

IN THE MISSISSIPPI SUPREME COURT

LEON STUART, Individually, and As Wrongful
Death Beneficiary and On Behalf of All Other
Wrongful Death Beneficiaries of SHIRLEY
STUART, DECEASED,

APPELLANT

VERSUS

No. 2007-CA-00864

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

APPELLEE

APPELLANT'S BRIEF

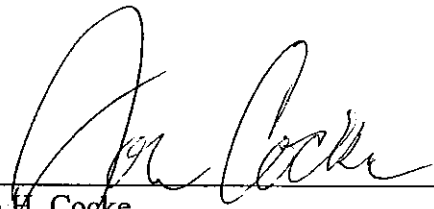
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CERTIFICATE OF INTERESTED PERSONS

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.

1. Leon Stuart, Individually and on Behalf of the Wrongful Death Beneficiaries of Shirley Stuart, Deceased (David Lee Stuart, Lorie Ann Stuart, Larry Joe Stuart).
2. John H. Cocke, Esq., Counsel for Appellant.
3. Roy Noble Lee, Jr., Esq., Co-Counsel for Appellant.
4. University of Mississippi Medical Center.
5. Senith C. Tipton, Esq., Counsel for University of Mississippi Medical Center (UMMC).



John H. Cocke
Counsel of Record for Appellant

STATEMENT OF THE ISSUES

1. Whether the trial court erred in granting UMMC's Motion for Summary Judgment?
 - 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?
2. Whether the trial court erred in dismissing Plaintiff's claims with prejudice?

TABLE OF CONTENTS

<u>ITEM</u>	<u>PAGE</u>
CERTIFICATE OF INTERESTED PERSONS	i
STATEMENT OF THE ISSUES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
COURSE OF PROCEEDINGS BELOW	1
SUMMARY OF THE ARGUMENT	4
ARGUMENT	7
 I. Summary Judgment Should Not Have Been Granted	
A. <u>Pursuant to pronouncements of the Mississippi Supreme Court, Defendant waived any objection it may have had as to Plaintiff's failure to comply with the waiting period.</u>	7
B. <u>Pursuant To Miss. R. Civ. P. 8(c) Defendant Waived Any Objection.</u>	9
C. <u>Easterling Should Not Be Applied Retroactively.</u>	12
 II. The Case Should Not Have Been Dismissed With Prejudice	18
CONCLUSION	19
CERTIFICATE OF SERVICE	20

TABLE OF AUTHORITIES

CASES:

<i>Chevron Oil Co. v. Huson</i> 404 U.S. 97 (1971)	16, 17
<i>City of Pascagoula v. Tomlinson</i> 741 So.2d 224 (Miss. 1999)	5, 7
<i>Conerly v. State</i> 607 So.2d 1103 (Miss. 1992)	5, 9
<i>Jackson v. City of Booneville</i> 738 So. 2d 1241 (Miss. 1999)	5, 7
<i>Jackson v. The City of Wiggins</i> 760 So.2d 694 (Miss. 2000)	5, 8
<i>Jones v. The Mississippi School For Blind</i> 758 So.2d 428 (Miss. 2000)	5, 8
<i>Leflore County v. Givens</i> 754 So.2d 1223 (Miss. 2000)	5, 8
<i>MS Credit Center v. Horton,</i> 926 So.2d 107 (Miss. 2006)	6
<i>Nelson v. Baptist Memorial Hospital-North Mississippi, Inc.</i> ___ So.2d ___ (No. 2005-CA-02058-COA) (Miss. App. May 8, 2007)	6, 18
<i>Presley v. The Mississippi State Highway Commission</i> 608 So.2d 1288 (Miss. 1992)	6, 14, 15
<i>Pruett v. The City of Rosedale</i> 421 So.2d 1046 (Mis. 1982)	13
<i>Rodriguez v. Aetna Casualty & Surety Co.</i> 395 U.S. 352 (1969)	16
<i>University of Mississippi Medical Center v. Easterling</i> 928 So.2d 815 (Miss. April 6, 2006)	2

Whitten v. Whitten,
 ___ So.2d ___ (No. 2005-CA-02031-COA) (Miss. App. May 22, 2007) 6, 10

Williams v. Clay County
 861 So.2d (Miss. 2003) 5, 9

OTHER STATUTES:

Mis Code Ann. §11-46-1 1, 9,
 Miss. Code Ann. §11-46-11 1, 2, 4, 9, 17
 Miss. Rule Civil Procedure 8(c) 5, 9
 Miss. Rule Civil Procedure 4(h) 10

STATEMENT OF THE CASE

Plaintiff filed this action alleging medical malpractice on the part of physicians employed by The University of Mississippi Medical Center (UMMC). In his complaint, Plaintiff Leon Stuart, surviving husband of Shirley Stuart, alleges that on December 10, 2002, Shirley Stuart was admitted to through the emergency room of UMMC with complaints of shortness of breath. Plaintiff alleges that the Defendant's employees were negligent in failing to rule out pulmonary embolism, and that Shirley Stuart died from a pulmonary embolism approximately 27 hours after she was admitted to UMMC.

