IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2010-CA-00743-COA

GERALD HEATH HUDSON AND ARTHUR GERALD HUDSON	**APPELLANT**
v.	
WLOX, INC.	**APPELLEE**

DATE OF JUDGMENT:	10/20/2009
TRIAL JUDGE:	HON. JOHN C. GARGIULO
COURT FROM WHICH APPEALED:	HARRISON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	JIM WAIDE
ATTORNEYS FOR APPELLEE:	HENRY LAIRD SAMUEL TRENT FAVRE
NATURE OF THE CASE:	CIVIL - TORTS-OTHER THAN PERSONAL INJURY & PROPERTY DAMAGE
TRIAL COURT DISPOSITION:	VERDICT FOR DEFENDANT
DISPOSITION:	AFFIRMED - 05/08/2012
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

MAXWELL, J., FOR THE COURT:

¶1. The Mississippi Supreme Court has held pre-suit written notice is a prerequisite to filing a defamation suit against a television station.[1] The aggrieved person must specify in his or her pre-suit notice letter (1) the particular telecast and (2) statements in the telecast alleged to be false and defamatory.[2] Here, Gerald Heath Hudson (Heath) and Arthur Gerald

[1] *Brocato v. Miss. Publishers Corp.*, 503 So. 2d 241, 243 (Miss. 1987).

[2] Miss. Code Ann. § 95-1-5(1) (Rev. 2004).

Hudson (Gerald) sued WLOX, a Mississippi television station, for defamation. The Hudsons' pre-suit notice letter specified two telecasts and alleged WLOX "ran a fictitious story" making three false claims: (1) the Hudsons "were not licensed contractors"; (2) "they had been sued for defective work"; and (3) "they had never been licensed contractors in Mississippi." Their subsequent complaint brought the same allegations. The jury returned a verdict in favor of WLOX. The Hudsons appeal, arguing the circuit court erred in limiting the jury's consideration to the three statements. We disagree.

¶2. Because notice is a prerequisite to filing suit, and because a required element of notice is the specification of the statements alleged to be false and defamatory, we find the circuit court correctly held the Hudsons were limited to proving the publication and falsity of statements substantially similar to those in their pre-suit notice letter and complaint. We find no error in the trial judge instructing the jury accordingly. Thus, we affirm the jury's verdict in favor of WLOX.

FACTS AND PROCEDURAL HISTORY

¶3. Heath and Gerald, who are father and son, own H & H Construction. In 2005, they were framing a house for a relative, Wayne Fairley, when they got into a dispute with Fairley over nonpayment. They did not finish the framing job and filed a construction lien on the house.

¶4. A year later, when the Hudsons tried to foreclose on the lien, Fairley contacted a reporter for WLOX and claimed the Hudsons walked off the job after doing poor work. The reporter then called Heath, who told her Fairley's story was false. On June 21, 2006, WLOX

ran a story about Fairley's dispute with the Hudsons. The report was part of a series exposing the questionable actions by contractors in the aftermath of Hurricane Katrina. After the report, Heath's wife called the reporter who covered the story, insisting H & H was licensed. The reporter then interviewed Hudson's wife and re-interviewed Fairley. A second report ran June 26, 2006.

¶5. On August 30, 2006, the Hudsons' attorney sent WLOX a letter "concerning defamatory information, which you telecast . . . approximately June 1 [sic], 2006." The letter asserted WLOX "ran a fictitious story, claiming that [the Hudsons] were not licensed contractors, that they had been sued for defective work by Mr. Wayne Fairley and that they had never been licensed contractors in Mississippi." The Hudsons' attorney requested a copy of the initial report "as well as the retraction, which you ran the following Monday, June 5 [sic], 2006." He also asked WLOX to inform him "as to all reasons why you believe I should not commence suit against you for defamation . . . ."

¶6. WLOX did not respond to this letter. On October 17, 2006, the Hudsons filed a complaint against WLOX for defamation. The complaint made the same allegations as the pre-suit notice letter: "Defendant, on June 21, 2006, telecast a story, indicating that [the Hudsons] were not licensed contractors, that [they] had been sued for defective work and that [they] had never been licensed contractors in Mississippi."

¶7. The circuit court denied WLOX's motion for summary judgment, which had argued the Hudsons were limited to proving the falsity of the statements made in the letter.

However, it did grant WLOX's motion in limine, limiting the jury's consideration to the following statements in the letter and complaint:

> "[The Hudsons] were not licensed contractors";
>
> "they had been sued for defective work by Mr. Wayne Failey"; and
>
> "they had never been licensed contractors in Mississippi."

But the circuit judge separately instructed the jury that:

> Plaintiffs are not required to prove that they used the exact language "were not licensed contractors" or "had been sued for defective work by Wayne Fairley." They are only required to demonstrate that the Defendant made statements *substantially the same* as saying that Plaintiffs "were not licensed contractors" or *substantially the same* as saying they "had been sued for defective work by Wayne Fairley."

(Emphasis added).

¶8. The jury returned a verdict in favor of WLOX. The Hudsons filed a motion for a new trial, arguing the trial court erred when it instructed the jury that the Hudsons' defamation claim was limited to the statements in the letter. After the trial court denied their motion, the Hudsons timely appealed.

