IN THE SUPREME COURT OF MISSISSIPPI
NO. 2007-CA-00864

LEON STUART, Individually, and as Wrongful Death Beneficiary and on Behalf of All Other Wrongful Death Beneficiaries of SHIRLEY STUART, DECEASED — APPELLANT

VS.

THE UNIVERSITY OF MISSISSIPPI MEDICAL CENTER and/or THE UNIVERSITY HOSPITALS & CLINICS — APPELLEES

APPELLEE'S BRIEF

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CERTIFICATE OF INTERESTED PERSONS
REQUIRED BY RULE 28

The undersigned counsel of record certifies that the following list of persons have an interested 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 disqualifications recusals:

1. Leon Stuart, Individually, and as wrongful death beneficiary and on behalf of all other wrongful death beneficiaries of Shirley Stuart, deceased.

2. John H. Cocke, Esq., and William B. Raiford, III, Esq., of the law firm Merkel & Cocke, P.A., and Roy Noble Lee, Jr., Esq., of the law firm Lee & Lee, P.A., attorneys for Respondents.

3. The University of Mississippi Medical Center and/or The University Hospitals & Clinics, Petitioner

4. Senith C. Tipton, Esq., and Melanie H. Morano, Esq., from the law firm of Wilkins, Stephens and Tipton, P.A., attorneys for Petitioners.

SO CERTIFIED, this the 29th day of August, 2007.

Respectfully submitted,

UNIVERSITY OF MISSISSIPPI MEDICAL CENTER
AND/OR THE UNIVERSITY HOSPITALS & CLINICS

WILKINS, STEPHENS & TIPTON, P.A.

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STATEMENT OF THE ISSUES

A. Whether pursuant to prior pronouncements of the Mississippi Supreme Court, UMMC waived any objection it may have had to plaintiff's failure to wait 90 days after giving notice prior to filing suit?

B. Whether UMMC waived any objection to plaintiff's failure to wait 90 days after giving notice prior to filing suit by failing to specifically assert and pursue the defense pursuant to *Miss. R. Civ. P.* 8(c)?

C. Whether *Easterling*, decided 2 ½ years after plaintiff's claim was filed, should be applied retroactively?

D. Whether the trial court erred in dismissing plaintiff's claims with prejudice?

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STATEMENT OF THE CASE

On January 14, 2004, plaintiff filed his medical malpractice and wrongful death action on behalf of the beneficiaries of Shirley Stuart, deceased. Ms. Stuart died at the University of Mississippi Medical Center ("UMMC") on December 11, 2002, as the result of a pulmonary embolism. Plaintiff asserts that UMMC was negligent in failing to rule out said pulmonary embolism, proximately causing her death.

COURSE OF PROCEEDINGS BELOW

It is undisputed that plaintiff must follow the requirements of the Mississippi Tort Claims Act (*Miss. Code Ann.* § 11-46-1 et seq) ("MTCA") in this suit, as UMMC is a governmental entity otherwise protected by sovereign immunity. The version of *Miss. Code Ann.* § 11-46-11 as amended in 1999 applies to this action and requires a substantially compliant notice of claim to be filed within its one-year statute of limitation. The filing of this notice of claim must precede the filing of a plaintiff's lawsuit by 90 days pursuant to *Miss. Code Ann.* §11-46-11(1) and 95 or 120 days pursuant to *Miss. Code Ann.* § 11-46-11(3) to allow time for the governmental entity to investigate and potentially settle the claim prior to facing suit on the issue. Following this period during which the statute specifies that no action can be maintained, a plaintiff is granted an additional 90 days in which to file his lawsuit if the claim has not been resolved.

Plaintiff filed a substantially compliant notice of claim with the chief executive officer of UMMC on December 4, 2003, which was within the one-year time limitation. (R.E. 2) It is undisputed that plaintiff ignored the statutorily required 90 or 95 day period in

which no claim could be filed and prematurely filed his lawsuit on January 14, 2004, just 41 days after filing his notice of claim. (R.E. 3.) UMMC was served with process several days later on January 20, 2004. (R.E. 4.)

On April 6, 2006, the Mississippi Supreme Court decided the *University of Mississippi Medical Center v. Easterling*, 928 So. 2d 815 (Miss. 2006), (rehearing denied June 2, 2006) setting forth a "hard-edged"strict-compliance standard for the 90-day waiting period under the post-amendment *Miss. Code Ann.* § 11-46-11(1) and abolishing the remedy of a stay in litigation for plaintiff's failure to comply with this statutory prerequisite to filing suit. Upon Defendant's motion for summary judgment filed shortly thereafter, the trial court found that *Easterling*'s rule was mandatory and dismissed plaintiff's claim. (R.E. 5; R.E. 6; R.E. 7.) Plaintiff appealed this dismissal on October 4, 2006. (R.E. 8.)

SUMMARY OF THE ARGUMENT

"If there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, summary judgment should be entered in his favor. *Davis v. Hoss*, 869 So. 2d 397, 401 (Miss. 2004). "Due to the public interest in protecting governmental officials and entities from the costs associated with defending civil lawsuits, summary judgment is especially applicable when governmental or official immunity is in issue. *Williams v. Lee County Sheriff's Dept.* 744 So. 2d 286, 291 (Miss. 1999). "This Court reviews a trial court's order granting summary judgment under the *de novo* standard of review." *Maxwell v. Baptist Memorial Hospital-DeSoto, Inc.*, No. 2006- CA-00440- COA

¶ 14) (Miss. Ct. App., 2007); citing *Saucier ex rel. Saucier v. Biloxi Reg'l Med. Ctr.*, 708 So. 2d 1351, 1354 (¶ 10) (Miss. 1998).