COURSE OF PROCEEDINGS BELOW

UMMC is an entity of the State of Mississippi, and as such, it is undisputed UMMC is subject to the provisions of the Mississippi Tort Claims Act, Miss. Code Ann. §11-46-1 et. seq. (the MTCA). Pursuant to the provisions of MTCA, a prerequisite to the filing of suit against a governmental entity is the requirement that written notice be served on the governmental entity at least 90 days prior to filing suit. *See* Miss. Code Ann. §11-46-11.

In this case Plaintiff served a notice of claim on the Chief Executive Officer of UMMC on December 4, 2003, within one year of the alleged negligent conduct - i.e., within the statute of limitations. (R. 9-10). This action was filed against UMMC on January 14, 2004, 41 days (not the prescribed 90 days) after service of Plaintiff's Notice of Claim. (R. 11). UMMC was served with process on January 20, 2004. After being served with process, UMMC did not make a motion to dismiss or to stay the proceedings. Instead, UMMC promptly filed its Answer and Defenses on February 13, 2004. (R. 14-18). UMMC also simultaneously served its Notice of Service of First Interrogatories and Requests for Production on February 12, 2004. The parties

proceeded to prepare the case for trial, including written discovery, depositions and disclosure of experts.

UMMC's Answer, while making a boiler plate assertion that it reserved rights pursuant to Miss. Code Ann. §11-46-1 et. seq., "including bar of limitations, trial by judge without jury, limitation of liability and exclusion of punitive damages", did *not* assert as an affirmative defense that Plaintiff had not complied with the notice provisions of the MTCA, or otherwise object in any manner to the proceeding as being premature. (R. 14-18).

On April 6, 2006, over 2 years after Plaintiff filed this action, the Mississippi Supreme Court decided *University of Mississippi Medical Center v. Easterling*, 928 So.2d 815 (Miss. April 6, 2006). In *Easterling*, the Mississippi Supreme Court affirmed dismissal of the plaintiff's complaint for failing to strictly comply with the 90 day notice provision of Miss. Code Ann. §11-46-11. *Easterling* asserts in 2004 "this Court announced in *Davis [v. Hoss]*, 869 So.2d [397] (Miss. 2004)] it was no longer the defendant's duty to request a stay or face a waiver or the ninety days when the plaintiff failed to wait the statutory notice period." *Easterling*, 928 So.2d at 818. With deference to the court, *Davis* did not say this, and even if it did *Davis* was decided after this action was filed, making it impossible to predict when this action was filed..

On June 14, 2006, UMMC filed a Motion for Summary Judgment. (R. 3 - 7). The sole basis of the Defendant's motion, raised for the first time some 2 ½ years after Plaintiff filed this action, was Plaintiff's failure to strictly comply with §11-46-11 by waiting only 41 days prior to filing suit.¹ *Id.* In it's motion, UMMC "respectfully requests this honorable Court to grant its

¹ Defendant did not contend that notice was not given and/or that the notice was inadequate. Defendant belatedly complained, only, that Plaintiff did not wait the requisite 90 days.

Motion for Summary Judgment for failure of the notice of claim provision of the MTCA, and respectfully requests that the Court dismiss UMMC from this action, *with prejudice*". (R. 6) (emphasis added). Plaintiff responded to Defendant's motion, asserting Defendant had waived its objection, or in the alternative, that *Easterling* should not be applied retroactively.

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case

The trial court heard UMMC's motion on September 15, 2006. On September 26, 2006, the trial court rendered its Memorandum Opinion and Order granting Defendant's Motion for Summary Judgment. (R. 41). In its Memorandum Opinion and Order, the trial court stated:

Plaintiffs' decedent (sic), Shirley Stuart, was admitted to the emergency room of the Defendant, University of Mississippi Medical Center (hereinafter "UMMC"), on December 10, 2002 complaining of shortness of breath. Plaintiff alleges in this lawsuit that UMMC's employees were negligent in failing to rule out pulmonary embolism, which proximately caused Ms. (sic) Stuart's death twenty-seven (27) hours of (sic) her admittance.

