IN THE SUPREME COURT OF MISSISSIPPI

NO. 2006-CA-01947

MARVIN BROWN — **APPELLANT**

V.

JENNIFER BROWN, NURSE and SOUTHWEST MISSISSIPPI REGIONAL MEDICAL CENTER — **APPELLEES**

ON APPEAL FROM THE CIRCUIT COURT OF PIKE COUNTY, MISSISSIPPI

BRIEF OF APPELLEE, SOUTHWEST MISSISSIPPI REGIONAL MEDICAL CENTER

ORAL ARGUMENT NOT REQUESTED

R. Mark Hodges, MSB #[redacted]
Mark J. Goldberg, MSB #[redacted]
WISE CARTER CHILD & CARAWAY
Professional Association
401 East Capitol Street, Suite 600
Post Office Box 651
Jackson, Mississippi 39205-0651
Telephone: (601) 968-5500
Facsimile: (601) 968-5519

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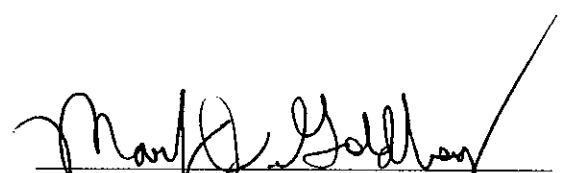
CERTIFICATE OF INTERESTED PERSONS

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

1. The Honorable Michael M. Taylor, Circuit Court Judge, Pike County, Mississippi
2. Marvin Brown, Appellant
3. Isaac K. Byrd, Jr., Attorney for Appellant
4. Suzanne G. Keys, Attorney for Appellant
5. Southwest Mississippi Regional Medical Center, Appellee
6. R. Mark Hodges, Attorney for Appellee
7. Mark J. Goldberg, Attorney for Appellee
8. Jennifer Brown, Appellee
9. James P. Streetman, III, Attorney for Appellee
10. Matthew A. Taylor, Attorney for Appellee

This, the 20th day of June, 2007.



R. MARK HODGES (MSB # 2493)
MARK J. GOLDBERG (MSB #101874)
Attorneys of record for Appellee
Southwest Mississippi Regional Medical Center

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STATEMENT OF ISSUES

I. Whether the trial court properly dismissed Plaintiff's claims against Southwest Mississippi Regional Medical Center due to his failure to comply with the Mississippi Tort Claims Act's ninety (90) day notice of claim requirement under Miss. Code Ann. § 11-46-11(1)?[1]

II. Whether the Plaintiff was unconstitutionally deprived of due process of law by the dismissal of his claims brought under the Mississippi Tort Claims Act against Southwest Mississippi Regional Medical Center?

[1] A copy of Miss. Code Ann. § 11-46-11 is attached to this Brief as Appendix "A", pursuant to Miss. R. App. P. 28(f).

STATEMENT OF THE CASE[2]

I. Nature of the Case and Course of Proceedings in the Court Below

This is a medical malpractice action arising from the care and treatment provided to the Plaintiff, Marvin Brown, at Southwest Mississippi Regional Medical Center ("Southwest") in March and April of 2002. On December 18, 2002, Mr. Brown filed this suit against Southwest, Jennifer Brown, and Doctors Julian Janes and Scott Smith. (C.P. 3). Southwest served its Answer and Defenses on February 28, 2003. (C.P. 8-11). Among several affirmative defenses, Southwest pled all applicable protections under the Mississippi Tort Claims Act ("MTCA"), and moved to dismiss the Complaint for Plaintiff's failure to comply with the MTCA's notice of claim provisions. (C.P. 8). Jennifer Brown's Answer and Defenses to the Complaint was served on March 4, 2003. (C.P. 12-16). Doctors Janes and Smith were not served with process and thus, neither doctor entered an appearance in the case. (*See* C.P. 1-2).

On July 30, 2003, an Order Staying Case was entered pursuant to Miss. Code Ann. § 83-23-135, as a result of the liquidation of Reciprocal of America, Southwest's insurer. (C.P. 46). Under the Order, the action was stayed for a period of six (6) months, through and including December 20, 2003. (C.P. 46). Although the stay expired on December 20, 2003, nothing was filed in the case until a March 3, 2004, Order Setting Trial. (C.P. 1). The trial date set by the March 3 Order was later set aside by a December 20, 2004 Agreed Order of Continuance, entered in part because of the Honorable Keith Starrett leaving the bench. (C.P. 47).

On December 23, 2004, Southwest filed its Amended Answer and Defenses asserting the

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[2] Throughout this Brief of Appellee, citations to the lower court's papers will be cited as "C.P." Citations to the transcripts from the hearings on Southwest's Motion for Summary Judgment and Plaintiff's Motion to Reconsider Motion for Summary Judgment will be cited as "T.R."

additional affirmative defense of all applicable protections under the Mississippi Insurance Guaranty Act. (C.P. 17). Southwest again pled all applicable protections under the MTCA and moved to dismiss the Complaint for Plaintiff's failure to comply with the MTCA's notice of claim provisions. (C.P. 17). On April 4, 2005, Jennifer Brown filed her Amended Answer and Defenses which invoked all rights and protections afforded by the MTCA. (C.P. 23-27).

On April 6, 2006, this Court held that "strict compliance is required" with the MTCA's ninety-day waiting period. *Univ. of Miss. Med. Ctr. v. Easterling*, 928 So. 2d 815, 819-20 (¶ 22) (Miss. 2006), *cert. denied*, 127 S. Ct. 549 (2006). On August 23, 2006, Southwest filed its Motion for Summary Judgment seeking dismissal of Plaintiff's claims. (C.P. 29).[3] Southwest argued that summary judgment was appropriate because Plaintiff failed to comply with the MTCA's ninety-day notice of claim provision by filing suit only **five (5) days** after submitting his Notice of Claim. (C.P. 30-31).[4] Between April 6, 2006, and the filing of Southwest's Motion for Summary Judgement, Southwest did not actively participate in litigation. (*See* C.P. 1-2).

Plaintiff responded to Southwest's Motion for Summary Judgment on October 13, 2006. (C.P. 54). Plaintiff admitted that he failed to comply with the MTCA's ninety-day notice of claim provision and "that now premature filing does require dismissal." (C.P. 56). However, Plaintiff contended that case law specifically overruled by *Easterling* applied to the notice of claim issue and required a dismissal of Southwest's Motion for Summary Judgment. (*See* C.P. 56-57).

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[3] Southwest also alternatively joined in Jennifer Brown's Motion to Dismiss for failure to prosecute. (C.P. 31).

[4] Southwest also noted that the contents of Plaintiff's Notice of Claim failed to comply with Miss. Code Ann. § 11-46-11(2). (C.P. 31).

Southwest's Motion for Summary Judgment was heard before the Honorable Circuit Court Judge Michael M. Taylor on October 16, 2006. (T.R. 1). Counsel for Southwest argued that Plaintiff's reliance upon case law overruled by *Easterling* was erroneous since this Court's rulings apply retroactively to cases awaiting trial or pending appeal. (*See* T.R. 6-7). Plaintiff's Counsel contended that Plaintiff complied with the MTCA's notice provisions under the law at the time suit was filed, and under this same law Southwest waived its right to seek dismissal of Plaintiff's claim. (*See* T.R. 7-8). Counsel for Plaintiff also argued that a dismissal of Plaintiff's claims would result in a denial of due process. (*See* T.R. 10). Judge Taylor granted the Motion for Summary Judgment "on the grounds that plaintiff has failed to comply with the Tort Claims Act as interpreted by the Court in *Easterling* and its progeny." (T.R. 12).[5] Judge Taylor found that *Easterling* interpreted the MTCA's ninety-day notice provision as jurisdictional and shifted the burden away from the State or public entity to request a stay upon a plaintiff's non-compliance with the statute. (*See* T.R. 11). A Final Order and Judgment of Dismissal with Prejudice as to Southwest was filed in the Court Docket on October 23, 2006. (C.P. 77).

