

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NOS. 2006-TS-01703  
Consolidated with 2007-CA-00821

NORMAN Q. THOMAS, JR., INDIVIDUALLY  
AND ON BEHALF OF WILLIAM THOMAS  
AND ANNA THOMAS, TWO MINORS

PLAINTIFF-APPELLANT

VERSUS

CLARK G. WARDEN, M.D.; MISSISSIPPI  
BAPTIST MEDICAL CENTER AND  
JOHN DOES 1-10

DEFENDANTS-APPELLEES

Appeal from the Circuit Court of the  
First Judicial District of Hinds County, Mississippi

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**BRIEF OF APPELLEE,  
MISSISSIPPI BAPTIST MEDICAL CENTER**

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ORAL ARGUMENT NOT REQUESTED

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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of the case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Norman Q. Thomas, Jr., Individually and on Behalf of William Thomas and Anna Thomas, Two Minors—Plaintiff-Appellant;
2. L. Breland Hilburn, C. Louis Clifford IV, and Patrick J. Schepens, Eaves Law Firm, Jackson, MS—Attorneys for Plaintiff-Appellant;
3. Roger L. McGehee, Jr., Attorney at Law, Jackson, MS—Attorney for Plaintiff-Appellant;
4. Mississippi Baptist Medical Center, Inc.—Defendant-Appellee;
5. Clark G. Warden, M.D.—Defendant-Appellee;
6. Stuart B. Harmon and Kristopher A. Graham, Page, Kruger & Holland, P.A.—Attorneys for Defendant-Appellee Dr. Clark Warden;

7. Eugene R. Naylor and Elizabeth A. Ganzerla, Wise Carter Child & Caraway,  
P.A.—Attorneys for Defendant-Appellee Mississippi Baptist Medical Center
8. Judge W. Swan Yerger, Circuit Court of the First Judicial District of Hinds  
County, Mississippi—Trial Court Judge



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Eugene R. Naylor, [REDACTED]  
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Mississippi Baptist Medical Center

## **TABLE OF CONTENTS**

Certificate of Interested Persons .....	i
Table of Contents .....	iii
Table of Authorities .....	iv
Statement Concerning Oral Argument .....	vii
Statement of the Issues .....	1
Statement of the Case	
A. Nature of the Case .....	2
B. Course of Proceedings and Disposition Below .....	2
C. Statement of the Facts .....	3
Summary of the Argument .....	4
Standard of Review .....	7
Argument .....	7
I. Whether appellant failed to comply with the requirements of Mississippi Code Annotated §§ 11-1-58 and 15-1-36(15)? .....	7
II. Whether strict compliance is the appropriate standard of compliance pursuant to Mississippi Code Annotated §§ 11-1-58 and 15-1-36(15)? .....	11
III. Whether this matter is time-barred by the statute of limitations, Mississippi Code Annotated § 15-1-36(1)? .....	13
IV. Whether Mississippi Code Annotated §§ 11-1-58 and 15-1-36(15) violate the Separation of Powers Clause of the Mississippi Constitution of 1890? .....	14
V. Whether appellant was denied access to court? .....	21
VI. Whether appellant was denied the right to open and accessible courts? .....	24
Conclusion .....	28
Certificate of Service	

## TABLE OF AUTHORITIES

### Cases

<i>Alexander v. State ex rel. Allain</i> , 441 So. 2d 1329 (Miss. 1983).....	16
<i>Arceo v. Tolliver</i> , 949 So. 2d 691 (Miss. 2006).....	passim
<i>Brooks v. Roberts</i> , 882 So. 2d 229 (Miss. 2004) .....	27
<i>Caldwell v. N. Miss. Med. Ctr., Inc.</i> , 956 So. 2d 888 (Miss. 2007).....	4, 12
<i>Carson v. Maurer</i> , 120 N.H. 925, 424 A.2d 825 (1980) .....	24, 27
<i>City of Jackson v. Sutton</i> , 797 So. 2d 977 (Miss. 2001) .....	18
<i>City of Oxford v. Northeast Miss. Elec. Power Assn.</i> , 704 So. 2d 59 (Miss. 1997) .....	7, 25
<i>Claypool v. Mladineo</i> , 724 So. 2d 373 (Miss. 1998) .....	12, 14
<i>Community Hospital of Jackson v. Goodlett</i> , 968 So. 2d 391 (Miss. 2007).....	vii
<i>Community Resources of Justice, Inc. v. City of Manchester</i> , 154 N.H. 748, 917 A.2d 707 (2007). .....	27
<i>Dependents of Nossor v. Natchez Jitney Jungle, Inc.</i> , 511 So. 2d 141 (Miss. 1987).....	25
<i>Elmore v. Triad Hospitals, Inc.</i> , 640 S.E.2d 217 (W.Va. 2006).....	21
<i>Foster v. City of Lake Jackson</i> , 28 F.3d 425 (5th Cir. 1994).....	23
<i>Grant v. State</i> , 686 So. 2d 1078 (Miss. 1996).....	14
<i>Holder v. Elms Hotel Co.</i> , 338 Mo. 857, 92 S.W.2d 620 (1936).....	18
<i>Middleton v. Texas Power &amp; L. Co.</i> , 249 U.S. 152, 39 S.Ct. 227 (1954).....	19
<i>Miss. Power Co. v. Goudy</i> , 459 So. 2d 257 (Miss. 1984).....	7, 25
<i>Mitchell v. Progressive Ins. Co.</i> , 965 So. 2d 679 (Miss. 2007) .....	19
<i>Newell v. State</i> , 308 So. 2d 71 (Miss. 1975).....	15
<i>Pathfinder Coach Div. of Superior Coach Corp. v. Cottrell</i> , 216 Miss. 358, 62 So. 2d 383 (1953).....	19
<i>Paz v. Brush Engineered Materials, Inc.</i> , 949 So. 2d 1 (Miss. 2007) .....	20

<i>Pope v. Brock</i> , 912 So. 2d 935 (Miss. 2005) .....	10
<i>Proli v. Hathorn</i> , 928 So. 2d 169 (Miss. 2006). .....	10
<i>Ratliff v. Stewart</i> , 508 F.3d 225 (5th Cir. 2007) .....	28
<i>Richmond v. Benchmark Constr. Corp.</i> , 692 So. 2d 60 (Miss. 1997) .....	7
<i>Richmond v. City of Corinth</i> , 816 So. 2d 373 (Miss. 2002).....	7
<i>Saucier Through Saucier v. Biloxi Reg. Med. Ctr.</i> , 708 So. 2d 1351 (Miss. 1998).....	7
<i>Sec. of State v. Wiesenber</i> g, 633 So. 2d 983 (Miss. 1994).....	7, 25
<i>Townsend v. Estate of Gilbert</i> , 616 So. 2d 333 (Miss. 1993) .....	22, 25
<i>Troupe v. McAuley</i> , 955 So. 2d 848 (Miss. 2007) .....	26
<i>Turrentine v. Brookhaven, Miss. School Dist.</i> , 794 F.Supp. 620 (S.D. Miss. 1992) .....	25
<i>U. of Miss. Med. Ctr. v. Easterling</i> , 928 So. 2d 815 (Miss. 2006) .....	11, 23
<i>Walker v. Whitfield Nursing Ctr., Inc.</i> , 931 So. 2d 583 (Miss. 2006) .....	passim
<i>Walters v. Blackledge</i> , 220 Miss. 485, 71 So.2d 433 (1954).....	18, 19, 26
<i>Wayne v. Tenn. Valley Auth.</i> , 730 F.2d 392 (5th Cir. 1984).....	22, 25
<i>Wells v. Panola County Bd. of Education</i> , 645 So. 2d 883 (Miss. 1994) .....	passim
<i>Weidrick v. Arnold</i> , 835 S. W. 2d 843 (Ark.1992) .....	24
<i>Williams v. Boyle</i> , 72 P.3d 392 (Colo. App. 2003).....	20
<i>Williams v. Stevens</i> , 390 So. 2d 1012 (Miss. 1980).....	14
<i>Wolfe v. City of D'Iberville</i> , 799 So. 2d 142 (Miss. App. 2001) .....	16