DISCUSSION

¶9. The Hudsons' appeal focuses on the pre-suit notice letter and its effect on their ability to bring a defamation suit against WLOX. The Hudsons argue the circuit court erred in limiting the jury's consideration to the three statements in the pre-suit notice letter. While the Hudsons acknowledge the supreme court has held notice is required before filing suit, they claim the subsequent lawsuit is not limited to the allegations in the notice. Further, the

Hudsons claim the supreme court in *Brocato v. Mississippi Publishers Corp*., 503 So. 2d 241, 243 (Miss. 1987) misinterpreted the pre-suit notice statute, Mississippi Code Annotated section 95-1-5(1) (Rev. 2004). They argue the statute, correctly interpreted, was intended to bar only the recovery of punitive damages—and not a suit for actual damages—if pre-suit notice is not given.

I. *Brocato* and the Requirement of Pre-suit Notice

¶10. As a preliminary matter, we address the Hudsons' argument the pre-suit notice statute has been wrongly interpreted. In *Brocato*, the supreme court held pre-suit written notice is a prerequisite to filing suit, not just to recovering punitive damages. *Brocato*, 503 So. 2d at 243. The Hudsons suggest failure to comply with section 95-1-5(1) was intended to bar punitive damages only, not the ability to bring suit for compensatory damages.[3] The

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[3] Mississippi Code Annotated section 95-1-5 states in its entirety:

> (1) Before any civil action is brought for publication, in a newspaper domiciled and published in this state or authorized to do business in Mississippi so as to be subject to the jurisdiction of the courts of this state, of a libel, or against any radio or television station domiciled in this state, the plaintiff shall, at least ten (10) days before instituting any such action, serve notice in writing on the defendant at its regular place of business, specifying the article, broadcast or telecast, and the statements therein, which he alleges to be false and defamatory.
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> (2) If it appears upon the trial that said article was published, broadcast or telecast in good faith, that its falsity was due to an honest mistake of the facts, and there were reasonable grounds for believing that the statements in said article, broadcast or telecast were true, and that within ten (10) days after the service of said notice a full and fair correction, apology and retraction was published in the same edition or corresponding issues of the newspaper in which said article appeared, and in as conspicuous place and type as was said

Hudsons acknowledge this court lacks authority to overrule Mississippi Supreme Court precedent. *Bevis v. Linkous Const. Co.*, 856 So. 2d 535, 541 (¶18) (Miss. Ct. App. 2003) (citation omitted). Even so, we are not convinced *Brocato* was wrongly decided.

¶11. In *Brocato*, the supreme court rejected the plaintiff's argument that the Legislature did not intend section 95-1-5 to be a prerequisite to filing suit. Instead, it found "the ten day notice required in § 95-1-5 is clearly a necessary preliminary step to the proper filing of a libel action . . . ." *Brocato*, 503 So. 2d at 243. "When the language of a statute is clear and unambiguous, the statute should be given its plain and obvious meaning." *Id.* (citing *Pinkton v. State*, 481 So. 2d 306, 309 (Miss. 1985); *MISS CAL 204, Ltd. v. Upchurch*, 465 So. 2d 326, 329 (Miss. 1986)). And according to our supreme court, "the language of § 95-1-15 [sic] is clear and unambiguous. 'Before any civil action is brought for publication of a libel[,] the plaintiff shall, at least ten (10) days before instituting any such action, serve notice in writing on the defendant.'" *Id.* (quoting Miss. Code Ann. § 91-1-5(1)).

> original article, or was broadcast or telecast under like conditions correcting an honest mistake, and if the jury shall so find, the plaintiff in such case shall recover only actual damages. The burden of proof of the foregoing facts shall be affirmative defenses of the defendant and pled as such.
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> (3) This section shall not apply to any publication concerning a candidate for public office made within ten (10) days of any primary, general or special election in which such candidate's candidacy for or election to public office is to be determined, and this section shall not apply to any editorial or to any regularly published column in which matters of opinions are expressed.

¶12. *Brocato* cited Florida's interpretation of its similarly worded notice statute.[4] *Id.* (citing *Ross v. Gore*, 48 So. 2d 412, 415 (Fla. 1950)). Like the Mississippi Supreme Court, the Florida Supreme Court held its "statute provides, in clear and unmistakable terms, that . . . the giving of notice in writing is a condition precedent to suit." *Ross*, 48 So. 2d at 415.

¶13. A year after *Brocato*, the United States District Court for the Northern District of Mississippi relied on *Brocato* to hold "[t]he plain language of the statute requires that plaintiff must serve a demand for retraction before any civil action is filed against a newspaper[, radio, or television station] for libel." *Pannell v. Associated Press*, 690 F. Supp. 546, 549 & n.2 (N.D. Miss. 1988). The district court expressly rejected the plaintiff's argument "that the retraction statement affects only plaintiffs' claim for punitive damages, not any claim for actual damages." *Id.* at 549. Instead, Judge Senter reinforced *Brocato*'s holding: "Other jurisdictions with similar retraction statutes hold that a retraction demand is an absolute prerequisite to a cause of action for libel." *Id.* (citing *Nelson v. Associated Press*, 667 F. Supp. 1468, 1473-75 (S.D. Fla. 1987) (applying Fla. Stat. Ann. § 770.01)). *See also* Wisc. Stat. Ann. § 895.05(2) (also requiring written notice "[b]efore any civil action

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[4] Florida Statutes Annotated section 770.01 (2011) states:

> *Before any civil action is brought* for publication or broadcast, in a newspaper, periodical, or other medium, of a libel or slander, the plaintiff shall, at least 5 days before instituting such action, serve notice in writing on the defendant, specifying the article or broadcast and the statements therein which he or she alleges to be false and defamatory.

(Emphasis added).

shall be commenced on account of any libelous publication in any newspaper, magazine or periodical").