Prior to and after the 1999 amendment, *Miss. Code Ann.*§ 11-46-11(1) stated that:

> 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.

Both versions further provided 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." The older version stopped there, only allowing the plaintiff a limited time frame following the 90-day waiting period in which to file suit. *Easterling* at 819 ¶ 20.

In answer to this inequity, case law interpreting the pre-amendment statute did not strictly enforce the 90-day waiting period, allowing a plaintiff to encroach upon the 90-day waiting period in which to file his lawsuit and setting forth in compromise that defendant may request a stay of the proceedings during litigation to complete the 90 days. *Easterling* at 819 ¶ 20; *City of Pascagoula v. Tomlinson,* 741 So. 2d 224, 227-228 (Miss. 1999). However, a stay of the proceedings during litigation does not meet the legislative purpose of furthering pre-suit investigation and potential pre-suit settlement that would allow early disposition of viable claims and avoid the expense of litigation to the state.

In 1999, the Legislature addressed this inequitable situation in § 11-46-11(3), lengthening the period of time during which a claimant cannot file suit to 95 or 120 days and

granting a 90-day grace period thereafter specifically for the filing of a lawsuit if the claim has not been resolved, although the legislature retained the 90-day waiting period language in § 11-46-11(1).

Section 11-46-11(3) now reads as follows:

> All actions brought under the provision 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. 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(3) (as amended in 1999) (portions added by amendment underlined).[1] At the very least the additional language adopted by the Legislature in the 1999 revisions strengthened evidence of the Legislature's resolve that a governmental entity be granted a specific period of at least 90 days during which no action can be maintained against a governmental entity.

Shirley Stuart's alleged injury took place on December 11, 2002, and therefore the pre-1999 version of § 11-46-11 was inapplicable to this action and the post-amendment version applies. Plaintiff's substantially compliant notice of claim was timely filed and is not at issue. Plaintiff's claim that defendant had no right to a pre-suit investigational period but that plaintiff had a right to file suit at any time during defendant's 90/95-day investigational period as well as during plaintiff's 90-day grace period (a total period of 180/185 days) is unsupported by the statutory language and applicable case law. (R.E. 9, pp. 5, 17.)

UMMC did not waive its right to the statutorily granted investigational period by failing to request a stay as asserted by the plaintiff. The legislature in the 1999 amendment corrected the inequitable situation that gave rise to the compromise option of a stay. Further, no case law interpreting the 1999 amendment validated plaintiff's claim that the entire 180/185 days after the filing of his notice of claim were for plaintiff's benefit to file suit at will and a governmental entity's only right was to request a stay in the midst of litigation.

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[1] Section 11-46-11 was amended again in 2002, but that amendment made no alteration to the notice and tolling provisions.

UMMC likewise did not waive any objection to plaintiff's failure to wait 90 days after filing his notice of claim before filing suit under *Miss. R. Civ. P.* 8(c). UMMC's second defense in its Answer and Defenses put plaintiff on notice that it was claiming all defenses under the MTCA, specifically mentioning the bar of limitations which put plaintiff on notice of a time limitations defense under § 11-46-11. (R.E. 10.) UMMC further did not waive its right to pursue dismissal for plaintiff's statutory non-compliance through its limited participation in discovery, as plaintiff's sluggish prosecution of his claim should not be construed against defendant, as discovery was ongoing at the time defendant's motion for summary judgment was filed, and as case law was developing on the issue.

Plaintiff's assertion that the Court's ruling in *University of Mississippi Medical Center v. Easterling,* 928 So. 2d 815 (Miss. 2006) should not be applied retroactively is misplaced. As a matter of course, judicial rulings are applied retroactively to cases pending trial. *Easterling* made clear that the earlier cases of *Davis v. Hoss,* 869 So. 2d 397 (Miss. 2004) and *Wright v. Quesnel,* 876 So. 2d 362 (Miss. 2004) were controlling on the waiting period issue. The strict compliance standard set forth in *Easterling* regarding the 90-day waiting period under *Miss. Code Ann.* § 11-46-11(1) was applied to the facts under that case and has been applied to other cases since then. Another line of cases interpreting the amended version of *Miss. Code Ann.* § 11-46-11(3) likewise required that the plaintiff wait 95 or 120 days after filing his notice of claim before filing suit, and thus it is clear that the Legislature and the Court intended there be a specified period of time of at least 90 days during which no action can be maintained as a pre-requisite to filing a lawsuit against a

governmental entity. Notwithstanding that plaintiff's claim to selectively prospective application of *Easterling* fails under the *Chevron Oil Company v. Huson*, 404 U.S. 97 (1971) test, the United States Supreme Court's subsequent ruling in *James B. Beam Distilling Company v. Georgia ("Jim Beam")*, 501 U.S. 529 (1991) requires that retroactive application be applied to this case.

