

**IN THE SUPREME COURT OF MISSISSIPPI
NO. 2007-CA-00316**

**LEANORA McCLAIN, INDIVIDUALLY AND
ON BEHALF OF THE WRONGFUL DEATH
BENEFICIARIES OF CARLTON McCLAIN,
DECEASED**

APPELLANT / PLAINTIFF

VS.

**STEVEN B. CLARK, M.D., BENNIE B. WRIGHT, M.D.,
TARENCE E. WADE, M.D., BOLIVAR MEDICAL
CENTER AND JOHN AND JANE DOES 1-5**

APPELLEES / DEFENDANTS

**APPEAL FROM THE CIRCUIT COURT OF BOLIVAR COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT
HON. CHARLES E. WEBSTER, CIRCUIT JUDGE**

BRIEF OF APPELLEE / DEFENDANT BENNIE B. WRIGHT, M.D.

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APPELLEES / DEFENDANTS

In Re: BRIEF OF APPELLEE / DEFENDANT, BENNIE B. WRIGHT, M.D.

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 and /or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. **Leanora McClain, Individually & on behalf of the Wrongful Death Beneficiaries of Carlton McClain, Deceased, Appellant / Plaintiff**
2. **Steven B. Clark, M.D., Appellee / Defendant**
3. **Bennie B. Wright, M.D., Appellee / Defendant**
4. **Tarence E. Wade, M.D., Appellee / Defendant**
5. **Bolivar Medical Center, Appellee / Defendant**
6. **Charles M. Merkel, Jr., Esq., of Merkel & Cocke, Counsel for Appellant / Plaintiff**
7. **Alma Walls, Esq., of Walls Law Firm, Counsel for Appellant / Plaintiff**
8. **James L Wilson IV, Esq., of Upshaw Williams Biggers Beckham & Riddick, Counsel for Appellee / Defendant Steven B. Clark, M.D.**

9. **L. Carl Hagwood, Esq.**, of Wilkins, Stephens & Tipton, P.A., Counsel for Appellee / Defendant Bennie B. Wright, M.D.
10. **Jason E. Dare, Esq.**, of Wilkins, Stephens & Tipton, P.A., Counsel for Appellee / Defendant Bennie B. Wright, M.D.
11. **James A. Becker Jr., Esq.**, of Watkins & Eager, Counsel for Appellee / Defendant Tarence E. Wade, M.D.
12. **Anastasia G. Jones, Esq.**, of Watkins & Eager, Counsel for Appellee / Defendant Tarence E. Wade, M.D.
13. **Kimberly Nelson Howland, Esq.**, of Wise Carter Child & Caraway, Counsel for Appellee / Defendant Bolivar Medical Center
14. **Honorable Charles E Webster**, Bolivar County Circuit Court Judge

THIS, the 22nd day of January, 2008.

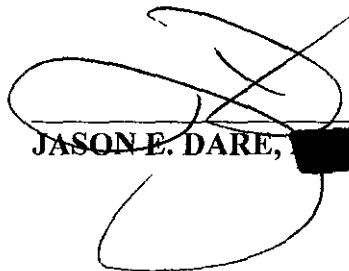

JASON E. DARE, [REDACTED]

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STATEMENT OF THE ISSUES

- I. WHETHER PLAINTIFF'S COMPLAINT WAS PROPERLY DISMISSED BECAUSE OF HER FAILURE TO STRICTLY COMPLY WITH MISS. CODE ANN. § 11-1-58.**
- II. WHETHER PLAINTIFF'S COMPLAINT, WITHOUT THE REQUIRED § 11-1-58 ATTACHMENTS, WAS INSUFFICIENT TO COMMENCE A MEDICAL MALPRACTICE ACTION AGAINST DR. WRIGHT AND TOLL PLAINTIFF'S STATUTE OF LIMITATIONS.**