II. The Sufficiency of Pre-Suit Notice

¶14. Cases that have addressed section 95-1-5(1) have only considered whether notice was given *at all*, not whether the content of the notice was sufficient. *Brocato*, 503 So. 2d at 242; *Holmes v. TV-3, Inc.*, No. W91-0109 (BR), 1993 WL 328365, at *5-6 (S.D. Miss. May 27, 1993); *Pannel*, 690 F. Supp. at 548-50; *Etheridge v. N. Miss. Commc'ns, Inc.*, 460 F. Supp. 347, 349 (N.D. Miss. 1978). The Hudsons advocate that we apply the substantial-compliance approach adopted by the Mississippi Supreme Court when interpreting the Mississippi Tort Claims Act's pre-suit notice statute, Mississippi Code Annotated section 11-46-11(1)-(2) (Rev. 2002). But even under a substantial-compliance approach, we find for notice to be sufficient it must specify the statements allegedly to be false and defamatory. And, in order to specify the statements, the notice must identify the alleged false and defamatory statements with sufficient particularity to enable the broadcaster to investigate the allegations and issue a retraction, if necessary.

A. Substantial-Compliance Approach

¶15. The Hudsons rely on the substantial-compliance approach, adopted by the Mississippi Supreme Court in *Lee v. Memorial Hospital at Gulfport*, 999 So. 2d 1263, 1266-67 (¶¶9-13) (Miss. 2008), to argue their pre-suit notice letter was sufficient to enable them to bring a defamation suit against WLOX based on the "overall tenor" of the two telecasts. In *Lee*, the supreme court held a pre-suit notice letter substantially complied with section 11-46-11(2),

even though it did not include the plaintiff's place of residence at the time of injury. *Id.* at 1267 (¶¶11-13).[5] But the supreme court cautioned that *Lee* "should not be interpreted as holding that the required elements do not need to be explicitly stated in the notice of claim." *Id.* at (The supreme court was careful to clarify: "While there may be some cases in which the claimant's residence is a critical issue, clearly it was not in this case." *Id.* at (¶12) (emphasis added).

¶16. The supreme court found the letter's content—which included the circumstances which brought about the plaintiff's injury, the date and place her injuries occurred, the extent of her injuries, her medical damages, and all persons known to be involved—"fulfilled the purpose of the statute." *Id.* (¶13). This purpose is "to insure that governmental boards, commissioners, and agencies are informed of claims against them. Such notice encourages entities to take corrective action as soon as possible when necessary; encourages pre-litigation settlement of claims; and encourages more responsibility by these agencies." *Id.* at 1266 (¶9) (citation omitted). So under *Lee*'s substantial-compliance approach, a statutorily required element can be missing from a pre-suit notice only when (1) the missing

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[5] Section 11-46-11(2) specifically requires:

> Every notice of claim required by subsection (1) of this section shall be in writing, and shall be delivered in person or by registered or certified United States mail. Every notice of claim shall contain a short and plain statement of the facts upon which the claim is based, including the circumstances which brought about the injury, the extent of the injury, the time and place the injury occurred, the names of all persons known to be involved, the amount of money damages sought and the residence of the person making the claim at the time of the injury and at the time of filing the notice.

element is not a "critical issue," and (2) the notice fulfilled the purpose of the statute. *Id.* at 1267 (¶¶12-13).

1. Section 95-1-5(1)

¶17. Applying the *Lee* approach, we ask: Does section 95-1-5 have any statutorily required elements that neither touch on critical issues nor are necessary to fulfill the statute's purpose? *See Lee*, 999 So. 2d at 1266-67 (¶¶9, 12). In contrast to section 11-46-11, section 95-1-5 has only two elements that must be provided in the notice—"[(1)] the article, broadcast or telecast, *and* [(2)] the statements therein . . . allege[d] to be false and defamatory." Miss. Code Ann. § 95-1-5(1) (emphasis added). According to the Hudsons and the dissent, only the first element is necessary for substantial compliance. Under this view, as long as the telecast is merely identified, a plaintiff may bring a defamation suit based on any content and inferences from that telecast. We disagree with this approach and find the second explicit element of section 95-1-5 touches on a critical issue and is necessary to fulfill the purpose of the statute.

¶18. The allegedly false and defamatory statements are a critical issue because they comprise an essential element of a defamation claim. *See Lee*, 999 So. 2d at 1267 (¶12). To establish a defamation claim, the Hudsons had to prove the following elements:

(1) *a false and defamatory statement concerning them*;

(2) unprivileged publication by WLOX to third party;

(3) fault amounting to at least negligence on part of the publisher, WLOX; and

> (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by publication.

Franklin v. Thompson, 722 So. 2d 688, 692 (¶12) (Miss. 1998) (citations omitted); *cf. Chalk v. Bertholf*, 980 So. 2d 290, 296 (¶¶11-12) (Miss. Ct. App. 2007) (looking to four elements of a defamation claim to determine whether plaintiffs sufficiently pled defamation under Mississippi Rule of Civil Procedure 8).

¶19. Like the MTCA's pre-suit notice statute, the purpose of the defamation notice statute is to "encourage[] . . . corrective action." *See Lee*, 999 So. 2d at 1266 (¶9).

> This opportunity, given by the statute, to correct inadvertent errors prior to suit is, in our opinion, no more than fairly and justly commensurate with the opportunity to make the errors. Thus, if by retraction, the damage is completely off-set or so mitigated as not to warrant suit, the newspaper or periodical will oft-times be saved the annoyance and expense of answering the suit, as well as the opprobrium consequent even to an unfounded suit for libel.

