

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2007-CA-01315

DEBRA ELLIS, EXECUTRIX OF THE ESTATE OF
WILLIE B. WOODRUFF, DECEASED, GEORGE
MITCHELL, JAMES MITCHELL AND BETTY
MITCHELL, INDIVIDUALLY AND ON BEHALF OF
ALL OTHER WRONGFUL DEATH BENEFICIARIES
OF WILLIE MAE MITCHELL, DECEASED

PLAINTIFFS-APPELLANTS

V

MISSISSIPPI BAPTIST MEDICAL CENTER, INC.
AND MISSISSIPPI BAPTIST HEALTH SYSTEMS, INC.
D/B/A BAPTIST MEDICAL CENTER

DEFENDANTS-APPELLEES

CORRECTED BRIEF OF APPELLEES

Appealed From The Circuit Court of The First Judicial District
of Hinds County, Mississippi Cause No: 251-05-53CIV

D. COLLIER GRAHAM, JR., ESQ. [REDACTED]
WISE CARTER CHILD & CARAWAY
401 EAST CAPITOL STREET, SUITE 600
POST OFFICE BOX 651
JACKSON, MS 39205-0651
TELEPHONE: (601) 968-5549
TELECOPIER: (601) 944-7738

ATTORNEYS FOR DEFENDANTS-APPELLEES

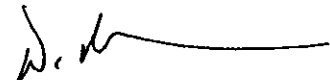
CERTIFICATE OF SERVICE

I, D. Collier Graham, Jr., one of the attorneys for defendants-appellees, hereby certifies that I have this day caused to be mailed by U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing Corrected Brief of Appellees to the following:

Bob Owens
Rajita Iyer Moss
Barry H. Powell
Owens Moss, PLLC
Post Office Box 808
Jackson, MS 39205-0808

Honorable W. Swan Yerger
Hinds County Circuit Judge
Post Office Box 327
Jackson, MS 39205

THIS, the 8th day of February, 2008.



D. COLLIER GRAHAM, JR.

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2007-CA-01315

DEBRA ELLIS, EXECUTRIX OF THE ESTATE OF
WILLIE B. WOODRUFF, DECEASED, GEORGE
MITCHELL, JAMES MITCHELL AND BETTY
MITCHELL, INDIVIDUALLY AND ON BEHALF OF
ALL OTHER WRONGFUL DEATH BENEFICIARIES
OF WILLIE MAE MITCHELL, DECEASED

PLAINTIFFS-APPELLANTS

V

MISSISSIPPI BAPTIST MEDICAL CENTER, INC.
AND MISSISSIPPI BAPTIST HEALTH SYSTEMS, INC.
D/B/A BAPTIST MEDICAL CENTER

DEFENDANTS-APPELLEES

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of the 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. Debra Ellis, Executrix of the Estate of Willie B. Woodruff, Deceased, George Mitchell, James Mitchell and Betty Mitchell, Individually and on Behalf of all Other Wrongful Death Beneficiaries of Willie Mae Mitchell, Deceased - Plaintiffs/Appellants

2. Shirley Mitchell, Benny Mitchell, Georgia Mae Bassett and Toni Faye Mitchell, other heirs of Willie Mae Mitchell, deceased, not joined as Plaintiffs.

3. Bob Owens, Rajita Iyer Moss, Barry H. Powell, Owens Moss, PLLC, P.O. Box 808, Jackson, MS 39205-0808 - Attorneys for Plaintiffs/Appellants

4. Mississippi Baptist Medical Center, Inc. and Mississippi Baptist Health Systems, Inc. d/b/a Baptist Medical Center - Defendants/Appellees

5. D. Collier Graham, Jr., Wise Carter Child & Caraway, P.O. Box 651, Jackson, MS 39205-0651 - Attorneys for Defendants/Appellees



D. COLLIER GRAHAM, JR., ATTORNEY OF
RECORD FOR DEFENDANTS/APPELLEES

TABLE OF CONTENTS

| | |
|--|--------|
| Certificate of Interested Persons | i |
| Table of Contents | ii |
| Table of Authorities | iii,iv |
| Statement Concerning Oral Argument | v |
| Statement of Issue | v |
| Statement of the Case | 1-3 |
| Summary of the Argument | 3-5 |
| Argument | 5-13 |
| Conclusion | 13-14 |
| Certificate of Service | 14 |