STATEMENT OF THE CASE

On April 4, 2006, Plaintiff Leanora McClain, individually and on behalf of the wrongful death beneficiaries of Carlton McClain, deceased, filed a medical malpractice suit against this Appellee / Defendant, Bennie B. Wright, M.D. and others arising out of Carlton McClain's medical care and treatment at Bolivar Medical Center in Cleveland, Mississippi from April 9, 2004 through April 21, 2004, and from May 8, 2004 until his death on May 17, 2004. *Plaintiff's Complaint*, ¶¶ 10, 16, 18 & 25 (CP 1 : 3-6). As to Dr. Wright, Plaintiff's Complaint alleges this Defendant breached the standard of care by removing 3,000 cc's of fluid from Mr. McClain's lungs during a thoracentesis on April 10, 2004, and failed to obtain studies to assist in determining the cause of Mr. McClain's subsequent pleural effusion. *Plaintiff's Complaint*, ¶¶ 12 & 14 (CP 1 : 3-4). On April 27, 2006, Plaintiff filed her Amended Complaint, which was **unsigned** by Plaintiff's counsel. *Plaintiff's Amended Complaint* (CP 1 : 14-26).

On June 2, 2006, Dr. Wright filed his Motion, Defenses and Separate Answer, denying Plaintiff's allegations of medical negligence against him and raising as affirmative defenses that (1) Plaintiff's Amended Complaint failed to state a claim upon which relief could be granted, (2) Dr. Wright was entitled to the protections, limitations and immunities of the Mississippi Tort Claims Act, and (3) Plaintiff's claims were barred by the statute of limitations. *Motions, Defenses & Separate Answer* (CP 1 : 46-50). On June 26, 2006, Dr. Wright filed his Motion to Dismiss premised upon Plaintiff failing to attach to her Complaint and Amended Complaint either a certificate executed by the attorney for the plaintiff or an expert disclosure in lieu of certificate of counsel in compliance with MISS. CODE ANN. § 11-1-58. *Motion to Dismiss* (CP 1 : 74-110).

In response to Dr. Wright's Motion, Plaintiff filed a "Certificate of Review" on June 30,

2006. *Certificate* (CP 2 : 218-220). She also filed a Response on June 30, 2006, in which she alleged that on December 29, 2005, Plaintiff “forwarded via certified mail a Notice of Claim to the Defendant” and that the Notice was served on Dr. Wright on January 5, 2006. *Response*, ¶ III (CP 2 : 221-222). Plaintiff claimed that attached to the Notice of Claim was a Certificate of Review. *Response*, ¶ IV (CP 2 : 222). Plaintiff also alleged that a report prepared by Plaintiff’s reviewing expert was forwarded to Dr. Wright’s insurance carrier, who then forwarded the document to Dr. Wright. *Response*, (CP 2 : 224).

Dr. Wright’s Motion to Dismiss was heard by the trial court on February 8, 2007. *Notice of Hearing* (CP 5 : 575-576). In its Order Granting Motions to Dismiss, filed February 16, 2007, the trial court found that “Plaintiff does not dispute that no Certificate was attached to either of the complaints *when filed*.” *Order*, ¶ 2 (CP 5 : 589) (emphasis in original). The trial court went on to rule that:

4. . . . [H]ad the Supreme Court of Mississippi in Walker established a “substantial compliance standard, then this court might very well have deemed the plaintiff’s attorney’s actions to be sufficient. Unfortunately for the plaintiff, the Walker Court did not adopt a standard of “substantial compliance.” Rather, it held that this court is to examine the record to determine “compliance or non-compliance” with the requirements of Miss. Code Ann. § 11-1-58. Therefore, based on the holding in Walker, this court concludes that even if plaintiff’s counsel complied with the spirit of the law, plaintiff’s counsel did not comply with the letter of the law which is the obligation imposed by the Mississippi Legislature as fortified by the Supreme Court of Mississippi’s opinion espoused first in Easterling and now through Walker. Therefore, ***because the plaintiff failed to attach the required Certificate to the Complaint, this court is compelled to find that the plaintiff has failed to strictly comply with the requirements of the statute.*** As such, and because this court must follow the directives of Miss. Code Ann. § 11-1-58 and of the Mississippi Supreme Court, this court must conclude that the plaintiff’s claims against all defendants must be dismissed.