Because UMMC is a State entity, Plaintiff was required by the Mississippi Tort Claims Act (hereinafter "MTCA"), more specifically, Miss. Code Ann. §11-46-11(1), to send UMMC written notice of the claim at least ninety (90) days before filing suit. The parties agree that this was not done, but disagree on the appropriate remedy. UMMC seeks summary judgment, while Plaintiff contends that UMMC's failure to request a stay in the proceedings constitutes a waiver of the right to object to the Plaintiff's non-compliance with the statutory waiting period.

Indeed, if the purported purpose of that waiting period is to afford UMMC ninety (90) days within which to investigate an attempt to reach an amicable resolution of the claim, then logically speaking the alternative of the stay, as sought by the Plaintiff, would have some validity....

Unfortunately, for the Plaintiff, the logic once afforded by the Mississippi Supreme Court to a stay, under circumstances such as today before the Court, has been abandoned by that higher authority. The erosion of the cases cited by the Plaintiff began in 2004 with *Wright v. Quesnel* [footnote omitted] wherein the Mississippi Supreme Court held that "allowing a plaintiff to file suit before ninety days had passed since noticing the claim is tantamount to reading out the notice provisions of the MTCA." For the plaintiff's failure to wait ninety days before filing suit, the Supreme Court affirmed summary judgment granted by the trial

court in favor of the defendants. [footnote omitted]. *Interestingly, there was no discussion of a stay or any mention of, much less any attempt to distinguish, the host of previous decisions preferring a stay over dismissal.*

The *coup de grace* came earlier this year in *Easterling v. Univ. Of Miss. Med. Ctr.* [footnote omitted]:

In order to make it perfectly clear to all that strict compliance is required, as stated in *Davis* and *Wright* [footnote 5]², we hereby overrule *Tomlinson* and its progeny, including *Booneville*, *Givens*, *City of Wiggins*, *Mississippi School for the Blind*, and *Clay County*.... In other words, the rule set forth in *Tomlinson*, that the responsibility falls on the defendant to request a stay of the lawsuit when a plaintiff is not in compliance with the 90-day notice requirement is abrogated.

...

Slip Op at 1-3 (R. 41-43).

Finding that *Easterling*'s rule was mandatory, the Court found that "UMMC's Motion for Summary Judgement be, and the same is hereby, granted." (R. 43). As a result, Plaintiff's claim stands as dismissed *with prejudice*. Plaintiff timely filed this appeal October 4, 2006. (R. 53).

SUMMARY OF THE ARGUMENT

Shirley Stuart died December 11, 2002. Proper notice was given December 4, 2003, within the applicable statute of limitations. Pursuant to Miss. Code Ann. §11-46-11, Plaintiff

²At footnote 5 to the trial court's opinion, the trial court stated as follows:

"Actually what the court said in *Davis v. Hoss*, 869 So.2d 397, 400 (Miss. 2004) was this: "under the MTCA we require *substantial* compliance with regard to the filing of a notice of claim in the institution of a suit.... However, "substantial compliance is not the same as, nor a substitute, for, non-compliance"." [emphasis added] Wright says nothing different, yet the Easterling court proclaims that these cases require strict compliance."

As the trial court correctly observed, *Davis* and *Wright* (both decided after this action was filed) *simply do not say* what the *Easterling* court claims they state.

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had at least 180 days from the date of service of notice ³ to institute his claims against UMMC. Had UMMC timely objected to the proceedings as being premature, Plaintiff could have dismissed his claim and re-filed them after the applicable 90 day period. However, UMMC did not move to dismiss, or move for a stay, or object in any way whatsoever, and instead proceeded with the case and discovery for 2 ½ years.

By the holdings of at least six Supreme court decisions prior to the filing of Plaintiff's complaint, Defendant's sole remedy was to seek a stay of the proceedings. If a defendant did not seek such a stay, any objection *was waived*. See *City of Pascagoula v. Tomlinson*, 741 So.2d 224 (Miss. 1999) ("It does not necessarily follow, however, that the proper remedy for failure to comply with the applicable waiting period should be the dismissal of the lawsuit. This court concludes that the dismissal of a lawsuit based on a failure to comply with the waiting period is a disproportionate remedy and contrary to the purpose of the legislature in enacting the tort claims act.... We conclude that the better approach is, instead, for a governmental entity to request that the trial court issue an order staying the lawsuit until such time as the entity has been given the benefit of the applicable waiting period.... *In cases in which no stay is requested, however, the issue should be properly considered to have been waived.*"); *Jackson v. City of Booneville*, 738 So. 2d 1241 (Miss. 1999); *Leflore County v. Givens*, 754 So.2d 1223 (Miss. 2000); *Jones v. The Mississippi School For Blind*, 758 So.2d 428 (Miss. 2000); *Jackson v. The City of Wiggins*, 760 So.2d 694 (Miss. 2000); *Williams v. Clay County*, 861 So.2d (Miss. 2003)(same).

