

**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**

APPELLANTS

V.

**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

**APPEAL FROM THE CIRCUIT COURT OF BOLIVAR
COUNTY, MISSISSIPPI**

BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of 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.

Leanora McClain, Individually and on Behalf of the Wrongful Death Beneficiaries
of Carlton McClain

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Hon. Charles Webster
Circuit Court of Bolivar County

Trial Court Judge

SO CERTIFIED, this the 30 day of October, 2007.


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STATEMENT REGARDING ORAL ARGUMENT

This appeal raises issues of first impression concerning the proper interpretation, application, and effect of a portion of the Mississippi Medical Malpractice Tort Reform Act of 2002, section 11-1-58 of the Mississippi Code. Specifically, this Court when deciding this appeal, must determine whether the certificate of consultation and consulting expert's opinion which were both served by the Plaintiff upon the Defendants prior to the filing of the original Complaint, and the service of a second Certificate upon the Defendants within sixty (60) days after service of the Complaint satisfies the intent of Miss. Code Ann. § 11-1-58. Due to the significant nature and complexity of these issues, Leanora McClain believes that oral argument would be helpful to the Court and that the decisional process would be significantly aided thereby. Therefore, pursuant to Rule 34 of the Mississippi Rules of Appellate Procedure, Leanora McClain requests oral argument.

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STATEMENT OF THE ISSUES

(1) Whether serving the Defendants with a certificate of consultation and providing the Defendants with Plaintiff's consulting expert's opinion pursuant to Miss. Code Ann. § 11-1-58 (7), prior to the filing of the Complaint, is sufficient compliance with the provisions of the statute so as to avoid the dismissal with prejudice of her medical malpractice claims against the Defendants?

(2) Whether McClain's claims are now time-barred by the two (2) year medical malpractice statute of limitations as codified at Miss. Code Ann. § 15-1-36 (2), as amended?

I. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is a civil action seeking monetary damages for the May 17, 2004, wrongful death of Carlton McClain which resulted from negligent medical care and treatment rendered to McClain by Dr. Steven G. Clark, Dr. Bennie B. Wright, Dr. Tarence E. Wade and Bolivar Medical Center. (R. 1)

B. COURSE OF THE PROCEEDINGS AND DISPOSITION BELOW

On December 29, 2005, the Plaintiff sent the Defendants her Notice of Claim, which gave the Defendants sixty days prior written notice of her intention to file a medical malpractice lawsuit pursuant to Miss. Code Ann. § 15-1-36 (15). (R. 135-138, R.E. 6) On December 29, 2005, pursuant to Miss. Code Ann. § 11-1-58, the Plaintiff forwarded the Defendants her Certificate of Review, confirming that she had reviewed the facts of the case and consulted with an expert, and based upon such review and consultation that there is a reasonable basis for the lawsuit. (R. 139, R.E. 7)

On April 7, 2006, the Plaintiff filed a wrongful death Complaint in the Circuit Court of the Second Judicial District of Bolivar County, Mississippi against Dr. Steven G. Clark, Dr. Bennie B. Wright, Dr. Tarence E. Wade, and Bolivar Medical Center alleging medical negligence and gross negligence in the treatment and care of Plaintiff's husband. (R. 1) On April 17, the Plaintiff filed an Amended Complaint. (S.V.2: 2)

On May 30, 2006, Dr. Clark filed a Motion to Dismiss alleging he was an employee of Delta Regional Medical Center, a community hospital and the Plaintiff's claims were barred by the one year statute of limitations. (R. 27-28)

On June 2, 2006, Dr. Wright filed a Motion, Defenses and Separate Answer. (R. 46) Defendant's Motion to Dismiss was on the grounds that Plaintiff failed to give proper written notice as required by the Mississippi Malpractice Tort Reform Act. (R. 46)

On June 9, 2006, Dr. Wade filed his Answer and Motion to Dismiss alleging the complaint fails to state a cause of action, insufficiency of notice and statute of limitations contained in § 15-1-36, Mississippi Code of 1971, insufficiency of process, insufficiency of service of process, Plaintiff failed to comply with the requirements of Miss. Code Ann. § 11-1-58, and failure to state a claim. (R. 53)

On January 11, 2007, the Circuit Court of the Second Judicial District of Bolivar County, Mississippi, Hon. Charles E. Webster presiding, heard oral argument on Dr. Clark's motion. (Tr. 1, R.E. 12). No Order was entered because Counsel for Dr. Clark asked for an additional ten days to submit proof to the Court that Delta Regional Medical Center has ownership interest in the clinic where Dr. Clark works, Cleveland Medical Clinic. (Tr. 55-56, R.E. 12) The Defendant never provided this proof to the Court.