5. In addition, because this cause of action is subject to Mississippi’s two (2) year medical malpractice statute of limitations as codified at Miss Code Ann. § 15-1-

36(2), *as amended*, and such limitation period has expired, this action will be dismissed *with prejudice*.

Order, ¶¶ 4-5 (emphasis in bold / italics added) (citations omitted) (CP 5 : 590-591).

Aggrieved by the trial court's ruling, Plaintiff sought the instant appeal.

SUMMARY OF THE ARGUMENT

It is undisputed in this appeal that neither a certificate executed by the attorney for Plaintiff nor an expert disclosure in lieu of certificate of counsel was attached to Plaintiff's Complaint or Plaintiff's unsigned Amended Complaint in compliance MISS. CODE ANN. § 11-1-58.¹ Plaintiff alleges substantial compliance with the statutory mandates of § 11-1-58 through her counsel providing expert information to Dr. Wright and/or his insurance carrier prior to filing suit. Plaintiff must, however, "strictly comply with, rather than substantially comply with, the directives of MISS.CODE ANN. § 11-1-58." *Community Hosp. of Jackson v. Goodlett*, 968 So. 2d 391, 397 (¶ 13) (Miss. 2007). Where a plaintiff fails to strictly comply with § 11-1-58, the trial court shall dismiss the plaintiff's complaint on that basis. *Goodlett*, 968 So. 2d at 397 (¶ 13). In order to strictly comply with § 11-1-58, Plaintiff must attach a certificate executed by the attorney for Plaintiff or an expert disclosure in lieu of certificate of counsel to her Complaint. Because this did not occur, the trial court correctly ruled that Plaintiff's claims against Dr. Wright should be dismissed.

Plaintiff also argues that dismissal *with prejudice*, based on the expiration of her statute of limitations, was in error since her limitations period was tolled once her Complaint was filed and continued to be tolled through dismissal of her claim. *See Watters v. Stripling*, 675 So. 2d 1242, 1244 (Miss. 1996). Carlton McClain died on May 17, 2004, and assuming a 60 day tolling period after providing Dr. Wright with a Notice of Claim pursuant to MISS CODE ANN. § 15-1-36(15), her two (2) year statute of limitation pursuant to MISS CODE ANN. § 15-1-36(2) would expire on July 17, 2006. Under Plaintiff's theory on appeal, her statute of limitations was tolled from April 4, 2006, when her Complaint was filed, through February 16, 2007, when her claims were dismissed. In

¹ An unsigned complaint cannot state a cause of action pursuant to MISS. R. CIV. P. 11.

Mississippi, however, attaching a certificate executed by the attorney for Plaintiff or an expert disclosure in lieu of certificate of counsel to a complaint is a prerequisite condition to the commencement of a medical malpractice action pursuant to § 11-1-58. Where Plaintiff failed to comply with § 11-1-58, no claim of medical malpractice was alleged in her complaint. *Walker v. Whitfield*, 931 So.2d 583, 591 (¶ 31) (Miss.2006). Therefore, Plaintiff's failure to comply with the statutory requirement of § 11-1-58 renders her Complaint insufficient to commence a medical malpractice action and cannot toll the two-year statute of limitation period.

For these reasons, Dr. Wright respectfully requests that the judgment of dismissal with prejudice by the trial court be affirmed.

ARGUMENT

I. WHETHER PLAINTIFF'S COMPLAINT WAS PROPERLY DISMISSED BECAUSE OF HER FAILURE TO STRICTLY COMPLY WITH MISS. CODE ANN. § 11-1-58.