Further, affirmative defenses which are not timely raised pursuant to Miss. R. P. 8(c) are waived. See, e.g., *Conerly v. State*, 607 So.2d 1103 (Miss. 1992) (statute of limitations is an

³ Plus the 7 days remaining prior to the running of the statute of limitations.

affirmative defense and is waived if not plead). Further, even if plead, Defendant's failure to timely pursue "an affirmative defense or other affirmative matter or right which would serve to terminate or stay the litigation, coupled with active participation in the litigation will ordinarily serve as a waiver [of the defense]". *Whitten v. Whitten*, ___ So.2d ___ (No. 2005-CA-02031-COA) (Miss. App. May 22, 2007) citing *MS Credit Center v. Horton*, 926 So.2d 107 (Miss. 2006).

Plaintiff had a justifiable right to rely on prior pronouncements of this Court. It would have been impossible to predict this Court (in *Easterling*) would summarily abandon the logic and holdings of *Tomlinson* and subsequent decisions at the time this action was filed. *Davis* and *Wright*, which were relied upon as the basis of the *Easterling* decision, were both decided *after* this action was filed.

Once a defense is waived, it is waived. In order to dismiss this action, UMMC must be found to have "unwaived" its waiver, to Plaintiff's detriment.

It is patently unfair to penalize a litigant who rightfully relies on decisions of this Court. Under the three-part test announced by this Court in *Presley v. The Mississippi State Highway Commission*, 608 So.2d 1288 (Miss. 1992), *Easterling* should not have been applied retroactively.

Finally, dismissal *with prejudice* is an unduly harsh result, and was error. *Nelson v. Baptist Memorial Hospital North Mississippi, Inc.*, ___ So.2d ___ (No. 2005 - CA02058-COA) (Miss. App. May 8, 2007).

ARGUMENT

I. Summary Judgment Should Not Have Been Granted

- A. Pursuant to pronouncements of the Mississippi Supreme Court, Defendant waived any objection it may have had as to Plaintiff's failure to comply with the waiting period.**

In *City of Pascagoula v. Tomlinson*, 741 So.2d 224 (Miss. 1999), the Plaintiff Tomlinson filed suit 15 days after filing his notice of claim. The City of Pascagoula moved to dismiss the plaintiff's claim, which the trial court denied. The City appealed. On appeal, the Mississippi Supreme Court concluded:

It does not necessarily follow, however, that the proper remedy for failure to comply with the applicable waiting period should be the dismissal of the lawsuit. *This court concludes that the dismissal of a lawsuit based on a failure to comply with the waiting period is a disproportionate remedy and contrary to the purpose of the legislature in enacting the tort claims act.*

We conclude that the better approach is, instead, for a governmental entity to request that the trial court issue an order staying the lawsuit until such time as the entity has been given the benefit of the applicable waiting period. The trial courts of this state have the inherent authority to grant such stays and we direct that such orders be granted as necessary ensure that a governmental entity is given the benefit of the waiting period. In the event that the trial court finds that the requirements of the waiting period have been violated, the governmental entity should be permitted to recover any expenses (including court costs and attorney's fees) which it incurs in obtaining a stay of proceedings.... *In cases in which no stay is requested, however, the issue should be properly considered to have been waived.*

Tomlinson, 741 So.2d at 228, 229.

In *Jackson v. City of Booneville*, 738 So. 2d 1241 (Miss. 1999) the court was again faced with the identical issue. In addressing this issue the Supreme Court held:

We note that every court has the discretionary power to stay proceedings to ensure that justice is done or to provide for the efficient and economic use of judicial resources.... The grounds for granting a stay vary with the facts of each case, but one recognized ground is to stay proceedings to allow the plaintiff to

exhaust his administrative remedies.... The same can be said here. *The City defendants did not request a stay, and we accordingly find that this issue has been waived.*

Jackson, 738 So.2d at 1246.

The Court was again faced with this identical issue in *Leflore County v. Givens*, 754 So.2d 1223 (Miss. 2000). Again the Mississippi Supreme Court held:

This court is not required to address whether the plaintiff's notice to the county was enough to constitute substantial compliance in this case because the county failed to request a stay in the proceedings to allow the time period referred to in Miss. Code Ann. §11-46-11 to expire. Because the county never requested a stay in the litigation to attempt to avail themselves of the benefit of this waiting period, *it has waived this issue and is not subject to appeal.*

Givens, 754 So.2d at 1232.

