

EXHIBIT 6



AlaFile E-Notice

01-CV-2012-001045.00

Judge: CAROLE C. SMITHERMAN

To: AGBOOLA ADEAPO TAIWO
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NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

ROBERTA CLARK VS PLANNED PARENTHOOD OF GEORGIA INC ET AL
01-CV-2012-001045.00

The following matter was FILED on 9/19/2014 3:18:48 PM

D004 PLANNED PARENTHOOD SOUTHEAST, INC

D003 UMOREN AQUA DON E DR MD

MOTION TO DISMISS PURSUANT TO RULE 12(B)

[Filer: MCCALLUM CHARLES ALEXANDE]

Notice Date: 9/19/2014 3:18:48 PM

ANNE-MARIE ADAMS
CIRCUIT COURT CLERK
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01-JEFFERSON

District Court Circuit Court

CV20

ROBERTA CLARK VS PLANNED PARENTHOOD OF GEORGIA INC ET AL

CIVIL MOTION COVER SHEET

Name of Filing Party: D003 - UMOREN AQUA DON E DR MD
 D004 - PLANNED PARENTHOOD SOUTHEAST, INC

Name, Address, and Telephone No. of Attorney or Party. If Not Represented.

CHARLES A MCCALLUM III
 905 Montgomery Highway, Suite 201
 VESTAVIA HILLS, AL 35216
 Attorney Bar No.: MCC052

Oral Arguments Requested

TYPE OF MOTION

Motions Requiring Fee

Motions Not Requiring Fee

- Default Judgment (\$50.00)
 Joinder in Other Party's Dispositive Motion (i.e. Summary Judgment, Judgment on the Pleadings, or other Dispositive Motion not pursuant to Rule 12(b)) (\$50.00)
- Judgment on the Pleadings (\$50.00)
- Motion to Dismiss, or in the Alternative Summary Judgment(\$50.00)
 Renewed Dispositive Motion(Summary Judgment, Judgment on the Pleadings, or other Dispositive Motion not pursuant to Rule 12(b)) (\$50.00)
- Summary Judgment pursuant to Rule 56(\$50.00)
- Motion to Intervene (\$297.00)
- Other _____
 pursuant to Rule _____ (\$50.00)

- Add Party
- Amend
- Change of Venue/Transfer
- Compel
- Consolidation
- Continue
- Deposition
- Designate a Mediator
- Judgment as a Matter of Law (during Trial)
- Disburse Funds
- Extension of Time
- In Limine
- Joinder
- More Definite Statement
- Motion to Dismiss pursuant to Rule 12(b)
- New Trial
- Objection of Exemptions Claimed
- Pendente Lite
- Plaintiff's Motion to Dismiss
- Preliminary Injunction
- Protective Order
- Quash
- Release from Stay of Execution
- Sanctions
- Sever
- Special Practice in Alabama
- Stay
- Strike
- Supplement to Pending Motion
- Vacate or Modify
- Withdraw
- Other _____
 pursuant to Rule _____ (Subject to Filing Fee)

*Motion fees are enumerated in §12-19-71(a). Fees pursuant to Local Act are not included. Please contact the Clerk of the Court regarding applicable local fees.

Local Court Costs \$ _____

Check here if you have filed or are filing contemporaneously with this motion an Affidavit of Substantial Hardship or if you are filing on behalf of an agency or department of the State, county, or municipal government. (Pursuant to §6-5-1 Code of Alabama (1975), governmental entities are exempt from prepayment of filing fees)

Date:
 9/19/2014 3:15:11 PM

Signature of Attorney or Party:
 /s/ CHARLES A MCCALLUM III

*This Cover Sheet must be completed and submitted to the Clerk of Court upon the filing of any motion. Each motion should contain a separate Cover Sheet.
 **Motions titled 'Motion to Dismiss' that are not pursuant to Rule 12(b) and are in fact Motions for Summary Judgments are subject to filing fee.

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

ROBERTA CLARK,

Plaintiff,

v.

**PLANNED PARENTHOOD OF
GEORGIA, INC., ET AL.,**

Defendants.