Pannell, 690 F. Supp. at 550 (quoting *Ross*, 48 So. 2d at 415); *see also Nelson*, 667 F. Supp. at 1475 (holding Florida's pre-suit notice "statute is designed to allow a defendant the opportunity to be put on notice so as to take necessary steps to mitigate potential damages and perhaps avoid precisely the type of litigation now before the Court"). For a notice to fulfill this purpose—to have the broadcaster correct errors in order to mitigate damages and/or avoid suit—the notice has to communicate what information was erroneous. How else would a potential defendant have notice of the particularly defamatory portions of its telecast to investigate for retraction purposes?

2. The Hudsons' Letter

¶20. The Hudsons assert their pre-suit notice letter sufficiently notified WLOX to make a reasonable investigation about the veracity of the "overall tenor" of both telecasts. But that is not what the Hudsons' letter stated. Nor is it what section 95-1-5(1) requires. As discussed, the statute requires more than mere notice of what telecasts are defamatory. It also requires notice of what specific statements within the broadcast are erroneous and defamatory. Miss. Code Ann. § 95-1-5(1).

¶21. The Hudsons' letter to WLOX specified the stories were untrue because the stories indicated the Hudsons were not licensed and had been sued for defective work. WLOX was not on notice to correct any other errors in the stories. Thus, we reject the Hudsons' "overall tenor argument—as well as the position taken by the dissent—because it ignores the second requirement of section 95-1-5(1) and seeks to presents claims to the jury of which WLOX had no pre-suit notice.

B. Sufficiently Particular Notice

¶22. Because we hold compliance with section 95-1-5(1) requires the pre-suit notice letter to both specify the telecasts *and* the allegedly false and defamatory statements, we clarify what it means to "specify[] . . . the statements." Because *Brocato* looked to Florida's interpretation of its notice statute for guidance, we find Florida law instructive on when a notice letter is sufficiently specific. *Brocato*, 503 So. 2d at 243 (relying on *Ross*, 48 So. 2d at 415); *see also Pannell*, 690 F. Supp. at 549-50 (discussing *Nelson*, 667 F. Supp. 1468; *Ross*, 48 So.2d at 415; *Hulander v. Sunbeam Television Corp.*, 364 So. 2d 845 (Fla. Ct. App. 1978); *Orlando Sports Stadium, Inc. v. Sentinel Star*, 316 So. 2d 607 (Fla. Ct. App. 1975)).

¶23. Florida requires "the best possible notice[.]" *Nelson*, 667 F. Supp. at 1474. And determining what qualifies as best possible notice may depend on how the alleged defamatory statement was published. In *Nelson*, the court held a pre-suit notice letter was insufficient for only referencing the general content of a written news story because the plaintiff had the written stories in her possession "and could have specifically referred to them and quoted them verbatim in her notice[.]" *Id.* But in *Edward L. Nezelek, Inc. v. Sunbeam Television Corp.*, 413 So. 2d 51, 55 (Fla. Dist. Ct. App. 1982), the Florida Court of Appeals rejected the argument that a complaint for defamation based on an oral statement in a television broadcast had to set out the statement verbatim. Instead, it found "it is sufficient that the plaintiff set out [in the complaint] the substance of the spoken words with sufficient particularity to enable the court to determine whether the publication was defamatory." *Id.*

¶24. Here, the allegedly defamatory statements were broadcast. Applying the best-possible-notice standard from *Nelson* and *Nelziak*, the Hudsons' notice letter did not have to specify the allegedly false and defamatory statements *verbatim*. But best possible notice under section 95-1-5(1) did require the Hudsons to identify the substance of the spoken statements "with sufficient particularity to enable [WLOX] to determine whether the publication was defamatory." *Nezelek*, 413 So. 2d at 55; *see Hulander*, 364 So. 2d at 846-47 (holding pre-suit letter demanding a "retraction of any allegations or innuendoes [sic] or intimidations [sic] of criminal conduct on the part of [the plaintiff]" had "failed to advise the

broadcasting company with particularity as to which statements were false . . . [because n]owhere in the retraction notice were the allegations, innuendos or intimations identified").[6]

¶25. The Hudsons' pre-suit letter specified the false and defamatory substance of the broadcast was that the Hudsons were not and had never been licensed contractors in Mississippi and that they had been sued for defective work. Thus, the trial court correctly held the pre-suit notice was sufficient for the Hudsons to bring their defamation claim against WLOX based on these statements. And indeed, the Hudsons brought this exact claim, alleging in their complaint: "Defendant, on June 21, 2006, telecast a story indicating that [the Hudsons] were not licensed contractors, that [they] had been sued for defective work and that [they] had never been licensed contractors in Mississippi." The trial court correctly denied WLOX summary judgment, even though the Hudsons admitted the statements in their complaint—"[the Hudsons] were not licensed contractors"; "they had been sued for defective work by Mr. Wayne Failey"; and "they had never been licensed contractors in Mississippi"—were not literally used in the telecasts.

¶26. The dissent argues the trial court erred by looking to the language in the pre-suit notice letter and not the complaint to instruct the jury. But we point out the language from Jury Instruction D-6(a)(1) tracks the allegations in the complaint, which are almost identical to those in the pre-suit notice letter. The only difference between the pre-suit notice letter and the allegations in complaint is that the letter stated the telecasts "claim[ed]" the Hudsons

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[6] In *Nezelek*, the Florida Court of Appeals receded from *Hulander* to the extent its holding barred single amendment of pre-suit notice letter. *Nelzelek*, 413 So. 2d at 57.

had been sued for defective work and were not licensed, while the complaint alleged the telecasts "indicat[ed]" the Hudsons had been sued and were not licensed. We find this minor distinction immaterial.