Plaintiff filed a Motion to Reconsider Motion for Summary Judgment on October 25, 2006. (C.P. 79). The Motion to Reconsider basically reargued the points presented in Plaintiff's prior opposition to Southwest's Motion. (*Compare* C.P. 79-84, *with* C.P. 56-57, *and* T.R. 7-10). Co-Defendant Jennifer Brown filed a Motion for Summary seeking dismissal of Plaintiff's claims on October 27, 2006. (C.P. 88). Southwest responded in opposition to Plaintiff's Motion to Reconsider on October 31, 2006. (C.P. 100-02).

The hearing on Plaintiff's Motion to Reconsider and Jennifer Brown's Motion for

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[5] Judge Taylor denied Southwest's alternative request that the action be dismissed due to Plaintiff's failure to prosecute. (T.R. 11-12).

Summary Judgment was held on November 2, 2006. (T.R. 14). Judge Taylor granted Jennifer Brown's Motion for Summary Judgment and again rejected Plaintiff's opposition to Southwest's Motion for Summary Judgment. (T.R. 30). The Orders denying Plaintiff's Motion to Reconsider and granting Jennifer Brown's Motion for Summary Judgment were entered and filed on November 2, 2006. (C.P. 106, 108). Plaintiff's Notice of Appeal was filed on November 6, 2006. (C.P. 109).

II. Statement of Facts Relevant to the Issues Presented for Review

Marvin Brown presented to Southwest's Emergency Room complaining of migraine headaches and related symptoms on March 31, April 4, April 5, and April 7, of 2002. (C.P. 29). During his March 31 visit, Mr. Brown was treated with an intramuscular injection of Demerol and Phenergan in the area of his right hip/buttocks. (C.P. 29). Defendant Jennifer Brown administered this injection. (C.P. 29). At the time, Jennifer Brown was a nursing student at the University of Southern Mississippi, College of Nursing, participating in a clinical field assignment at Southwest. (C.P. 29).

On December 13, 2002, Mr. Brown, through retained counsel, prepared a Notice of Claim to Southwest purporting to be "in accordance with Mississippi Code Annotated § 11-46-11." (C.P. 34). The Notice of Claim was received by Southwest on December 16, 2002. (C.P. 34). The Notice alleges that Marvin Brown was initially injured at Southwest on March 31, 2002. (C.P. 35). Also, the Notice claims that the negligence of Southwest's employees and agents caused Mr. Brown to suffer injury. (C.P. 35). Although Marvin Brown's Notice of Claim included a "residence of the person making the claim . . ." subheading, the residence of Marvin Brown at the time of injury or at the time his claim was filed was not provided. (C.P. 34-36).

On December 18, 2002, only **five (5) days** after preparing his Notice of Claim, **two (2)**

days after Southwest actually received the Notice of Claim and **fourteen (14) days** prior to the effective date of the medical malpractice and civil justice reforms passed by the Mississippi Legislature in 2002,[6] Mr. Brown filed this action. (C.P. 3).

[6] *See* 2002 Miss. Laws 3rd Ex. Sess. Ch. 2 (H.B. 2) § 13; 2002 Miss. Laws 3rd Ex. Sess. Ch. 4 (H.B. 19) § 16.

SUMMARY OF THE ARGUMENT

Southwest is a Community Hospital created and existing pursuant to Miss. Code Ann. § 41-13-15. As such, Southwest is considered a "political subdivision," and in turn a "governmental entity," and any lawsuits brought against it are subject to the requirements of the MTCA. Section 11-46-11(1) of the MTCA requires a plaintiff to wait ninety (90) days after filing a notice of claim before bringing suit against a governmental entity. Plaintiff Marvin Brown failed to comply with section 11-46-11(1) when he filed suit against Southwest only **five (5) days** after submitting his Notice of Claim.

Plaintiff's failure to comply with section 11-46-11(1) requires the dismissal of his claims under this Court's controlling opinion in *University of Mississippi Medical Center v. Easterling*, 928 So. 2d 815 (Miss. 2006), *cert. denied*, 127 S. Ct. 549 (2006). *Easterling* specifically overruled prior case law which only entitled a defendant to seek a stay of proceedings upon a plaintiff's failure to comply. *Id.* at 819-20 (¶ 22). Thus, the burden was shifted from the defendant to the plaintiff to correct any non-compliance.

The trial court properly found *Easterling*, and not the line of cases it overruled, to apply to the notice of claim issue in this case. This Court's rulings are presumptively applied retroactively to cases awaiting trial or pending appellate review. The Court in *Easterling* did not limit its holding to subsequent cases. Therefore, *Easterling* was correctly applied to this action under the presumptive rule of retroactivity.

Plaintiff's argument that Southwest waived its ability to seek dismissal of Plaintiff's claims is directly contradicted by *Easterling*. The defendant is no longer required to request a stay of proceedings upon a plaintiff's non-compliance or face a waiver of the ninety-day defense. *See Easterling*, 928 So. 2d at 818 (¶ 16) (citation omitted). The plaintiff has the responsibility to

correct a failure to comply. *Easterling* may also be read as interpreting the MTCA's notice provisions as mandatory, jurisdictional requirements incapable of waiver. A jurisdictional defense may be raised at any stage of the proceedings.

The dismissal of Plaintiff's claims pursuant to his failure to comply with the MTCA's ninety-day notice of claim provision did not result in a deprivation of due process. A due process violation cannot arise unless one is deprived of a protected property interest. Plaintiff had no protected property interest in suing Southwest, a governmental entity and political subdivision of the sovereign State of Mississippi. Even assuming that the State's limited waiver of sovereign immunity through the enactment of the MTCA granted Plaintiff a protected property interest, there has been no violation of due process. The MTCA's notice provision is rationally related to a legitimate governmental interest and therefore constitutional. Plaintiff has failed to provide any authority supporting his contention that the retroactive application of *Easterling* resulted in a deprivation of due process.

The trial court's decision granting Southwest summary judgment as a matter of law should be affirmed.

ARGUMENT

Standard of Review

This Mississippi Supreme Court reviews grants of summary judgment de novo. *Univ. of Miss. Med. Ctr. v. Easterling*, 928 So. 2d 815, 817 (¶ 8) (Miss. 2006) (citation omitted), *cert. denied*, 127 S. Ct. 549 (2006). Summary judgment is appropriate "if 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 and that the moving party is entitled to a judgment as a matter of law." Miss. R. Civ. P. 56(c). The movant has the burden of showing the absence of any "genuine issue of material fact while the non-moving party should be given the benefit of every reasonable doubt." *Citifinancial Retail Servs. v. Hooks*, 922 So. 2d 775, 779 (¶ 17) (Miss. 2006) (citations omitted). The non-moving party "must be diligent and may not rest upon allegations or denials in the pleadings but must set forth specific facts showing a genuine issue for trial." *Zurich Am. Ins. Co. v. Goodwin*, 920 So. 2d 427, 432 (¶ 7) (Miss. 2006) (citing *Richmond v. Benchmark Constr. Corp.*, 692 So. 2d 60, 61 (Miss. 1997)). Where the moving party establishes the plaintiff's inability to meet any one of the essential elements of his claim, "all other contested issues of fact are rendered immaterial." *Williams v. Bennett*, 921 So. 2d 1269, 1272 (¶ 10) (Miss. 2006) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

I. The Trial Court Properly Dismissed Plaintiff's Claims Against Southwest Due to His Failure to Comply with the MTCA's Ninety (90) Day Notice of Claim Requirement Under Miss. Code Ann. § 11-46-11(1)

A. The Plaintiff Failed to Comply with the MTCA's Ninety (90) Day Notice of Claim Provision when He Filed Suit Against Southwest Only Five (5) Days After Submitting His Notice of Claim

Southwest is a Community Hospital created and existing pursuant to Mississippi Code Annotated section 41-13-15. As such, Southwest is considered a "political subdivision," and in

turn a "governmental entity," and any lawsuits brought against it are subject to the requirements of the MTCA. *Blailock ex rel. Blailock v. Hubbs*, 919 So. 2d 126, 129 (¶ 7) (Miss. 2005); *see also* Miss. Code Ann. § 11-46-1(g), (i); *Bolivar Leflore Med. Alliance, LLP v. Williams*, 938 So. 2d 1222, 1232 (¶ 25) (Miss. 2006) (holding that an "instrumentality" of a "community hospital" was entitled to the MTCA's protections, limitations and immunities); *Gilchrist v. Veach*, 807 So. 2d 485, 489 (¶ 11) (Miss. Ct. App. 2002) (recognizing that a "community hospital" is afforded the protections of the MTCA). Under section 11-46-11(1) of the MTCA, "[a]fter the plaintiff gives notice, he must wait the requisite ninety days before filing suit." *Easterling*, 928 So. 2d at 820 (¶ 24). Plaintiff Marvin Brown was required to wait ninety days after submitting his Notice of Claim prior to filing suit against Southwest pursuant to section 11-46-11(1).[7]