The trial court correctly dismissed plaintiff's action with prejudice pursuant to statutory law and *Easterling*. Regardless, the statute of limitations has run and the savings clause under *Miss. Code Ann.* § 15-1-69 does not apply to this action under the MTCA; thus the effect is dismissal with prejudice.

There is no genuine issue of material fact that plaintiff failed to comply with the mandatory waiting period set forth in *Miss. Code Ann.* § 11-46-11 and *Easterling* as well as other related case law. Therefore, defendant UMMC respectfully requests this Honorable Court to affirm the trial court's grant of summary judgment and dismissal in this case.

ARGUMENT

A. Whether pursuant to pronouncements of the Mississippi Supreme Court, UMMC waived any objection it may have had to plaintiff's failure to wait 90 days after giving notice prior to filing suit?

Plaintiff incorrectly asserts that a specified waiting period before filing suit after filing the notice of claim is optional under *Miss. Code Ann.* § 11-46-11, as amended in 1999. (R.E. 9, pp. 5, 17.) He asserts that a governmental entity's only recourse for a plaintiff's failure to comply with the period set forth by statute during which no action can be maintained is to request a stay of the proceedings after the lawsuit has been filed. (R.E. 9,

p. 17) Plaintiff relied upon case law interpreting the pre-amendment version of § 11-46-11 which were inapplicable to this post-amendment action and were overturned by *University of Mississippi Medical Center v. Easterling*, 928 So. 2d 815 (Miss. 2006).

"By enactment of the Mississippi Tort Claims Act, the legislature elected to waive sovereign immunity. However, this waiver was qualified by specifying certain procedural requirements which must be met before an action was filed." *Vortice v. Fordice*, 711 So. 2d 894, 896 (Miss. 1998). "The legislature has an interest in conserving state funds" and "notice provisions encourage settlement of claims prior to entering a litigation, therefore conserving valuable governmental resources." *Vortice* at 896. "Although the Tort Claims Act waived sovereign immunity to a certain extent, it is still concerned with conserving government funds and protecting the public health and welfare at the earliest possible moment." *Vortice* at 896. A claimant has up to one year to investigate and develop her case during which time the defendant remains ignorant of a possible claim against it. *Williams v. Clay County*, 861 So. 2d 953, 975 (Miss. 2003). Plaintiff's interpretation fails to further the legislature's intent that a governmental entity also have an opportunity to investigate a claim against it prior to facing litigation and have the opportunity to either contest the claim at trial or settle the claim prior to facing a lawsuit, thereby avoiding the time and expense to the state of defending unnecessary litigation. *City of Pascagoula v. Tomlinson*, 741 So. 2d 224, 228 ¶ 10 (Miss. 1999).

The allegedly negligent conduct in this action took place at the latest on December 11, 2002. There is no dispute that the version of *Miss. Code Ann.* § 11-46-11 as

amended in 1999 applies to this action. After a timely notice of claim was filed, plaintiff's lawsuit was filed prematurely 41 days later on January 14, 2004, in defiance of the requisite period of at least 90 days set aside to allow investigation by the governmental entity.

Plaintiff insists that case law in the line of *City of Pascagoula v. Tomlinson*, 741 So. 2d 224 (Miss. 1999)(where the plaintiff stepped into an uncovered pipe hole on June 2, 1995) (overturned by *Easterling* on the waiting period issue), interpreting the pre-1999 amendment statute is controlling.[2] In *Tomlinson* the Court acknowledged that "[a] statute of limitations serves to control the period in which a lawsuit may be *filed*, and the fact that the Legislature chose to extend the statute of limitations based on the requirements of subsection (1) indicates that the Legislature intended for plaintiffs to wait ninety days from the providing of notice to file any lawsuit." *Tomlinson* at 228. The court then dealt with the inequities inherent in the pre-amendment version of § 11-46-11 where the statute of limitations was tolled for 95 days, but 90 of those days were set aside for the defendant to investigate and possibly settle the claim against it before facing a lawsuit, thereby severely limiting the time period a plaintiff had to file suit if the claim were not resolved. In compromise, the court allowed the plaintiff to encroach upon the 90 days granted the defendant and allowed the

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Other pre-amendment cases relied upon by the plaintiff and overturned by *Easterling* were *Jackson v. City of Booneville*, 738 So. 2d 1241 (Miss. 1999) (slip and fall which took place on November 26, 1996); *Leflore County v. Givins*, 754 So. 2d 1223 (Miss. 2000) (motor vehicle accident which took place on August 27, 1994); *Jones v. Mississippi School for the Blind*, 758 So. 2d 428 (Miss. 2000) (wheelchair accident which took place on January 16, 1997); *Jackson v. City of Wiggins*, 760 So. 2d 694 (Miss. 2000) (injury from falling into a hole which took place on December 25, 1996).

defendant the option of requesting a stay in the proceedings during litigation to belatedly complete the 90 day waiting period. *Tomlinson* at 227-229; *Easterling* at ¶ 20. Plaintiff ignores that the Supreme Court in *Tomlinson* specifically qualified its ruling as interpretive of the pre-amendment statute in footnote 1, where it clarified that "the Legislature has recently amended § 11-46-11, 1999 (Miss. Laws Chapter 469, H. B. 778) but these amendments, which are effective from and after passage, are not applicable herein. The present case arose prior to the enactment of the amendments." *Tomlinson* at 228, FN1.