TABLE OF AUTHORITIES

| | Page |
|---|---------------|
| <u>Community Hospital of Jackson v. Goodlett</u> , 968 So.2d 391 (Miss. 2007) | v, 4, 8 |
| <u>Walker v. Whitfield Nursing Center, Inc.</u> , 931 So.2d 583, 591-92 (Miss. 2006) | v, 2, 4, 7, 8 |
| <u>Stockstill v. State</u> , 854 So.2d 1017, 1023 (Miss. 2003) | 10 |
| <u>Truax v City of Gulfport</u> , 931 So2d. 592,598, (Miss. App.2005) | 10 |
| <u>Williams v. Gamble</u> , 712 So.2d 1053, 1059 (Miss. App. 2005) | 10 |
| <u>Caldwell v. North Mississippi Medical Center</u> , 956 So.2d 888 (Miss. 2007) | 10,11 |
| <u>Hanshaw v Hanshaw</u> 2007 WL447085 ¶ 13 (Miss App.2007) | 11 |
| <u>Partin v North Mississippi Medical Center, Inc.</u> 929 So2d 924, 934-35 (Miss App 2005) | 12 |
| <u>Broadhead v. Terpening</u> 611 So2d. 949,953 (Miss 1992) | 12 |
| <u>Harris v. Mississippi Valley State University</u> , 873 So.2d 970 (Miss. 2004) | 12 |
| <u>Hester v. Bandy</u> , 627 So.2d 833, 839 (Miss. 1993) | 12 |
| <u>Pickens v. Donaldson</u> , 748 So.2d 684 (Miss. 1999) | ..12 |
| <u>Tolliver v. Mladineo</u> 2007 WL 20034622 (Miss App. rehearing denied 1/22/08) | 13 |
| <u>Pitalo v GPCH-GP, Inc.</u> 933 So2d. 927, 928-929 (Miss 2006) | 13 |
| <u>Arceo v Tolliver</u> 949 So2d. 691, 695 (Miss 2006) | 13 |
| <u>Saul v. Jenkins</u> , 963 So. 2d. 552, 554 (Miss. 2007). | 13 |

OTHER AUTHORITIES

| | Page |
|--|---------------------------------|
| §11-1-58 <u>Mississippi Code Annotated</u> (1972) | v,1,2,3,4,5,6,7,8,9,10,11,12,14 |
| §11-1-58(1)(a) <u>Mississippi Code Annotated</u> (1972) | v,1,2,3,4,5,6,7,9,10 |
| §11-1-58 (1)(b) <u>Mississippi Code Annotated</u> (1972) | 1,10 |
| §11-1-58(1)(c) <u>Mississippi Code Annotated</u> (1972) | 1 |
| §11-1-58(3) <u>Mississippi Code Annotated</u> (1972) | 1 |
| §11-1-58(4) <u>Mississippi Code Annotated</u> (1972) | 8,9 |

OTHER AUTHORITIES CONTINUED

| | Page |
|--|----------|
| §11-1-58(7) <u>Mississippi Code Annotated</u> (1972) | 1 |
| §15-1-36(15) <u>Mississippi Code Annotated</u> (1972) | 39,12,13 |
| Rule 4.03, <u>Uniform Circuit and County Court Rules</u> | 3,4,12 |
| Rule 15(a) <u>Mississippi Rules of Civil Procedure</u> | 11 |
| Rule 15(c), <u>Mississippi Rules of Civil Procedure</u> | 5,12,13 |

STATEMENT CONCERNING ORAL ARGUMENT

Defendants/Appellees, Mississippi Baptist Medical Center, Inc. (MBMC) and Mississippi Baptist Health Systems, Inc. (MBHS) do not believe oral argument would be useful for the resolution of this appeal. The dispositive issue of the appeal - whether the failure to strictly comply with the mandatory requirements of §11-1-58 requires the dismissal of an action - has been recently authoritatively decided. Community Hospital of Jackson v. Goodlett, 968 So.2d 391 (Miss. 2007) (decided En banc September 20, 2007, rehearing denied November 29, 2007) and Walker v. Whitfield Nursing Center, Inc., 931 So.2d 583 (Miss. 2006). Additionally, the decisional process would not be significantly aided by oral argument because the facts and legal arguments are adequately presented in the briefs and record. However, should the court determine that oral argument would be useful to clarify some matter raised by the plaintiff/appellant in her reply brief MBMC and MBHS are prepared to assist the court.

STATEMENT OF ISSUE

The plaintiff's statement of the issue incorporates procedural fallacies, and thus, a re-statement is required.

Whether plaintiff may circumvent strict compliance with the mandatory requirements of §11-1-58, Mississippi Code Ann. (1972) and avoid dismissal of the action by way of an amended complaint authorized by an order entered without the defendants having the opportunity to object.