The Mississippi Supreme Court again faced the identical issue in *Jones v. The Mississippi School For Blind*, 758 So.2d 428 (Miss. 2000). Again the Supreme Court held:

Pursuant to *Tomlinson*, the school's sole remedy for Jones' failure to comply the ninety waiting period was to file a motion to stay the lawsuit. The Circuit Judge accordingly erred in dismissing the present lawsuit based on Jones' failure to comply strictly with the 90 - day waiting period.

Jones, 758 So.2d at 429.

The Supreme Court again addressed the issue in *Jackson v. The City of Wiggins*, 760 So.2d 694 (Miss. 2000). Again, the Supreme Court held:

The dismissal of a lawsuit based on the failure to comply with the waiting period is a disproportionate remedy in contrary to the purpose of the legislature in enacting in the Tort Claims Act.... We conclude that the better approach is, instead, for a governmental entity to request that the trial court issue an order staying the lawsuit until such time as the entity has been given the benefit of the applicable waiting period. The trial courts of this state have the inherent authority to grant such stays and we direct that such orders be granted as necessary to ensure that a governmental entity has given the benefit of the waiting period.... *In cases in which no stay is requested, however, the issue should be properly considered to have been waived.*

Jackson, 760 So.2d at 696.

The Mississippi Supreme Court again addressed the issue in *Williams v. Clay County*, 861 So.2d (Miss. 2003). The Court again held:

In the case at bar, Clay County did not request a stay after Williams gave her second notice of claim on February 13, 2001. ***Therefore it waived its right to a 90 day waiting period.***

Williams, 861 So.2d at ¶ 101.

In the present case, Plaintiff acknowledges that this lawsuit was filed 41 days after giving proper notice. Defendant did not request a stay, and pursuant to the judicial pronouncements of the Mississippi Supreme Court as set forth above, Defendant waived any defense based on Plaintiff's failure to strictly comply with the 90 day waiting period.

B. Pursuant To Miss. R. Civ. P. 8(c) Defendant Waived Any Objection.

Pursuant to Mississippi Rule of Civil Procedure 8(c):

In pleading to a preceding pleading, a party shall set forth affirmatively ... any other matter constituting an avoidance or affirmative defense....

Pursuant to Rule 8(c), any claim that Plaintiff failed to comply with the provisions of the Mississippi Tort Claims Act would be an affirmative defense which would be required to specifically raised and plead as an affirmative defense. Defendant made no specific assertion in its answer that Plaintiff failed to comply with the provisions of the notice of requirements of Miss. Code Ann. §11-46-11. Affirmative defenses which a party does not specifically raise and plead are waived. *See, e.g., Conerly v. State*, 607 So.2d 1103 (Miss. 1992) (statute of limitations is an affirmative defense and is waived if not plead).

Alternatively, even if Defendant's boiler plate assertion that it "reserved rights pursuant to Miss. Code Ann. §11-46-1 et . seq." is read to properly raise the affirmative of failure to

comply with the notice provisions of Miss. Code Ann. §11-46-11, UMMC waived that defense by failing to pursue that defense and actively participating in the litigation process for 2 ½ years before pursuing the defense.

In *Whitten v. Whitten* ___ So.2d ___ (2005-CA-02031-COA) (Miss. App. May 22, 2007), Thoms Whitten, Jr. (Whitten, Jr.) filed a complaint against his father, Thomas Whitten, Sr. (Whitten, Sr.), alleging his father had negligently discharged a shotgun, severely injuring him. Whitten, Jr.'s complaint was not served within 120 days as required by Miss. R. Civ. P. 4(h). After service of process was had, Whitten, Sr. filed an answer which included an affirmative defense of insufficiency of process and insufficiency of service of process. However, Whitten, Sr. Actively participated in the litigation and waited over two years, after the statute of limitations had run, before moving to dismiss because service of process was not completed within 120 days. The trial court granted Whitten, Sr.'s motion. Whitten, Jr. appealed, and the Mississippi Court of Appeals reversed. In its opinion, the Court of Appeals stated:

II. WHETHER WHITTEN, SR.'S PARTICIPATION IN THE LITIGATION FOR APPROXIMATELY TWO YEARS WAIVED THE DEFENSES OF INSUFFICIENCY OF PROCESS AND INSUFFICIENCY OF SERVICE OF PROCESS.