The uncontested fact before the trial court on appeal is that neither a certificate executed by the attorney for Plaintiff nor an expert disclosure in lieu of certificate of counsel was attached to Plaintiff's Complaint, filed April 7, 2006, or her unsigned Amended Complaint, filed April 27, 2006. It was not until June 30, 2006, after Dr. Wright had filed his Motion to Dismiss, that Plaintiff filed a "Certificate of Review."

The statute at issue in this portion of Appellant / Plaintiff's Appeal is MISS. CODE ANN. § 11-1-58, which reads in pertinent part as follows:

(1) In any action against a licensed physician, health care provider or health care practitioner for injuries or wrongful death arising out of the course of medical, surgical or other professional services where expert testimony is otherwise required by law, *the 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 qualified pursuant to the Mississippi Rules of Civil Procedure and the Mississippi Rules of Evidence who is qualified to give expert testimony as to standard of care or negligence and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, 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) or (c) within sixty (60) days after service of the complaint or the suit shall be dismissed. . .

(7) The plaintiff, in lieu of serving a certificate required by this section, may provide the defendant or defendants with expert information in the form required by the Mississippi Rules of Civil Procedure. Nothing in this section requires the disclosure of any "consulting" or nontrial expert, except as expressly stated herein.

MISS. CODE ANN. § 11-1-58(1) & (7) (emphasis added). "[A] plaintiff must strictly comply with, rather than substantially comply with, the directives of MISS.CODE ANN. § 11-1-58." *Community Hosp. of Jackson v. Goodlett*, 968 So. 2d 391, 397 (¶ 13) (Miss. 2007) (quoting *Walker v. Whitfield*, 931 So.2d 583, 588-90 (Miss.2006)). Where a plaintiff fails to strictly comply with § 11-1-58, the trial court shall dismiss the plaintiff's complaint on that basis. *Goodlett*, 968 So. 2d at 397 (¶ 13).

Although no time requirement is specified in § 11-1-58(7), the *Walker* Court has held that "a literal reading of MISS.CODE ANN. § 11-1-58, provides that the stated purpose of sub-section (7) can reasonably be construed to provide an alternative to furnishing a certificate of expert consultation by the plaintiff's attorney. However, the statute does not alter the time requirement stated under sub-section (1) for furnishing the expert's information. Therefore, the time for compliance as stated in sub-section (1) applies to sub-section (7)." *Walker*, 931 So.2d at 590 (¶ 25).

In *Caldwell v. N. Miss. Med. Cntr., Inc.*, 956 So. 2d 888 (Miss. 2007), the Mississippi Supreme Court affirmed its holding in *Walker* that a plaintiff's failure to strictly comply with § 11-1-58 warrants dismissal of that plaintiff's claim. *Caldwell*, 956 So. 2d at 895 (¶ 25). In *Caldwell*, the plaintiffs filed suit against North Mississippi Medical Center, Inc. and Dr. Alan Paul Brown on May 5, 2005. *Id.* at 889 (¶ 1). Due to Dr. Brown's death, the plaintiffs filed a motion to substitute Dr. Brown's estate as a party-defendant on August 12, 2005, which was granted by the trial court on September 12, 2005. *Id.* at (¶ 2). On September 15, 2005, the plaintiffs "filed an expert disclosure in lieu of certificate of counsel," and then on October 12, 2005, filed their amended complaint. *Id.*

at (§§ 2-3). The trial court granted the defendants' motions to dismiss for plaintiffs' failure to comply with § 11-1-58, and appeal was taken. *Id.* at (§§ 4-5). In affirming the trial court's dismissal, the *Caldwell* Court held that "the Caldwell's position that the amended complaint substantially complied with MISS.CODE ANN. § 11-1-58 because of the expert disclosure in lieu of certificate of counsel filed on September 15, 2005, is also flawed. Neither a certificate executed by the attorney for the plaintiff nor an expert disclosure in lieu of certificate of counsel was attached to the amended complaint when filed as required under MISS.CODE ANN. § 11-1-58. *Id.* at 892 (§ 15). The *Caldwell* Court, therefore, held that the trial court properly dismissed the plaintiffs' amended complaint. *Caldwell*, 956 So. 2d at 895 (§ 25).