¶27. Also, in finding reversible error in Jury Instruction D-6(a)(1), the dissent does not mention Jury Instruction P-23, in which the trial court instructed the jury: "Plaintiffs are not required to prove that they used *the exact language* 'were not license contractors' or 'had been sued for defective work by Wayne Fairley.'" Instead, "they are only required to demonstrate that the Defendant made statements *substantially the same*[.]" (Emphasis added). *See Boone v. Wal-Mart Stores, Inc.*, 680 So. 2d 844, 845 (Miss. 1996) (citation omitted) (instructing appellate courts to review the jury instructions "as a whole" to determine if they "fairly—although [maybe] not perfectly—announce the applicable primary rules of law"). Because the jury was instructed it could look beyond the exact language to determine if language substantially the same as the three statements was published and was false and defamatory, we find the trial court correctly instructed the jury on the scope of the Hudsons' defamation claim, based on the substance of their pre-suit notice letter *and* their complaint.

¶28. Likewise, we find the trial court correctly held the pre-suit notice letter was *insufficient* for the Hudsons to sue based upon "any allegations or innuendos or intimations" from the telecasts that were not substantially similar to those provided in their pre-suit notice letter. *Hulander*, 364 So. 2d at 847. To hold otherwise would render meaningless section

95-1-5(1)'s language requiring the plaintiff "specify[] . . . the statements therein, which he alleges to be false and defamatory." Miss. Code Ann. § 95-1-5(1).

CONCLUSION

¶29. The supreme court has held compliance with 95-1-5(1) is required in order to sue a television station for defamation and because specifying the statements alleged to be false and defamatory is required for substantial compliance with section 95-1-5(1). Thus, it stands to reason that failure to specify certain statements or allegations prevents being able to prove their publication, falsity, and defamatory nature in ensuing defamation suit—particularly in this case, where the complaint alleged the telecasts were false and defamatory *for the very same reasons* as the pre-suit notice letter.[7] Because we find no reversible error in the trial court's instructions, we affirm the jury's verdict in favor of WLOX.

¶30. **THE JUDGMENT OF THE HARRISON COUNTY CIRCUIT COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

LEE, C.J., GRIFFIS, P.J., ISHEE, ROBERTS AND FAIR, JJ., CONCUR. BARNES, J., CONCURS IN RESULT ONLY WITHOUT SEPARATE WRITTEN OPINION. CARLTON, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY IRVING, P.J., AND RUSSELL, J.

CARLTON, J., DISSENTING:

¶31. Because I would reverse and remand this case for a new trial due to an error in the trial court's instructions to the jury, I respectfully dissent from the majority's opinion.

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[7] *Cf. Chalk*, 980 So. 2d at 298-299 (¶¶18-19) (holding the plaintiffs failed to plead a sufficient defamation claim under Rule 8 partly because the complaint did not "provide any substance regarding the allegedly slanderous words").

¶32. The Hudsons argue that the trial court erred in instructing the jury and framing their claims for relief based upon the three specific statements from WLOX's broadcast dissected from their pre-suit notice letter instead of framing their claims for relief based on their civil complaint. As discussed below, I submit that this Court must follow Mississippi Supreme Court precedent as set forth in *Brocato v. Mississippi Publishers Corporation,* 503 So. 2d 241, 243 (Miss. 1987), and its requirement of pre-suit notice.[8] Interestingly, the record shows that the Hudsons complied with this pre-suit notice requirement, and in response to a pretrial motion filed by WLOX, the trial court found the Hudsons' pre-suit notice letter sufficient. Utilizing the substantial-compliance standard of review as articulated by the Mississippi Supreme Court in other cases addressing statutory pre-suit notice sufficiency, I concur with the trial court's pretrial ruling and submit that the trial court properly determined that the Hudsons provided WLOX with sufficient pre-suit notice as required by Mississippi Code Annotated section 95-1-5 (Rev. 2004) when ruling on pretrial motions. *See Price v. Clark,* 21 So. 3d 509, 520 (¶20) (Miss. 2009) (discussing whether a notice-of-claim letter substantially complied with the statutory requirements of the Mississippi Tort Claims Act (MTCA)). The record reflects that, at trial, the trial court looked to the pre-suit notice letter instead of the civil complaint when framing the jury instructions and the Hudsons' claims for

[8] "This Court, sitting as an intermediate appellate court, is bound by established precedent as set out by the Mississippi Supreme Court and we do not have the authority to overrule the decisions of that court." *Bevis v. Linkous Constr. Co.*, 856 So. 2d 535, 541 (¶18) (Miss. Ct. App. 2003) (citation omitted).

relief.[9] I find merit to the Hudsons' allegations that the trial court erred in granting Jury Instruction D-6(a)(1).

A. STATUTORY PRE-SUIT NOTICE

¶33. The Hudsons request that this Court overrule *Brocato* and its determination that section 95-1-5 requires pre-suit notice as a condition precedent to filing suit.[10] The Hudsons' request is unnecessary because the Hudsons sufficiently complied with the statutory pre-suit

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[9] The record shows that various judges presided over this case during the pretrial and trial phases: Judge Jerry O. Terry presided over the pretrial motion for summary judgment as to the sufficiency of the pre-suit notice, and Judge John C. Gargiulo presided over the trial.