¶19. Alternatively, Whitten, Jr. asserts that Whitten, Sr. waived the defenses of insufficiency of process and insufficiency of service of process by neglecting to pursue those defenses for two years after asserting them in his answer and by participating in the litigation during that time. Indeed, Whitten, Sr. filed his answer on October 21, 2002, asserting, among other defenses, the defenses of insufficiency of process and insufficiency of service of process. For the next two years, Whitten, Sr. participated in discovery. The parties exchanged written discovery requests and written discovery responses, discussed settlement, and Whitten, Sr. noticed Whitten, Jr.'s deposition. Then, on October 26, 2004, after the expiration of the statute of limitations, Whitten, Sr., filed the motion to dismiss asserting untimely service of process.

¶20. Our resolution of this issue is governed by *MS Credit Center, Inc. v. Horton*, 926 So.2d 167 (Miss. 2006) and *East Mississippi State Hospital v. Adams*, 947 So.2d 887 (Miss. 2007). In *MS Credit Center*, the defendants asserted their right to compel arbitration in their answer but then for eight months participated in the litigation by consenting to a scheduling order, engaging in written discovery, and taking the plaintiff's deposition. *MS Credit Ctr.*, 926 So.2d at 180 (¶¶41, 43). Then, the defendants filed a motion to compel arbitration. *Id.* The court held that "ordinarily, neither delay nor participation in the judicial process, standing alone, will constitute a waiver, "but when there is substantial and unreasonable delay in pursuing the right along with active participation in the litigation process, the court "will not hesitate to find a waiver of the right to compel arbitration." *Id.* at 180 (¶¶41-42). Critically, the court expressed that its holding was not limited to assertion of the right to compel arbitration. *Id.* at 180 (¶44). The court stated: "A defendant's failure to timely and reasonably raise and pursue the enforcement of **any affirmative defense or other affirmative matter or right which would serve to terminate or stay the litigation**, coupled with active participation in the litigation process, will ordinarily serve as a waiver." *Id.* The court declined to set a number of days that would constitute unreasonable delay in every case, but did hold that, absent unusual circumstances, an eight-month unjustified delay in the pursuit of any affirmative defense or other right which could serve to terminate the litigation, along with participation, constitutes a waiver as a matter of law. *Id.* at 181 (¶45).

¶21. In *East Mississippi*, the court applied *MS Credit Center* in holding that the defendants had waived the defenses of insufficiency of process and insufficiency of service of process. [note omitted] *East Mississippi*, 947 So.2d at 891 (¶¶10-11). The defendants had asserted in their responsive pleading that the complaint should be dismissed for insufficiency of process and insufficiency of service of process. *Id.* at 889 (¶14). After the passage of over two years during which the case proceeded through motions to compel, status conferences, and additional discovery, the defendants moved to dismiss due to inadequate service and the expiration of the statute of limitations. *Id.* at 889 (¶15). The court found that the defendants had waived the defenses of insufficiency of process and insufficiency of service of process by neglecting to pursue them for two years after initially raising them in their answer and by participating actively in the litigation for over two years while never contesting jurisdiction. *Id.* at 891 (¶11). The court observed that the defendants had participated fully in discovery and had filed and opposed various motions during the over two-year period.

¶22. The facts in this case bear striking similarity to those in *East Mississippi*. As in *East Mississippi*, Whitten, Sr. raised the defenses of insufficiency of process and insufficiency of service of process in the responsive pleading but did not pursue those defenses for two years and until the statute of limitations had expired, all the while actively participating in the litigation. Whitten, Sr. contends

that his participation in the litigation was not substantial enough to enable this Court to find a waiver. While less occurred in this case than in *East Mississippi*, Whitten, Sr.'s participation in the litigation closely resembled that round sufficient to support a waiver in *MS Credit Center*. Whitten, Sr. engaged in written discovery and in settlement negotiations and noticed Whitten, Jr.'s deposition. Whitten, Sr.'s two-year delay in pursuing the affirmative defenses was far longer than the eight-month period held by *MS Credit Center* to presumptively constitute a waiver when coupled with participation in the litigation. Whitten, Sr. has provided no justification or asserted any "extreme and unusual circumstances" to explain the two-year delay. Whitten, Sr. did properly raise the defenses of insufficiency of process and insufficiency of service of process in his answer. M.R.C.P. 12(h). But, Whitten, Sr. waived those defenses through his participation in the litigation together with his unreasonable two-year delay in pursuing the defenses. For that reason, we reverse and remand this case for further proceedings consistent with this opinion.

Whitten, Slip. Op. at ¶19-22.