Plaintiff also mistakenly relied upon *Williams v. Clay County*, 861 So. 2d 953 (Miss. 2003) (R.E. 9, p. 9.) The plaintiff in *Williams* fell down a flight of stairs at the Clay County Courthouse on November 1, 1999; thus the revised version of *Miss. Code Ann.* § 11-46-11 applied. The Court in *Williams* attempted to interpret the 1999 changes in the statute of limitations under §11-46-11, but did not address the waiting period issue other than to note that under the amended statute a plaintiff's time period for filing suit falls after the 95/120 day tolling period under § 11-46-11(3). *Williams* at 958-960,¶¶ 18-24. The only mention of a stay in *Williams* was a brief comment in the lengthy dissent and is insufficient as post-amendment authority on the waiting period issue. *Williams* at 977 ¶101.

The Court in several cases before *Easterling* explained the post-amendment § 11-46-11(1), stating that "a claimant must give notice to the governmental entity ninety days prior to bringing suit." *Black v. Ansah*, 876 So. 2d 395, ¶ 22 (Miss. Ct. App. 2003). The Court in *Davis v. Hoss*, 869 So. 2d 397, ¶ 13 (Miss. 2004) found the plaintiff's complaint, filed on the same day as his notice of claim, was not substantially compliant with the requirements

of the MTCA. Interpreting § 11-46-11(1), the Court explained that "a plaintiff must provide notice of a claim to the chief executive officer of a state institution ninety days prior to bringing a civil suit against the state entity" and "[s]ince UMMC is protected by the MTCA, *Davis* had to meet the requirements of § 11-46-11." *Davis* at ¶¶ 12, 17. Similarly, in *Wright v. Quesnel*, 876 So. 2d 362, ¶ 9 (Miss. 2004), the plaintiff filed her complaint eleven days after filing her notice of claim. The Court found the plaintiff failed to wait "the statutorily-prescribed ninety-day period before filing suit" and dismissal was proper. *Wright* at ¶ 9.

Correspondingly, another line of cases attempted to interpret the 1999 revisions of §11-46-11(3). The pre-1999 version differs from the post-1999 version on "when and for how long the one-year statute of limitations is tolled when a plaintiff gives a governmental entity notice of a pending claim prior to filing an action based on that claim." *Marshall v. Warren County Board of Supervisors*, 831 So. 2d 1211, 1212 ¶¶ 5-9 (Miss. Ct. App. 2002.) "On March 25, 1999, our Legislature extended the period of time a notice of claim tolled the statute of limitations for actions brought against governmental entities under the Mississippi Tort Claims Act., *Miss. Code* Ann. § 11-46-1 through 23 (Supp. 2001)." *Roberts v. New Albany Separate School District*, 813 So. 2d 729, 731-732, ¶¶ 5-7 (Miss. 2002).

While the law interpreting the counting method for the statute of limitations under the revised statute has evolved, all authority is in agreement that under the amended statute a claimant must wait until after the tolling period to file his lawsuit under the revised statute. "After the 120-day period, the claimant has 90 days to bring suit. Should the government

respond within the 120-day period, the claimant has 90 days to bring suit from the date of response." *Williams v. Clay County*, 861 So. 2d 953, ¶ 24, FN5 (Miss. 2003). This means that the statute might better be understood as providing a one year period within which to file a notice of claim. Once that is filed, a state agency has 95 days and other governmental bodies 120 days to respond to the claim. Then beginning with the end of those time periods or with an earlier denial, the claimant has 90 days to file suit." *Burge v. Richton Municipal Separate School District*, 797 So. 2d 1062, ¶ 26 (Miss. Ct. App. 2001). "The one year limitations period is still said to be "tolled", but the statute then provides that the 90 day period within which to file suit begins at the end of the tolling period." *Burge* at ¶ 25.

The Supreme Court in *Page v. University of Southern Mississippi,* 878 So. 2d 1003 (Miss. 2004) clarified the procedure for counting of the statute of limitations, but continued to assert that after the expiration of the 95 or 120 day "tolling" period (unless the entity denies the claim earlier), "the claimant is then left with the remaining days in the original one-year limitations period not used at the time notice was received plus the additional 90 days in which to file suit." *Page* at 1007 ¶ 12. Nothing in *Page* suggests that a plaintiff can file suit during the "tolling" period set aside for the defendant governmental entity to investigate the claim.

In the action herein, plaintiff interprets *Miss. Code Ann.* § 11-46-11 (as amended in 1999), as offering an optional but not required 90 or 95 day investigational period. Ignoring the clear statutory language and case law, he asserts that "pursuant to *Miss. Code Ann.* § 11-46-11, Plaintiff had at least 180 days from the date of service of notice to institute his claims

against UMMC." (R.E. 9, pp. 5, 17.) Plaintiff thus believes that he may file his lawsuit at his pleasure any time during the 90-day period (under § 11-46-11(1)) or the 95 day period (under § 11-46-11(3)) set aside by the legislature for defendant's investigation and possible resolution of the claim, as well as within the 90 days set aside thereafter specifically for the filing of plaintiff's lawsuit if his claim has not been resolved. Plaintiff mistakenly holds to the overruled remedy that a governmental entity's only recourse for his blatant violation of the mandated investigational period, a pre-requisite to filing suit against a governmental entity, is to request an ineffectual stay after his lawsuit is filed, a remedy no longer logical nor good law.