[10] Pre-suit notice in a defamation case is clearly required by section 95-1-5, which provides, in pertinent part, as follows:

> (1) Before any civil action is brought for publication, in a newspaper domiciled and published in this state or authorized to do business in Mississippi so as to be subject to the jurisdiction of the courts of this state, of a libel, or against any radio or television station domiciled in this state, the plaintiff shall, at least ten (10) days before instituting any such action, serve notice in writing on the defendant at its regular place of business, specifying the article, broadcast or telecast, and the statements therein, which he alleges to be false and defamatory.
>
> (2) If it appears upon the trial that said article was published, broadcast or telecast in good faith, that its falsity was due to an honest mistake of the facts, and there were reasonable grounds for believing that the statements in said article, broadcast or telecast were true, and that within ten (10) days after the service of said notice a full and fair correction, apology and retraction was published in the same edition or corresponding issues of the newspaper in which said article appeared, and in as conspicuous place and type as was said original article, or was broadcast or telecast under like conditions correcting an honest mistake, and if the jury shall so find, the plaintiff in such case shall recover only actual damages. The burden of proof of the foregoing facts shall be affirmative defenses of the defendant and pled as such.

notice requirements of section 95-1-5.[11] As noted, when ruling on pretrial motions, the trial court found that the Hudsons indeed complied with the pre-suit statutory notice requirement, and I find no error in the trial court's determination. I turn to review the trial court's ruling on the sufficiency of the pre-suit notice letter.

¶34. In its order denying the motion for summary judgment filed by WLOX on this issue,[12] the trial court stated, in part, as follows:

> On October 17, 2006, [p]laintiffs filed a [c]omplaint alleging damages for defamation and malicious interference with business due to a story [d]efendant aired on June 21, 2006. Prior to filing the [c]omplaint, [p]laintiffs' counsel sent [d]efendant a letter dated August 30, 2006, which specified the defamatory remarks allegedly made by [d]efendant. Defendant now moves for summary judgment and argues this letter does not comply with [Mississippi Code Annotated section] 95-1-5.
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> Under [section] 95-1-5, plaintiff[s] must, at least ten days before instituting any civil action, serve notice in writing on . . . defendant at its regular place of business, specifying the article, broadcast, or telecast, and the statements therein, which he alleges to be false and defamatory. Upon review, this [c]ourt finds the letter of August 30, 2006[,] meets the requirements of [section] 95-1-5. Thus, [d]efendant's motion for summary judgment should be denied.

¶35. After reviewing the record and utilizing the standard of review applicable to statutory pre-suit notice set forth by Mississippi precedent, I find no error in the trial court's determination that the Hudsons provided sufficient statutory notice in this case. Regarding sufficiency of statutory notice in the context of various statutes, the supreme court has stated:

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[11] *See Price*, 21 So. 3d at 520 (¶20) (finding that the law requires substantial compliance, not strict compliance, with statutory notice requirements).

[12] WLOX filed several pretrial motions for summary judgment, all of which were denied by the trial court.

> Where a claimant does provide written notice, we have adhered to the principle that substantial compliance is the standard for analyzing the contents of the notice to determine its sufficiency. Sufficient information must be contained in the notice to permit the recipient to make a reasonable investigation of the claims being made.

Arceo v. Tolliver, 19 So. 3d 67, 72 (¶17) (Miss. 2009) (internal citations omitted).[13] In this case, the trial court explained in its findings that the Hudsons provided WLOX with sufficient written notice of their defamation claim, referencing the defamatory assertions, on August 30, 2006. The Hudsons subsequently filed their complaint against WLOX on October 17, 2006 – easily satisfying the ten-day requirement. During oral argument, WLOX also admitted that no confusion existed as to which broadcast or complainant was at issue.

B. JURY INSTRUCTION

¶36. Jury Instruction D-6(a)(1) framed the Hudsons' claims for relief based on the pre-suit letter instead of the claims raised in their complaint. The trial court required the Hudsons to prove that WLOX expressly made three allegedly defamatory statements, or substantially similar statements, dissected from the Hudsons' pre-suit notice letter, without allowing the jury to consider any other false statements in the broadcast. However, the Hudsons' complaint asserted claims for relief for defamation "indicated" by WLOX's broadcast. Civil

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[13] As recognized in *Arceo,* the Mississippi Supreme Court has repeatedly applied the same standards for evaluating statutory notice to the Medical Malpractice Tort Reform Act and the MTCA. *Arceo,* 19 So. 3d at 71-72 (¶¶16-17). *See also Price,* 21 So. 3d at 520 (¶20) (finding that substantial compliance, not strict compliance, is the applicable standard for addressing whether the contents of a notice-of-claim letter complied with the MTCA); *Lee v. Mem'l Hosp. at Gulfport*, 999 So. 2d 1263, 1266-67 (¶¶9-13) (Miss. 2008) (finding statutory notice required under the MTCA as to delivery of notice and contents of notice, while not a question of fact, but one of law, is a fact-sensitive question).

complaints must comply with Rule 8 of the Mississippi Rules of Civil Procedure, and the factfinder must consider the statements in the context of the broadcast as a whole to determine whether the defamation occurred. *See Journal Publ'g Co. v. McCullough,* 743 So. 2d 352, 360 (¶24) (Miss. 1999).[14] However, Jury Instruction D-6(a)(1) precluded the jury from considering the broadcast as a whole and in context. The Hudsons were entitled to have the jury properly instructed as to their claims for relief.[15]

¶37. Mississippi courts have held that sufficiency of a complaint is a question of law. I find that the Hudsons' defamation action survived a pretrial motion for summary judgment and a motion for directed verdict at trial. *See State v. Bayer Corp.,* 32 So. 3d 496, 502-03 (¶21) (Miss. 2010); *Robinson v. Enter. Leasing Co. – S. Cent. Inc.,* 57 So. 3d 1, 2 (¶4) (Miss. Ct. App. 2010).[16] The Mississippi Supreme Court has overruled pre-rules cases regarding