## **Statutes**

U.S. CONST. AMEND. XIV .....	24
MISS. CONST. ART. 1, § 1 .....	15
MISS. CONST. ART. 3, § 14.....	24
MISS. CONST. ART. 3, § 24.....	22, 23

MISS. CONST. ART. 6, § 144.....	15
MISS. CODE ANN. § 9-3-61 (2007) .....	15
MISS. CODE ANN. § 11-1-58 (2007).....	passim
MISS. CODE ANN. § 15-1-36 (2007).....	passim
COLO. REV. STAT. § 13-20-602. ....	20
W. VA. CODE § 55-7B-6. ....	20

### **Rules**

Miss. R. Civ. P. 1.....	19
Miss. R. Civ. P. 6 .....	5, 10, 13
Miss. R. Civ. P. 11 .....	27
Miss. R. Civ. P. 15 .....	5, 8, 12
Miss. R. Civ. P. 26 .....	21
Miss. R. Civ. P. 56 .....	7
Miss. R. Prof. Conduct 3.1.....	27

### **Other Authorities**

Black's Law Dictionary (Bryan A. Garner ed., 8 <sup>th</sup> ed., Thomson West 2004).....	16
The Federalist Papers: No. 47 (1788) .....	15

## STATEMENT CONCERNING ORAL ARGUMENT

Defendant/Appellee, Mississippi Baptist Medical Center, Inc. (MBMC), does not believe oral argument would be useful for the resolution of this appeal. The dispositive issues of the appeal, whether the failure to comply with Mississippi Code Annotated §§ 11-1-58 and 15-1-36(15) requires the dismissal of an action, has been authoritatively decided. *Community Hospital of Jackson v. Goodlett*, 968 So. 2d 391 (Miss. 2007) (decided *en banc* September 20, 2007, rehearing denied November 29, 2007); *Walker v. Whitfield Nursing Center, Inc.*, 931 So. 2d 583 (Miss. 2006). The consideration of the issues in this matter will not be significantly aided by oral argument because the facts and legal arguments are adequately presented in the briefs and record. However, should the court determine that oral argument would be useful to clarify some matter raised by the plaintiff/appellant in his reply brief, MBMC is prepared to proceed.



## **STATEMENT OF THE ISSUES**

The Appellees submit that the issues on appeal are:

- I. Whether appellant failed to comply with the requirements of Mississippi Code Annotated §§ 11-1-58 and 15-1-36(15)?
- II. Whether strict compliance is the appropriate standard of compliance pursuant to Mississippi Code Annotated §§ 11-1-58 and 15-1-36(15)?
- III. Whether this matter is time-barred by the statute of limitations, Mississippi Code Annotated § 15-1-36(15)?
- IV. Whether Mississippi Code Annotated §§ 11-1-58 and 15-1-36(15) violate the Separation of Powers Clause of the Mississippi Constitution of 1890?
- V. Whether Appellant was denied access to court?
- VI. Whether Appellant was denied the right to open and accessible courts?

## **STATEMENT OF THE CASE**

### **A. Nature of the Case**

Plaintiff's decedent, Melinda Thomas, underwent duodenal switch bariatric surgery in Ocean Springs, Mississippi, performed by Dr. Clark G. Warden ("Warden"), on or about October 1, 2002. (R. at 6; R. at 12). Thomas was admitted to Mississippi Baptist Medical Center ("MBMC") by another of her treating physicians on or about September 2, 2003 with complications from her surgery, and she died on or about September 7, 2003. (R. at 7; R. at 13). Plaintiff filed the complaint herein on or about November 4, 2005, and, by order dated March 9, 2007, Judge W. Swan Yerger of the Circuit Court for the First Judicial District of Hinds County, Mississippi, dismissed the complaint based upon plaintiff's failure to comply with the requirements of Mississippi Code Annotated §§ 11-1-58 and 15-1-36(15). (R. at 320-21). Plaintiff filed this appeal. (R. at 314.)

### **B. Course of Proceedings and Disposition Below**

On or about September 6, 2005, plaintiff/appellant's counsel mailed a letter of notice of intent to pursue a claim against Warden and MBMC. (R. at 205). On or about November 4, 2005, Norman Q. Thomas, individually and on behalf of two minor children, William Thomas and Anna Thomas,<sup>1</sup> filed a complaint in the Circuit Court for the First Judicial District of Hinds County, Mississippi against Warden and MBMC for the wrongful death of Melinda Thomas. (R. at 5). The complaint was filed on November 4, 2005, fifty-nine (59) days after Thomas' written notice, rather than the sixty (60) days prescribed by Mississippi Code Annotated § 15-1-36(15). (R. at 205-06). Thomas also failed to attach to the complaint a certificate of expert consultation executed by counsel as required by Mississippi Code Annotated § 11-1-58. (R. at 206). Thomas' failure to attach the certificate of consultation rendered the complaint a nullity, and the

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<sup>1</sup> This Brief will refer to plaintiff/appellant as "Thomas."

statute of limitations continued to run on Thomas' claims. On November 7, 2005, this action became time-barred. (R. at 206). MBMC filed its Answer to Thomas' complaint on December 20, 2005, raised these issues in its Third Defense and made its motion to strike plaintiff's complaint and/or to dismiss the action. (R. at 11).

On or about January 3, 2006, nearly two months after expiration of the statute of limitations, Thomas filed a "Certificate of Compliance Pursuant to Section 11-1-58, Mississippi Code of 1972, Annotated, As Amended." (R. at 21). The certificate made no reference to the earlier complaint and no request was made for leave to amend the Complaint. (R. at 21). On January 30, 2006, Warden filed a Motion to Dismiss based on Thomas' non-compliance with Mississippi Code Annotated §§ 11-1-58 and 15-1-36(15), and an order of dismissal was entered on August 28, 2006. (R. at 64). Thomas filed a notice of appeal on September 27, 2006. (R. at 94). On October 17, 2006, MBMC filed a Motion to Dismiss, or in the Alternative, for Summary Judgment, and on March 9, 2007, a Final Judgment dismissing with prejudice Thomas' claims against MBMC was entered. (R. at 322). On March 26, 2007, Thomas filed a Notice of Appeal of the judgment in favor of MBMC. (R. at 314).

### **C. Statement of the Facts**

Beyond the dates of events, which are born out by pleadings of record, the disposition of this case does not require a discussion of the facts purportedly underlying Thomas' wrongful death claim.<sup>2</sup> In pertinent part, Melinda Thomas was admitted to MBMC by her treating physician Dr. Diane Beebe on September 2, 2003, for, among other things, hydration and nutritional consultation for protein supplementation. Melinda Thomas' diagnosis included jaundice, fever, malnourishment, abdominal mass and pain, and weakened immune system. (R. at 13). Melinda Thomas died on or about September 7, 2003. (R. at 7; R. at 13).

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<sup>2</sup> Furthermore, this action never reached the discovery stage, and the "facts" recited in Thomas' brief are taken from unsubstantiated allegations contained in the complaint.

On or about September 6, 2005, one day prior to the expiration of the two-year statute of limitations, Mississippi Code Annotated § 15-1-36(1), Thomas mailed a notice of claim to MBMC. Fifty-nine days later, Thomas filed the complaint in the First Judicial District of Hinds County, Mississippi, without certification of expert consultation. (R. at 205-06). MBMC filed its answer on December 20, 2005. (R. at 11). Thomas filed a "Certificate of Compliance" on January 3, 2006. (R. at 21). As the complaint was defective when filed and did not toll the statute of limitations, the action by that time had been time-barred since November 7, 2005.

### **SUMMARY OF THE ARGUMENT**

The trial court properly dismissed the complaint and claims asserted because Thomas failed to comply with the requirements of Mississippi Code Annotated §§ 11-1-58 and 15-1-36(15). In an attempt to avoid the result caused by the failure to comply with statutory prerequisites for commencing an action for alleged medical negligence, appellant launches a constitutional challenge of the statutes themselves. Thomas did not attach a certificate of consultation, nor certification of any of the stated statutory justifications for not consulting with a expert prior to filing a complaint. From the outset, Thomas did not comply with Mississippi Code Annotated §§ 11-1-58 and 15-1-36(15) and now comes to this Court purportedly as an innocent victim to these statutory mandates, yet with no explanation for non-compliance.