In the present case, UMMC *did not* specifically plead lack of proper notice. However, even if it did, it waived the defense. When UMMC filed its answer, Plaintiff had time to dismiss the action and re-file after the requisite 90 day waiting period. UMMC did not file any motion to dismiss or stay, but instead actively participated in litigation, including interrogatories, depositions, disclosure of experts, a scheduling order and even a trial setting. Only 2 ½ years after Plaintiff's complaint was filed did Defendant first move to dismiss.

Defendant's failure to timely raise or pursue this affirmative defense constitutes waiver pursuant to Miss. R. Civ. P. 8(c).

C. Easterling Should Not Be Applied Retroactively.

University of Mississippi Medical Center v. Easterling, 928 So.2d 815 (Miss. April 6, 2006), specifically overruled *Tomlinson* and its progeny. See *Easterling* at ¶22. *Easterling* based

its decision on *Davis*⁴ and *Wright*⁵, both decided *after* this action was filed. Accordingly, it would have been impossible to predict *Tomlinson* would be overruled when this case was filed. Indeed, Defendant didn't even initially bother to object to this action as being premature. As such, the judicial pronouncement in *Easterling* overruling *Tomlinson* should not be applied retroactively to litigants who fairly relied upon the Mississippi Supreme Court's prior pronouncements.

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As the Court is certainly aware, the Mississippi Tort Claims Act was legislatively enacted following the Mississippi Supreme Court's decision in *Pruett v. The City of Rosedale*, 421 So.2d 1046 (Mis. 1982). In *Pruett*, the Mississippi Supreme Court abolished the judicially recognized doctrine of sovereign immunity. However, in *Pruett*, the Mississippi Supreme Court, recognizing that governmental entities had relied upon its prior holdings of judicial sovereign immunity, refused to make its decision retroactive. Instead, in *Pruett*, decided November 10, 1982, the Supreme Court held its mandate would be prospective only, instead applying only to causes of action accruing on or after July 1, 1984. The court recognized the inherent unfairness in making its opinion retroactive to governmental entities which had previously relied upon its prior determinations of judicial sovereign immunity. Further, by making the decision prospective to a point almost 18 months into the future, the Supreme Court allowed the Mississippi Legislature time in which to fashion a legislative remedy. As a result of the Mississippi Supreme Court's decision, the precursors of the Mississippi Tort Claims Act were eventually passed.

As a result of the Mississippi Supreme Court's decision in *Pruett*, the Mississippi

⁴*Davis v. Hoss*, 869 So.2d 397 (Miss. April 1, 2004).

⁵*Wright v. Quesnel*, 876 So.2d 362 (Miss. July 1, 2004).

Legislature did adopt a version of the Mississippi Tort Claims Act. However, for four successive years, the Mississippi Legislature successively amended the act so that the effective date of the act never went into effect.

In *Presley v. The Mississippi State Highway Commission*, 608 So.2d 1288 (Miss. 1992), the Mississippi Supreme Court declared the legislative actions unconstitutional. Again, however, rather than implementing the Court's judicial decision retroactively, the Court fashioned a prospective remedy. In *Presley*, the Court held:

For the past 8 years, the state and its political subdivisions have relied upon a legislative response to our declaration in *Pruett* thought sufficient to immunize the public treasury. It is logical to assume that alternative provisions and contingency planning to protect that treasury have been foregone. To now hold that no immunity has existed since 1984 [when we decided *Pruett*] poses fiscally disastrous consequences to our state and its political subdivisions. We had hoped to avoid such consequences by setting a date certain for the cessation of our recognition of judicially created immunity.

...

It is now necessary that we do something similar now. This Court creates a "new rule" as today's ruling suddenly scraps the immunity the State of Mississippi and its political subdivisions were granted under Miss. Code Ann. §11-46-6.... An essential question before this Court, then, is whether this "new rule" will apply prospectively (stripping immunity from the date of this decision forward), retroactively (stripping immunity for this action as well as for actions caused prior to the date of this decision), or a selectively prospective application (stripping immunity from the date of this decision forward and stripping immunity from Mississippi State Highway Commission in this case).... We conclude that the first option - pure prospective application of the new rule - - is the correct course.

Without doubt, the State and its political subdivisions have relied upon their immunity under Miss. Code Ann. §11-46-1 et., seq. and conducted non-proprietary activities with this knowledge of this immunity. It therefore seems the only appropriate resolution of this case, in light of a new rule and its effect on old (and unsuspecting) parties, would be to apply this decision prospectively. In *Cain*, 552 So.2d at 92, we observe that where a new rule of law is created, where the defendant was not aware of the new rule at the time the cause of action arose and

where the new rule was not “clearly foreshadowed,” it would be unfair to apply the new rule retroactively....