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Case No.: CV-2012-01045

ORAL ARGUMENT REQUESTED

MOTION TO DISMISS AND/OR TO STRIKE

COME NOW Defendants Planned Parenthood Southeast, Inc. (“PPS”) and Dr. Aqua Don Umoren (“Umoren”) (at times referred to collectively as “Defendants”) and move this Honorable Court to dismiss and/or strike certain new claims raised in Plaintiff’s Amended Complaint, and in support thereof show as follows:

I. INTRODUCTION

Plaintiff, Roberta Clark (“Clark” or “Plaintiff”) initially commenced this medical malpractice action on August 9, 2012 against Planned Parenthood of Georgia, Planned Parenthood of Alabama, and Dr. Aqua Don Umoren (hereinafter “Original Complaint”). The medical malpractice that is the subject of the Original Complaint was alleged to have occurred on August 20, 2010. *See* Original Complaint, ¶7. Specifically, the Plaintiff alleged that on **August 20, 2010**, the Defendants negligently or wantonly failed to diagnose an ectopic pregnancy. Original Complaint, ¶¶7, 22. Plaintiff subsequently amended her Original Complaint on January 21, 2013 (hereinafter “First Amended Complaint”), to substitute Planned Parenthood Southeast as the proper party in place of Planned Parenthood of Georgia and Planned Parenthood of Alabama, and adopted and incorporated the allegations and claims set forth in the Original Complaint.

More than four (4) years after the alleged malpractice occurred, Plaintiff again amended her Complaint on September 2, 2014 (hereinafter “Second Amended Complaint”). The Second Amended Complaint includes two (2) new parties, Physicians Laboratory Service, Inc. and Dr. Michael B. Rohlfing. The Second Amended Complaint also added a hodgepodge of new allegations and causes of action against Defendants PPS and Umoren. The new allegations and claims identify additional occurrences and events that allegedly constitute malpractice committed by PPS and Umoren.

For the reasons set forth below, the newly alleged occurrences and events allegedly constituting malpractice are due to be dismissed and/or stricken because they are (a) barred by the statute of limitations; (b) fail to state a claim under Rule 12(b)(6) Ala.R.Civ.P.; or (c) should be stricken from the pleadings because the allegations are insufficient, immaterial or impertinent to the underlying action pursuant to Rule 12(f) Ala.R.Civ.P.

II. THE CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

Under the Alabama Medical Liability Act (“AMLA”), any action for damages against a health care provider, whether in contract or tort, are governed by AMLA. *See* §6-5-551 *Ala. Code* (1975). It is undisputed that the Defendants are health care providers and consequently the allegations and claims contained in the Second Amended Complaint are subject to AMLA. Under AMLA, the statute of limitations for malpractice claims, whether sounding in tort or contract, is two (2) years from the date of occurrence. *See* §6-5-482 *Ala. Code* (1975).

In her Original Complaint and First Amended Complaint, Plaintiff alleges that the specific events that gave rise to her malpractice claims occurred on August 20, 2010. *See* Original Complaint, ¶¶7, 22.

The Plaintiff's Second Amended Complaint now asserts new occurrences and events that occurred on August 10, 2010 and September 16 or 17, 2010. *See* Second Amended Complaint, ¶¶20, 29, 30, 37, 39(vi)(vii)(viii), 66, 67, 68, 69. In particular, the new allegations of malpractice that are alleged to have occurred relate to (a) an unidentified staff member, who was allegedly not qualified, committed malpractice during the course of providing treatment to the Plaintiff on August 10, 2010; and (b) the Defendants allegedly failed to inform the Plaintiff that her pregnancy had not been successfully terminated when they received a pathology report on September 16 (or 17th), 2010.

These are new and separate events of malpractice that are not related to the events of alleged malpractice that occurred on August 20, 2010 that are subject to the Plaintiff's Original Complaint and First Amended Complaint. Consequently, under Rule 15(c) the new events of malpractice do not relate back to the filing of Plaintiff's Original Complaint and are barred by the two (2) year statute of limitations contained in §6-5-482 *Ala. Code* (1975). *See Prior v. Cancer Surgery of Mobile, P.C.*, 959 So.2d 1091 (Ala. 2006).