Mississippi Code Annotated §§ 11-1-58 and 15-1-36(15) are not newly enacted laws on which the Supreme Court has yet to provide interpretative guidance. This Court has repeatedly announced a standard of strict compliance with both statutes. *Caldwell v. N. Miss. Med. Ctr., Inc.*, 956 So. 2d 888 (Miss. 2007); *Walker v. Whitfield Nursing Ctr., Inc.*, 931 So. 2d 583 (Miss. 2006); *Arceo v. Tolliver*, 949 So. 2d 691, 696 (Miss. 2006). Thomas attempts to distinguish himself by suggesting that his actions were not as glaringly neglectful as the plaintiffs in *Walker*,

*Caldwell*, or *Arceo*. However, precedent mandates that plaintiff must comply with the statutes as written.

In attempting to avoid the application of Mississippi Code Annotated §§ 11-1-58 and 15-1-36(15), Thomas argues that compliance with these statutes deprives plaintiffs of the liberal amendment provisions of Rule 15, Mississippi Rules of Civil Procedure. However, Thomas did not even request leave from the trial court to amend his complaint and while this position is without merit, appellant is in no position to raise it. Thomas alternatively argues that the confluence of the expiration of the sixty-day notice period and the statute of limitations made it difficult to know when filing was necessary; yet, he apparently made no reference to Rule 6, Mississippi Rules of Civil Procedure, for timing considerations. Simply put, Thomas did not comply with Mississippi Code Annotated §§ 11-1-58 and 15-1-36(15), and he predicates a constitutional challenge upon an alleged denial of processes which were never invoked.

Mississippi Code Annotated §§ 11-1-58 and 15-1-36(15) are proper enactments of the Mississippi Legislature with which litigants must comply. These statutes are substantive in nature because they fix plaintiffs' rights to claims and follow a proper exercise of legislative power to modify common law remedies. The requirement of an expert to establish the standard of care in medical malpractice cases is established Mississippi substantive law. The sixty-day notice requirement is not merely a procedural time limitation, but it allows for investigation of claims and avoidance of the time and expense of litigation, concerns which are within the purview of the Legislature. Furthermore, this action is barred by the statute of limitations, a mechanism clearly within the authority of the Legislature.

Despite delaying the mailing of notice of a claim for nearly two years, and only one day before the expiration of the statute of limitations, Thomas surprisingly argues that the sixty-day notice period of Mississippi Code Annotated § 15-1-36(15) delayed proceeding to Mississippi's

courts and thereby denied Thomas access to open courts. In *dicta*, this Court previously instructed that dismissal under Mississippi Code Annotated § 15-1-36(15) does not implicate any constitutionally endowed rights, and that only a reasonable right of access is required. Facially, Thomas' argument is misplaced, not only due to appellant's own delay in proceeding, but also because of his failure to certify consultation with a duly qualified expert, despite having additional time to do so once notice was sent to the defendants.

Related to the attack on Mississippi Code Annotated § 15-1-36(15), Thomas argues that both Mississippi Code Annotated §§ 11-1-58 and 15-1-36(15) interfere with his "fundamental" right to open and accessible courts and that this Court must review these statutes with strict scrutiny. In support of the contention that a fundamental right is implicated, Thomas offers a reference to a dissenting opinion. Previously, the Court applied rational basis scrutiny where the Legislature has placed limitations or requirements on litigants' access to courts. The same standard of review is applicable in this situation since the Mississippi Legislature has authority to modify common law rights and Thomas had no vested interest in a cause of action prior to the enactment of Mississippi Code Annotated §§ 11-1-58 and 15-1-36(15). Upon review, both Mississippi Code Annotated §§ 11-1-58 and 15-1-36(15) are rationally related to a legitimate governmental purpose of assuring that there exists a legally sufficient basis upon which to pursue claims for alleged medical negligence.

Thomas advances several constitutional attacks on Mississippi Code Annotated §§ 11-1-58 and 15-1-36(15) and invokes core principles of republican government. However, equally at the core of Mississippi's governance is the rule of law and the mandate of individuals to abide by properly enacted legislation. Without excuse, Thomas has failed to comply with Mississippi Code Annotated §§ 11-1-58 and 15-1-36(15) and now disingenuously urges this Court to believe

that the appellant has fallen victim to these statutes. The rulings of the lower court on the statutes at issue were proper and should be affirmed.

### **STANDARD OF REVIEW**

This Court reviews rulings granting summary judgment *de novo*. *Saucier Through Saucier v. Biloxi Reg. Med. Ctr.*, 708 So. 2d 1351, 1354 (Miss. 1998). Rule 56(c), Mississippi Rules of Civil Procedure allows for a grant of summary judgment where “the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact.” Miss. R. Civ. P. 56(c). The court views the evidence in the light most favorable to the non-moving party. To avoid summary judgment, the non-moving party must establish a genuine issue of material fact within the means allowable under the Rule. *Walker*, 931 So. 2d at 588. “If any triable issues of fact exist, the lower court's decision to grant summary judgment will be reversed. Otherwise the decision is affirmed.” *Richmond v. Benchmark Constr. Corp.*, 692 So. 2d 60, 61 (Miss. 1997).

The burden upon a party challenging the constitutionality of a statute is to demonstrate unconstitutionality beyond a reasonable doubt. *City of Oxford v. Northeast Miss. Elec. Power Assn.*, 704 So. 2d 59, 65 (Miss. 1997); *Sec. of State v. Wiesenberg*, 633 So. 2d 983, 989 (Miss. 1994); *Miss. Power Co. v. Goudy*, 459 So. 2d 257, 263 (Miss. 1984). Enactments of the Legislature receive a strong presumption of validity. *Richmond v. City of Corinth*, 816 So. 2d 373, 375 (Miss. 2002).

### **ARGUMENT**

#### **I. Whether appellant failed to comply with the requirements of Mississippi Code Annotated §§ 11-1-58 and 15-1-36(15)?**

Thomas asserts several constitutional arguments, but these arguments are aimed at one purpose: to obscure the fact that in filing his lawsuit against Mississippi Baptist Medical Center, he failed to comply with relevant statutory mandates. Thomas offers no valid excuse for failure

to comply with these requirements. The mandates are not burdensome, and Mississippi Code Annotated §§ 11-1-58 and 15-1-36(15) are uncomplicated and easily followed.

**A. Appellant failed to comply strictly with the requirements of Mississippi Code Annotated § 11-1-58.**

Thomas filed the complaint in the Circuit Court for the First Judicial District of Hinds County on November 4, 2005, without attaching a certificate of consultation as required by § 11-1-58. That section mandates that in any action against a health care provider for personal injuries or wrongful death arising out of a course of medical services:

[T]he complaint shall be accompanied by a certificate executed by the attorney for the plaintiff declaring that: (a) The attorney has reviewed the facts of the case and has consulted with at least one (1) expert . . . and that the attorney has concluded on the basis of such review and consultation that there is a reasonable basis for the commencement of such action; or (b) The attorney was unable to obtain the consultation required by paragraph (a) of this subsection because a limitation of time established by Section 15-1-36 would bar the action and that the consultation could not reasonably be obtained before such time expired. A certificate executed pursuant to this paragraph (b) shall be supplemented by a certificate of consultation pursuant to paragraph (a) . . . within sixty (60) days after service of the complaint or the suit shall be dismissed . . .”

Miss. Code Ann. § 11-1-58. Thomas’ complaint was not accompanied by any certificate whatsoever.<sup>3</sup> Not until January 3, 2006, did Thomas file his certificate of compliance. By that time, MBMC had already filed its answer to Thomas’ complaint, meaning that the time for amendment as a matter of course under Mississippi Rule of Civil Procedure 15(a) had passed. Furthermore, the action became time barred on November 7, 2005, at the expiration of the statute of limitations, as the defective filing failed to toll the statute.