While the tortious conduct here allegedly is clearly prescribed as a matter of law, nothing in our previous decisions foreshadows our present view of the propriety of the legislation in question. Indeed we specifically left the subject matter to the legislature in *Pruett* and we have never before intimated that its response failed to pass constitutional muster....

Presley, 608 So.2d at *34 - *38.

The Mississippi Supreme Court went on to adopt and follow a three-part test announced by the U.S. Supreme Court in determining whether judicial decisions should be applied retroactively. Specifically, the Mississippi Supreme Court held:

The United States Supreme Court has been faced with a question of retroactive application of a new rule. *In Chevron Oil, 404 U.S. at 105-8...., the United States Supreme Court held a laborer injured on an oil rig may continue to maintain an action against the owner of the rig, even though case law decided since the initiation of the action would currently prohibit filing the action. A blind, retroactive application of this “new rule” would cause an unjust result as the laborer would be barred from recovery based on the intervening precedent that was entirely unforeseeable....* The Chevron court developed a three factor, prospectivity test for determining the rights of a party to remain undamaged by a new rule:

First, the decision 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....

Second, it has been stressed that ‘we must ... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further retard its operation.’...

Finally, we have weighed the inequity imposed by a 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 holding of non-retroactivity.’

Presley, at *37.

Indeed, the U.S. Supreme Court's decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) provides a directly relevant analogous situation. In *Huson*, the plaintiff filed an action in the United States District Court for the Eastern District of Louisiana to recover for personal injuries sustained approximately two years earlier by the plaintiff while working on the defendant's artificial island drilling rig located on the outer continental shelf off the Louisiana coast. The defendant did not question the timeliness of the action as a matter of laches under admiralty law, which at that time was held to be the applicable law under the Outer Continental Shelf Lands Act in a line of Court of Appeals decisions. However, in 1969, while *Huson's* action was pending, the United States Supreme Court rendered its decision in *Rodriguez v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969). In *Rodriguez*, the U.S. Supreme Court interpreted the act as making state law remedies, rather than admiralty laws remedies, applicable to such accident. As so interpreted by the U.S. Supreme Court, Louisiana's one year statute of limitations, rather than the previously applied admiralty doctrine of laches, would be applicable to plaintiff's claim. Although plaintiff's claim had been timely made under the admiralty doctrine of laches, and although the defendant Chevron did not object to plaintiff's claim as being untimely at the time it was made, Chevron, after the Supreme Court's decision in *Rodriguez*, asserted that the plaintiff's claim was untimely under the Louisiana's one year statute of limitations. The district court agreed with the defendant, and dismissed the plaintiff's claim. The plaintiff appealed to the Fifth Circuit which reversed. The matter was eventually appealed to the United States Supreme Court, which affirmed the Fifth Circuit. In its ruling, the U.S. Supreme Court announced the three part test announced above and quoted in *Presley*. Applying this test, the U.S. Supreme Court held:

Upon consideration of each of these factors, we conclude that the Louisiana one year statute of limitations should not be applied retroactively in the present case. *Rodriguez* was not only a case of first impression in this court under the Land's Act, but it also effectively overruled a long line of decisions by the Court of Appeals for the Fifth Circuit holding that admiralty law, including the doctrine of laches, applies through the Land's Act.... When the respondent was injured, for the next two years until he instituted his lawsuit, and for the ensuing year of pre-trial proceedings, these Court of Appeals decisions represent the law governing his case. It cannot be assumed that he did or could foresee that this consistent interpretational Land's Act would be overturned. The most he could do was rely on the law as it then was....

To hold that the respondent's lawsuit is retroactively time barred would be anomalous indeed.... Retroactive application of the Louisiana statute of limitations in this case would deprive the respondent of any remedy whatsoever on the basis of superceding legal doctrine that was quite unforeseeable. To abruptly terminate this lawsuit that has proceeded through lengthy and, no doubt, costly discovery stages for a year would truly be inimical to the beneficent purpose of Congress.

It would also produce the most "substantial inequitable result" ... to hold that the respondent "slept on his rights" at a time when he could not have known the time limitation that the law imposed upon him.

Chevron Oil, 404 U.S. at 107.

Shirley Stuart died December 11, 2002. Proper notice was given December 4, 2003, within the applicable statute of limitations. 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. Had UMMC objected to the proceedings as being premature, Plaintiff could have dismissed his claim and re-filed them after the applicable 90 day period, or UMMC could have moved for a stay, which this court had consistently held was a governmental entity's sole remedy. However, UMMC did not object, or move for a stay, and instead proceeded with discovery. Because UMMC waived any objection, Plaintiff should not be penalized by the retroactive application of *Easterling* which was not foreshadowed when this action was filed.