This Court initially required strict compliance with the MTCA's notice provisions. *See, e.g., Carpenter v. Dawson*, 701 So. 2d 806, 808 (¶ 7) (Miss. 1997); *City of Jackson v. Lumpkin*, 697 So. 2d 1179, 1182 (¶ 8) (Miss. 1997). In late 1998 and early 1999, however, this Court began to follow a standard of substantial compliance. *See, e.g. Carr v. Town of Shubuta*, 733 So. 2d 261, 263 (¶ 6) (Miss. 1999); *Reaves v. Randall*, 729 So. 2d 1237, 1240 (¶ 10) (Miss.1998). On April 6, 2006, this Court returned to strictly enforcing section 11-46-11(1) under its "constitutional mandate to faithfully apply the provisions of constitutionally enacted legislation." *See Easterling*, 928 So. 2d at 820 (¶ 23).

Under a substantial or strict compliance standard, Plaintiff Marvin Brown failed to comply with section 11-46-11(1)'s notice requirement. In 2004, this Court found that a plaintiff

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[7] As further explained below, Plaintiffs are required to wait 120 days before suing a political subdivision (as opposed to the state or its agencies), but that distinction is immaterial on the facts presented here.

failed to substantially comply with section 11-46-11(1) when suit was filed only **eleven (11) days** after the filing of a notice of claim. *See Wright v. Quensel*, 876 So. 2d 362, 366 (¶ 9) (Miss. 2004). The Court explained that "although strict compliance with the MTCA notice provisions is no longer required, a complete failure to comply is not the same as substantial compliance." *Id.* Similar to the plaintiff in *Wright*, Marvin Brown failed to comply with section 11-46-11(1) when he filed suit only **five (5) days** after submitting his Notice of Claim to Southwest.[8]

B. The Dismissal of Plaintiff's Claims Against Southwest was the Required Result for His Non-Compliance with the MTCA's Ninety-Day Notice Provision

The trial court was required to dismiss Plaintiff's claims for his failure to comply with section 11-46-11(1) under *University of Mississippi Medical Center v. Easterling*, and its progeny. In *Easterling*, this Court reversed a trial judge's denial of summary judgment where a plaintiff did not comply with section 11-46-11(1)'s ninety-day waiting period. 928 So. 2d at 816 (¶ 1), 820 (¶¶ 24-25). Instead of submitting a notice of claim and waiting ninety days to file suit, Angela Easterling brought suit against the University of Mississippi Medical Center ("UMMC"), and approximately four months later filed a notice of claim. *Id.* at 816-17 (¶ 5). One month after submitting her notice of claim Easterling served UMMC with process. *Id.* at 817 (¶ 5).

In reversing the trial judge's denial of UMMC's motion for summary judgment the Court held that "strict compliance is required" with the MTCA's ninety-day waiting period. *Id.* at 819-20 (¶ 22). This holding specifically overruled the Court's prior decisions which established that

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[8] Although not addressed in the court below, Marvin Brown's premature filing also clearly failed to comply with the 120-day waiting period stipulated under Miss. Code Ann. § 11-46-11(3). Section 11-46-11(3) provides in pertinent part that "no action may be maintained" for 120 days from the date a political subdivision receives a notice of claim, unless the claim is denied in the interim. Southwest did not deny Marvin Brown's claim in the two days between the time it was received and suit was filed.

a plaintiff's failure to wait ninety-days only entitled a defendant to seek a stay of proceedings. *Id.* at 820 (¶ 22) (overruling *City of Pascagoula v. Tomlinson*, 741 So. 2d 224 (Miss. 1999); *Jackson v. City of Booneville*, 738 So. 2d 1241 (Miss. 1999); *Leflore County v. Givens*, 754 So. 2d 1223 (Miss. 2000); *Jackson v. City of Wiggins*, 760 So. 2d 694 (Miss. 2000); *Jones ex. rel. Jones v. Miss. Sch. for Blind*, 758 So. 2d 428 (Miss. 2000); *Williams v. Clay County*, 861 So. 2d 953 (Miss. 2003)). The responsibility to comply with section 11-46-11(1) now correctly falls upon the plaintiff. *See id.* at 820 (¶ 24).

In support of its "strict compliance" holding and overruling of the preceding opinions the Court relied upon two 2004 decisions affirming grants of summary judgment partly due to the failure of plaintiffs to comply with section 11-46-11(1). *Id.* at 818-19 (¶¶ 16-17) (citing *Davis v. Hoss*, 869 So. 2d 397, 402 (Miss. 2004); *Wright*, 876 So. 2d at 367). *Wright* and *Davis* were in conflict with the *Tomlinson* line of cases, and implicitly shifted "the responsibility to correct the plaintiff's failure to follow the ninety-day notice requirement from the defendant to the plaintiff." *See Easterling*, 928 So. 2d at 819 (¶¶ 18-19). *Wright* and *Davis* applied to the plaintiff before the Court in *Easterling* since her case was pending when those decisions were handed down and judicial rulings are presumptively applied retroactively to cases awaiting trial or pending appellate review. *Easterling*, 928 So. 2d at 819 (¶ 19) (citing *Thompson v. City of Vicksburg*, 813 So. 2d 717, 721 (Miss. 2002); *Anderson v. Anderson*, 692 So. 2d 65, 70 (Miss. 1997)).

Easterling's strict compliance holding was reaffirmed in *South Central Regional Medical Center v. Guffy*, 930 So. 2d 1252, 1259 (¶ 25) (Miss. 2006). Rhonda Guffy filed suit against South Central Regional Medical Center ("South Central") without previously submitting a notice of claim. *Id.* at 1253-54 (¶¶ 1, 4). South Central raised the MTCA as an affirmative defense in its answer, and subsequently filed a motion to dismiss on the basis of Guffy's failure to provide

notice under section 11-46-11. *Id.* at 1254 (¶¶ 1-2). The trial court's denial of South Central's motion was reviewed on interlocutory appeal by this Court. *Id.* at 1254 (¶ 2). The Court explained that the MTCA specifically requires a plaintiff to wait ninety days following the submission of notice prior to bringing suit against a governmental entity. *Id.* at 1259 (¶ 23) (citing Miss. Code Ann. § 11-46-11(1)). The Court then relied upon *Easterling*'s "strict compliance" holding and ruled that South Central's motion to dismiss on the basis of Guffy's failure to meet the requirements of section 11-46-11(1) should have been granted. *Id.* at 1259 (¶ 25) ("[I]n *Easterling*, . . . this Court . . . adopted strict compliance as to the ninety-day notice requirement under Miss. Code Ann. § 11-46-11(1).").[9] *Guffy*, *Easterling*, *Wright* and *Davis* apply to this case to require dismissal of Plaintiff Marvin Brown's claims due to his failure to comply with section 11-46-11(1).

In arguing against dismissal, Plaintiff contends that the Court's strict compliance holdings in *Easterling* and *Guffy* are factually distinguishable from this case. (*See* Brief of Appellant pp. 3, 6). In *Easterling*, the notice of claim was provided approximately four months after suit was filed. 928 So. 2d at 816-17 (¶ 5). In *Guffy*, Plaintiff never submitted a notice of claim. 930 So. 2d at 1254 (¶ 4). Marvin Brown submitted his Notice of Claim five days prior to filing suit. (C.P. 3, 34).