Thomas made no motion to amend his initial pleading with the certificate of compliance, and the certificate of compliance did not relate back to the date of the complaint’s filing. In his brief Thomas asserts that this Court has stated that Rule 15 should be liberally construed to allow

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<sup>3</sup> Thomas does not claim an inability to obtain medical records or to locate an expert witness.



amendments. However, Thomas passes over the fact that he never asked the lower court to grant him leave to amend his pleading.

Thomas provides no explanation for his failure to attach the certificate at the time of filing his Complaint, except to now mention that the statute of limitations would have soon barred his claim.<sup>4</sup> Section 11-1-58 makes provisions for those plaintiffs who do not have sufficient time for their attorneys to consult with an expert witness. The attorney may execute a certificate stating that the approaching statute of limitations made it unreasonable for them to consult an expert witness; plaintiff then gains sixty (60) days from service of the complaint to consult an expert. Additionally, the attorney may execute a certificate stating that after three (3) separate good faith attempts with three (3) different experts, the attorney was unable to obtain a consultation. Thomas did none of these things and he should not be allowed to raise any such issue on appeal.<sup>5</sup>

**B. Appellant failed to comply strictly with the requirements of § 15-1-36(15).**

Thomas initially mailed a notice of claim letter to MBMC on or about September 6, 2005, one day before the expiration of the two-year statute of limitations. (T. at 205). Section 15-1-36(15), provides in pertinent part, “No action based upon the health care provider’s professional negligence may be begun unless the defendant has been given at least sixty (60) days’ prior written notice of the intention to begin the action,” and further that “if the notice is served within sixty (60) days prior to the expiration of the applicable statute of limitations, the

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<sup>4</sup> Appellant made no argument in the trial court that the complaint had to be filed without expert consultation to avoid the statute of limitations. There is no such issue before the Court in this appeal.

<sup>5</sup> The certificate of compliance filed on January 3, 2006, states only, “This is to certify that the Attorneys for the Plaintiffs have consulted with at least one (1) expert who is qualified under the Mississippi Rules of Civil Procedure and Rules of Evidence to give expert testimony as to the standard of care. After consultation with this expert, it is the conclusion of the attorneys for the Plaintiffs that this is a reasonable basis for commencement of the above-referenced cause of action.” The certificate provides no explanation for the failure to certify from the outset of litigation. (R. at 21).

time for the commencement of the action shall be extended sixty (60) days from the service of the notice for said health care providers and others.” As the notice of claim letter was sent on September 6, 2005, the required sixty-day notice period did not end until November 5, 2005. Thomas chose to file his complaint on the fifty-ninth day of notice. Despite Thomas’ attempt to excuse his early filing by arguing that MBMC was not served with process until after the expiration of the sixty-day notice period, the Mississippi Supreme Court has stated that plaintiffs are “prohibited by law” from *filing suit* during the sixty-day notice period. *Pope v. Brock*, 912 So. 2d 935, 938 (Miss. 2005). Thomas failed to comply with § 15-1-36(15).

Thomas’ explanation for his early filing is that the statute of limitations would have run on Sunday, November 6, 2005, and “it was unclear whether the sixty additional days given to plaintiffs in § 15-1-36(15) was absolute or if the statute of limitations would have been tolled an additional day.” This explanation for early filing in Thomas’ case is unconvincing, particularly in view of the Court’s opinion in *Pope, infra*, on September 8, 2005—early in Thomas’ notice period—that § 15-1-36(15) “requires a sixty-day tolling of the two-year statute of limitations.”<sup>6</sup> 912 So. 2d at 939.

The Court’s holding in *Pope* made it clear that after the expiration of the sixty-day notice period, Thomas had an additional day remaining to file his complaint. Thomas explains his premature filing of the complaint by suggesting confusion created by the expiration of the sixty-day period on a Sunday. However, Rule 6(a), Mississippi Rules of Civil Procedure, provides:

[i]n computing any period of time prescribed or allowed by these rules, by order of court, or by *an applicable statute* . . . [t]he last day of the period so computed shall be included, unless it is *a Saturday, a Sunday* . . . in which event the period runs until the end of the

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<sup>6</sup> Nearly a year following the *Pope* decision, the Mississippi Supreme Court clarified its holding in *Pope*, stating that by the language of the statute, the time period is “extended, not tolled.” *Proli v. Hathorn*, 928 So. 2d 169, 174 (Miss. 2006). That clarification of language does not change the application of the law to the situation faced by Thomas in filing his complaint during the sixty-day notice period.

*next day* which is not a Saturday, a Sunday, a legal holiday, or any other day when the courthouse or the clerk's office is closed.”<sup>7</sup>

Simple reference to the Mississippi Rules of Civil Procedure clears any confusion remaining after the *Pope* decision. Thomas' failure to comply with § 15-1-36(15) was inexcusable.

**II. Whether strict compliance is the appropriate standard of compliance pursuant to Mississippi Code Annotated §§ 11-1-58 and 15-1-36(15)?**

In his opinion and order granting MBMC's motion for summary judgment, Judge Yerger properly found that strict compliance was the appropriate standard of compliance for both §§ 15-1-36(15) and 11-1-58. Thomas argues that the trial court, based on MBMC's urging, incorrectly adopted this standard from case law involving the Mississippi Tort Claims Act. In fact, Judge Yerger followed established case law in which the Mississippi Supreme Court considered §§ 11-1-58 and 15-1-36(15) and found that strict compliance was the appropriate standard.

**A. Strict compliance with Mississippi Code Annotated § 11-1-58 is required.**

The Mississippi Supreme Court previously addressed § 11-1-58 in *Walker v. Whitfield Nursing Center, Inc.*, 931 So. 2d 583, and concluded that strict compliance is required. In *Walker*, plaintiff conceded failure to comply strictly with the statute and urged the Court to adopt a standard of substantial compliance. Plaintiff did not file her certificate of expert consultation for over one year following the filing of her complaint. The Court looked to *University of Mississippi Medical Center v. Easterling*, 928 So. 2d 815, a case which involved the Mississippi Tort Claims Act, and adopted strict compliance as to that Act's ninety-day notice requirement. Though the Court acknowledged that the holding in *Easterling* was limited to Mississippi Code Annotated § 11-46-11(1), it found that its decision in that case indicated that “when reviewing statutory requirements, this Court will examine the record to determine compliance or non-compliance,” meaning that strict compliance applied.

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<sup>7</sup> Emphasis added.

In *Caldwell v. North Mississippi Medical Center, Inc.*, 956 So. 2d 888, the Mississippi Supreme Court reiterated that in examining whether the requirements of § 11-1-58(1) are satisfied, a court applies a strict compliance standard. *Id.* at 891. In *Caldwell* the court rejected plaintiff's argument that an expert witness disclosure served four (4) months after the filing of a complaint with no certificate of consultation cured the defect in the original complaint or excused the attachment of a certificate to the subsequently filed amended complaint. *Id.* at 589.

Thomas attempts to distinguish the present case from *Walker* because he did not wait over a year from the filing of the complaint to file his certificate. Thomas did not serve a certificate until after MBMC had filed its answer and he made no motion to amend his complaint, pursuant to Rule 15, Mississippi Rules of Civil Procedure. Thomas disingenuously obscures that fact in his argument that application of the strict compliance standard to § 11-1-58 denies plaintiffs the benefits of the liberal construction of Rule 15. In Mississippi, the courts apply the plain meaning of the statute when a statute is not ambiguous. *Claypool v. Mladineo*, 724 So. 2d 373, 382 (Miss. 1998). By its own language, the statute mandates dismissal where plaintiff fails to comply, as previously held by the Mississippi Supreme Court.