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[14] In order to establish a defamation claim, an ordinary plaintiff is required to show the following: (1) "a false and defamatory statement concerning the plaintiff"; (2) "an unprivileged publication to a third party"; (3) "fault amounting at least to negligence on the part of the publisher"; and (4) "either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." *McCullough*, 743 So. 2d at 359 (¶22). "This Court has described a defamatory statement as 'any written or printed language which tends to injure one's reputation, and thereby expose him to public hatred, contempt or ridicule, degrade him in society, lessen him in public esteem or lower him in the confidence of the community.'" *Id.* at 360 (¶24) (quoting *Fulton v. Miss. Publishers Corp.,* 498 So. 2d 1215, 1217 (Miss. 1986)). "The words employed must have clearly been directed toward the plaintiff, and the defamation must be clear and unmistakable from the words themselves and not be the product of innuendo, speculation or conjecture." *Id.* (citation omitted). Additionally, the headline or portions of the story "must be considered together and construed as a whole." *Id.*

[15] *See APAC Miss., Inc. v. Johnson,* 15 So. 3d 465, 476 (¶26) (Miss. Ct. App. 2009).

[16] The record reflects no pretrial motions by WLOX to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the Mississippi Rules of Civil Procedure.

sufficiency of claims for relief pled in the complaint. *Blue Water Logistics, LLC v. Williford*, 55 So. 3d 148, 158 (¶37) (Miss. 2011).[17] In *Blue Water Logistics,* the supreme court affirmed the notice-pleading standards of the Mississippi Rules of Civil Procedure. *Id.* at 157-58 (¶¶35-36).

¶38. Mississippi Rule of Civil Procedure 8 sets forth the general rules of pleading and only requires a "short and plain statement of the claim showing that the pleader is entitled to relief[.]" The appellate court must bear in mind "that the promulgation of Rule 8 was intended to lessen the pleading requirements so that a plaintiff's rights 'are not lost by poor drafting sills of counsel.'" *Chalk v. Bertholf,* 980 So. 2d 290, 296 (¶13) (Miss. Ct. App. 2007) (quoting M.R.C.P. 8 cmt.). "Rule 8 abolishes many technical requirements of pleadings[; however,] it does not eliminate the necessity of stating circumstances, occurrences, and events which support the proffered claim." *Id.* (citation omitted).

¶39. In *Chalk,* this Court addressed the issue of whether a party's complaint alleging defamation pleaded sufficient detail pursuant to Rule 8. *Id.* at 296-97 (¶14). The *Chalk* court, relying upon federal guidance, stated:

> Mississippi federal courts have examined our state law and ruled on the matter of pleading requirements in a suit for defamation on several occasions. Quite consistently, these courts have found that Mississippi law requires that a complaint for defamation must provide allegations of sufficient particularity so as to give the defendant or defendants notice of the nature of the complained-of statements.

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[17] *See generally Long v. McKinney,* 897 So. 2d 160 (Miss. 2004) (acknowledging Mississippi Supreme Court's authority to promulgate procedural rules applicable in civil cases in state courts and stating that sufficiency of a complaint constitutes a question of law).

Id. at 297 (¶14). The *Chalk* court further provided that defamation complaints should set forth the following information: the statements made, paraphrased or verbatim; to whom the statements were directed; by whom the statements were made; and how the statements were slanderous. *Id.* at 298 (¶18). Clearly, neither Rule 8 nor pre-rule precedent have ever required defamation to be pleaded verbatim or restricted a jury's consideration of the context of a broadcast.[18]

¶40. In framing the jury instructions, the trial court looked to the statements identified in the Hudsons' pre-suit letter instead of their complaint, and the court instructed the jury not to consider whether any other statements in the broadcast were false and defamatory. Jury Instruction D-6(a)(1) thus prohibited the jury's consideration of context and the broadcast as a whole. *See McCullough,* 743 So. 2d at 360 (¶24). Therefore, the trial court erred by improperly limiting the jury's consideration.

¶41. Furthermore, the Mississippi Supreme Court also has recognized that "the overall tone or structure of a story may so distort the truth as to make the underlying implication of the story false, even where no material omissions are involved." *Id.* at (¶27) (citation omitted); *see also Church of Scientology of Calif. v. Flynn,* 744 F.2d 694, 696 (9th Cir. 1984) ("It is well settled that the 'arrangement and phrasing of apparently non[-]libelous statements'

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[18] *See TracFone Wireless, Inc. v. Carson,* No. 3:07-CV-1761-G, 2008 WL 4107584, at *9 (N.D. Tex. August 28, 2008) ("Although federal courts do not require parties to 'set forth allegedly defamatory statements *en haec verbis,'* such allegations must 'afford the other party sufficient notice of the communications complained of to enable him to defend himself.'").

cannot hide the existence of a defamatory meaning. Indeed, the meaning of a statement is often dependent upon its context." (Internal citation omitted)); *Eselin-Bullock & Assocs. Ins. Agency, Inc. v. Nat'l Gen. Ins. Co.*, 604 So. 2d 236, 241 (Miss. 1992) (question of what is or is not implied by allegedly defamatory statements is a question of fact for jury); *Hudson v. Palmer,* 977 So. 2d 369, 385 (¶47) (Miss. Ct. App. 2007) ("[T]he relevant inquiry is whether the statement could be reasonably understood as declaring or implying a provable assertion of fact.").[19]