STATEMENT OF THE CASE

Once again plaintiff/appellant presents a skewed and incomplete statement of the procedural history of the case. An accurate summary of the case as presented to the circuit court, both when the motion to dismiss was granted, and when plaintiff's motion to alter or amend and reconsider dismissal was denied is as follows:

On January 21, 2005 the plaintiff¹ filed the original complaint in this action against Mississippi Baptist Medical Center (MBMC), Mississippi Baptist Health Systems, Inc. (MBHS) and Community Nursing Home Foundation, Inc. d/b/a Community Nursing Home, Inc. Plaintiff alleged that her elderly decedent was injured and subsequently died as a result of care and treatment provided by the hospital and nursing home facilities operated by the respective sets of defendants in the period of October 2002 to January 26, 2003. The complaint wholly failed to include any certification from plaintiff's counsel that the action was commenced only after consultation with a qualified medical expert and a determination that there was a reasonable basis for the medical malpractice allegations as required by § 11-1-58(1)(a) (R4-7).² Prior to any of the defendants answering this original complaint the plaintiff filed an amended complaint on February 14, 2005. The only difference in the original complaint and the amended complaint filed on February 14, 2005 is that plaintiff adds "Community Hospital of Jackson, Mississippi d/b/a Community Nursing Home, Inc." as a defendant who allegedly operated the subject nursing home facility (R8-11). Significantly, the amended complaint also wholly fails to incorporate any certification in compliance with §11-1-

¹The original complaint named as plaintiff "Willie B. Woodruff, on Behalf of Herself and all Other Wrongful Death Beneficiaries of Willie Mae Mitchell, Deceased". (R5-7). The named plaintiff remained the exact same in the first amended complaint filed on February 14, 2005. (R8-11) While some but not all other alleged wrongful death beneficiaries were later added as plaintiffs, the single " plaintiff" will be referred to hereinafter. Additionally, during this litigation Ms. Woodruff died and Debra Ellis has been substituted as representative of Ms. Woodruff's Estate.

²The complaint likewise fails to invoke any of the alternate means of complying with §11-1-58, such as subsections (1)(b) (attorney certification of an inability to consult expert prior to filing suit due to impending expiration of statute of limitations, with required follow-up certification within sixty (60) days of complaint being filed); (1)(c)(attorney certification that three separate experts had refused consultation requests); (3) (attorney certification of reliance solely on either "res ipsa loquitur" or "informed consent"); (4) (attorney certification regarding consultation with qualified medical expert deferred until ninety (90) days following receipt of medical records from a defendant when there is an unresponded to request for production of records at the time the complaint is filed); or (7) (disclosure of expert witness information in lieu of an attorney certification).

58, Mississippi Code Ann. (1972). On February 23, 2005, defendants Community Nursing Home Foundation, Inc., et al. (Nursing Home defendants) responded to the amended complaint with a motion to dismiss raising among other grounds the failure of plaintiff to comply with the mandatory requirement of §11-1-58, Mississippi Code Ann. (1972) (R-12-22). Thereafter, defendants MBMC and MBHS answered the amended complaint on February 28, 2005 and incorporated motions to dismiss on grounds including the failure of the amended complaint to state a claim upon which relief could be granted and the expiration of the statute of limitations³ (R23-26). On March 21, 2005 the plaintiff filed her motion to file a third amended complaint (R27)⁴. While the motion attached a copy of the proposed third amended complaint, it raised absolutely no grounds for granting the motion, other than stating that additional plaintiffs were to be included. Pursuant to Rule 4.03, Uniform Circuit and County Court Rules the defendants had ten (10) days time to file a response to the motion. However, rather than allowing the defendants the opportunity to oppose the motion to amend then presiding Circuit Judge Tomie Green granted the motion to file a third amended complaint on March 23, 2005, a mere two (2) days after the motion was filed.⁵ (R34). Thus, in distinction to the statement made by plaintiff/appellant in the brief on appeal, it is simply not the case that defendants chose not to object to or oppose the motion to amend - they were not permitted the opportunity provided for by the rules to oppose the motion.

On March 30, 2005 the third amended complaint was filed (R2, and 2nd Supplemental Record -SR1-5). The third amended complaint adds as plaintiff some, but not all, of the alleged wrongful death beneficiaries of Willie Mae Mitchell as named plaintiffs. Additionally, the third amended complaint includes a certificate of plaintiff's attorney, Rajita Moss, dated March 29, 2005 stating

³In addition to following on the heels of the nursing home defendants' motion to dismiss for the failure to comply with §11-1-58, MBMC and MBHS raised the plaintiff's failure to comply with §11-1-58 in the very way approved by this court in Walker v. Whitfield Nursing Center, Inc., 931 So.2d 583, 591-92 (Miss. 2006), i.e. alleging the failure to state a claim upon which relief can be granted in the answer to the defective complaint.