**B. Strict compliance is the appropriate standard of compliance for Mississippi Code Annotated § 15-1-36(15).**

As with § 11-1-58, the Mississippi Supreme Court has already addressed § 15-1-36(15) and determined the appropriate compliance standard to be strict compliance. *Caldwell*, 956 So. 2d at 894-95 (stating that *Arceo v. Tolliver*, 949 So. 2d 691, followed the logic of *Walker* in dismissing the complaint without prejudice for failure to comply with the statutory requirements of § 15-1-36(15)). In *Arceo* the Court dismissed plaintiff's action for failure to provide sixty days' written notice to defendant of her intention to commence suit, holding that dismissal was in accord with the plain meaning of the statute and stating, in *dicta*, that it did not deprive plaintiff of any constitutionally endowed right. 949 So. 2d at 696. The application of § 15-1-36(15) as

plainly written is consistent with the Court's "constitutional mandate to faithfully apply the provisions of constitutionally enacted legislation." *Id.* As will be discussed below, Section 15-1-36(15) is constitutionally enacted legislation.

Thomas asserts that his circumstances differ from those of plaintiffs in previous cases considered by the Mississippi Supreme Court. He argues that he could not strictly comply with § 15-1-36(15) because of his stated concern that the claim would be time-barred if he did not file his complaint one day before the end of the sixty-day notice period. However, as discussed above, this argument is unconvincing because Rule 6 establishes that when a time limitation expires on a Saturday or Sunday, the action is preserved until the next day the courthouse is open. This rule, coupled with the *Pope* ruling that plaintiffs are "prohibited by law" from filing suit during the sixty-day notice period, establishes that filing on the fifty-ninth day of the sixty-day notice period was not necessary and violated § 15-1-36(15), requiring dismissal of the action.

### **III. Whether this matter is time-barred by the statute of limitations, Mississippi Code Annotated § 15-1-36(1)?**

Thomas' failure to attach a certificate of compliance rendered his complaint filed on November 4, 2005, defective. Section 11-1-58 mandates that the complaint "shall be accompanied by a certificate." "Shall" is a mandatory instruction with which plaintiff must comply. *Arceo*, 949 So. 2d at 694. Having attached no certificate of consultation, or any certificate whatsoever, Thomas' complaint was defective and a nullity and without effect in tolling the running of the statute of limitations. By the time Thomas filed his certificate of compliance on January 3, 2006, this action was time barred and could not be revived.

**IV. Whether Mississippi Code Annotated §§ 11-1-58 and 15-1-36(15) violate the Separation of Powers Clause of the Mississippi Constitution of 1890?**

**A. The dismissal of this matter did not result from Thomas' inability to comply with statutory prerequisites and Thomas has no standing to argue that the statutes are unconstitutional.**

Instead of explaining why he did not follow the law, Thomas attacks the constitutionality of Mississippi Code Annotated §§ 11-1-58 and 15-1-36(15). Thomas' defective complaint and the time bar of the statute of limitations prevented his action from moving forward. The Mississippi Supreme Court has stated, "Established law is that constitutional issues are not reached if cases can be resolved upon other bases." *Grant v. State*, 686 So. 2d 1078, 1090 (Miss. 1996) (quoting *Williams v. Stevens*, 390 So. 2d 1012, 1014 (Miss. 1980)). The right to access Mississippi's courts is coupled with a responsibility to comply with the applicable rules and statutes governing plaintiff's action. *Arceo*, 949 So. 2d at 697. Thomas did not comply with statutory prerequisites to the filing of a medical negligence claim. The dismissal of the action did not result from a denial of avenues of relief, rather Thomas did not pursue available alternatives and cannot now complain.

**B. Mississippi Code Annotated §§ 11-1-58 and 15-1-36(15) are proper exercises of the Legislature's authority to enact substantive laws.**

Appellant, quoting *Claypool v. Mladineo*, 724 So. 2d 373, asserts that "the inherent power of this Court to promulgate procedural rules emanates from the fundamental constitutional concept of the separation of powers and the vesting of the judicial powers in the courts." *Id.* at 380. However, in the present case Appellant misapprehends §§ 11-1-58 and 15-1-36(15) as legislatively enacted procedural rules that usurp "the inherent rulemaking powers of the judiciary." To the contrary, these statutes are facially substantive in nature. They provide for pre-suit notification and a sixty (60) day period in which to investigate and potentially avoid

litigation and also requires that parties have a legitimate basis for filing the claims in the first instance.

Article 1, Section 1 of the Mississippi Constitution, provides:

[t]he powers of the government of the State of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another.

Through Article 6, Section 144, of the Mississippi Constitution, judicial powers vest in the Supreme Court and other courts provided for by the Constitution. From those constitutional provisions, the Mississippi Supreme Court concluded that the Mississippi Constitution granted it inherent power to promulgate procedural rules. *Newell v. State*, 308 So. 2d 71, 76 (Miss. 1975). The Mississippi Legislature recognizes that inherent power through Mississippi Code Annotated § 9-3-61, which acknowledges the Court's power over

the forms of process, writs, pleadings, motions, rules of evidence and the practice and procedure for trials and appeals in the Court of Appeals and in the circuit, chancery and county courts of this state and for appeals to the Supreme Court from interlocutory or final orders of trial courts and administrative boards and agencies, and certiorari from the Court of Appeals.

Though the concept of separation of powers has at times caused clashes between this Court and the Legislature, it is nonetheless deeply ingrained into this state's law. However, separation of powers by no means establishes that the Legislature is precluded from all matters involving Mississippi's courts. Given that the Legislature is charged with enacting the laws of this state and that the courts are charged with administering those laws, it is inevitable that at times the domains of the Legislature and the courts overlap. The separation of powers has never been as rigidly demarcated in Mississippi or at the federal constitutional level as Thomas urges. Though Thomas would assert that the constitutional framers considered any interchange of power among the three branches of governments as penultimate evil, their actual views were much more tempered and pragmatic. In Federalist No. 47, James Madison acknowledged "the

impossibility and inexpediency of avoiding any mixture whatever of these departments.” In other words, absolute separation of powers is an ideal, and as this Court has stated, “there will be areas in which the functions of the separate bodies will clash with the idealistic concept of separation of powers.” *Alexander v. State ex rel. Allain*, 441 So. 2d 1329, 1336 (Miss. 1983) (overruled on other grounds). Former Mississippi Court of Appeals and current Fifth Circuit Court of Appeals Judge Leslie H. Southwick noted that

[a] republican form of government as required under Article 4, Section 4 of the United States Constitution for each state has not usually been considered to require three separate, watertight compartments comprising the judicial, legislative, and executive powers. Instead, the very concept of checks and balances reveals that each branch has some interplay with the other branches. The Mississippi Supreme Court has recognized that principle when it properly wrested from the legislature only the power to adopt rules of practice and procedure and did not attempt to arrogate all powers over matters that touch or concern the judicial system.

*Wolfe v. City of D'Iberville*, 799 So. 2d 142, 150 (Miss. App. 2001) (Southwick, J., concurring).

The right to pursue a claim in the court system is one area in which the powers of the Legislature and the courts necessarily overlap, primarily because the substantive lawmaking power of the Legislature and the procedural rulemaking power of the Court converge to ensure that an individual granted a right of claim by the Legislature or by common law has a process by which to receive remedy. Judge Southwick also stated in his discussion of separation of powers that

[t]he Supreme Court has attempted to maintain a distinction between purely procedural matters that were within the Court's authority and other kinds of rules that were not . . . No Mississippi precedent I have found gives extensive commentary on what is practice and procedure and what is beyond those categories. There is a sense that if the regulation is of conduct occurring within a court, from the time the matter was properly commenced in that court until it is disposed of by the court, it is likely to be a matter of practice and procedure. These are core functions in the day-to-day operations of courts and properly within their control under *Newell*. Whether the matter was timely commenced in that court is not internal practice and procedure, but instead it is something that can be, and indeed always has been, controlled by the legislature through statutes of limitations.