Appellant's Brief to this Court raises several arguments why substantial compliance, not strict compliance, with § 11-1-58 should be required. Plaintiff's argument that she provided Dr. Wright with expert information prior to filing suit is purely an argument that her failure to strictly comply with § 11-1-58(1) & (7) was less egregious than the plaintiffs' failure to comply in *Walker*. With the "strict compliance" standard set out in *Goodlett*, *Caldwell* and *Walker surpa*, the question before the trial court and this Court does not concern deciphering the level of egregiousness of Plaintiff's conduct in her failure to comply with § 11-1-58. Instead, the question is whether Plaintiff's Complaint was accompanied by either a certificate executed by the attorney for Plaintiff or an expert disclosure in lieu of certificate of counsel. In this instance, Plaintiff's Complaint and Amended Complaint did not. In *Caldwell supra*, the plaintiffs also claimed substantial compliance by filing an "expert disclosure in lieu of certificate of counsel." The flaw in *Caldwell*, as with the Plaintiff's arguments herein, is that "[n]either a certificate executed by the attorney for the plaintiff nor an expert disclosure in lieu of certificate of counsel was attached to [the Complaints] when filed

as required under MISS.CODE ANN. § 11-1-58.” *See Caldwell supra*. For these reasons, the trial court properly dismissed Plaintiff’s Complaint against Dr. Wright.

Plaintiff also makes the argument in passing that by filing a “Certificate of Review” on June 30, 2006 (*i.e.* - after Dr. Wright filed his Motion to Dismiss on June 26, 2006), she strictly complied with § 11-1-58(1)(b), as it was “within 60 days of the service of the complaint upon all of the Appellees.” *Appellant Brief*, page 16. This argument is fatally flawed in that § 11-1-58(1)(b) is two-pronged:

- (1) “[T]he complaint shall be accompanied by a certificate executed by the attorney for the plaintiff declaring that . . . [t]he 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,” and then
- (2) “A certificate executed pursuant to this paragraph (b) ***shall be supplemented*** by a certificate of consultation pursuant to paragraph (a) or (c) within sixty (60) days after service of the complaint or the suit shall be dismissed.”

MISS. CODE ANN. § 11-1-58(1)(b) (emphasis added). Plaintiff did not attach to either her Complaint or Amended Complaint a certificate executed by her counsel declaring that her counsel was unable to obtain the consultation required by paragraph (1)(a), and therefore, the Certificate of Review filed by Plaintiff on June 30, 2006 could not be a *supplementation* of the original certificate. Because Plaintiff did not strictly comply with both prongs of § 11-1-58(1)(b), the trial court’s dismissal was appropriate.

Whether it is under § 11-1-58(1)(a), § 11-1-58(1)(b) or § 11-1-58(7), the statute mandates that a certificate executed by the attorney for Plaintiff or an expert disclosure in lieu of certificate of counsel shall be “attached to the complaint when the case was filed.” *Walker*, 931 So.2d at 591. “The language of MISS.CODE ANN. § 11-1-58 is clear and unambiguous that based on the failure to

comply with its mandatory statutory requirements, the complaint *shall be dismissed.*” *Id.* (emphasis added). Therefore, Dr. Wright respectfully requests this Court affirm the trial court’s judgment of dismissal.

II. WHETHER PLAINTIFF’S COMPLAINT, WITHOUT THE REQUIRED § 11-1-58 ATTACHMENTS, WAS INSUFFICIENT TO COMMENCE A MEDICAL MALPRACTICE ACTION AGAINST DR. WRIGHT AND TOLL PLAINTIFF’S STATUTE OF LIMITATIONS.

