintiff submits a contemporaneously filed memorandum of law in support of this motion.

WHEREFORE, Plaintiff asks that the Court grant Plaintiff's motion to amend and enter Plaintiff's Consolidated Complaint for filing.

**THIS MOTION IS EXPECTED TO BE HEARD ON TUESDAY, MARCH 2<sup>nd</sup>, 2010 AT 9:00 A.M. ON THE COURT'S REGULAR MOTION DOCKET. FAILURE TO FILE AND SERVE A TIMELY RESPONSE MAY RESULT IN THE MOTION BEING GRANTED WITHOUT FURTHER HEARING.**

Respectfully submitted,



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Attorneys for Plaintiff

**CERTIFICATE OF SERVICE**

I hereby certify that a true and exact copy of the foregoing was mailed, postage prepaid, this the 15<sup>th</sup> day of January 2010, to the following:

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R. Burke Keaty, II