III. FAILURE TO STATE CLAIMS

In addition, many of the new allegations and claims asserted in the Second Amended Complaint fail to state a claim under Rule 12(b)(6) Ala.R.Civ.P.

The Second Amended Complaint purportedly asserts malpractice and fraud claims for allegedly failing to inform the Plaintiff of the results of a pathology report the Defendants received on September 16 or 17, 2010. *See* Second Amended Complaint, ¶¶29, 30. According to the Plaintiff, the Defendants allegedly negligently, wantonly or fraudulently failed to inform Plaintiff of the contents of the reports. *See* Second Amended Complaint, ¶¶39(viii), 66, 67, 68, 69.

It is axiomatic to any cause of action that the Plaintiff must establish that the Defendants' act or omission caused an injury or damage to the Plaintiff. *See Wilson v. Gayfers Montgomery Fair Co.*, 953 F.Supp. 1415, 1423-1424 (M.D.Ala. 1996) (granting summary judgment motion on fraud claim because plaintiff "failed to show that he was damaged as a proximate result of any misrepresentation made by the defendants."); *see also* MARSHALL GAMBLE, ALABAMA LAW OF DAMAGES, §1:2 (5th ed. 2004) ("[d]amage to the person or property rights of the plaintiff is an essential element of a viable cause of action").

On the face of her Second Amended Complaint, the Plaintiff has alleged and demonstrated that she cannot successfully maintain a claim for the Defendants' alleged failure to promptly inform her of the contents of the pathology reports the Defendants received on September 16 or 17, 2010. Plaintiff can not assert that Defendants caused her injury. As specifically alleged in the Second Amended Complaint, the Plaintiff's damages and injuries occurred prior to the time that the Defendants received the pathology reports on either September 16 or 17, 2010:

33. **On September 14, 2010**, plaintiff presented to emergency department of BMC Princeton Medical Center in Birmingham Alabama with complaints of pain, nausea, vomiting and left lower quadrant pain.
34. **On September 14, 2010** following physical examination and ultrasound testing at the emergency department of BMC Princeton Medical Center, the ultrasound showed evidence of a 13-week gestation that was extrauterine involving left adnexa (fallopian tube), this finding prompted emergency admission of plaintiff for surgical intervention, pain management and treatments.
35. **On September 15, 2010**, at BMC-Princeton Medical Center, plaintiff underwent a laparoscopy with conversion to laparotomy for ruptured ectopic pregnancy to remove a 13-week fetus and the placenta.

Second Amended Complaint, ¶¶33, 34, 35 (emphasis added); *see* ¶69 “...their mis-diagnosis of ectopic pregnancy thereby causes the plaintiff to suffer ruptured ectopic pregnancy on September 15, 2010.”

Thus, assuming *arguendo*, that the Plaintiff could establish that the Defendants somehow breached their duty or standard of care on September 16 or 17, 2010 by failing to inform the Plaintiff of the pathology reports promptly upon receipt of the reports, she cannot allege, claim or establish that she would have acted differently or have taken measures to avert the injuries and damages that are the subject of her claims.

This Court should also dismiss Count IV of Plaintiff’s Amended Complaint pursuant to Ala. R. Civ. P. 12(b)(6) because Plaintiff fails to state the basic elements for a claim for fraudulent suppression. Under Alabama law, a plaintiff must allege four (4) elements to properly plead a fraudulent suppression or concealment claim:

- (1) the defendant had a duty to disclose material facts;
- (2) the concealment/non-disclosure of material facts by the defendant;
- (3) that induced the plaintiff to act or refrain from acting; and,
- (4) injury resulting as a proximate consequence of the concealment.

See Allstate Ins. Co. v. Ware, 824 So. 2d 739 (Ala. 2002).

The Second Amended Complaint must therefore contain allegations concerning a duty to disclose and the inducement of the Plaintiff to act in order to properly state a suppression claim. In this case, Plaintiff’s Second Amended Complaint does not allege the existence of a confidential relationship or that the Defendants’ alleged suppression induced Plaintiff to act to her detriment. Thus, the Plaintiff has failed to plead all elements of a suppression claim under Alabama law, and

this Court should dismiss Count IV pursuant to Ala. R. Civ. P. 12(b)(6).