¶42. The pertinent parts of the Hudsons' complaint provide as follows:

> 4. In late May 2006, a false complaint was made to the [d]efendant from an unreliable source[;] complaint was made maliciously, because the source for the story (Mr. Wayne Fairley) was simply making the complaint because he had declined to pay a bill. Mr. Fairley had become involved in a contract dispute with [p]laintiffs, when Mr. Fairley had terminated [p]laintiffs' construction contract and himself dealt directly with subcontractors working under [p]laintiffs.
>
> 5. Prior to running the story, the [d]efendant's agent, A.J. Guardinia, [sic] personally spoke with Gerald Heath Hudson and was told that the story that he was about to run was false. Nevertheless, the [d]efendant proceeded to run the story, because it wished to run a sensational story regarding improper contract work, so as to attract viewers. The [d]efendant was willfully indifferent to the [p]laintiff Gerald Heath Hudson's attempt to correct the story.

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[19] *See also Roussel v. Robbins,* 688 So. 2d 714, 723 (Miss. 1996); *Joyner v. Wear,* 665 So. 2d 634, 638 (La. Ct. App. 1995) (The question of whether communication is defamatory is answered by determining whether "a listener could have reasonably understood the communication, taken in context, to have been intended in a defamatory sense."). *See also* 50 Am. Jur. 2d *Libel & Slander* § 107 (2006); Restatement (Second) of Torts § 566 (1977).

> 6. Thereafter, through gross negligence and without making an appropriate investigation, the [d]efendant, on June 21, 2006, telecast a story, *indicating that* [*p*]*laintiffs were not licensed contractors, that* [*p*]*laintiffs had been sued for defective work*[,] *and that* [*p*]*laintiffs had never been licensed contractors in Mississippi.*
>
> 7. Plaintiffs have given the ten[-]day notice required by Mississippi Code Annotated [section] 95-1-5 and this notice is attached as Exhibit "1."

(Emphasis added).[20]

¶43. The Hudsons alleged in their complaint that WLOX's broadcast "implied" the defamatory assertions of fact with gross negligence and willful indifference so as to attract viewers. "Parties have the right to 'embody their theories of the case in the jury instructions provided there is testimony to support it.'" *APAC Miss., Inc. v. Johnson,* 15 So. 3d 465, 476 (¶26) (Miss. Ct. App. 2009) (quoting *Reese v. Summers,* 792 So. 2d 992, 994 (¶4) (Miss. 2001)). Also, the plaintiff is entitled to have the jury properly instructed on the law. *See Simmons v. Strickland,* 76 So. 3d 178, 182 (¶21) (Miss. Ct. App. 2011).

¶44. Keeping this standard of review in mind, I submit that the trial court erred by granting Jury Instruction D-6(a)(1), resulting in an improperly instructed jury. Jury Instruction D-6(a)(1) provides as follows:

> The [c]ourt instructs the jury that the [p]laintiffs, in order to recover against the [d]efendant, WLOX, must prove by a preponderance of the evidence that the

[20] In its answer to paragraph five of the Hudsons' complaint, WLOX admitted that Giardina and Heath spoke with each other, but WLOX denied the other allegations regarding the conversation. WLOX also admitted in its answer to paragraph six of the Hudsons' complaint that it telecast a news story on or about June 21, 2006, but WLOX denied the remainder of the allegations in paragraph six.

> language complained [of], as published by WLOX[,] was false and defamatory.
>
> The [c]ourt further instructs the jury that if the [p]laintiffs fail to prove by a preponderance of the evidence that the following statements allegedly broadcasted by WLOX were both false and defamatory, then it is your sworn duty as jurors to return your verdict in favor of the [d]efendant, WLOX:
>
> > "were not licensed contractors";
> >
> > "they had been sued for defective work by Mr. Wayne Fairley"; or
> >
> > "they had never been licensed contractors in Mississippi[."]
>
> *In reaching your verdict, you are not to consider whether any other words or language* [*p*]*laintiffs claim WLOX broadcasted were false and defamatory.*

(Emphasis added). While WLOX correctly argues that defamation must be clear and not from speculation or conjecture,[21] the jury instructions given by the trial court in this case erroneously precluded the jury's consideration of the statements in the context of the broadcast as a whole. The law does not limit defamation to only expressly stated assertions of fact but instead recognizes that defamatory facts may be implied assertions of fact.[22] *See McCullough,* 743 So. 2d at 360 (¶24); *Ward v. Zelikovsky*, 643 A.2d 972, 981 (N.J. 1994); *Alianza Dominicana, Inc. v. Luna*, 645 N.Y.S.2d 28, 30 (N.Y. App. Div. 1996) (courts must consider the full context of communication in which the statement appears including

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[21] *See Chalk,* 980 So. 2d at 296 (¶12); *Hayne v. The Innocence Project,* No. 3:09-CV-218-KS-LRA, 2011 WL 198128, at *9 (S.D. Miss. Jan. 20, 2011); *Perry v. Sears, Roebuck, and Co.,* No. 1:09CV260-SA-JAD, 2010 WL 1427334, at *2 (N.D. Miss. April 8, 2010).

[22] *See Hudson,* 977 So. 2d at 385 (¶47).

surrounding circumstances that signal readers or listeners that what is being read or heard is likely opinion, not fact); *New Times, Inc. v. Isaacks,* 146 S.W.3d 144, 158 (Tex. 2004).

¶45. Based on the foregoing, I would reverse and remand this case for a new trial.

IRVING, P.J., AND RUSSELL, J., JOIN THIS OPINION.