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[9] The trial court's refusal to grant South Central's motion on the basis of Guffy's failure to meet the notice requirements of section 11-46-11(2) was also found to constitute reversible error. *Id.* at 1258 (¶ 21), 1259 (¶ 26). Under section "11-46-11(2), there are seven required categories of information which must be included." *Id.* at 1257 (¶ 18). "[T]he failure to provide *any one* of the seven categories is failure to comply." *Id.* at 1258 (¶ 19) (emphasis added). Although Marvin Brown's Notice of Claim included a "residence of the person making the claim . . ." subheading, the residence of Marvin Brown at the time of injury or at the time his claim was filed was not provided in the Notice of Claim. (C.P. 34-36). Therefore, Mr. Brown's claims could have also been dismissed under this Court's reading of section 11-46-11(2) in *Guffy*. *See also Harden v. Field Mem'l Cmty. Hosp.*, No. 5:06cv158, 2007 WL 1141500, at *7 (S.D. Miss. Apr. 17, 2007) (dismissing Field Memorial Community Hospital from an action because the plaintiff's notice of claim failed to provide residency and damage information).

Plaintiff has merely pointed out a factual distinction without a difference. *Easterling*'s "strict compliance" holding is not limited to cases where there is a complete lack of notice, or where notice is provided after suit is filed. This is evident by *Easterling*'s explicit overruling of cases where no pre-suit notice was provided *and* cases where plaintiffs provided pre-suit notice, but failed to wait ninety days before filing suit. *Compare Jackson*, 738 So. 2d at 1245 (¶ 16) (notice of claim submitted approximately seven (7) months after suit was filed), *with Jones*, 758 So. 2d at 428 (¶ 1) (suit filed approximately seventy-seven (77) days after submission of notice of claim), *Jackson*, 760 So. 2d at 695 (¶ 1) (suit filed approximately sixty-seven (67) days following filing of notice of claim), *Leflore County*, 754 So. 2d at 1224 (¶ 1) (complaint filed three (3) days after notice of claim was filed), *and Tomlinson*, 741 So. 2d at 225 (¶ 1) (suit filed fifteen (15) days following submission of notice of claim).

Also, Plaintiff's argument ignores this Court's 2004 holding in *Wright v. Quensel*. Again, in *Wright*, this Court found that a plaintiff failed to comply with the MTCA's notice provisions when she filed suit only eleven (11) days after submitting her notice of claim. 876 So. 2d at 366 (¶ 9). Summary judgment was granted in favor of the MTCA defendant partly due to plaintiff's failure to comply. *Id.* at 367 (¶ 16). Plaintiff Marvin Brown's claims were also appropriately dismissed pursuant to a grant of summary judgment due to his failure to wait ninety days before filing suit against Southwest after submitting his Notice of Claim.

Plaintiff further erroneously contends that dismissal was not required because he "complied with the statute and the law in effect at the time of filing in December of 2002." (Brief of Appellant p. 4). First, Plaintiff did not comply with section 11-46-11(1) when he filed suit against Southwest only five days after submitting his notice of claim. Since the MTCA's enactment in 1993, section 11-46-11(1) has provided "that *ninety (90) days* prior to maintaining

an action . . . [against a governmental entity, a] person *shall file* a notice of claim with the chief executive officer of the governmental entity." *See* Miss. Code Ann. § 11-46-11(1) (emphasis added). Even the now overruled *Tomlinson* recognized that a plaintiff failed to comply with section 11-46-11(1) when he filed suit prior to the passage of ninety days following the submission of a notice of claim. *See* 741 So. 2d at 228 (¶ 10). The true issue was "the proper remedy for a failure to comply with the ninety day waiting period." *Id. Tomlinson* and its progeny provided that the proper remedy was a stay of proceedings and that a defendant's failure to request a stay resulted in a waiver of the defense. *Id.* at 228-29 (¶ 11). The Court's 2004 holdings in *Wright* and *Davis* conflicted with *Tomlinson*'s remedy, which was later explicitly overruled by *Easterling* on April 6, 2006.[10]

Second, the case law in effect in December of 2002 regarding the appropriate remedy for a plaintiff's failure to comply with section 11-46-11(1), is inapplicable in this action. Instead, *Guffy*, *Easterling*, *Wright* and *Davis* are controlling because this Court's rulings presumptively apply to cases awaiting trial or pending appeal. *See Easterling*, 928 So. 2d at 819 (¶ 19) (citing *Thompson*, 813 So. 2d at 721; *Anderson*, 692 So. 2d at 70). In the due process section of Appellant's Brief, Plaintiff states that "this Court's rulings are not always retroactive." (Brief of Appellant p. 9). This statement is true but does not alter the application of *Guffy*, *Easterling*, *Wright* and *Davis* to this case. As a rule, the Mississippi Supreme Court's decisions "are presumed to have retroactive effect unless otherwise specified." *Mississippi Transp. Comm'n v.*

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[10] Plaintiff also implies that under the *Tomlinson* line of cases Southwest received the appropriate remedy, a stay of proceedings. (*See* Brief of Appellant pp. 6-7). Besides the fact that *Tomlinson* and its progeny have been overruled, this argument fails because the six (6) month stay in this case in 2003 had nothing to do with Plaintiff's failure to comply with section 11-46-11(1). Instead, the stay was entered pursuant to Miss. Code Ann. § 83-23-135, as a result of the liquidation of Reciprocal of America, Southwest's insurer. (C.P. 46).

Ronald Adams Contractor, Inc., 753 So. 2d 1077, 1093 (¶ 54) (Miss. 2000) (citing *Morgan v. State*, 703 So. 2d 832, 839 (Miss. 1997) (citing *Solem v. Stumes*, 465 U.S. 638, 642 (1984)). When a Mississippi Supreme Court decision is to have only a prospective effect, the Court indicates this result within its ruling. *Id.* (citations omitted).[11]

There is nothing in *Guffy*, *Easterling*, *Wright* or *Davis* limiting their Section 11-46-11(1) holdings to subsequent cases. This case was pending when those decisions were handed down. Therefore, they are applicable and require a dismissal of Plaintiff's claims.

C. Plaintiff's Waiver Argument is Without Merit

Plaintiff incorrectly contends that Southwest waived its ability to seek dismissal of Plaintiff's claims by not seeking a stay or filing its Motion for Summary Judgement "as soon as possible." (Brief of Appellant p. 8). Plaintiff first errs in relying upon *City of Pascagoula v. Tomlinson* and ignoring *Easterling*. In *Easterling*, the plaintiff argued that "UMMC waived the ninety-day notice period by not requesting a stay." 928 So. 2d at 817 (¶ 10). This argument was rejected since "strict compliance" is required with section 11-46-11(1) and the responsibility for compliance lies with the plaintiff. *See Easterling*, 928 So. 2d at 819 (¶ 22), 820 (¶ 24). Further,

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[11] On March 9, 2006, this Court announced "that the limited retroactive standard set forth in the United States Supreme Court case of *Teague v. Lane* should be applied to all issues relating to the retroactive application of judicially enunciated rules." *Manning v. State*, 929 So. 2d 885, 900 (¶ 42) (Miss. 2006). The facts of *Manning* and subsequent Mississippi Supreme Court opinions show that *Teague*'s restrictive approach to retroactivity has been limited to the collateral review of criminal convictions. *Compare Manning*, 929 So. 2d at 889 (¶ 4) (denying petition for post-conviction relief), *with Creel v. Bridgestone/Firestone N. Am. Tire, LLC*, 950 So. 2d 1024, 1027-28 (¶¶ 10-11) (Miss. 2007) (applying presumptive rule of retroactivity to civil action on direct appeal), *Crenshaw v. Roman*, 942 So. 2d 806, 811 (¶ 19) (Miss. 2006) (applying presumptive rule of retroactivity to civil action on interlocutory appeal), *and Cleveland v. Mann*, 942 So. 2d 108, 113 (¶ 11) (Miss. 2006) (applying presumptive rule of retroactivity to action on appeal from denial of motion to compel arbitration). Further, the United States Supreme Court does not follow *Teague*'s limited approach to retroactivity in civil cases on direct review. *See, e.g., Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752, 758 (1995); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97-98 (1993). Therefore, this Court's presumptive rule of retroactivity, as delineated in *Mississippi Transportation Commission*, applies to this civil action.

the Court explained that "the rule set forth in *Tomlinson*, that the responsibility falls on the defendant to request a stay of the lawsuit when a plaintiff is not in compliance with the ninety-day notice requirement, is abrogated." *Easterling*, 928 So. 2d at 820 (¶ 22). As explained above, *Easterling*'s strict compliance holding applies to this case since it was pending at the time *Easterling* was handed down. *See Mississippi Transp. Comm'n*, 753 So. 2d at 1093 (¶ 54) ("[D]ecisions of this Court are presumed to have retroactive effect unless otherwise specified.") (citation omitted). Thus, Plaintiff's reliance upon *Tomlinson* in support of waiver fails.