On February 9, 2007, the Circuit Court of the Second Judicial District of Bolivar County, Mississippi, Hon. Charles E. Webster presiding, heard oral argument on the motions of Dr. Wade and Dr. Wright. (Tr. 59, R.E. 12) On February 16, 2007, the circuit court entered an order granting all of the Defendants' Motions to Dismiss. (R. 588-591, R.E. 2) In the order, the circuit court made the following significant findings:

1. This is an action alleging medical malpractice. The action was initially filed April 7, 2006. An Amended Complaint was filed April 17, 2006. It is undisputed that no Certificate as contemplated by Miss. Code Ann. §11-1-58(1) accompanied either of the Complaints.

2. The plaintiff asserts that she forwarded the subject Certificate to each of the defendants as an attachment to the Notice of Claim letter(s). The plaintiff makes a compelling argument that she has complied with the purpose of Miss. Code Ann. §11-1-58(1), such purpose being to avoid the filing of frivolous lawsuits by requiring the plaintiff's attorney to seek counsel from a qualified medical expert prior to filing a medical malpractice complaint. Certainly, it appears to this court that the plaintiff has complied with the *spirit* of the law. Plaintiff asserts *and this court so finds* that plaintiff consulted with at least two medical experts prior to filing the instant complaint. The plaintiff also asserts that she provided the defendants, through their respective insurance carriers, a copy of the opinions of her respective experts. Plaintiff does not dispute that no Certificate was attached to either of the complaints *when filed*.

The court however concluded that based upon the Mississippi Supreme Court's holding in Walker v. Whitfield Nursing Ctr., Inc., 931 So.2d 583 (Miss. 2006), the circuit court is to examine the record to determine compliance or non-compliance. (R. 590) Therefore, based on the holding in Walker, the circuit court found that because the Plaintiff failed to attach a certificate to the complaint, she has failed to strictly comply with the requirements of the statute and her claims against all defendants must be dismissed. (R. 480-487)

The circuit court also held that the two (2) year statute of limitations under Miss. Code Ann. § 15-1-36, had expired and dismissed the Plaintiff's claims with prejudice.

Aggrieved by the dismissal, the Plaintiff-Appellant has brought this appeal. (R. 592-593)

C. STATEMENT OF THE FACTS

On April 9, 2004, Carlton McClain was sent to Bolivar Medical Center by his family physician for a thoracentesis that was to be performed that day. He was referred to Steven G. Clark, M.D. for the procedure. (S.V.2: 4) On the date of admission, Dr. Clark was not available to McClain, chest x-rays ordered by the referring physician were not obtained, and the thoracentesis

was not performed. (S.V.2: 4)

On the morning of April 10, 2004, at approximately 10:30 a.m., Dr. Bennie Wright performed the thoracentesis on Mr. McClain. During the procedure, twice the safe amount of pleural fluid was removed resulting in pneumothorax and failure of lung re-expansion, which required that Mr. McClain undergo surgery on April 12, 2004, to insert a chest tube for re-expansion of his lung. (S.V.2: 4, 5)

On April 10, 2004, at 6:33 p.m., Dr. Clark dictated into Mr. McClain's medical records that he had performed an admission history and physical examination on the patient and his plan "is to have a thoracentesis done on the patient." (R. 333, 334, S.V.2: 5) Curiously, however, by the time of the purported dictation, Mr. McClain had already received a thoracentesis from Dr. Wright, approximately eight (8) hours earlier. (R. 333, 334, S.V.2: 5)

Dr. Clark's written record of such purported physical examination indicates Mr. McClains' lungs were "clear with air movement throughout without wheezes." (R. 333, 334, S.V. 5) This assessment is incompatible with Dr. Clark's own diagnosis of right pleural effusion and congestive heart failure. (R. 333, 334, S.V.2. 5) It also contradicts the nurses notes and the medical report by Mr. McClain's family physician. (R. 333, 334, S.V.2: 5)

Leanora McClain never left the hospital during her husband's entire hospital stay. (R. 325-328) Mrs. McClain and her adult son, Carlton Edward McCain, both state that Dr. Clark never came to the hospital to see Carlton McClain prior to April 12, 2004, a factual assertion which is compatible with the nurses notes. (R. 326, SV.2: 5)

On April 9, 2004, Mr. McClain drove himself and his wife to Bolivar Medical Center, and walked in under his own control. (S.V.2: 6) When he was discharged on April 21, 2004, Mr.