⁴Plaintiff proposed a second amendment to the complaint, but it was not pursued. (R1)

⁵Judge Green later recused herself from presiding as judge in the case in an unexplained *sua sponte* order entered on August 10, 2006. Pursuant to Local Circuit Court Rules the case was then randomly re-assigned to Judge Swan Yerger by order dated August 17, 2006 (R3).

that she had consulted with a qualified expert, and had thereby concluded that there was a reasonable basis “for the commencement of this action”. The defendants answered the third amended complaint renewing their respective motions to dismiss (R2, R35), and later supplemented the motions with supporting authorities (R39-44, R45-61).⁶

After considering plaintiff’s response to defendants’ motion to dismiss (R65-68) and hearing further oral arguments on the motion, the court found that the plaintiffs had indeed failed to comply with the mandatory requirements of §11-1-58. The Court further found that under the circumstances dismissal with prejudice was appropriate. (See order of dismissal and final judgment, 1st Supplemental Record, -SR1-2). Plaintiffs then filed their motion to alter or amend and reconsider the order of dismissal and final judgment, arguing for the first time that plaintiff’s counsel had actually consulted with a qualified medical expert witness prior to the filing of the original complaint on January 21, 2005, more than two years previous (R69-90). Plaintiffs supported their motion with the affidavits of her counsel, Rajita Moss, (R89-90) and Dr. Calvin Ramsey (R74-88). Although plaintiff now argues on appeal that her counsel actually conferred with Dr. Ramsey prior to filing the original complaint, and merely “inadvertently omitted” the certificate required by §11-1-58⁷, there is nothing in the record attempting to excuse or explain the failure to comply with §11-1-58 when the original and first amended complaints were filed, or why plaintiff waited until after the court had entered final judgment of dismissal to disclose any information about an expert review of the case by Dr. Ramsey. The circuit court was unpersuaded and entered an order denying the plaintiff’s post-judgment motion on January 10, 2007 (R96). This appeal followed (R97).

SUMMARY OF THE ARGUMENT

The dismissal of this action by the circuit court for failure to strictly comply with the mandatory requirements of § 11-1-58 was correct and in accord with repeated holdings of this court.

⁶In addition to plaintiff’s failure to comply with §11-1-58, they also failed to provide the Nursing Home defendants with the statutorily required pre-suit notice of claim under §15-1-36(15). Just prior to the hearing on the defendants’ joint motion to dismiss for failure to comply with § 11-1-58 and the Nursing Home defendant’s additional motion to dismiss for failure to comply with § 15-1-36(15), plaintiff voluntarily dismissed the Nursing Home defendants with prejudice (R62-64).

⁷Brief of Plaintiffs/Appellants p.3

Community Hospital of Jackson v. Goodlett, 968 So.2d 391 (Miss. 2007), Walker v. Whitfield Nursing Center, Inc., 931 So.2d 583 (Miss. 2006). §11-1-58(1)(a) requires that before an action for medical malpractice is properly “commenced” plaintiff’s counsel must certify that he or she has reviewed the facts of the case and consulted with a qualified medical expert to conclude that there is a reasonable basis for the commencement of the malpractice action.⁸ Without dispute the plaintiff failed to comply with this bright-line mandatory requirement. Since this action was not properly commenced, its dismissal should be affirmed.

Plaintiff should not be allowed to circumvent the strict requirements of §11-1-58 by belatedly attaching a certification of expert consultation to a third amended complaint filed after the defendants moved for dismissal, and after the statute of limitation had otherwise expired. In the first instance, plaintiff should not have been permitted to file the third amended complaint with the belated certificate of expert consultation attached. The order allowing the filing of the third amended complaint was entered a mere two (2) days after plaintiff’s motion was filed, and before defendants had the opportunity to oppose the motion in accordance with Uniform Circuit and County Court Rule 4.03. It was otherwise an abuse of discretion to allow the third amended complaint as plaintiff made absolutely no showing of record that justice so required that the complaint be amended; and moreover, it is clear that permitting plaintiff to amend the complaint to belatedly add a certification necessary to commence the action is futile and/or unfairly prejudiced the defendants. §11-1-58 provides medical malpractice defendants, including MBMC and MBHS, with the valuable right not to have actions “commenced” against them unless plaintiffs timely certify that a qualified medical expert has been consulted and given an opinion that the proposed claim has merit. Allowing plaintiffs to certify consultation with an expert witness through an amended complaint after the applicable statute of limitations has otherwise expired, and/or otherwise requiring defendants to confront the veracity of a claim by plaintiff’s counsel that he had actually consulted with an expert two (2) years earlier and merely “inadvertently omitted” certification of such, unfairly strips

⁸As noted in footnote 2 above, §11-1-58 provide alternative methods of compliance. None of these alternative methods of compliance are even arguably applicable in this case.