Plaintiff's waiver argument also ignores *South Central Regional Medical Center v. Guffy*. In *Guffy*, there was an approximate two-year delay between the filing of the Complaint and the defendant's motion to dismiss. 930 So. 2d at 1254 (¶¶ 1-2). Also, the defendant took depositions and filed interrogatories in the case. *Id.* at 1254 (¶ 1). Notwithstanding this approximate two-year delay and the defendant's active participation in the litigation process, the Court dismissed plaintiff's complaint. *Id.* at 1259 (¶ 26). *Guffy* also negates Plaintiff's contention that Southwest waived its section 11-46-11(1) defense by not seeking dismissal "as soon as possible."

Although not explicitly stated in *Easterling* and *Guffy*, the Court's rulings imply that a section 11-46-11(1) defense cannot be waived since the MTCA's notice provisions impose jurisdictional requirements.[12] "It is fundamental that the parties cannot, by agreement *or by waiver*, confer jurisdiction where none exists as a matter of law." *Draper v. City of Flowood*, 736 So. 2d 512, 513 (¶ 5) (Miss. Ct. App. 1999) (emphasis added) (citing *Donald v. Reeves Transp. Co. of Calhoun, Ga.*, 538 So. 2d 1191, 1194 (Miss. 1989)). Prior holdings under the

[12] In fact, the trial court interpreted *Easterling*'s section 11-46-11(1) holding as jurisdictional. (T.R. 11).

MTCA support this interpretation. *See, e.g., Henderson v. Un-Named Emergency Room, Madison County Med. Ctr.*, 758 So. 2d 422, 427 (¶ 18) (Miss. 2000) ("[T]he trial court lacked jurisdiction because Henderson failed to comply with the notice provisions of the MTCA."); *Little v. Mississippi Dep't of Human Servs.*, 835 So. 2d 9, 12 (¶¶ 14-15), 14 (¶ 20) (Miss. 2002) (finding that a trial court correctly "ruled that it had no jurisdiction to hear" claims where the plaintiff failed to comply with the MTCA's notice provisions).[13]

A party's ability to raise a jurisdictional defense at any stage of the proceedings is a long-standing principle reflected in the Mississippi Rules of Civil Procedure, *see* Miss. R. Civ. P. 12(h)(3), and this Court's holdings interpreting mandatory, statutory requirements. *See Norwood v. Extension of Boundaries of City of Itta Bena*, 788 So. 2d 747, 751-52 (¶ 12) (Miss. 2001) (holding that the "mandatory and jurisdictional" notice requirements of Miss. Code Ann. § 21-1-15 could be raised for the first time on appeal); *Esco v. Scott*, 735 So. 2d 1002, 1006-07 (¶¶ 13-14, 17) (Miss. 1999) (providing that the statutory requirement of independent certification under Miss. Code Ann. § 23-15-927 was jurisdictional and thus, could be raised at any time); *Bd. of Trustees of State Insts. of Higher Learning v. Brewer*, 732 So. 2d 934, 936 (¶ 4) (Miss. 1999) (finding that the defendant did not waive the defense of a plaintiff's failure to post a bond under Miss. Code Ann. § 11-51-93 by omitting the defense from its answer since compliance with section 11-51-93 was a jurisdictional issue); *Travelers Indem. Co. v. Monro Oil & Paint Co.*, 364

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[13] *But see Gale v. Thomas*, 759 So. 2d 1150, 1159 (¶ 40) (Miss. 1999) (holding that a defendant could not raise a plaintiff's failure to comply with the MTCA's notice provisions for the first time on appeal). *Gale*'s holding is inapplicable to this case because Southwest raised the defense of Marvin Brown's non-compliance with the MTCA's notice of claim provisions in its Answer and Defenses (C.P. 8, 17), and obtained dismissal at the trial court level on the basis of the defense. (C.P. 77, 106). *Gale*'s interpretation of the "jurisdictional" nature of the MTCA's notice provisions is also questionable in light of the later decided *Henderson* and *Little*, whose holdings are quoted above. Further, the Court's specific rejection of the plaintiff's waiver argument in *Easterling* negates any possible application of *Gale* to this case.

So. 2d 667, 668 (Miss. 1978) (ruling that the statutory requirement of publication under Miss. Code Ann. § 31-5-13,[14] was jurisdictional and thus, could be raised for the first time on appeal). Interpreting the jurisdictional requirements of the MTCA's notice provisions to be incapable of waiver promotes consistency with the Court's rulings as to Miss. Code Ann. §§ 21-1-15, 23-15-927, 11-51-93 and 31-5-13. The defense of Marvin Brown's failure to comply with the MTCA's ninety-day notice of claim provision is incapable of wavier under this consistent approach.

Plaintiff's waiver contention is also negated by this Court's holdings defining the defense. A waiver is the voluntary and intentional relinquishment of a known right. *Union Planters Bank, Nat'l Ass'n v. Rogers*, 912 So. 2d 116, 119 (¶ 8) (Miss. 2005) (citing *Ewing v. Adams*, 573 So. 2d 1364, 1369 (Miss. 1990)). "To establish a waiver, there must be shown an act or omission on the part of the one charged with the waiver fairly evidencing an intention permanently to surrender the right alleged to have been waived." *Id.* Southwest has never voluntarily surrendered its right to seek to dismissal of Plaintiff's claims for his failure to comply with the MTCA's ninety-day notice of claim provision. Southwest's Answer and Defenses asserted Plaintiff's noncompliance as a ground for dismissal. (C.P. 8, 17). Southwest's Motion for Summary Judgment, seeking dismissal on this basis, was timely filed under the Mississippi Rules of Civil Procedure. *See* Miss. R. Civ. P. 56(b) (providing that a defending party may file a motion for summary judgment "at any time").

Plaintiff's reliance upon *Mississippi Credit Center, Inc. v. Horton*, 926 So. 2d 167 (Miss. 2006), and its progeny in support of waiver is misplaced. In *Horton*, the Court found that defendants waived the right to seek arbitration of a plaintiff's claims by actively participating in

[14] Section 31-5-13 was repealed in 1981.

litigation for eight months before filing their motion to compel arbitration. 926 So. 2d at 180 (¶ 43), 181 (¶ 45). Also, the Court held that:

> A defendant's failure to timely and reasonably raise and pursue the enforcement of any affirmative defense or other affirmative matter or right which would serve to terminate or stay the litigation, coupled with active participation in the litigation process, will ordinarily serve as a waiver.

Id. at 180 (¶ 44). *Horton*'s waiver holding has been subsequently applied to the assertion of "defenses of insufficiency of process and insufficiency of service of process." *See E. Miss. State Hosp. v. Adams*, 947 So. 2d 887, 891 (¶¶ 10-11) (Miss. 2007).

Horton and *Adams* are clearly inapplicable to this case for the following reasons. First, neither opinion involved the assertion of a plaintiff's failure to comply with "a hard-edged, mandatory rule," such as the MTCA's ninety-day notice of claim requirement. *See Easterling*, 928 So. 2d at 820 (¶ 23). Instead, *Horton* involved an arbitration defense which has consistently been held subject to waiver by delay and/or participation in litigation. *See, e.g., In re Tyco Int'l (US) Inc.*, 917 So. 2d 773, 781-82 (¶ 32) (Miss. 2005); *Cox v. Howard, Weil, Labouisse, Friedrichs, Inc.*, 619 So. 2d 908, 913-14 (Miss. 1993). *Adams* involved defenses related to process which are by Rule considered waived if not asserted in a defendant's first responsive pleading. *See* Miss. R. Civ. P. 12(h)(1). Conversely, this Court has consistently held mandatory, jurisdictional defenses to be incapable of waiver. *See Norwood*, 788 So. 2d at 751-52 (¶ 12); *Esco*, 735 So. 2d at 1006-07 (¶¶ 13-14, 17); *Brewer*, 732 So. 2d at 936 (¶ 4); *Travelers Indem. Co.*, 364 So. 2d at 668.