McClain was unable to walk or talk, could not feed himself, had to wear a diaper, and had to be turned every thirty (30) minutes. (S.V.2: 6) He was discharged with sepsis, pleural effusion, chronic obstructive pulmonary disease (COPD) with exacerbation, and pneumonia. (S.V.2: 6)

On May 8, 2004, Carlton McClain again presented to Bolivar Medical Center with shortness of breath and was re-admitted. (S.V.2: 6, R.E. 11) Dr. Tarence Wade, who was working as an emergency room physician that day, inserted a right sided chest tube to remove fluid from Mr. McClain's lungs. (R. 123-130) Diagnostic tests revealed that the chest tube had marked kinking at the insertion site in the right lateral pleural cavity, and the kinking was cause for the tube's malfunction. (R. 133)

On May 9, 2004, x-rays revealed that Mr. McClain suffered from persistent large right mid and lower pleural effusion, and the x-rays also showed that the suboptimal positioned chest tube with kinking remained. (R. 132) Mr. McClain's condition worsened and he developed a complex loculated fluid collection. Dr. Wade and Dr. Clark allowed the suboptimal positioned chest tube with an approximately 90 degree kink to remain until May 13, 2004. (R. 133, 134)

On May 15, 2004, Mrs. McClain went into the hallway to find a doctor to see her husband because he was in severe pain and was having difficult and labored breathing. Dr. Clark never saw Mr. McClain on May 15, 2004. (S.V.2: 7) On May 16, 2004, Mr. McClain was non responsive the entire day; yet, he was not seen by Dr. Clark or any other physician. (S.V.2: 7)

On May 17, 2004, at approximately 10:45 a.m., Mr. McClain coded. (S.V.2: 7) At 11:00 a.m., Dr. Clark gave orders to transfer Mr. McClain to ICU, and at 11:09 a.m. he was pronounced dead, as a result of congestive heart failure due to chronic obstructive pulmonary disease (COPD) secondary to pleural effusion. (S.V.2: 7)

Prior to filing the Complaint, counsel for the Plaintiff reviewed the facts of the case, and on June 2, 2005, sent a letter to McClain's consulting expert. (E. 4-5, R.E. 3) On October 26, 2005, Plaintiff's counsel received the consulting expert's written opinion and concluded on the basis of her review and the consultation that there was a reasonable basis for the commencement of this action. (E. 6-8, R.E. 4) Counsel for the Plaintiff also had a second consulting expert review the facts of the case and submit a written opinion regarding the case. (E. 1-3, 16-23, R.E. 5)

On January 5, 2006, pursuant to § 15-1-36(15), Miss. Code Ann. (Rev. 2002), Dr. Wright and Dr. Clark were served with written notice of Plaintiff's intention to file a lawsuit, the legal basis of the claim, and the type loss sustained. (R. 111-114, 146-159, R. E. 6) On January 5, 2006, pursuant to § 11-1-58, Miss. Code Ann. (Amended 2002), both physicians were served with certificates of review verifying that Plaintiff's counsel had reviewed the facts of the case, consulted with at least one medical expert knowledgeable in the relevant issues, and concluded on the basis of the review and consultation that there is a good faith basis for bringing the lawsuit. (R. 111-114, 146-159, R.E. 7)

On January 9, 2006, and January 10, 2006, the Plaintiff served Bolivar Medical Center and Dr. Wade respectively her written notices of claim and certificates of review. (R. 111-114, 115-119, R.E. 6, 7)

On January 30, 2006, Plaintiff's counsel received a letter from Dr. Wades's insurance carrier, Western Litigation Specialists, Inc., requesting copies of medical records, medical bills, a description of specific allegations against Dr. Wade, and any additional information that would assist them in review and evaluation of Plaintiff's claim. (R. 140, R.E. 9)

On February 8, 2006, counsel for Plaintiff received a letter from Drs. Clark and Wright's insurance carrier, Medical Assurance Company, requesting specific allegations of negligence against Drs. Clark and Wright with supporting opinions outlined by the reviewing medical expert, documentation of medical and special expenses, and a specific demand for settlement. (R. 228, R.E. 10)

On February 16, 2006, Plaintiff's settlement demand with a copy of Mr. McClain's medical records, bills, and Plaintiff's consulting expert's supporting opinion were forwarded to Dr. Wade's insurance carrier. (E. 9, R.E. 10) On February 28, 2006, a copy of Mr. McClain's medical records, bills, and Plaintiff's consulting expert's supporting opinion were forwarded to Drs. Clark and Wright's insurance carrier. (R. 204, R.E. 11)

On March 13, 2006, Drs. Clark and Wright sent Plaintiff's counsel a copy of the letter that the carrier forwarded to the Defendants with a copy of Plaintiff's settlement package. (E. 14, R.E. 10)

On or about April 2, 2006, counsel for the Plaintiff called the claim representative handling the claim for Drs. Clark and Wright regarding settlement. Counsel was informed that Dr. Clark did not wish to make a settlement.

On April 7, 2006, Plaintiff's original wrongful death lawsuit was filed and an amended complaint filed on April 27, 2006.

A chronology of the significant events is as follows:

DATE	EVENT
05/17/04	Carlton McClain dies as a result of negligent medical care and treatment by Dr. Clark, Dr. Wright, Dr. Wade and Bolivar

Medical Center.

01/05/06 Dr. Clark was served with Plaintiff's Notice of Claim and Certificate of Review, pursuant to Miss. Code Ann. §§ 15-1-36(15) and 11-1-58.