Plaintiff's allegations and causes of action against Defendants regarding Dr. Umoren and PPS's liability for the alleged "unqualified staff members"¹ treatment of Plaintiff should be dismissed as well. The Second Amended Complaint repeatedly alleges that Plaintiff was negligently treated by a "female staff," "a staff member who was not qualified," a "female employee," or "unqualified or untrained employees." See ¶¶ 15-18, 20-22, 47, 48, 61 and 62. AMLA requires all claims to be pled with a "detailed specification and factual description" of each AMLA claim. See §6-5-551, *Ala. Code* (1975). Plaintiff has failed to make any specific allegations regarding the alleged negligent acts of the unknown female staff member that purportedly caused her injury or to even identify the unknown female staff member. Defendants cannot be expected to defend a medical malpractice claim based on the qualifications of an unknown mystery woman. As such, Plaintiff does not meet AMLA's heightened pleading requirements because Plaintiff cannot identify the staff member that allegedly acted negligently, let alone provide a "detailed specification" of the deficiencies in an employee's training and experience. Accordingly, the Court should dismiss all causes of action and strike all allegations in Plaintiff's Second Amended Complaint regarding the unknown and unqualified staff member. Specifically, Defendants request this Court to dismiss all causes of action regarding the negligent acts of the unknown employee in the Second Amended complaint and to strike all factual allegations regarding the unknown employee contained in ¶¶ 15 - 18, 20-22, 47, 48, 61 and 62 of the Second Amended Complaint.

¹The new claims asserted against the unnamed "unqualified" staff member are also due to be dismissed because the statute of limitations has run on any such claims because the claims were not asserted within the two (2) year statute of limitations and/or the Plaintiff has not acted diligently to identify the unnamed "unqualified" staff member.

Defendants move to strike any and all allegations in Plaintiff's Second Amended Complaint regarding breach of contract or a beneficiary to a third party contract. Under Alabama law, any action for damages against a health care provider, whether in contract or tort, is governed by the AMLA. Plaintiff makes several factual allegations regarding breach of contract, implied contracts and third party beneficiary of a contract. However, plaintiff asserts no causes of action for breach of contract in her Second Amended Complaint and, even if such a cause of action was now asserted it would be barred by AMLA's two (2) year statute of limitations. Accordingly, the Court should strike all allegations, specifically ¶¶8, 10, 11 and 37, regarding contract claims in the Second Amended Complaint.

IV. CERTAIN ALLEGATIONS SHOULD BE STRICKEN

Rule 12(f) Ala.R.Civ.P. allows the Court to strike from pleadings insufficient, immaterial or impertinent matters. As previously shown, the Plaintiff's Second Amended Complaint is filled with allegations that are immaterial and/or impertinent to the Plaintiff's claims and should be stricken. In addition, Defendants request that Plaintiff's allegations that "[i]n his deposition, Dr. Umoren lied under oath when he testified that he performed plaintiff's ultrasound and diagnosed uterine pregnancy when in fact he was did not perform ultrasound examination either to diagnose uterine pregnancy or rule out ectopic pregnancy." See ¶63 Second Amended Complaint. Not only do the Defendants vehemently disagree with the allegation, the allegation does not support and is not relevant or material to any of the Plaintiff's causes of actions.

V. CONCLUSION

Defendants reserve, and do not waive, any and all other affirmative defenses they may have to the Second Amended Complaint and specifically adopt and incorporate herein by reference and

all defenses previously raised.

For the foregoing reasons, Defendants respectfully request that the Court dismiss and/or strike from the Plaintiff's Second Amended Complaint the matters set forth herein.

Respectfully submitted this 19th day of September, 2014.

/s/ Charles A. McCallum, III

Charles A. McCallum, III

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CERTIFICATE OF SERVICE

This is to certify that on September 19, 2014, a true and correct copy of the foregoing was filed with the Clerk of the Court using the CM/ECF system, which automatically notifies counsel as follows:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served on all the defendants of record by U. S. Mail, postage prepaid, properly addressed, on September 19, 2014.

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/s/ Charles A. McCallum, III

COUNSEL