The trial court dismissed this action *with prejudice* because the “two (2) year medical malpractice statute of limitations as codified at Miss. Code Ann. § 15-1-36(2) . . . [had] expired.” *Order*, pages 3-4 (CP 5 : 589). After Carlton McClain’s death on May 17, 2004, Plaintiff claims to have served Dr. Wright with a Notice of Claim pursuant to Miss. Code Ann. § 15-1-36(15) on January 5, 2006. *Appellant Brief*, page 21. Assuming a proper Notice of Claim, the statute of limitations was tolled for sixty (60) days during the time that Plaintiff could not file suit, and the statute of limitations therefore became two years and 60 days. *See Pope v. Brock*, 912 So. 2d 935 (Miss. 2005), MISS. CODE ANN. § 15-1-36(15). Two years and 60 days from the date of Mr. McClain’s death on May 17, 2004 was July 16, 2006. Because this date fell on a Sunday, Plaintiff’s statute of limitations for filing suit against Dr. Wright expired on Monday, July 17, 2006. MISS. R. CIV. P. 6(a). The trial court’s order dismissing Dr. Wright with prejudice was filed February 16, 2007, which was indeed after the statute of limitations had expired.

Plaintiff, however, claims that the filing of her Complaint on April 4, 2006, should toll the statute of limitations through the time of dismissal. The question before this Court is therefore whether Plaintiff’s medical malpractice action *had been commenced* against Dr. Wright so as to toll the statute of limitations when her Complaint was filed in violation of MISS. CODE ANN. § 11-1-58.

Plaintiff cites this Court to Mississippi opinions which she claims hold that “[t]he filing of an action is an event which initiates the tolling of the statute of limitations.” *Appellant’s Brief*, page 20 (citing *Erby v. Cox*, 654 So. 2d 503 (Miss. 1995)). In *Erby*, the issue before the Court was whether the “simple filing of the complaint without process being issued tolls the statute of limitations.” *Erby*, 654 So. 2d at 505. Erby’s decedent, J.C. Cannon, died on September 3, 1987, and Erby filed a medical malpractice complaint on August 25, 1989. *Id.* at 504. Summons was not issued for 105 days after the filing of the complaint, but was served on the defendants on December 8, 1989 (*i.e.* - within 120 days following the filing of the complaint). *Id.* The trial court held that summary judgment was appropriate on statute of limitations grounds since “the defendants were served on December 8, 1989, and that the cause of action accrued on September 3, 1987.” *Id.* In reversing the trial court, the Mississippi Supreme Court held that “the filing of a complaint . . . tolls the applicable statute of limitations. *Id.* at 505 (quoting *Estate of Schneider v. Schneider*, 585 So. 2d 1275 (Miss. 1991)). Because Erby “filed suit well within the prescribed limitations under Miss. Code Ann. § 15-1-36, and process was timely served pursuant to M.R.C.P. 4(h),” the *Erby* Court held that “the trial court erred in dismissing the complaint against the defendant doctors. . . .” *Erby*, 654 So. 2d at 505.

The issue before this Court is not controlled by *Erby supra* or *Watters v. Stripling*, 675 So. 2d 1242, 1244 (Miss. 1996) (“Commencement of lawsuit tolls the statute of limitations, at least for 120 days to serve process.”), also cited by Plaintiff, since these cases and their progeny assume proper commencement of an action. Instead, the issue is controlled by the statutory mandate of § 11-1-58, which provides that in order to commence a medical malpractice action, the “complaint shall be accompanied by a certificate executed by the attorney for the plaintiff.” MISS. CODE ANN.

§ 11-1-58(1). In the alternative, a plaintiff can file an expert disclosure in lieu of certificate of counsel pursuant to § 11-1-58(7). Regardless of which § 11-1-58 attachment Plaintiff chooses, a document in compliance with § 11-1-58 must be filed with the complaint in order to commence a medical malpractice cause of action. Where a plaintiff fails to comply with § 11-1-58, no claim of medical malpractice is alleged in her complaint. *Walker*, 931 So.2d at 591 (¶ 31).