01/05/06 Dr. Wright was served with Plaintiff's Notice of Claim and Certificate of Review, pursuant to Miss. Code Ann. §§ 15-1-36(15) and 11-1-58.

01/09/06 Bolivar Medical Center was served with Plaintiff's Notice of Claim and Certificate of Review, pursuant to Miss. Code Ann. §§ 15-1-36(15) and 11-1-58.

01/10/06 Dr. Wade was served with Plaintiff's Notice of Claim and Certificate of Review, pursuant to Miss. Code Ann. §§ 15-1-36(15) and 11-1-58.

01/30/06 Plaintiff's counsel received letter from Dr. Wade's insurance carrier in response to the Notice and Certificate.

02/08/06 Plaintiff's counsel received letter from Dr. Clark and Dr. Wright's insurance carrier in response to the Notice and Certificate.

02/16/06 Per request from Dr. Wade's insurance carrier, a copy of McClain's medical records, bills, and Plaintiff's consulting expert's supporting opinion were forwarded to the company.

02/28/06	Per request from Drs. Clark and Wright's insurance carrier, a copy of McClain's medical records, bills, and Plaintiff's consulting expert's supporting opinion were forwarded to the company.
03/13/06	Plaintiff's counsel received copy of letter forwarded to Drs. Clark and Wright's by their insurance carrier personally supplying said Doctors with McClain's medical records, bills, and Plaintiff's consulting expert's supporting opinion.
04/07/06	Plaintiff files a wrongful death Complaint against Dr. Clark, Dr. Wright, Dr. Wade and Bolivar Medical Center.
04/17/06	Plaintiff filed an Amended Complaint against the Defendants.
05/08/06	Dr. Wade was served the Summons and Complaint.
05/11/06	Dr. Clark, Dr. Wright, and Bolivar Medical Center were each served a Summons and Complaint.
05/30/06	Dr. Clark filed his Motion to Dismiss.
06/02/06	Dr. Wright filed his Motion, Defenses and Separate Answer.
06/09/06	Dr. Wade filed his Answer and Motion to Dismiss.
06/12/06	Bolivar Medical Center filed its Motion to Dismiss and Answer and Defenses.
06/26/06	Dr. Wright filed his Motion to Dismiss.
06/26/06	Plaintiff filed her Response to Bolivar Medical Center and Dr. Wright's Motions to Dismiss.

06/26/06	Plaintiff filed her Response to Dr. Wade's Motion to Dismiss.
06/27/06	Plaintiff filed her Response to Dr. Clark's Motion to Dismiss.
06/30/06	Plaintiff's Certificate filed with the Court.
06/30/06	Plaintiff filed her Response to Dr. Wright's Motion to Dismiss.
07/13/06	Dr. Clark filed his Rebuttal in Support of Motion to Dismiss and Notice of Conversion to Motion for Summary Judgment.
08/09/06	Plaintiff filed her Response in Opposition to Dr. Clark's Rebuttal in Support of Motion to Dismiss and Notice of Conversion to Motion for Summary Judgment.
09/06/06	Dr. Clark filed his Surrebuttal in Support of Motion for Summary Judgment
01/08/07	Dr. Wade filed his Motion to Dismiss and/or for Summary Judgment.
01/11/07	Dr. Clark files his Supplement in Support of Motion for Summary Judgment.
01/11/07	Hearing was held on Dr. Clark's Motion to Dismiss and/or for Summary Judgment.
01/23/07	Dr. Clark file his Supplement to Motion for Summary Judgment.
01/25/07	Plaintiff files her Motion to Hold the Ruling on Dr. Clark's Motion for Summary Judgment in Abeyance Pending

Discovery.

01/29/07

Plaintiff files her Response to Dr. Wade's Motion to Dismiss and/or for Summary Judgment.

02/02/07

Dr. Clark files his Opposition to Plaintiff's Motion to Hold Defendant's Motion for Summary Judgment in Abeyance Pending Discovery.

02/07/07

Dr. Wade filed his Reply to Plaintiff's Response to Motion to Dismiss and/or Summary Judgment.

02/09/07

Hearing was held on Drs. Wade and Wright's Motions to Dismiss and/or for Summary Judgment; and, Plaintiff's Motion to Hold the Ruling on Dr. Clark's Motion in Abeyance Pending Discovery.

02/16/07

Order filed Granting the Defendants' Motions to Dismiss.

II. SUMMARY OF THE ARGUMENT

Whether service of a certificate of consultation upon the Defendants and providing the Defendants with Plaintiff's consulting expert's opinion pursuant to Miss. Code Ann. § 11-1-58 (7), prior to the filing of the Complaint constitutes sufficient compliance with the provisions of the statute so as to avoid a dismissal with prejudice of Plaintiff's medical malpractice claims against the Defendants?

The provisions of Miss. Code Ann. § 11-1-58 state, in relevant part, that: the complaint shall be accompanied by a certificate executed by the Plaintiff's attorney; and, allows the plaintiff, in lieu of serving a certificate required by this section to provide the defendant or defendants with expert information in the form required by the Mississippi Rules of Civil Procedure.