Although the Legislature and Supreme Court have not yet clarified whether the period during which no suit can be filed under the revised statute is 90 or 95 days for a state agency, the 1999 statutory revisions, at a minimum, strengthened the legislative intent that a specific investigational period of at least 90 days is a mandatory prerequisite before a suit against a governmental entity can be filed. Plaintiff could have read and complied with the unambiguous language of the revised statute that a specific period of at least 90 days is set aside "during which time no lawsuit may be maintained by the claimant unless the claimant has received a notice of denial of claim." Plaintiff also had ample notice of the Court's interpretation of the 1999 amended statute in case law, and knew or should have known that after the filing of a notice of claim a claimant cannot file his lawsuit for a period of at least 90 days. Pursuant to the amended statutory language and applicable post-amendment case

law a stay is not a necessary nor appropriate remedy and dismissal for failure to comply with this prerequisite to filing suit is appropriate.

B. Whether UMMC waived any objection to plaintiff's failure to wait 90 days after giving notice prior to filing suit by failing to specifically assert and pursue the defense pursuant to *Miss. R. Civ. P.* 8(c)?

Pursuant to *Miss. R. Civ. P.* 8(c), defendant's affirmative defenses under *Miss. Code Ann.* 11-46-1 et seq. (MTCA) must be set forth in defendant's answer. However, plaintiff's assertion that the affirmative defenses under the MTCA must be "specifically raised" is mistaken. Although *Miss. R. Civ. P.*, Rule 9, requires specificity in asserting fraud or mistake, it is sufficient to give simple notice of the affirmative defenses offered under Rule 8. (R.E. 9, p. 9) "The purpose of Rule 8 is to give notice, not to state facts and narrow the issues as was the purpose of pleadings in prior Mississippi practice." *Miss. R. Civ. P.* 8 comment. "Indeed, notice is the underlying purpose of Rule 8." *Pass Termite and Pest Control, Inc. v. Walker*, 904 So. 2d 1030, ¶ 17, FN 5 (Miss. 2004.)

Plaintiff mistakenly asserts that defendant should have specifically asserted that plaintiff failed to comply with the notice requirements. (R.E. 8, pp. 9, 12.) Contrary to plaintiff's assertion, his timely filed notice of claim is not at issue in defendant's argument.

The second defense set forth in UMMC's answer and defenses states "UMMC reserves all rights and defenses accorded to it pursuant to *Miss. Code Ann.* § 11-46-1 et seq., including but not limited to bar of limitations, trial by judge without jury, limitation of liability and exclusion of punitive damages." This affirmative defense is more than sufficient to put the plaintiff on notice of a potential defense under the MTCA, and specifically under

Miss. Code Ann. § 11-46-11 which addresses the "bar of limitations" including the time limitations therein regarding the investigational period and the filing of plaintiff's complaint. As defendant's answer put plaintiff on proper notice of a potential defense under the MTCA, and in particular as to the time limitations of filing suit, the affirmative defense was not waived.

Plaintiff also asserts that UMMC waived the defense regarding the plaintiff's failure to comply with the waiting period by actively participating in the litigation process. (R.E. 9, pp. 9-12.) Plaintiff misleadingly asserts that UMMC "actively participated in litigation, including interrogatories, depositions, disclosure of experts, a scheduling order and even a trial setting." (RE. 9, p. 12.) In reality, plaintiff's case lay quiet during much of the approximately two and a half years following the filing of his complaint, and defendant should not be penalized for plaintiff's delay in prosecuting his case. UMMC participated in written discovery and discovery related issues, but contrary to plaintiff's assertion, the only expert disclosed in this case was disclosed by the plaintiff, not UMMC. The single deposition taken in this case was noticed and led by the plaintiff. Defendant's motion for summary judgment and notice of hearing were filed approximately one and half months before the agreed scheduling order setting a trial date was entered; therefore, the scheduling order and trial setting are immaterial to this issue. *See Mississippi Credit Center v. Horton*, 926 So. 2d 167, 181 ftn 9 (Miss. 2006).

Plaintiff relies upon several cases, the facts of which are distinguishable from this action. In *Whitten v. Whitten*, 956 So. 2d 1093 (Miss. Ct. App. 2007), the defendant

Whitten, Sr., engaged in written discovery and in settlement negotiations and noticed the deposition of Whitten, Jr., prior to filing his motion for dismissal on the basis of failure of service of process. *Whitten* at ¶ 19, 22. Similarly, in *East Mississippi State Hospital v. Adams*, 947 So. 2d 887 (Miss. 2007), defendants "participated in substantial discovery in the form of interrogatories, production requests, depositions, designation of experts, scheduling order, and trial date order" prior to filing their similar motion for dismissal for failure of service of process. *Adams* at ¶ 8. Under the individual facts of these two cases, the Supreme Court found defendants had waived their right to pursue their defense of failure of service of process for failing to comply with the "spirit" of *Miss. R. Civ. P.* 12(h), which states that the defenses of "improper venue, insufficiency of process, or insufficiency of service of process" can be waived if omitted from defendant's answer and defenses or responsive pleading. *Adams* at ¶11.