defendants of the rights protected by the bright line rule of §11-1-58. Furthermore, even if it was not an abuse of discretion to allow plaintiffs to file a certificate of expert consultation with a third amended complaint, such an amendment would not properly “relate back” to the filing of the original complaint under Rule 15(c), Mississippi Rules of Civil Procedure. Without the certification required by §11-1-58, the action was never properly “commenced”; and thus, there was no validly filed original complaint to which the belated expert consultation certification could “relate back”. Additionally, the belated expert consultation certification did not arise out of the “conduct transaction or occurrence set forth or attempted to be set forth” in the original complaint as is required for “relation back” under Rule 15(c). The “conduct, transaction, or occurrence” that is the exclusive subject of the original and first amended complaints are the alleged injuries to and death of plaintiff’s decedent on January 26, 2003 due to alleged malpractice in her care and treatment at the respective defendants’ nursing home and hospital facilities during the period of October 28, 2002 to January 26, 2003. (R5-7, R8-11). Conversely, the “conduct, transaction or occurrence” that is the subject of the third amendment to the complaint is the allegation that plaintiff’s counsel conferred with a qualified expert sometime prior to March 29, 2005, and thereby concluded that there was a reasonable basis for commencement of the action (Second SR4-5). The subject of the third amendment of the complaint is an entirely separate event than the original and first amended complaints. The subject of the third amendment is not the conduct of the defendants or the death of Willie Mae Mitchell on January 26, 2003; rather, the subject of the third amendment is the conduct of plaintiff’s counsel some two or more years later.

Since plaintiff undisputedly failed to properly “commence” this action pursuant to §11-1-58, it was appropriately dismissed. Under the circumstances that the plaintiff did not attempt to comply with §11-1-58 until after defendants moved to dismiss the action, and after the expiration of the statute of limitations, the circuit court was well within its discretion to dismiss the action with prejudice.

ARGUMENT

The dismissal of the instant action should be affirmed because the plaintiffs indisputably

failed to properly “commence” the action pursuant to the mandatory requirements of §11-1-58, Miss. Code Ann. (1972). An action for medical malpractice may not be brought unless plaintiff attaches to the original complaint a certification by her counsel that there is a reasonable basis for commencement of the action based on a review of the facts and consultation with a qualified medical expert witness.⁹

In any action against a licensed physician, health care provider or health care practitioner for injuries or wrongful death arising out 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 Mississippi Rules of Evidence who is qualified to give expert testimony as to the 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.

§11-1-58(1)(a) (emphasis added)

In the instant case the plaintiffs filed a complaint on January 21, 2005, and an amended complaint on February 14, 2005 both alleging that the defendants committed medical malpractice in their care and treatment of Willie Mae Mitchell that resulted in her death on January 26, 2003. Neither of these complaints included the certificate required by §11-1-58(a). In response, the defendants noted the plaintiff’s failure to comply with §11-1-58 and moved to dismiss the action for failure to state a claim upon which relief could be granted.¹⁰ Only after defendants moved to dismiss the action did

⁹Again, as pointed out in note 2 and 8 there are alternative methods of complying with §11-1-58, none of which are even arguably applicable here.

¹⁰As detail above in the statement of the case, the Nursing Home defendants were the first to respond to the Amended Complaint and moved to dismiss on grounds that included the failure to comply with §11-1-58. (R12-22). The Hospital defendants followed-up with a motion to dismiss including as grounds the failure to state a claim and the expiration of the statute of limitations. (R23-26). Both sets of defendants supplemented their motions to dismiss with case authorities from this court supporting dismissal for failure to state a claim pursuant to §11-1-58 (R39-61).

plaintiff attempts to circumvent the strict requirements of §11-1-58 by filing a third amended complaint with a certification of expert consultation from their counsel dated March 29, 2005. The order granting plaintiff leave to file the third amended complaint was entered only two (2) days after plaintiff filed her motion, and before defendants had an opportunity to respond in opposition.