In enacting the statute, the Legislature intended that an expert consultation and a certificate of consultation verifying same to be a condition precedent to filing the lawsuit and the record is clear that the Plaintiff provided the Defendants with a Certificate, along with her consulting expert's opinion prior to the filing of the Complaint.

Plaintiff submits that by consulting not one but two experts and by providing the Defendants with both a Certificate of consultation and the actual report of the expert prior to the filing of the Complaint, she has much more than complied with the directive of Miss. Code Ann. § 11-1-58, which requires that the health care provider be provided with a Certificate of the "good faith" basis of the suit.

Whether McClain's claims are now time-barred by the two (2) year medical malpractice statute of limitations as codified at Miss. Code Ann. § 15-1-36 (2), as amended?

Miss. Code Ann. § 15-1-36 (2) state, in relevant part, that: For any claim accruing on or after July 1, 1998, and except as otherwise provided in this section, no claim in tort may be brought against a health care provider for injuries or wrongful death arising out of the course of medical, surgical or other professional services unless it is filed within two (2) years from the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered.

The facts in the present case demonstrate that the Defendants were properly and timely served with written notice pursuant to Miss. Code Ann. § 15-1-36(15), the original Complaint was timely filed, and the Defendants were properly served with McClain's Summons and Complaint within 120 days of the filing of the Complaint. The Mississippi Supreme Court's decisions have established a rule that filing of the Complaint tolls the statute of limitations. As such, McClain's claims are not

barred by the two (2) year medical malpractice statute of limitations as codified at Miss. Code Ann. § 15-1-36 (2), as amended.

The Plaintiff provided the Certificate required by Miss. Code Ann. § 11-1-58 and the statute of limitations had not expired at the time the case was dismissed with prejudice. Therefore, under the facts of the case *sub judice*, and under the established law of Mississippi, the Defendants' motions to dismiss should not have been granted by the circuit court. This Court should reverse the circuit court's order and remand this action for a trial on the merits.

III. ARGUMENT

1. STANDARD OF REVIEW

This Court applies a *de novo* standard of review to all questions of law, including motions to dismiss and summary judgments. City of Jackson v. Perry, 764 So. 2d 373, 375 (Miss. 2000). Thus, on appeal this Court applies the same standards employed by the trial court. Application of the statute of limitations is a question of law. Sarris v. Smith, 782 So.2d 721, 723 (Miss. 2001).

A Rule 12(b)(6) Motion tests the legal sufficiency of the complaint. To grant a motion to dismiss for failure to state a claim, "there must appear to a certainty that the plaintiff is entitled to no relief under any set of facts that could be proved in support of the claim." Gulledge v. Shaw, 880 So.2d 288, 292 (Miss. 2004). Even if it seems "almost a certainty to the court that the facts alleged can not be proved to support the legal claim," the claim may not be dismissed so long as the complaint states a claim. Boudeloche v. Grow Chemical Coatings Corp., 728 F.2d 759, 762 (5th Cir. 1984).

B. THE PLAINTIFF HAS COMPLIED WITH THE PROVISIONS OF MISS. CODE ANN. § 11-1-58, WHICH REQUIRES PROVIDING A CERTIFICATE OF CONSULTATION AS A CONDITION PRECEDENT TO FILING A COMPLAINT.

The Appellant provided the Appellees with the required certificate of file review as required by the statute prior to filing the Complaint. In relevant part, Miss. Code Ann. § 11-1-58 states:

(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; or

(c) The attorney was unable to obtain the consultation required by paragraph (a) of this subsection because the attorney had made at least three (3) separate good faith attempts with three (3) different experts to obtain a consultation and that none of those contacted would agree to a consultation.

....

(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 non trial expert, except as expressly stated herein.

On January 5, 2006, the Plaintiff served Dr. Clark and Dr. Wright via certified mail with Certificates of Review certifying the "good faith" basis of the action. On January 9, 2006, Bolivar Medical Center was served with Plaintiff's Certificate, and on January 10, 2006, Dr. Wade was served with Plaintiff's Certificate. Pursuant to Section 11-1-58 of Mississippi Code Annotated, counsel for the Appellant certified that she had reviewed the facts of the case, that the case had been reviewed by a knowledgeable medical expert, and that based upon the review and consultation, there is a reasonable basis for bringing the action.

In response to the notice and certificate served on the Appellees, the Appellant received a letter from the insurance carriers for Drs. Clark, Wright, and Wade requesting that Appellant provide them with her consulting expert's opinion, Mr. McClain's medical records, bills, and a description of specific allegations against each physician in order to review and evaluate the Plaintiff's claims. Also, a specific demand for settlement was requested by the adjustor for Drs. Clark and Wright.