Second, *Easterling* postdates *Horton* and specifically rejected a plaintiff's argument that a defendant waived a section 11-46-11(1) defense by not requesting a stay of proceedings. "[T]he responsibility [no longer] falls on the defendant to request a stay of the lawsuit when a plaintiff is

not in compliance with the ninety-day notice requirement, ..." *Easterling*, 928 So. 2d at 820 (¶ 22). Because the responsibility to comply with section 11-46-11(1) lies with the Plaintiff, *Horton*'s focus on the actions or inactions of the defendant is inapposite to this case.

Third, the plaintiff's claims in *Guffy* would not have been dismissed if *Horton* applied to the assertion of a section 11-46-11(1) defense. As explained above, in *Guffy* there was an approximate two-year delay between the filing of the Complaint and the defendant's motion to dismiss. 930 So. 2d at 1254 (¶¶ 1-2). Also, the defendant actively participated in litigation by taking depositions and filing interrogatories. *Id.* at 1254 (¶ 1). The Court recognized that the plaintiff alleged the defendant unnecessarily delayed in filing the motion to dismiss. *Id.* at 1255 (¶ 10). Nonetheless, the Court dismissed the plaintiff's complaint. *Id.* at 1259 (¶ 26). Clearly, the Court does not consider *Horton* and its progeny applicable to a section 11-46-11(1) defense.

Even assuming for the sake of argument that *Horton* was applicable, the facts of this litigation do not support a finding of waiver under its holding. The conclusion that a plaintiff's non-compliance with section 11-46-11(1) required dismissal was not definite until this Court's April 6, 2006 ruling in *Easterling*. The Court's 2004 holdings in *Davis* and *Wright* only implicitly shifted the burden of compliance to the plaintiff, while *Easterling* made "clear . . . that strict compliance is required." *See Easterling*, 928 So. 2d at 819 (¶¶ 19, 22). Thus, until April 6, 2006, there was no certainty that the pursuit of Southwest's section 11-46-11(1) affirmative defense would have served "to terminate . . . the litigation."[15] *See Horton*, 926 So. 2d at 180 (¶

[15] Southwest only sought a dismissal of Plaintiff's claims and not a stay of litigation pursuant to its Motion for Summary Judgment. Therefore, the "or stay" portion of *Horton* is not relevant to this analysis. And, of course, the case was stayed in excess of 90 days in 2003 on separate, statutorily mandated grounds. It would have been illogical for Southwest to seek a 90 day stay at the conclusion of a six-month stay.

44). However, Southwest filed its Motion for Summary Judgment seeking dismissal of Plaintiff's claims on August 23, 2006, only approximately four and one-half months after the *Easterling* decision. (C.P. 29). Between April 6, 2006, and the filing of Southwest's Motion for Summary Judgement, Southwest did not actively participate in litigation. (C.P. 1-2). Therefore, Southwest timely pursued the enforcement of Plaintiff's failure to comply with section 11-46-11(1) once it became clear that Plaintiff's non-compliance required dismissal.

Further, prior to April 6, 2006, certain events occurred in this action which could serve to negate an ordinary application of *Horton*'s waiver holding. First, in 2003, the action was stayed for a period of six (6) months due to the liquidation of Southwest's insurer. (C.P. 46). Second, on December 20, 2004, an Agreed Order of Continuance was entered in part because of the Honorable Keith Starrett leaving the bench. (C.P. 47). These events considered in the aggregate should be construed as "extreme and unusual circumstances" precluding an application of *Horton*'s waiver holding. *See* 926 So. 2d at 181 (¶ 45).

Notwithstanding these alternative considerations, *Easterling* and its progeny preclude any finding of waiver on the part of Southwest in this action. Whether this is the result of compliance with section 11-46-11(1) lying with the Plaintiff, or the result of the MTCA's notice provisions constituting jurisdictional, non-waivable requirements, the trial court correctly rejected Plaintiff's waiver argument in opposition to Southwest's Motion for Summary Judgement. (*See* T.R. 11).

II. The Plaintiff was not Unconstitutionally Deprived of Due Process of Law by the Dismissal of His MTCA Claims Against Southwest

The trial court correctly denied Plaintiff's due process argument. The Due Process Clause of the Fourteenth Amendment of the United States Constitution has been interpreted to

guarantee fundamental fairness. *See, e.g., Superintendent, Massachusetts Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 456 (1985); *Richards v. Dretke*, 394 F.3d 291, 294 (5th Cir. 2004). Plaintiff asserts that applying *Easterling* retroactively to this case is fundamentally unfair because "[t]here was nothing to give Plaintiff Marvin Brown notice in December 2002, that his substantial compliance with the notice provisions would not be sufficient." (*See* Brief of Appellant p. 12). First, filing suit five days after submitting a notice of claim is not substantial compliance under the MTCA. *See Wright*, 876 So. 2d at 366 (¶ 9) (holding that filing suit eleven days after submitting a notice of claim evidenced a gross disregard for the MTCA's notice provisions and was not substantial compliance).

Second, Plaintiff's assertion ignores the fact that since the MTCA's enactment in 1993, section 11-46-11(1) has provided "that *ninety (90) days* prior to maintaining an action . . . [against a governmental entity, a] person *shall file* a notice of claim with the chief executive officer of the governmental entity." *See* Miss. Code Ann. § 11-46-11(1) (emphasis added); *see also Easterling*, 928 So. 2d at 820 (¶ 23) ("Since the MTCA's passage in 1993, a considerable amount of time has passed for the legal profession to become aware of the ninety-day notice requirement in section 11-46-11(1).") (citing 1993 Miss. Laws 476). The trial court recognized that *Easterling* merely interpreted the plain language of section 11-46-11(1), and did not create some new standard of conduct for MTCA claimants. (*See* T.R. 29). Consequently, Plaintiff had sufficient notice in December of 2002 of the MTCA's ninety-day notice of claim provision and there is nothing fundamentally unfair about the dismissal of his claims for his non-compliance with the provision.

Another flaw in Plaintiff's due process argument is that the dismissal of his claims did not result in the deprivation of a protected property interest. "[N]o due process violation exists

where the complaining party is not deprived of a protected property interest." *Smith v. Braden*, 765 So. 2d 546, 558 (¶ 39) (Miss. 2000) (citations omitted). "A plaintiff has no property interest in the right to sue a governmental entity." *Overstreet v. George County Sch. Dist.*, 741 So. 2d 965, 971 (¶ 19) (Miss. Ct. App. 1999) (citing *Mohundro v. Alcorn County*, 675 So. 2d 848, 852 (Miss. 1996)). In *Overstreet*, the court of appeals rejected a plaintiff's argument that the MTCA's one-year statute of limitations deprived him of due process. *See id.* The court found plaintiff's argument to be without merit since he had "no constitutionally protected interest in suing a governmental entity . . . ." *Id.* Similarly, Plaintiff Marvin Brown has not been deprived of a protected property interest in the dismissal of his claims since Southwest is a governmental entity under the MTCA. *See* Miss. Code Ann. §§ 11-46-1(g), (i); 41-13-15.

Even if the legislature's enactment of the MTCA is considered to have bestowed a protected property interest upon Marvin Brown, there has been no violation of due process in this cause. The notice provision of the MTCA is rationally related to a legitimate governmental interest. *See Vortice v. Fordice*, 711 So. 2d 894, 896 (¶ 5) (Miss. 1998). In *Vortice*, a plaintiff challenged the MTCA's ninety-day notice provision under the Equal Protection Clause of the United States Constitution. *Id.* at 895 (¶ 3). The Court applied a rational basis standard of review to the plaintiff's claim since "[t]here is no fundamental right to bring suit against the state of Mississippi or a political subdivision of Mississippi, ..." *Id.* at 895 (¶ 4) (citing *Wells v. Panola County Bd. of Educ.*, 645 So. 2d 883, 893 (Miss. 1994)). The Court found that the MTCA's notice provision furthered the valid purpose of "conserving government funds and protecting the public health and welfare at the earliest possible moment." *Id.* at 896 (¶ 5). Therefore, the notice provision was constitutional and the plaintiff was properly dismissed for failing to provide written notice ninety days before filing suit. *Id.* at 895 (¶ 2), 896 (¶¶ 5, 6). The

same valid purpose underlying the MTCA's notice provision identified by the Court in *Vortice* applies in this action to deny Plaintiff's due process challenge to dismissal under section 11-46-11(1).