When the circuit court ultimately addressed defendants' motion to dismiss it followed this court's ruling directly on point in the case of Walker v. Whitfield Nursing Center, Inc., 931 So.2d 583 (Miss. 2006). There, as in the instant case, plaintiffs failed to properly commence an action for medical malpractice by attaching a certificate of expert consultation. In response the defendants raised the defense of a failure to state a claim upon which relief could be granted. Just as with the instant plaintiff, the plaintiff in Walker claimed that dismissal was not proper because in the first instance the defendants had waived plaintiff's failure to comply with §11-1-58 by only raising a "failure to state a claim" defense; and in the second instance, the plaintiffs had later submitted affidavits asserting that the attorneys had actually consulted with an expert witness prior to filing the original complaint. This court roundly rejected plaintiff's arguments and affirmed the dismissal of the action with prejudice. This court noted that raising the defense of a failure to state a claim upon which relief could be granted was indeed a proper avenue to pursue dismissal for plaintiff's failure to comply with §11-1-58. *Id* at 591-591. Moreover, this court recognized that inclusion of the word "shall" in §11-1-58 made it mandatory that a certificate of expert consultation be included with the original complaint for an action to be timely and properly commenced. This court refused to allow the plaintiff to "circumvent" the clear and unambiguous requirement of §11-1-58 through subsequent assertions that counsel had actually consulted an expert witness prior to filing suit. *Id* at 590. Instead, this court recognized a bright-line compliance rule that does not invite the uncertainty and potential mischief of determining months or even years later whether plaintiff's counsel had actually vetted the merits of a claim by review of the fact with a qualified expert prior to filing the initial complaint. Because plaintiffs did not strictly comply with the bright-line rule of §11-1-58 by timely and properly commencing an action with the required certificate dismissal of the action was mandatory. *Id* at 592.

More recently, this court has reaffirmed its holding in Walker that strict compliance with §11-1-58 is mandatory. In Community Hospital of Jackson v. Goodlett, 968 So.2d 391 (Miss. 2007)¹¹ the plaintiffs filed a complaint alleging medical malpractice, and rather than comply with §11-1-58(1)(a) by attaching a certificate of expert consultation, plaintiffs attempted to follow an alternative method of compliance, pursuant to §11-1-58(4) by attaching a certificate from their counsel that an expert could not then be consulted because plaintiff had not yet received medical records requested from the defendants. Defendants move to dismiss the action for plaintiffs' failure to attach a certificate of expert consultation in compliance with §11-1-58(1)(a), and challenging the plaintiffs' ability to rely on the alternate method of compliance under §11-1-58(4) because the plaintiff with standing had not requested the medical records. Thereafter, plaintiffs filed a "Certificate of Expert Consultation", similar to the instant plaintiff's attempt to include a belated certification by amendment to the complaint. Circuit Court Judge Tomie Green denied defendants' motion to dismiss holding that the plaintiffs had "substantially complied with the medical malpractice statutes". On interlocutory appeal, this court reversed, agreeing with the defendants that §11-1-58(4) was not properly invoked by plaintiffs; and agreeing that plaintiffs' failure to strictly comply with §11-1-58(1)(a) by filing a certificate of expert consultation with the original complaint required dismissal of the action. Following the holding in Walker, this court noted that the circuit court was in the best position to exercise discretion as to whether the dismissal of the action should be with or without prejudice. The case was remanded back to the circuit court for a determination whether dismissal of the action with or without prejudice was more appropriate under the circumstances. Id at 397-398.

In the instant case, the plaintiff did not attempt to rely on §11-1-58(4), but did try to travel the same "substantial compliance" road with a belated amended filing of an certificate of expert consultation. Clearly, dismissal of the action is required under the holdings of Walker and Goodlett. However, the plaintiffs may not now argue on appeal that dismissal should have been without

¹¹Ironically, the defendants in Goodlett are the very same as the Nursing Home defendants in the instant case who plaintiff agreed to voluntarily dismiss with prejudice just prior to the circuit court's dismissal of the remaining action against MBMC and MBHS for plaintiff's failure to comply with §11-1-58.

prejudice, rather than with prejudice, as plaintiff did not raise such a claim with the circuit court. Stockstill v. State, 854 So.2d 1017, 1023 (Miss. 2003); Truax v. City of Gulfport, 931 So.2d 592, 598 (Miss. App. 2005); Williams v. Gamble, 712 So.2d 1053, 1059 (Miss. App. 2005). (Claims or arguments not initially raised before the trial court may not be raised for the first time on appeal.) Moreover, the circuit court here exercised sound discretion in determining that dismissal with prejudice was appropriate for the plaintiff's failure to timely and properly commence this action pursuant to §11-1-58 prior to the expiration of the applicable two year statute of limitations. Plaintiff did not seek to file any pleading to "substantially comply" with §11-1-58 until after defendants filed their motion to dismiss, and even then such was not filed within two (2) years of Ms. Mitchell's death as required by §15-1-36, Mississippi Code Annotated (1972). Furthermore, plaintiff provided no disclosure of the alleged pre-suit consultation with Dr. Calvin Ramsey prior to final judgment being entered in this case - almost two (2) years after the original complaint was filed without a certificate of expert consultation.