Because no § 11-1-58 attachment was filed with Plaintiff's Complaint or Amended Complaint, neither the Complaint nor Amended Complaint, standing alone, was sufficient to commence a medical malpractice action against Dr. Wright. Plaintiff's statute of limitations was not tolled during the pendency of her Complaint against Dr. Wright, and her statute of limitations expired on July 17, 2006. When the trial court entered its order of dismissal on February 16, 2007, Plaintiff's statute of limitations had already expired and the trial court properly entered an order of dismissal *with prejudice* on this basis.

For these reasons, Dr. Wright respectfully requests that the trial court's dismissal with prejudice in favor of this Defendant be affirmed.

CONCLUSION

The undisputed finding of fact before the trial court was that "no Certificate was attached to either of the complaints *when filed*," in violation of MISS. CODE ANN. § 11-1-58. Plaintiff's sole argument to this Court is that her substantial compliance with § 11-1-58 should suffice. It is well-settled law in this State, however, that "strict compliance" with § 11-1-58 is required. *Community Hosp. of Jackson v. Goodlett*, 968 So. 2d 391, 397 (¶ 13) (Miss. 2007). Where a plaintiff fails to strictly comply with § 11-1-58, the trial court shall dismiss the plaintiff's complaint on that basis. *Goodlett*, 968 So. 2d at 397 (¶ 13). Because it is undisputed that Plaintiff failed to strictly comply

with § 11-1-58, the trial court correctly dismissed Plaintiff's Complaint against all Defendants.

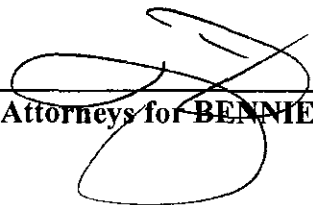
Plaintiff also alleges that her statute of limitations was tolled upon the filing of her Complaint, so that it did not expire on July 17, 2006. However, Plaintiff failed to allege a claim of medical malpractice in her Complaint or Amended Complaint when she failed to comply with § 11-1-58. *Walker v. Whitfield*, 931 So.2d 583, 591 (¶ 31) (Miss.2006). In Mississippi, pursuant to § 11-1-58, a plaintiff cannot commence a medical malpractice action unless she attaches to her complaint a certificate executed by her attorney or an expert disclosure in lieu of certificate of counsel. Plaintiff's statute of limitations was never tolled because Plaintiff never commenced a medical malpractice action against Defendants. Her statute of limitations expired on July 17, 2006 and when the trial court entered its order of dismissal on February 16, 2007, Plaintiff's limitations period had expired. Therefore, the trial court properly granted Dr. Wright a dismissal *with prejudice*.

For the foregoing reasons, Appellee / Defendant Bennie Wright, M.D. prays this Court affirm the trial court's dismissal with prejudice in his favor.

RESPECTFULLY SUBMITTED, this 22nd day of January, 2008.

L. CARL HAGWOOD,
JASON E. DARE,

BY:



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CERTIFICATE OF SERVICE

I, JASONE. DARE, one of the attorneys for Dr. Wright, certify that I have this day delivered via U.S. Mail, postage prepaid, a true and correct copy of the foregoing document to the following:

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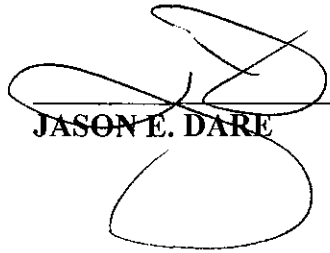
THIS, the 22nd day of January, 2008.



JASON E. DARE

CERTIFICATE OF FILING

I, JASONE. DARE, certify that I have this day delivered via Hand-Delivery, the original and three copies of, and a floppy disc containing, Brief of Appellee / Defendant Bennie B. Wright, M.D., on January 22, 2008, to Ms. Betty W. Sephton, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi, 39201.


JASONE. DARE