*Id.*



Judge Southwick's exposition of the procedural rule versus substantive law issue augments and develops the dictionary meanings urged by Thomas. *Black's Law Dictionary* defines "substantive law" as "the part of the law that creates, defines, and regulates the rights, duties, and powers of parties" and "procedural law" as "the rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves." *Black's Law Dictionary* 1241, 1470 (Bryan A. Garner ed., 8<sup>th</sup> ed., Thomson West 2004). Sections 11-1-58 and 15-1-36(15) are substantive principles of law, in that these statutes regulate, or fix, a plaintiff's right to a remedy at law, and concern the Legislature's substantive interest in preventing unnecessary claims and requiring a legitimate basis for a claim that will meet the requisite standard of medical negligence claims.

Both §§ 11-1-58 and 15-1-36(15) establish requirements with which a plaintiff must comply in order to proceed with a claim. Without meeting these requirements, plaintiffs essentially have no right to a claim at law and have no right to invoke the court system for vindication of a right to claim through remedy. Looking to Judge Southwick's characterization of procedure, these conditions do not regulate "conduct occurring within a court, from the time the matter was properly commenced in that court until it is disposed of by the court"; rather, these conditions indicate the Legislature's legitimate interest in avoiding the creation of unnecessary claims and requiring a legitimate basis for a claim from the outset of litigation. The Legislature has authority over the substance of medical negligence claims and may properly regulate these claims. Of course, if a plaintiff brings a claim implicating these statutes, the courts still procedurally determine if the complaint is defective or if a claim exists at all, as these actions are within the inherent power of the courts.

The Legislature has not overstepped the authority of the courts on procedural matters; rather, the Legislature in §§ 11-1-58 and 15-1-36(15) has modified a common law remedy,

which is within their constitutionally mandated power. Thomas has no right to a remedy. *Walters v. Blackledge*, 220 Miss. 485, 508, 71 So. 2d 433, 441 (1954) (“No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit.”). “It can be assumed without misgiving that there is no vested right in any remedy for a tort yet to happen which the Constitution protects. Except as to vested rights, the legislative power exists to change or abolish existing statutory and common-law remedies.” *Walters*, 220 Miss. at 509, 71 So. 2d at 441 (quoting *Holder v. Elms Hotel Co.*, 338 Mo. 857, 866, 92 S.W.2d 620, 624 (Mo. 1936)); *Wells v. Panola County Board of Education*, 645 So. 2d 883, 890 (Miss. 1994). As a principle of law, it is well established that “the constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to obtain a permissible legislative object.” *Wells*, 645 So. 2d at 890 (citations omitted). The legislature has the right to place limits and conditions upon the right of a plaintiff to pursue a claim.

Legislation that modifies or abolishes common law remedies has previously faced constitutional attack from displeased plaintiffs, and this Court determined that such legislation was proper. The Mississippi Tort Claims Act, which modified the common law doctrine of absolute governmental immunity, has been attacked, but this Court has ruled that it does not violate the state constitution. *City of Jackson v. Sutton*, 797 So. 2d 977, 980 (Miss. 2001). In analyzing the Mississippi Tort Claims Act, this Court observed that “[a] constitutional guarantee of a remedy does not mean that recovery must be absolute or that it may be unlimited.” *Wells*, 645 So. 2d at 890-91.

Historically, individuals challenged the establishment of worker’s compensation laws as an unconstitutional violation of separation of powers on the part of the Legislature, but this Court found those challenges unconvincing, and affirmed the right of the legislature to abolish a common-law action, noting that “[t]he law of master and servant, as a body of rules of conduct,

is subject to change by legislation in the public interest.” *Walters*, 220 Miss. 485, 71 So. 2d 433 (1954) (quoting *Middleton v. Texas Power & L. Co.*, 249 U.S. 152, 163, 39 S.Ct. 227, 231 (1919)); see also *Pathfinder Coach Div. of Superior Coach Corp. v. Cottrell*, 216 Miss. 358, 62 So. 2d 383 (Miss. 1953). In *Walters*, the Court affirmed the statutory enactment and concluded that “the legislature chose to substitute one remedy for another: a statutory cause of action in place of the remedy available at common law.” *Wells*, 645 So. 2d at 890.

**C. As substantive laws, Mississippi Code Annotated §§ 11-1-58 and 15-1-36(15) do not conflict with the Mississippi Rules of Civil Procedure.**

In its Order adopting the Mississippi Rules of Civil Procedure, the Mississippi Supreme Court stated that “in the event of a conflict between these rules and any statute or court rule previously adopted these rules shall control.” Thomas’ arguments imply that this Order requires that any conflict between a statute and a rule of civil procedure be resolved in favor of the rule. However, such an application would fail to distinguish between substantive law and procedural rules. In this case there is no conflict, and as discussed *supra*, the statutes in question are substantive. Rule 1, Mississippi Rules of Civil Procedure, states, “[t]hese rules govern *procedure* in the circuit courts . . .” Emphasis added. Following Thomas’ reasoning, courts could prevent the Legislature from enacting substantive law, something that is clearly within its power and authority, and would contradict the mandate of Rule 1, which clearly confines the scope of the rules to matters of procedure.

None of the provisions of §§ 11-1-58 and 15-1-36(15) preclude the courts of Mississippi from applying the procedural rules mandated by the Mississippi Supreme Court. Instead the provisions operate as conditions precedent to fixing a right to and filing the action, much like statutes of limitation, which this Court has recognized as “within the province and function of the Legislature.” *Mitchell v. Progressive Ins. Co.*, 965 So. 2d 679, 683 (Miss. 2007). How the

courts deal procedurally with a plaintiff who fails to meet the conditions precedent remains the province of the court.

**D. Decisions from Foreign Courts do not mandate that Mississippi Code Annotated §§ 11-1-58 and 15-1-36(15) are unconstitutional.**

Thomas asserts that because other states have addressed statutes similar to §§ 11-1-58 and 15-1-36 and found them unconstitutional, this Court should similarly declare these statutes unconstitutional. However, those findings do not bind this Court, and their findings would not comport with established Mississippi law. *Paz v. Brush Engineered Materials, Inc.*, 949 So. 2d 1, 7 (Miss. 2007) (“This Court is not bound by the decisions of courts of other jurisdictions on similar questions. While the Court may utilize these decisions as persuasive authority if it finds them well-reasoned, the decisions are not binding, and this Court is at liberty to disregard them.”) (internal citations omitted). Just as some states have questioned and invalidated notice period and certificate requirements, so have other states enforced them as enacted. Colorado requires the filing of a certificate of review sixty (60) days *after* the filing of a complaint where professional negligence is alleged. Colo. Rev. Stat. § 13-20-602. This requirement is in accord with § 11-1-58 which requires a certificate of consultation within ninety (90) days of filing in the event that plaintiff cannot consult with an expert before the statute of limitations expires. The Colorado Court of Appeals has affirmed the statute as a valid extension of the requirement of expert testimony to prove a prima facie case of medical negligence and has not deemed the requirement procedural. *Williams v. Boyle*, 72 P.3d 392, 397 (Colo. App. 2003) (certiorari denied).

West Virginia has a statute very much like §§ 11-1-58 and 15-1-36, requiring a thirty-day notice of claim period and that defendants be served with a certificate of merit prior to the commencement of the action. W. Va. Code § 55-7B-6. Finding no separation of powers violation, the West Virginia Supreme Court held that “[u]nder these circumstances we have no

choice but to apply the statute as written.” *Elmore v. Triad Hospitals, Inc.*, 640 S.E.2d 217, 223 (W.Va. 2006).

The differing results in other states merely highlight the need for this Court to look not to other states for guidance, but to its own precedent and interpretive rules in reaching its decision about the validity of §§ 11-1-58 and § 15-1-36. Because these statutes are substantive in nature, fixing a plaintiff’s right to claim, and because Mississippi has a well-established history of allowing its Legislature to modify common law remedies as it deems necessary, these statutes should be upheld. Such is all the more significant where, as here, a party is merely aggrieved by a result which is not inconsistent with the operation of law that requires plaintiffs to possess a legally sufficient basis for filing claims alleging medical negligence.