Plaintiff further relied on *Mississippi Credit Center v. Horton*, 926 So. 2d 167 (Miss. 2006), in which the defendants asserted their right to compel arbitration in their respective answers to Plaintiff's complaint, but then proceeded to substantially engage in the litigation process by consenting to a scheduling order, engaging in written discovery, and conducting plaintiff's deposition. *Horton* at ¶ 41. In *Horton,* the defendant knew or should have known of the possibility of waiver of their right to arbitration by participating in litigation from previous case law. *Mississippi Credit Center* at 179-180, ¶¶ 30-40. Under the facts in *Horton* and relying on previous case law, the Court found that the defendants had waived their right to compel arbitration.

Under the facts of this case the involvement of UMMC in litigation has been more limited than the defendants' involvement in *Whitten, Horton* and *Adams.* This case is also distinguishable from *Whitten, Horton* and *Adams* where the defendants in those cases delayed requesting a well-settled right and remedy. A defendants' right to move for dismissal for insufficiency of process or insufficiency of service of process and a defendant's right to compel arbitration have long been well settled rights in Mississippi law. In this case, Plaintiff knew or should have known by the plain language of the amended §11-46-11 and case law interpreting the amended statute that an investigational period of at least 90 days during which he cannot file suit was intended by the Legislature and that he had a duty to comply with the law. (See *Easterling* at 820, ¶ 23.) However, unlike *Whitten, Adams* and *Horton,* case law has been in evolution as to defendants' redress for a plaintiffs' noncompliance with this statutory requirement. The Court interpreted for the first time in *Easterling* that the compromise option of a stay of the proceedings as an (albeit ineffectual) remedy for plaintiff's failure to comply with the statutorily required waiting period was no longer good law and that dismissal was proper. *Easterling* at 820, ¶ 22.

Defendant's motion for summary judgment seeking the remedy set forth in *Easterling* was filed less than two weeks after rehearing was denied in *Easterling.* Since *Easterling* was expressly made retroactive, it clearly applied to this case which was pending at the time. *Easterling* at 819, ¶ 19. To find that UMMC waived its right to seek the remedy set forth in *Easterling* before it became law would be to apply *Easterling* prospectively only and is

contrary to the intent of the Court. Thus, defendant's motion for summary judgment was timely filed and its right to the newly adjudicated remedy in *Easterling* was not waived.

Plaintiff was put on notice in defendant's answer of a potential defense pursuant to the MTCA, and in particular related to the time limitations set forth in *Miss. Code Ann.* ¶ 11-46-11; thus defendant did not waive this defense under *Miss. R. Civ. P.* 8(c). Plaintiff's sluggish prosecution of his case should not be construed against UMMC, and UMMC's limited participation in litigation prior to the filing of its motion for summary judgment was insufficient to cause prejudice to the plaintiff. UMMC did not waive its right to the newly adjudicated remedy under *Easterling*, as its motion for summary judgment was filed promptly after *Easterling* became authoritative law.

C. Whether *Easterling*, decided 2 ½ years after plaintiff's claim was filed, should be applied retroactively?

Plaintiff's action was filed against UMMC on January 14, 2004. The Court's ruling in *University of Mississippi Medical Center v. Easterling*, 928 So. 2d 815 (Miss. 2006), handed down approximately two years and three months later on April 6, 2006 (rehearing denied June 2, 2006), formed the basis of the trial court's grant of summary judgment in this case. The Court in *Easterling* found that *Davis v. Hoss*, 869 So. 2d 397 (Miss. 2004) and *Wright v. Quesnel*, 876 So. 2d 362 (Miss. 2004), controlled where they required a claimant to wait the mandated 90-day time period after serving their notice of claim before filing their lawsuit. *Easterling* at 819 ¶ 19. (*Davis* was handed down shortly after plaintiff filed his lawsuit and at least two and a half months before the expiration of the statute of limitations

in this case. Relying on the statutory revisions and *Davis* where the Court instructed that the MTCA required a 90-day waiting period and that plaintiff "had to meet the requirements of § 11-46-11," plaintiff could have dismissed his lawsuit and re-filed it after the investigational period to ensure compliance with Mississippi law, but chose not to do so.) *Davis* at ¶¶ 12-17.

Easterling specifically overruled *City of Pascagoula v. Tomlinson,* 741 So. 2d 224 (Miss. 1999) and its progeny which were illogically relied upon by plaintiff for his position that he need not comply with the 90-day waiting period, despite the language of the statutory revisions and interpretive case law which strengthened the waiting period requirement. Plaintiff mistakenly asserts that the holding in *Easterling* was not "clearly foreshadowed" under *Presley v. The Mississippi State Highway Commission*, 608 So. 2d 1288 (Miss. 1992) and thus he maintains and that the judicial pronouncement in *Easterling* should not be applied retroactively to this case.

New Supreme Court decisions are generally applied retroactively. "As a matter of course, new decisions are given retroactive application to the pending case." *Fortenberry v. Foxworth Corporation*, 825 F. Supp. 1265, 1280 (S. D. Miss. 1993); citing *James B. Beam Distilling Company v. Georgia*, et al, 501 U.S. 529 (1991). "We have clearly held that newly enunciated rules of law are applied retroactively to cases that are pending trial or that are on appeal, and not final at the time of the enunciation." *Thompson v. City of Vicksburg*, 813 So. 2d 717, ¶ 16 (Miss. 2002).