On February 16, 2006, pursuant to section 11-1-58(7), Plaintiff's consulting expert's supporting written opinion, a settlement demand including medical records, and medical bills were forwarded to Dr. Wade's insurance carrier. On February 28, 2006, Plaintiff's consulting expert's supporting written opinion pursuant to section 11-1-58(7), a settlement demand including medical records, and medical bills were mailed to Drs. Clark and Wright's insurance carrier. The liability insurance companies then forwarded the Appellant's aforesaid medical documentation to the Appellees for their review and consent for the carriers to settle the claims against them.

Accordingly, all Appellees were provided with plaintiff's consulting expert's opinion and all medical documentation relative to Mr. McClain's medical treatment prior to suit being filed. Counsel for the Appellant telephoned the insurance adjuster for Drs. Clark and Wright's in an effort to make a good faith effort to resolve the claim prior to litigation. Upon being told that Dr. Clark did not wish to settle the claims against him, Leanora McClain filed her lawsuit. Clearly, the evidence shows that the Appellant has more than complied with the intent and purpose of the statute in providing Appellees with a certificate preceding the filing of the Complaint, as well as a copy of her consulting expert's supporting written opinion. The conditions precedent to filing of her Complaint were met.

Additionally, on June 28, 2006, the Appellant provided the Appellees with a second Certificate of Review, that was filed in the Circuit Court of Bolivar County on June 30, 2006, within 60 days of the service of the complaint upon all of the Appellees, as alternatively required by Miss. Code Ann. § 11-1-58(1)(b). (R. 218-220, R.E. 8).

The Appellant submits that it is clear that the Legislature intended the statute to be mandatory, and not discretionary, when it came to providing a certificate of expert consultation as evidence of a plaintiff's "good faith" basis for the suit. The provision for a certificate of consultation is an executory condition, which must be complied with to validly proceed with the filing of the Complaint. By providing the Appellees with not only certificates of consultation but the actual report resulting from such consultation, the Appellant has complied with the clear intent of the statute in satisfying the condition precedent prior to filing the Complaint.

The Appellees rely upon Walker v. Whitfield Nursing Center, Inc., 931 So.2d 583 (Miss. 2006) as their basis for dismissal of Appellant's Complaint. However, in Walker, there exists no set

of facts that are remotely analogous to the present case.

Walker filed a lawsuit against Whitfield Nursing Center, Inc. on April 7, 2004 and revealed for the first time that she had consulted an expert, a nurse, during depositions on August 5, 2005, which was over a year and four months after the filing of the complaint. Walker produced no proof of any expert consultation until September 8, 2005, when her attorney first executed a certificate of consultation which indicated that prior to filing the complaint, he had participated in a “telephone conversation” with a nurse and based on the nurse’s “thoughts and impressions,” he was satisfied there was a reasonable basis for filing the suit.

The question presented in Walker was whether Walker complied with the requirements of Miss. Code Ann. § 11-1-58(1), or alternatively, Miss. Code Ann. § 11-1-58(7).

In ruling against Walker, this Court’s findings that Walker had not complied with the provisions of Miss. Code Ann. § 11-1-58(7) were based upon the following facts:

1. Walker’s letter of intent did not state that an expert had been consulted prior to filing suit;
2. There was no report or records sent to Whitfield from Plaintiff’s reviewing expert; and
3. Walker’s attorney did not sign an affidavit until September 7, 2005, providing that he participated in a “telephone conversation” with a nurse regarding her review of Plaintiff’s medical records before filing suit.

The present case is distinguishable from Walker for a number of reasons. First, Appellant served the Appellees with her attorney’s certificate verifying that she had consulted with a medical expert regarding the case and there was a good faith basis for the claim at least three (3) months prior to the filing of her Complaint.

Second, prior to the filing of her Complaint, the Appellant provided the Appellees with her consulting expert's actual supporting written opinion with descriptions of specific allegations of negligence against them, a settlement demand, medical records, and medical bills.

Walker, on the other hand, did not provide the Defendants with an affidavit that he had participated in a telephone conversation with an expert until more than a year after the filing of the Complaint.

Finally, Plaintiff provided the Defendants with a second certificate of consultation which was filed on June 30, 2006, within 60 days of the service of the Complaint as alternatively required by Miss. Code Ann. § 11-1-58(1)(b).

The spirit and intent of the statute is to provide a good faith certificate as a condition precedent to the filing of the complaint, certifying that the complaint and the allegations contained therein are believed to be meritorious based upon consultation with a medical expert. This spirit and intent of the statute is upheld when, prior to filing her Complaint, the Appellant has provided the Appellees with a certificate of consultation, her consulting expert's written opinion with specific allegations of negligence against the Appellees, a copy of her husband's medical records, and medical bills. Therefore, this Court should reverse the trial court's order granting the Defendant's-Appellees' motions to dismiss and remand this case or a trial on the merits.