Glaringly absent from Thomas’ constitutional discussion is any showing that the asserted constitutional infirmities prejudiced him in this case. Having taken no action for two (2) years following the death of plaintiff’s decedent, it cannot be said that Thomas was denied access to the court by the sixty (60) day notice period. Further, given that Thomas did not respond to MBMC’s interrogatories (propounded December 29, 2005; R. at 18) requesting Rule 26(b)(4) expert witness information, only through unsupported conjecture does Thomas contend that he was prejudiced by the dismissal of this case for failing to comply with the required certification of consultation with duly qualified expert prior to the initiation of litigation.

**V. Whether appellant was denied access to court?**

Following his argument that Mississippi Code Annotated §§ 11-1-58 and 15-1-36(15) violate the separation of powers provisions of the Mississippi Constitution, Thomas focuses on § 15-1-36(15), arguing that it violates § 24 of the Mississippi Constitution by delaying a plaintiff’s entrance into the courts. Considering that he waited nearly two years and only one day before the statute of limitations would have barred his action to send his notice of claim,

Thomas is hardly in a position to claim that the notice period (which allows parties to attempt to avoid or settle claims) denied him access to the courts. Section 24 reads:

All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay.

Miss. Const. Art. 3, § 24. Thomas references a passage from a 1928 treatise on Mississippi's constitutions, but more importantly, does not explain the failure to commence action during the two (2) years following the death of Melinda Thomas, or how the sixty (60) day notice period denied appellant access to the Court.

The Mississippi Supreme Court has stated that § 24 does not create an unlimited right of access to courts and does not guarantee that recovery must be absolute or that it may be unlimited. *Wells*, 645 So. 2d at 890-91. More recently, the Court addressed the constitutional issue of access to the courts in the medical malpractice context in *Arceo*, a case in which plaintiff filed a medical malpractice claim against defendant with no pre-suit notice. There, the Court concluded in *dicta* that application of the plain meaning of § 15-1-36(15) and dismissal of her claim did not deprive plaintiff of any constitutionally endowed right. *Arceo*, 949 So. 2d at 696. "All that is required is a *reasonable* right of access to the courts—a reasonable opportunity to be heard." *Id.* at 697 (quoting *Wayne v. Tenn. Valley Auth.*, 730 F.2d 392, 403 (5<sup>th</sup> Cir. 1984) (cited with approval in *Townsend v. Estate of Gilbert*, 616 So. 2d 333 (Miss. 1993) (emphasis in original)).

Thomas argues that § 15-1-36(15) effectively suspends the Mississippi Rules of Civil Procedure and imposes a delay upon plaintiffs in medical malpractice actions, restricting an individual's access to the courts. The sixty-day pre-suit notice requirement does not restrict access to the courts; rather, it expands by sixty days the two-year statute of limitations for filing a medical malpractice claim. Though individuals may not file a complaint during the notice

period, the statute and its case law ensure that an individual's claim will survive the sixty-day notice period, ensuring that their access to the courts is protected. If anything, the sixty-day notice period enhances an individual's access to the court by extending the statute of limitations.

The Mississippi Supreme Court has already declared pre-suit notice provisions valid in the Mississippi Tort Claims Act context, where it has noted its "constitutional mandate to faithfully apply the provisions of constitutionally enacted legislation." *U. of Miss. Med. Ctr. v. Easterling*, 928 So. 2d 815, 820 (Miss. 2006). While Thomas may argue that the MTCA differs from the medical negligence statutes in that the Legislature has complete authority over the waiver of sovereign immunity, the MTCA does not preempt the Mississippi Rules of Civil Procedure. Though that Act has different underlying principles than § 15-1-36(15), the notice provision operates in the same manner. The statutorily mandated ninety-day period does not implicate § 24 of the Mississippi Constitution.

The only case cited by Thomas concerning § 24 is a Fifth Circuit case construing the First Amendment of the United States Constitution. There, the Fifth Circuit, in *dicta*, stated that the right of access is "implied where the ability to file suit was delayed, or blocked altogether." *Foster v. City of Lake Jackson*, 28 F.3d 425, 430 (5<sup>th</sup> Cir. 1994). *Foster* bears no resemblance to this action. In *Foster*, plaintiffs filed a federal § 1983 claim alleging discovery violations that amounted to a constitutional delay under the First Amendment. *Id.* at 427. The Fifth Circuit disposed of the action based on the qualified immunity of the government officials, finding that even if a constitutional violation had occurred, government officials could not have known that their discovery violations amounted to a constitutional violation. *Id.* at 431. The court did not hold that the right of access had been denied; rather, the court held that the right of access "clearly encompassed a right to file an action," and acknowledged case law that "delay filing suit could interfere with the 'constitutionally protected right to institute . . . suit', if that right had

been prejudiced.” However, § 15-1-36(15) does not violate these findings, as it does not deny the right to file an action once the notice period ends and expands the statute of limitations. Further, appellant herein demonstrates neither a denial of access to the court and no prejudice to him or his claim.

In *Arceo*, the Court pointed out that the right to access courts is tempered with responsibility, “including the responsibility to comply with legislative enactments, rules, and judicial decisions.” 949 So. 2d at 697. The Court stated that the plaintiff had a right to access the courts for a remedy, but also had a responsibility to comply with § 15-1-36(15). To hold otherwise, the Court reasoned, “would render meaningless any rule or statute setting time limitations on litigants.” The same conclusion applies here—Thomas had a responsibility to comply with § 15-1-36(15) and the statute of limitations applicable to medical malpractice actions. As in *Arceo*, Thomas’ failure to comply with rules and statutes should not be excused.

In support of his argument that §15-1-36(15) violates § 24 of the Mississippi Constitution, Thomas refers to two out-of-state cases where notice provisions were held unconstitutional. This Court is not bound by the actions of other state courts and the cases cited by Thomas, *Weidrick v. Arnold*, an Arkansas case, and *Carson v. Maurer*, a New Hampshire case, which do not address the concept of unconstitutional delay.

## **VI. Whether appellant was denied right to open and accessible courts?**

### **A. Strict Scrutiny is an appropriate Standard for Mississippi Code Annotated §§ 11-1-58 and 15-1-36(15).**

Thomas asserts that §§ 11-1-58 and 15-1-36(15) violate the Equal Protection Clauses of the Mississippi and Federal Constitution because they fail to withstand strict scrutiny. The Equal Protection Clause states that “[n]o person shall be deprived of life, liberty, or property except by due process of law.” U.S. Const. Amend. XIV; Miss. Const. Art. 3 § 14. Under Mississippi law a party challenging the constitutionality of a statute must prove unconstitutionality beyond a



reasonable doubt. *City of Oxford v. Northeast Miss. Elec. Power Assn.*, 704 So. 2d 59, 65 (Miss. 1997); *Sec. of State v. Wiesenberger*, 633 So. 2d 983, 989 (Miss. 1994); *Miss. Power Co. v. Goudy*, 459 So. 2d 257, 263 (Miss. 1984). Citing only a dissenting opinion to support his argument that strict scrutiny is the appropriate standard, Thomas has failed to meet this standard of review. Additionally, by failing to make any specific arguments concerning constitutionality under the United States Constitution, Thomas has failed to show unconstitutionality under the Fourteenth Amendment.

As Thomas acknowledges, the court applies strict scrutiny only where a statute implicates a suspect class or a fundamental right. *Wells*, 645 So. 2d at 895-96 (citing *Turrentine v. Brookhaven, Miss. School Dist.*, 794 F.Supp. 620 (S.D. Miss. 1992)). Thomas does not allege that §§ 11-1-58 and 15-1-36(15) implicate a suspect class or that he is a member of a suspect class. Instead, he argues that the right to open and accessible courts and that the right to trial by jury are fundamental rights and that strict scrutiny applies.