The United States Supreme Court declined to consider the Mississippi Supreme Court's retroactive application of *Easterling* on October 30, 2006. Regardless of the general rule of retroactivity, plaintiff mistakenly urges that an analysis under *Chevron Oil Company v. Huson*, 404 U.S. 97 (1971) would preclude retroactive application of *Easterling*. (R.E. 9, pp. 15-17.) Although inappropriate in this case, an application of the three *Chevron* factors to this action is as follows:

> (a) "First, the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil Company* at 106.

Where *Tomlinson* interpreted the pre- amendment statute, *Easterling* interpreted the post amendment statute, the language of which clearly established a mandatory period of time set aside for defendant to investigate a claim prior to facing a lawsuit. *Easterling* at 819 ¶ 20. The ruling in *Davis v. Hoss*, 869 So. 2d 397 (Miss. 2004) which was handed down prior to the expiration of the statute of limitations in this case, served "to shift the responsibility to correct the plaintiff's failure to follow the ninety-day notice requirement from the defendant to the plaintiff." *Easterling* at 819, ¶ 19. Heeding the Court's holding in *Davis*, the plaintiff could have dismissed his suit and re-filed it after the investigational period, but chose instead to ignore the requirements of § 11-46-11.

The Court's ruling in *Easterling* was issued because of its "constitutional mandate to faithfully apply the provisions of constitutionally enacted legislation," and simply required a plaintiff to comply with the statute. *Easterling* at 820, ¶ 23. Case law interpreting the post

amendment statute has consistently supported a mandatory pre-litigation period of time after filing of the notice of claim which is set aside for investigation by the governmental entity. Only after this time period can the claimant file his lawsuit; therefore, the ruling in *Easterling* was foreshadowed. The legal community was or should have been aware that a waiting period of at least 90 days is required by the legislature in *Miss. Code Ann.* ¶ 11-46-11, as amended, and plaintiff's reliance upon pre-amendment case law in his post-amendment lawsuit was misplaced. *Easterling* at 820, ¶ 23.

> (b) "Second, it has been stressed that we must weigh the merits and demerits in a case by looking at the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Chevron Oil* at 106-107.

The statutory revisions went into effect March 25, 1999, long prior to the filing of plaintiff's action. The "merits and demerits" weigh in favor of accurate application of the legislative language wherein at least 90 days are set aside for the benefit of the governmental entity to investigate the claim, after which the plaintiff has 90 days in which to file his lawsuit unless he receives a denial of notice of claim prior to that date. Prospective application of *Easterling* would have the effect of improperly delaying the effective date of the revised statute beyond that contemplated by the Legislature and would thus retard its operation.

> (c) "Finally, we have weighed the inequity imposed by retroactive application, for where a decision of this court could produce substantial and inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of non-retroactivity." *Chevron Oil* at 107.

The Supreme Court has applied the plain language of the 1999 statute, to plaintiff's consternation. Plaintiff was well aware of the language of the amended statute, but chose to rely on case law interpreting the older version of the statute. Plaintiff would have the Court abandon good law interpreting the applicable statute in favor of improper application of case law interpreting a prior statute due to his misplaced reliance thereon. Defendant asserts that such a holding would be inequitable and a clear departure from the legislative intent and applicable law. Thus, an application of the *Chevron* factors weighs in favor of retrospective application of *Easterling.*

The strict compliance standard regarding the 90 day waiting period in *Easterling* has been applied to at least three cases; thus plaintiff's request is in actuality a request for *selectively prospective* application of *Easterling*. First, the ruling in *Easterling* was applied to that case. *Easterling* at 819-820. The Supreme Court then relied on the ruling in *Easterling* (in part) to dismiss the suit in *South Central Regional Medical v. Guffy*, 930 So. 2d 1252, 1259 ¶¶ 25-26 (Miss. 2006). Further, although not authoritative because it has not been published at this time, the federal court recently relied on *Easterling*'s strict compliance standard regarding the 90-day waiting period in dismissing the case in *Banner v. City of Jackson*, 2007 WL 433245 (S. D. Miss. 2007).

Selectively prospective application of *Easterling* is not in keeping with legal principles. As noted in *Gates v. Walker*, 865 F. Supp. 1222 (S .D. Miss. 1994), application of the *Chevron Oil* test was limited by the later *James B. Beam Distilling Company v. Georgia* ("*Jim Beam*"), 501 U.S. 529 (1991). Referring to *Jim Beam*, the Court in *Gates*

stated that "routed in the principles of equality and *stare decisis*, this rule holds that once the Supreme Court has applied a rule of law to litigants in one case it must do so with respect to all others not barred by procedural requirements or *res judicata*." *Gates* at 1234. The Supreme Court interpreted that the 90-day waiting period as set forth under *Miss. Code Ann.* § 11-46-11(1) was mandatory in *Davis v. Hoss*, 869 So. 2d 397 (Miss. 2004); *Wright v. Quesnel*, 876 So. 2d 362 (Miss. 2004); and *University of Mississippi Medical Center v. Easterling*, 928 So. 2d 815 (Miss. 2006). The strict compliance standard for the 90-day waiting period and reversal of the ineffectual and unnecessary stay of litigation as the remedy for plaintiff's non-compliance has also been applied to *South Central Regional Medical v. Guffy*, 930 So. 2d 1252, 1259 ¶¶ 25-26 (Miss. 2006) and *Banner v. City of Jackson*, 2007 WL 433245 *2-4 (S.D. Miss. 2007). Thus, under *Jim Beam*, enforcement of the 90 day waiting period and dismissal for a plaintiff's non-compliance should not be made selectively prospective and should be applied in this case.