Also undermining Plaintiff's due process claim is this Court's November 30, 2006, rejection of a similar argument in *Albert v. Allied Glove Corp.*, 944 So. 2d 1 (Miss. 2006). In *Albert*, the trial court dismissed Albert's claims pursuant to a retroactive application of this Court's changed interpretation of Miss. R. Civ. P. 20 joinder rules. 944 So. 2d at 3 (¶ 1). On appeal, Albert argued that he was denied due process by the dismissal of his lawsuit since the suit was in compliance with Mississippi law at the time it was filed. *Id.* at 6 (¶ 15). The Court provided that Albert failed to evidence a deprivation of a protected property interest since there was no showing that he was barred from filing suit in another jurisdiction. *Id.* at 6 (¶ 17). Even assuming there had been a necessary deprivation, Albert received the process he was due. *Id.* at 6-7 (¶ 19). Albert's Counsel extensively briefed the trial judge on the issue of dismissal and three separate hearings were held in the case. *See id.* at 6-7 (¶ 19). Accordingly, the Court found no merit to Albert's due process argument. *Id.* at 7 (¶ 20).

Although *Albert* is distinguishable from this action since Marvin Brown failed to comply with the MTCA at the time suit was filed, the holding is instructive. Like Albert, Plaintiff Marvin Brown received the process he was due prior to the dismissal of his claims. There were two separate hearings on the matter and Plaintiff's counsel briefed the trial court prior to both hearings. (*See* Plaintiff's Response to For Summary Judgement and Motion to Dismiss, C.P. 54-76; Transcript of the October 16, 2006 hearing on Southwest's Motion for Summary Judgment, T.R. 1-13; Plaintiff's Motion to Reconsider Motion for Summary Judgment, C.P. 79-84; Transcript of the November 2, 2006 hearing on Plaintiff's Motion to Reconsider, T.R. 14-31).

The trial court fully considered Plaintiff's arguments prior to correctly finding in favor of Southwest at both hearings. (*See* T.R. 10-12, 28-30).

Plaintiff's failure to provide any authority finding a due process violation arising from the retroactive application of case law also negates his due process claim. The majority of Plaintiff's due process argument centers upon attempting to distinguish two cases where the Mississippi Supreme Court ruled in favor of the retroactive application of case law. *See Cain v. McKinnon*, 552 So. 2d 91, 93 (Miss. 1989) (holding that a prior decision abolishing interspousal immunity was applicable to all actions not final upon the date the case was decided); *Anderson v. Anderson*, 692 So. 2d 65, 70 (Miss. 1997) (applying court rulings made while the principal decision was pending appeal). Plaintiff seems to imply that *Cain* and *Anderson* are distinguishable from this case because the retroactive application of case law in those opinions did not unfairly surprise the parties. However, as explained above, the ninety-day notice of claim provision has been part of the MTCA since its enactment in 1993, and the Mississippi Supreme Court's first interpretative decisions of the provision required strict compliance. Thus, there was ample authority present in December of 2002 to give Plaintiff notice that his filing suit five days after submitting a notice of claim was a failure to comply with section 11-46-11(1) which could result in dismissal. Therefore, the Mississippi Supreme Court's retroactive application of case law in *Anderson* and *Cain* is not distinguishable from this case.

The Plaintiff's reliance upon *Pritchard v. Norton*, 106 U.S. 124 (1882), *Martinez v. California*, 444 U.S. 277 (1980) and *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), does not support a finding of a deprivation of due process in this action. (*See* Brief of Appellant p. 9). In *Pritchard*, "[t]he single question presented . . . [was] whether the law of New York, or that of Louisiana, defines and fixes the rights and obligations of the parties." 106 U.S. at 128. No due

process violation was alleged and consequently, none was found.

In *Martinez*, the Supreme Court did find that a statutory wrongful death action against the State of California was *arguably* a type of property protected under the Due Process Clause. 444 U.S. at 281-82. However, the Supreme Court also noted that it was *arguable* the State's creation of an immunity defense under the statute negated the existence of a protected property interest. *See id.* at 282 n.5. In any event, there was no violation of due process since California's grant of immunity to state employees who make parole-release decisions was rationally related to a legitimate state interest. *See id.* at 282-83. *Martinez* does not support Plaintiff Marvin Brown's alleged due process violation.

In *Logan*, the Supreme Court did find a violation of due process. *See* 455 U.S. at 437. However, the violation neither arose from the retroactive application of case law, nor from a plaintiff's failure to comply with a notice provision. Instead, the violation arose from the State of Illinois having in place a system which allowed for the termination of a complainant's "action because a state official, for reasons beyond the complainant's control, failed to comply with a statutorily mandated procedure." *See id.* Further, the Supreme Court explained that "the State certainly accords *due* process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule." *Id.* at 437 (citations omitted). Since Plaintiff Marvin Brown's claims were dismissed for *his* failure to comply with the MTCA's ninety-day notice of claim provision, he has been afforded due process. Consequently, *Logan* also fails to support Plaintiff's due process claim.

Plaintiff's reliance upon *Griffith v. Kentucky*, 479 U.S. 314 (1987) and *Chevron Oil Company v. Huson*, 404 U.S. 97 (1971), is also misplaced. Plaintiff contends that in both opinions, the Supreme Court upheld an equitable exception "to the rule of retroactivity . . . ."

(Brief of Appellant p. 11). Plaintiff's reading of *Griffith* is incorrect. In *Griffith*, the Supreme Court considered whether *Batson v. Kentucky*, 476 U.S. 79 (1986), should be applied retroactively to criminal actions not yet final at the time *Batson* was decided. *Griffith*, 479 U.S. at 316. The Supreme Court answered in the affirmative. *Id.* "We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Id.* at 328. The Court even reasoned that failing to apply new rules retroactively violated "the principle of treating similarly situated defendants the same." *See id.* at 323 (citing *Desist v. United States*, 394 U.S. 244, 258-59 (1969)). Clearly, *Griffith* does not support Plaintiff's equitable exception/due process argument against retroactivity.

Chevron's multi-factored approach to retroactivity has been abandoned. *See, e.g.*, *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97-98 (1993). In *Harper*, the Supreme Court extended *Griffith*'s presumptive rule of retroactivity in criminal cases to civil actions. *See Harper*, 509 U.S. at 96-97. The Supreme Court held "that this Court's application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to that decision." *Id.* at 89. This holding led to a reversal of the Virginia Supreme Court's decision not to retroactively apply United States Supreme Court case law to petitioners seeking a refund of state income taxes. *Id.* The Virginia Supreme Court erroneously applied *Chevron*'s three-pronged test in determining the retroactivity issue. *See id.* at 97. In *Hyde*, the Supreme Court refused to create a reliance exception to *Harper*'s rule of retroactivity. *See Hyde*, 514 U.S. at 759. The Court also recognized that *Harper* overruled *Chevron*. *See id.* at 752. Thus, *Chevron*'s approach to

retroactivity can have no effect on this action.

Ultimately, the trial court correctly rejected Plaintiff's due process argument. Plaintiff has no fundamental right to sue Southwest under the MTCA. (T.R. 28-29). The MTCA only provides for a limited system of recovery against a governmental entity. (*See* T.R. 29). There was no violation of Plaintiff's constitutional rights when his claims were dismissed under that limited system of recovery's special notice rules. (*See* T.R. 30).