This court also affirmed the dismissal of an action for failure to strictly comply with the requirements of §11-1-58 in the case of Caldwell v. North Mississippi Medical Center, 956 So.2d 888 (Miss. 2007). There, the plaintiff filed a malpractice action without a certificate of expert consultation attached to the complaint. The defendants answered and alleged a failure to state a claim upon which relief could be granted due to plaintiff's failure to comply with §11-1-58. Thereafter, plaintiff filed an expert disclosure in lieu of a certificate of expert consultation and later an amended complaint substituting an estate for a deceased defendant. Since the circuit court dismissed the case without prejudice, this court was not called upon to determine whether to affirm a dismissal with prejudice under the circumstances. As noted above, because she is procedurally barred from doing so, the instant plaintiff does not argue that the dismissal of her action should have been without prejudice, as occurred in Caldwell. Instead, plaintiff makes a feeble attempt to distinguish Caldwell by arguing that her action should not have been dismissed because defendants supposedly did not raise the failure to comply with §11-1-58 sufficiently to provide an opportunity to correct the deficiency within the sixty (60) day period allowed by §11-1-58(1)(b). Plaintiff's attempt to

distinguish Caldwell is undermined by the record here. As noted above, the first responsive pleading filed was a motion to dismiss that specifically put plaintiff on notice that she had failed to comply with §11-1-58 (R12-22) followed by motions to dismiss for failure to state a claim and expiration of the applicable statute of limitations. Moreover, plaintiff can not seek refuge in §11-1-58(1)(b) because her counsel neither filed a certificate with the original complaint in reliance on §11-1-58 (1)(b), nor filed a follow up certificate within sixty (60) days of the original complaint.

Plaintiff attempts to circumvent the failure to strictly comply with the bright-line mandatory requirement of §11-1-58 by arguing that she filed a certificate of expert consultation in a third amendment to the complaint that was permitted by the court “without opposition or objection” by the defendants. Plaintiff further argues that her third amendment to the complaint adding a certificate of expert consultation “relates back” to the filing of the original complaint under Rule 15(c), Mississippi Rules of Civil Procedure saving her action from dismissal. Plaintiff’s argument is riddled with both procedural and substantive flaws such that it should be given absolutely no credence here. In her motion to file a third amendment to the complaint Plaintiff provided absolutely no information to inform the court’s discretion to allow the amendment, much less establishing the requirements of justice, except only that plaintiff sought “to include additional plaintiffs” in a third amendment to the complaint (R 27). There is no mention at all in Plaintiff’s motion of an attempt to cure a fatal defect in failing to include a certificate of expert consultation in the proposed third amended complaint, nor is there any statement to justify or excuse the failure to timely comply with §11-1-58.

In the first instance, plaintiff’s claim that the order granting leave to file the third amendment to the complaint was unopposed by defendants is disingenuous at best. Judge Tomie Green granted the motion for leave to file the third amended complaint only two (2) days after it was filed (See R27-34). The defendants were not given the opportunity provided for in Uniform Circuit and County Court Rule 4.03 to respond in opposition to the motion. Thus, MBMC and MBHS can hardly be said to have waived the right to contest the propriety or effect of the third amendment to the complaint. Hanshaw v Hanshaw 2007 WL447085 ¶ 13 (Miss App.2007) (when court rules on objections

without giving opposing party a hearing or an opportunity to object, objection is not waived). Partin v. North Mississippi Medical Center, Inc., 929 So2d 924, 934-35 (Miss App 2005) (improper for trial court to rule on motion before opposing party had opportunity to respond in opposition). Plaintiff's reliance on Broadhead v. Terpening, 611 So2d. 949, 953 (Miss 1992) for the assertion that defendants waived any right to complain about the third amendment to the complaint is just not applicable here. Additionally, while Rule 15(a) provides that leave to amend a pleading should be freely given "when justice so requires", leave to amend is not "automatic", but rather a matter of sound discretion and should not be allowed where it would be futile or unfairly prejudice the rights of the defendant. Harris v. Mississippi Valley State University, 873 So.2d 970 (Miss. 2004); Hester v. Bandy, 627 So.2d 833, 839 (Miss. 1993); Pickens v. Donaldson, 748 So.2d 684 (Miss. 1999) (denial of leave to amend was a proper exercise of discretion where claim was already time-barred).

On the other hand, it was an abuse of discretion for Judge Green to allow the Plaintiff to attempt to "substantially comply" with §11-1-58 by way of a belated amendment. As noted length above, this Court has repeatedly held that attempts to circumvent the strict requirements of §15-1-58 with certifications filed after the original complaint are simply not permitted by law¹². Indeed, this Court specifically reversed Judge Green's acceptance of a subsequently filed certificate of expert consultation as contrary to law in Goodlett.