C. MCCLAIN'S MEDICAL NEGLIGENCE CLAIMS ARE NOT BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS SET FORTH UNDER MISSISSIPPI CODE ANNOTATED § 15-1-36(2).

Notice was properly given each Defendant at least sixty days prior to filing the claim pursuant to Miss. Code Ann. § 15-1-36(15) (Rev. 2003), which provides:

No action based upon the health care provider's professional negligence may be begun unless the defendant has been given at least sixty days' prior written notice of the intention to begin the action. No particular form of notice is required, but it shall notify the defendant of the legal basis of the claim and the type of loss sustained, including with specificity the nature of the injuries suffered. If the notice is served within sixty (60) days prior to the expiration of the applicable statute of limitations, the time for the commencement of the action shall be extended sixty (60) days from the service of the notice for said health care provider and others.

The circuit court erred when it dismissed the case sub judice with prejudice on the grounds that Plaintiff's claims were barred by the two (2) year medical malpractice statute of limitation set forth under Miss. Code Ann. § 15-1-36(2), which states in relevant part:

For any claim accruing on or after July 1, 1998, and except as otherwise provided in this section, no claim in tort may be brought against a licensed physician....for injuries or wrongful death arising out of the course of medical, surgical or other professional services unless it is filed within two (2) years from the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered

The trial court based its opinion on In Re Holtzman, 832 So.2d 1180, 1182 (fn 1) (Miss. 2002), a case that is distinguishable from the present case. In that case, Holtzman filed a lawsuit on April 28, 2000, two (2) days before the applicable three (3) year statute of limitations. However, the summons and complaint were never served. The 120 day deadline to effect service under the applicable provision of Mississippi Rule of Civil Procedure 4(h) ran on August, 26, 2000, without Holtzman having filed for an extension of time to effect service of process. Then, on January 31, 2001, Holtzman filed a motion for an extension of time to complete service. Holtzman admitted the reason service was not effected was that the summons was mistakenly or inadvertently misfiled.

In denying Holtzman's request for an extension of time, the trial court found that, after allowing for the 120 days in which to serve process, the statute of limitations ran on August 26, 2000. Holtzman waited over five (5) months before filing a motion for an extension of time. In affirming the decision of the trial court, this Court found that Holtzman did not show good cause in failing to serve process within 120 days.

In the case *sub judice*, the original Complaint was filed on April 7, 2006, and the Amended Complaint was filed on April 17, 2006. Dr. Wade was served with McClain's Summons and Complaint on May 8, 2006 and Dr. Clark, Dr. Wright, and Bolivar Medical Center were each served with McClain's Summons and Complaint on May 11, 2006. The record clearly shows that service was effected on all Defendants within the 120 days for service of process under the applicable provision of Mississippi Rule of Civil Procedure 4(h).

The Plaintiff timely filed her Complaint against the Defendants, therefore, the applicable statute of limitations tolled from April 7, 2006, the date the original complaint was filed and continued to toll after the suit was dismissed on February 13, 2007, pursuant to the 60-day notice given to the Defendants-Appellees under Miss. Code. Ann. § 15-1-36(15).

The filing of an action is an event which initiates the tolling of the statute of limitations. Erby v. Cox, 654 So.2d 503 (Miss. 1995). The limitations period begins to run again if service of process is not made within the 120-day period following the filing of the complaint. Watters v. Stripling, 675 So.2d 1242 (Miss. 1996). In the present case, the statute of limitations applicable to McClain's claims tolled from April 7, 2006, the date the original complaint was filed until after the action was dismissed on February 13, 2007, since the original complaint was filed prior to the May 17, 2006 statute of limitations and service of process was effected during the 120-day period

following the filing of the complaint.

Prior to dismissal of the Complaint, Plaintiff, on January 5, 2006, served Dr. Clark and Dr. Wright with notice of her intent to file a claim pursuant to Miss. Code Ann. § 15-1-36(15). On January 9, 2006, McClain served Bolivar Medical Center with notice of her intent to file a claim, and on January 10, 2006, McClain served Dr. Wade with notice of her intent to file a claim. During this notice period, McClain's claims were not actionable.

Under Section 15-1-36(15), if a plaintiff gives the required notice within sixty days of the expiration of the statute of limitations, the statute of limitations is tolled for sixty days. This allows a plaintiff to give notice even on the last day of the statute of limitations, wait the required sixty day period, and still timely file her complaint. Pope v. Brock, 912 So.2d 935, 939 (Miss. 2005). In Pope, the Court concluded that the interpretation most faithful to the language of the statute requires a sixty-day tolling of the two-year statute of limitations provided by Section 15-1-36(2). Id. Since the Plaintiff provided the written notice required by section 15-1-36(15), she triggered the sixty day extension of the statute of limitations.