Mississippi law is clear that a prerequisite period of at least 90 days is granted by the MTCA to a defendant governmental entity after receipt of a notice of claim in which to investigate that claim before facing a lawsuit. Under the facts of this case the plaintiff was clearly non-compliant with the statutory requirements and dismissal is proper.

D. Whether the trial court erred in dismissing plaintiff's claims with prejudice?

Although the trial court's order does not specify whether the dismissal is with or without prejudice, "unless an involuntary order of dismissal specifies that it is without

prejudice it operates as an adjudication on the merits." *Quarles v. Jackson*, 95 F.3d 1149 FN 4 (5th Cir. 1996). In support of his position that the case should have been dismissed without prejudice, plaintiff relies upon *Nelson v. Baptist Memorial Hospital - North Mississippi, Inc.*, ____ So. 2d _____ (No. 1005-CA-0205-COA) (Miss. Ct. App. May 8, 2007) (unpublished opinion). (R.E. 9, pp. 18-19.) Plaintiff also relies upon references in *Nelson* to *Pitalo v. GPCH-GP, Inc.*, 933 So. 2d 927 (Miss. 2006) that dismissal without prejudice was proper when a plaintiff failed to serve notice on a defendant at least 60 days before commencing an action. Plaintiff's reliance upon *Nelson* is misplaced, as unpublished opinions lack authority on appeal. (*Miss. R. App. P.* 35(B)(b)); *Crawford v. Butler*, 924 So.2d 569 (Miss. Ct. App. 2005). Therefore, defendant requests this Honorable Court to strike that portion of plaintiff's argument that relied upon the unpublished *Nelson* as lacking authority.

Plaintiff's reliance upon *Pitalo* and *Nelson* are likewise substantively misplaced as both cases interpret *Miss. Code Ann.* § 15-1-36 and do not interpret provisions of the MTCA. *Nelson* at ¶ 14; *Pitalo* at ¶ 6; see also *Arceo v. Tolliver*, 949 So. 2d 691, ¶ 6 (Miss. 2006). The one-year statute of limitations under the MTCA has run in plaintiff's action and the saving statute in *Nelson* and *Pitalo* under *Miss. Code Ann.* 15-1-69 applicable to § 15-1-36 is not applicable in cases falling under the MTCA. *Stockstill v. State*, 854 So. 2d 1017, ¶¶ 12-13 (Miss. 2003). Dismissal of a suit without prejudice does not lengthen the statute of limitations, as "[t]he dismissal of suit without prejudice does not deprive the defendant of any defense he may be entitled to make to the new suit, nor confer any new right or

advantage on the plaintiff and hence it will not have the effect of excepting from the period prescribed by the statute of limitations, the time during which that suit was pending." *Smith v. Copiah County*, 100 So. 2d 614, 844 (Miss. 1958) citing *Nevitt v. Bacon*, 32 Miss. 212, 66 Am. Dec. 609. The Supreme Court in *Davis, Wright* and *Easterling* granted summary judgment and dismissal with implied prejudice for plaintiff's failure to comply with the pre-requisite 90-day waiting period; therefore summary judgment with dismissal is likewise appropriate in this action. Regardless, under Mississippi law plaintiff is precluded by the statute of limitations from filing another suit on this issue.

CONCLUSION

It is undisputed that plaintiff failed to comply with the mandatory investigational period set forth by the legislature in *Miss. Code Ann.* § 11-46-11 during which he cannot file suit. Pursuant to the 1999 statutory amendment and case law interpreting said amendment, the waiting/tolling period of 180-185 days is not a gratuitous gift for plaintiff's benefit as plaintiff suggests. Instead, the first 90 to 95 days of this tolling period was specifically set aside by the Legislature for the benefit of the governmental entity to investigate and potentially settle the claim prior to facing a lawsuit and thereafter plaintiff has 90 days in which to file his action if no resolution had been reached. The burden is on the plaintiff to correct his mistake in failing to comply with the statutory pre-requisite and under the post-amendment statute a request for a stay would have been neither appropriate nor necessary.

Defendant's answer and defenses sufficiently put plaintiff on notice that defendant claimed all affirmative defenses under the MTCA including the time limitations under *Miss. Code Ann.* § 11-46-11. UMMC did not waive its right to pursue this motion through its limited participation in the litigation process of this slowly prosecuted case, and as case law was evolving on the issue. *Easterling* has been and should be applied retroactively, under both general procedure and as a plain application of the language of *Miss. Code Ann.* § 11-46-11 as amended in 1999. Dismissal with prejudice as granted by the trial court is appropriate under controlling case law.

Therefore, defendant UMMC respectfully requests this Honorable Court to affirm the trial court's grant of summary judgment in this case, finally dismissing it from this action with prejudice.

SO CERTIFIED, this the 29th day of August, 2007.

Respectfully submitted,

UNIVERSITY OF MISSISSIPPI MEDICAL CENTER
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CERTIFICATE OF SERVICE

I do hereby certify that I have this forwarded a true and correct copy of the above and foregoing **Appellee's Brief** to:

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