CONCLUSION

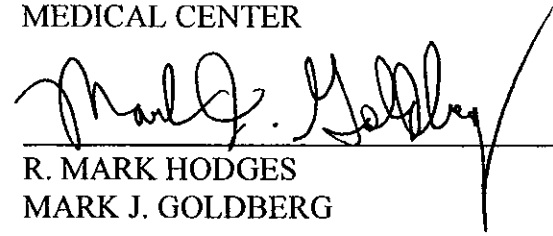
Plaintiff failed to comply with the MTCA's ninety-day notice of claim provision when he filed suit against Southwest only five (5) days after submitting his Notice of Claim. Plaintiff's failure to comply with section 11-46-11(1) requires dismissal. Southwest did not waive the right to seek dismissal of Plaintiff's claims. The responsibility for compliance lies with the Plaintiff and the notice provisions of the MTCA are mandatory, jurisdictional requirements. The dismissal of Plaintiff's MTCA's claims against Southwest did not result in a denial of due process of law. Therefore, the trial court correctly found no genuine issue of material fact and granted Southwest summary judgment as a matter of law.

It appears that Plaintiff filed this suit in violation of section 11-46-11(1) in order "to beat" the effective date of medical malpractice reform laws set to go in effect on January 1, 2003, before the ninety day waiting period would expire. Plaintiff thus gambled that the clear language of section 11-46-11(1) would not be applied to this action when he filed suit against Southwest only five days after submitting his Notice of Claim and fourteen days prior to the effective date of the medical malpractice and civil justice reforms passed by the Mississippi Legislature in 2002. The Plaintiff's gamble failed when the trial court correctly applied *Easterling*'s "strict compliance" holding to his claim. The trial court's decision should be affirmed.

Dated, this the 20th day of June, 2007.

Respectfully submitted,

SOUTHWEST MISSISSIPPI REGIONAL MEDICAL CENTER

BY: 

R. MARK HODGES
MARK J. GOLDBERG

OF COUNSEL:

R. Mark Hodges, MSB [redacted]
Mark J. Goldberg, MSB [redacted]
WISE CARTER CHILD & CARAWAY
401 East Capitol Street, Suite 600
Post Office Box 651
Jackson, Mississippi 39205-0651
Telephone: (601) 968-5500
Facsimile: (601) 968-5519

CERTIFICATE OF SERVICE

I, Mark J. Goldberg, one of the attorneys for Southwest Mississippi Regional Medical Center, hereby certify that I have this day caused to be mailed by United States mail, postage prepaid, a true and correct copy of the above and foregoing, Brief of Appellee, to the following:

The Honorable Michael M. Taylor
Circuit Court Judge
P.O. Drawer 1350
Brookhaven, MS 39602

The Honorable James M. Hood, III
Attorney General of the State of Mississippi
P.O. Box 220
Jackson, MS 39205-0220

I also hereby certify that I have caused a true and correct copy of the above and foregoing Brief of Appellee to be served via hand-delivery to the following:

Isaac K. Byrd, Jr., Esq.
Suzanne G. Keys, Esq.
Byrd & Associates, PLLC
Post Office Box 19
Jackson, MS 39205

Matthew A. Taylor, Esq.
Scott Sullivan Streetman & Fox, P.C.
Post Office Box 13847
Jackson, MS 39236-3847

THIS, the 20th day of June, 2007.

MARK J. GOLDBERG

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APPENDIX "A"

Miss. Code Ann. § **11-46-11**

West's Annotated Mississippi Code Currentness
Title 11. Civil Practice and Procedure
Chapter 46. Immunity of State and Political Subdivisions from Liability and Suit for Torts and Torts of Employees (Refs & Annos)

→§ 11-46-11. Notice of claim requirements; infancy or unsoundness of mind

(1) After all procedures within a governmental entity have been exhausted, any person having a claim for injury arising under the provisions of this chapter against a governmental entity or its employee shall proceed as he might in any action at law or in equity; provided, however, that ninety (90) days prior to maintaining an action thereon, such person shall file a notice of claim with the chief executive officer of the governmental entity. Service of notice of claim may also be had in the following manner: If the governmental entity is a county, then upon the chancery clerk of the county sued; if the governmental entity is a municipality, then upon the city clerk. If the governmental entity to be sued is a state entity as defined in Section 11-46-1(j), service of notice of claim shall be had only upon that entity's chief executive officer. If the governmental entity is participating in a plan administered by the board pursuant to Section 11-46-7(3), such chief executive officer shall notify the board of any claims filed within five (5) days after the receipt thereof.

(2) 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.

(3) All actions brought under the provisions of this chapter shall be commenced within one (1) year next after the date of the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based, and not after; provided, however, that the filing of a notice of claim as required by subsection (1) of this section shall serve to toll the statute of limitations for a period of ninety-five (95) days from the date the chief executive officer of the state agency receives the notice of claim, or for one hundred twenty (120) days from the date the chief executive officer or other statutorily designated official of a municipality, county or other political subdivision receives the notice of claim, during which time no action may be maintained by the claimant unless the claimant has received a notice of denial of claim. After the tolling period has expired, the claimant shall then have an additional ninety (90) days to file any action against the governmental entity served with proper claim notice. However, should the governmental entity deny any such claim, then the additional ninety (90) days during which the claimant may file an action shall begin to run upon the claimant's receipt of notice of denial of claim from the governmental entity. All notices of denial of claim shall be served by governmental entities upon claimants by certified mail, return receipt requested, only. For purposes of determining the running of limitations periods under this chapter, service of any notice of claim or notice of denial of claim shall be effective upon delivery by the methods statutorily designated in this chapter. The limitations period provided herein shall control and shall be exclusive in all actions subject to and brought under the provisions of this chapter, notwithstanding the nature of the claim, the label or other characterization the claimant may use to describe it, or the provisions of any other statute of limitations which would otherwise govern the type of claim or legal theory if it were not subject to or brought under the provisions of this chapter.

Miss. Code Ann. § **11-46-11**

(4) From and after April 1, 1993, if any person entitled to bring any action under this chapter shall, at the time at which the cause of action accrued, be under the disability of infancy or unsoundness of mind, he may bring the action within the time allowed in this section after his disability shall be removed as provided by law. The savings in favor of persons under disability of unsoundness of mind shall never extend longer than twenty-one (21) years.

CREDIT(S)

Laws 1984, Ch. 495, § 7; Laws 1985, Ch. 474, § 6; Laws 1987, Ch. 483, § 6; Laws 1988, Ch. 479, § 3; Laws 1993, Ch. 476, § 5, eff. from and after passage (approved April 1, 1993). Amended by Laws 1999, Ch. 469, § 1, eff. from and after passage (approved March 25, 1999); Laws 2000, Ch. 315, § 1, eff. from and after passage (approved April 8, 2000); Laws 2002, Ch. 380, § 1, eff. from and after passage (approved March 18, 2002).

VALIDITY

<This section was held unconstitutional in University of Mississippi Medical Center v. Robinson (Miss. 2004) 876 So.2d 337. See Notes of Decisions, post.>

HISTORICAL AND STATUTORY NOTES

For information concerning the repeal of the law governing causes of action occurring prior to the effective date of Chapter 46, Title 11, Mississippi Code of 1972, see Historical and Statutory Notes under Section 11-46-1.

The 1999 amendment, in subsection (1), added the second and third sentences relating to alternative methods of making service of notice; at the beginning of subsection (2), substituted "Every notice of claim" for "The notice of claim", and made a nonsubstantive change; and in subsection (3), in the first sentence, added all language following "(95) days", and inserted the new second, third, fourth, and fifth sentences preceding what was formerly the second sentence.

At its April 28, 1999 meeting, pursuant to its authority under Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation ratified the correction of a typographical error in subsec. (3). The words "service of any notice of claim or denial of notice of claim" were changed to "service of any notice of claim or notice of denial of claim".

The 2000 amendment added subsec. (4) relating to persons under a disability.

The 2002 amendment, in subsection (4), substituted "April 1, 1993," for "May 15, 2000".

Miss. Code Ann. § **11-46-11**, MS ST § **11-46-11**

Current through 2006 Sessions & 2007 Reg. Sess., Chs. 301,302,305 to 307, 311 to 313, 315, 319 to 321, 323 to 330, 335, 339, 341, 343, 346, 349 to 353, 357, 360, 362, 365, 378, 383, 387, 394, 397, 403, 405, 408, 410 to 412, 419, 422, 425, 426, and 430

Miss. Code Ann. § **11-46-11**

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