In the present case, Carlton McClain received medical treatment at Bolivar Medical Center at various times beginning April 9, 2004, until he died on May 17, 2004, and was subjected to ongoing negligent acts and omissions until his demise. If the time for commencement of the action is extended 60 days, then two years, plus the sixty-day extension, results in the expiration of the statute of limitations two years and sixty days after his death, which is on July 16, 2006. Even computing from the date of McClain's initial admission on April 9, 2004, 2 years and sixty days from April 9, 2004, is June 8, 2006. After dismissal of the Appellant's Complaint on February 13, 2007, there remained sixty-two (62) days left for the statute of limitations to run.

Applying the rules of statutory construction to Miss. Code Ann. § 15-1-36 reveals the intent of the legislature is to toll the statute of limitations. When interpreting a statute, the proper way to determine the real intent of the Legislature is to study the words used by it in context. Kerr-McGee Chemical Corp. v. Beulow, 670 So.2d 12,17 (Miss. 1995). If the statute is not ambiguous, the Court should simply apply the statute according to its plain meaning and should not use principles of statutory construction. However, if the statute is unclear or ambiguous, this Court must look to the rules of statutory construction to interpret the statute. Claypool v. Mladineo, 724 So.2d 373, 382 (Miss. 1998). The Court, in construing a statute, must seek the intention of the Legislature and knowing it, must adopt that interpretation which will meet the real meaning of the Legislature. Evans v. Boyle Flying Service, Inc., 680 So.2d 281, 825 (Miss. 1996). When construing a statute, the object is to get at its spirit and meaning --- its design and scope. Claypool, 724 So.2d at 382. The chief desire of the courts is to reach the real intention of the Legislature, and knowing this, to adopt that interpretation which will meet the real meaning though such interpretation may be beyond or within, wider or narrower, than the mere letter of the statute. Evans, 680 So.2d at 821. Unthought of results must be avoided if possible, especially if injustice follows, and unwise purpose will not be imputed to the Legislature when a reasonable construction is possible. Id. In short, a court must construe statutes to avoid unreasonable or absurd results. 73 Am. Jur. 2d Statutes § 172. A court should not give a statute a literal interpretation if it leads to absurd consequences that are contrary to legislative intent. Id.

The rules of statutory construction should be used to interpret § 15-1-36, since the statute is ambiguous on its face. Section 15-1-36 requires a plaintiff to give a defendant medical provider at least sixty (60) days notice before filing a medical malpractice action. The statute makes it clear that

a medical negligence claim is not actionable unless the medical provider is given sixty days written notice prior to filing the lawsuit. If the notice is served within sixty (60) days prior to the expiration of the applicable statute of limitations, the time for commencement of the action is extended sixty (60) days from the service of the notice.

A plain language reading of § 15-1-36 reveals that the Legislature intended to give the plaintiff more, but never less, than the statutory two (2) year period in which to bring a medical negligence action. This intent is best effectuated by construing § 15-1-36 as tolling the statute of limitations. Tolling the statute of limitations during the sixty (60) day waiting period achieves the legislative objective of encouraging negotiated resolutions of claims without denying plaintiffs access to the court.

Tolling can be compared to a clock that is stopped and restarted. Whatever period of time remains on the statute of limitations when the clock is stopped is available when the clock restarts. This construction harmonizes the language of the statute and maintains its legislative mandate. McClain's claims were timely filed since the statute of limitations tolled during the notice period; and, pursuant to Miss. Code Ann. § 15-1-36(2), on April 7, 2006, McClain timely filed her Complaint. This Court has found that to impose the ultimate sanction of dismissal with prejudice, which prevents the plaintiff from bringing a new suit based on the same cause of action, is extreme and harsh, and only the most egregious cases warrant such dismissals. Miss. Dep't of Human Servs. v. Guidry, 830 So.2d 628, 632 (Miss. 2002). This Court, applying a logical reading and interpretation of § 15-1-36, should reverse the trial court's order granting Defendants-Appellees' motions to dismiss with prejudice and remand this case for further proceedings.

CONCLUSION

Based on the foregoing, Leanora McClain has complied with Miss. Code Ann. § 11-1-58 and her claims are not barred by the two (2) year medical malpractice statute of limitation set forth under Miss. Code Ann. § 15-1-36(2). The record clearly shows that the Appellant served the Appellees with Certificates, as well as, her consulting expert's opinion. In addition, the record reflects that the Appellees were served the Notice of Claim, which if served within sixty (60) days prior to the expiration of the applicable statute of limitations, tolls the statute of limitations for sixty (60) days.

Leanora McClain respectfully requests that this Court reverse the February 13, 2007, order of the trial court granting a dismissal with prejudice to Dr. Clark, Dr. Wright, Dr. Wade, and Bolivar Medical Center and remand this case for a trial on the merits.

CERTIFICATE OF SERVICE

I, CHARLES M. MERKEL, JR., do hereby certify that I have this day mailed via U. S. mail, postage prepaid, a true and correct copy of APPELLANT'S BRIEF to:

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THIS, the 30 day of October, 2007.


CHARLES M. MERKEL, JR. (MSB2884)