The statutes at issue do not implicate a fundamental right. As discussed above, Mississippi's constitution does not confer an unlimited right of access to the courts. *Turrentine*, 794 F.Supp. at 626. "All that is required is a *reasonable* right of access to the courts—a reasonable opportunity to be heard." *Id.* at 697 (quoting *Wayne v. Tenn. Valley Auth.*, 730 F.2d 392, 403 (5<sup>th</sup> Cir. 1984) (cited with approval in *Townsend v. Estate of Gilbert*, 616 So. 2d 333 (Miss. 1993)) (emphasis in original)). This statement by the Mississippi Supreme Court does not indicate a fundamental right at stake. Previously, in the arenas of the Mississippi Tort Claims Act and the Mississippi Workers' Compensation Act, the Court has applied rational basis scrutiny where the Legislature has placed limitations or requirements on litigants' access to courts. *Dependents of Nosser v. Natchez Jitney Jungle, Inc.*, 511 So. 2d 141 (Miss. 1987); *Wells*,

645 So. 2d at 896. It should continue that level of scrutiny as to Mississippi Code Annotated §§ 11-1-58 and 15-1-36(15).

Thomas attempts to differentiate §§ 11-1-58 and 15-1-36(15) from *Wells*' application of rational basis scrutiny by pointing out that the Court stated that "[t]he right to trial by jury is guaranteed only for those actions for which, at common law, a jury was required." *Wells*, 645 So. 2d at 899. At common law, he reasons, individuals had no right to damages from the government, but they did have a right to trial by jury in medical negligence cases. He provides no explanation as to how this statement acknowledging a right to trial by jury in common law actions establishes that the right to open and accessible courts is a fundamental right. The differentiation proves irrelevant when coupled with *Wells* reaffirmation that "the constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to obtain a permissible legislative object." *Id.* at 890. The Mississippi Legislature has authority to modify common law rights, and unless Thomas' cause of action vested before the enactment of §§ 11-1-58 and 15-1-36(15), he has no fundamental right to have the common law remedy remain unmodified. *Walters*, 220 Miss. at 508, 71 So. 2d at 441. Having established no fundamental right, Thomas is incorrect in asserting that strict scrutiny applies to §§ 11-1-58 and 15-1-36(15). Where plaintiff cannot show membership in a suspect class or interference with a fundamental right, the rational relation test properly applies. *Wells*, 645 So. 2d at 896. Defendant need only show that the statutes at bar are "rationally related to a legitimate governmental purpose." *Id.* at 896.

#### **B. Mississippi Code Annotated § 11-1-58 Withstands Rational Basis Scrutiny.**

Mississippi requires expert testimony in medical negligence actions in order for plaintiffs to identify and articulate the requisite standard of care. *Troupe v. McAuley*, 955 So. 2d 848, 856 (Miss. 2007). "It is [Mississippi's] general rule that in a medical malpractice action, negligence

cannot be established without medical testimony that the defendant failed to use ordinary skill and care.” *Brooks v. Roberts*, 882 So. 2d 229, 232 (Miss. 2004). Section 11-1-58 ensures that plaintiffs can meet the requisite element of a medical negligence claim *prior* to filing their action, so that, among other reasons, financial resources will not be expended in defense of litigation of questionable merit.

The Mississippi Supreme Court has affirmed the legitimate governmental purpose of preventing the filing of questionable lawsuits (Miss. R. Civ. P. 11; Rule 3.1 of the Mississippi Rules of Professional Conduct). Section 11-1-58 complements existing rules that recognize a legitimate governmental purpose in preventing the filing of frivolous lawsuits which unnecessarily consume the resources of Mississippi’s courts. Nothing prevents the Mississippi Legislature from substantively addressing a problem which this Court also addresses procedurally, and the statute is rationally related to a legitimate governmental purpose.

**C. Mississippi Code Annotated § 15-1-36(15) Withstands Rational Basis Scrutiny.**

In support of his argument that § 15-1-36(15) does not withstand strict scrutiny, Thomas cites the Supreme Court of New Hampshire’s decision in *Carson v. Maurer*, where the court applied intermediate scrutiny in holding that a provision similar to § 15-1-36(15) failed to pass the constitutional standard. Thomas does not however mention that the application of intermediate scrutiny was overruled in *Community Resources for Justice, Inc. v. City of Manchester*, 154 N.H. 748, 917 A.2d 707 (2007). The court determined that the intermediate scrutiny standard articulated in *Carson* no longer comported with the United States Supreme Court’s standard and was less stringent. It should be pointed out that New Hampshire chooses to apply the United States Supreme Court’s levels of scrutiny to its own state constitution, something that a state is not required to do. Given that New Hampshire has changed its

constitutional standards of scrutiny, that they are in a state of uncertainty and that *Carson* is overruled as to that core issue, application of *Carson*'s reasoning to this case is inappropriate.

Section 15-1-36(15) provides a mechanism whereby the parties have a period of time prior to the commencement of legislation to investigate and/or resolve claims or concerns without the necessity of litigation. Perhaps by way of example, *Ratliff v. Stewart*, 508 F.3d 225, (5th Cir. 2007), reveals the circumstances that warrant the enactment of § 15-1-36(15). In *Ratliff*, a patient alleged injury from a drug, and filed her claim naming the wrong doctor. *Id.* at 227. Though the defendant's counsel repeatedly informed plaintiff's counsel that the patient had sued the wrong doctor, nearly a year passed before the suit was dismissed against him. *Id.* at 228. Stewart expended time and resources pursuing dismissal of an action that plaintiff never should have filed against him. *Id.* at 236. Aside from avoidance of litigation, the attendant problems of medical malpractice insurance reporting and medical staff inquiries can be avoided if unnecessary litigation is prevented. The statute is rationally related to these legitimate governmental purposes.

### **CONCLUSION**

This case does not require a re-analysis of whether Mississippi Code §§ 11-1-58 and 15-1-36 are constitutional. These statutes are substantive and this court has ruled definitively on their constitutionality. The present case is a proceeding by a party who failed to act in accordance with statutory conditions precedent to the commencing litigation, and feeling aggrieved, yet having no explanation for his non-compliance, seeks relief from this court in the form of a declaration that two statutes passed by the Mississippi Legislature are unconstitutional. Glaringly absent from this appeal is any explanation by appellant of the reasons for non-compliance with these statutory requirements and how, if at all, the operation of these statutes served to deprive him of any constitutional right.

Section 11-1-58 requires that an attorney attach a certificate of consultation with an expert to a complaint when filed. Alternatively, if there is insufficient time because of the statute of limitations or because medical records were unavailable or because more than three expert witnesses have declined to provide a consultation, then the party may so state in a certificate attached to the complaint when filed. Appellant did not avail himself to any of these processes and cannot arguably suggest that the results of his inaction somehow justify a constitutional challenge to the statutory conditions precedent to commencing litigation.

Further, appellant's failure to file a complaint with the requisite certificate of consultation rendered it a nullity which did not toll the statute of limitations. Thus, by the time appellant filed the untimely "certificate of compliance" the statute of limitations had expired and the claim was time-barred. In a further effort of avoidance of the ruling of the trial court, appellant, on appeal, invokes Rule 15, Mississippi Rules of Civil Procedure, another avenue not pursued in the trial court, to suggest that the dismissal of the proceeding was not proper. To the contrary, not only did plaintiff not file a timely motion to amend the complaint, plaintiff filed no motion to amend the pleading.



Finally, appellant's argument that §15-1-36 deprives a litigant of access to the court is of no consequence to appellant who prematurely filed the complaint in this matter. Again, offering no explanation as to why he waited two years to initiate the claim process, appellant is in no position to contend that a statute which extends the period of time in which to pursue a claim deprives litigants of access to the courts.

This case is not about the constitutionality of these statutes, rather this case is representative of the type of litigation which the statutes in question rationally and legitimately address and an occasion on which this court may once again reaffirm the legitimate legislative mandate. The decision of the lower court should be affirmed.

RESPECTFULLY SUBMITTED, this the 15th day of February, 2008.

MISSISSIPPI BAPTIST MEDICAL CENTER, INC.

BY:  

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**CERTIFICATE OF SERVICE**

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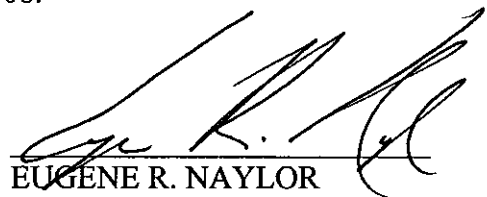
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