Moreover, an amendment to the complaint should not be allowed where the original complaint did not validity commence the action in the first place. Tolliver v. Mladineo 2007 WL 20034622 (Miss App. rehearing denied 1/22/08). In Tolliver the original complaint did not serve to validly commence the action because the plaintiff lacked standing to bring the action. The court recognized that allowing the plaintiff to amend the complaint would be improper since the lack of standing was "jurisdictional." Similar to the instant Plaintiff, the argument was advanced in Tolliver that an amendment to cure the defective original complaint should "relate back" to the filing of the

12

In Walker, this Court noted that to allow the plaintiff to circumvent the requirements of §11-1-58 would render the statutory requirements "meaningless." Id. at 590.

original complaint to save the action from dismissal. and the bar of an intervening expiration of the two-year statute of limitations for medical malpractice actions. The court rightly rejected plaintiff's argument holding that where an action was not properly commenced with a complaint that met the mandatory prerequisites for proceeding an amendment can not "relate back" to the original complaint pursuant to Rule 15(c), MRCP because an amendment can not relate back to a "nullity" Id at ¶ 8-916.

This court has recognized that §11-1-58 and §15-1-36(15) (requiring that plaintiffs provide sixty (60) days notice to medical malpractice defendants before an action may be commenced) were both enacted as part of the same "tort reform" legislation, and that both contained the same mandatory directive ("shall") requiring certain prerequisites for an action to be validity "commenced". Walker at 590, v Pitalo v GPCH-GP, Inc., 933 So2d. 927, 928-929 (Miss 2006), Arceo v Tolliver, 949 So2d. 691, 695 (Miss 2006). Thus, both §11-1-58 and §15-1-36(15) are of the same cloth. This court has also noted that these statutory prerequisites to the valid commencement of an action for medical malpractice are "mandatory and jurisdictional" such that the failure to comply requires dismissal. Saul v. Jenkins, 963 So. 2d. 552, 554 (Miss. 2007).¹³

In the instant case the plaintiff indisputably failed to comply with the statutory prerequisites to file a valid complaint. Thus, the original complaint was a jurisdictional "nullity" and could not support an amendment which would "relate back." Tolliver.

Regardless of the propriety of the plaintiff being allowed to file a third amendment, it is clear that such an untimely submission of a certificate of consultation cannot "relate back" to the filing of the original complaint and save the action from dismissal. As noted above, since a mandatory prerequisite to commencing an action was not complied with, there was no valid complaint for the amended complaint to "relate back". Tolliver. Additionally, the third amendment cannot "relate back" to the filing of the original complaint because its subject does not arise from the same

¹³

Dismissal of the action in Saul was not ultimately found to be proper because §15-1-36(15) and §11-1-58 were not applicable due to the defendant not being a licensed healthcare provider.

“conduct, transaction or occurrence” as the subject of the original complaint, as required by Rule 15(c). Plaintiff argues that an amendment “relates back” as long as it “relates” to the same “conduct and occurrence” as set forth in the original complaint. (Brief of Plaintiffs/Appellants, p.5) That is plainly a much more liberal standard than permitted by Rule 15(c) which actually states that:

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(Emphasis added)

Here, the claim that is asserted in the original complaint is that the defendants allegedly committed medical malpractice in their respective care and treatment of Willie Mae Mitchell during the period of October 2002 to January 26, 2003, and that such conduct resulted in Ms. Mitchell’s death on January 26, 2003. Conversely, the claim that is the subject of the third amendment is that sometime prior to March 29, 2005 plaintiff’s counsel consulted with a qualified medical expert, and determined therefrom that there was a reasonable basis to commence the action. Thus, while the allegation of the third amendment may “relate” to the conduct, transaction or occurrence set forth in the original complaint, it certainly does not “arise” from the conduct, transaction or occurrence alleged or attempted to be alleged therein. The conduct, transaction or occurrence that is the exclusive subject of the original complaint is the defendant’s alleged conduct in caring for and treating Ms. Mitchell and the occurrence of her death on January 26, 2003. The conduct, transaction or occurrence that is the exclusive subject of the third amendment is the alleged conduct of plaintiff’s counsel in consulting with a qualified medical expert more than two years later. Therefore, plaintiff’s attempt to circumvent the mandatory timing requirement of §11-1-58 and survive dismissal is not aided by Rule 15(c), because the third amendment simply cannot “relate back” to the filing of the original complaint.

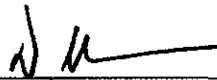
CONCLUSION

The dismissal of the instant action for the plaintiff’s indisputable failure to timely comply with the mandatory requirements of §11-1-58 should be affirmed. This Court has recently and

repeatedly recognized that a medical malpractice action is not validly commenced unless there has been strict compliance with the statutory prerequisites. Allowing plaintiff to circumvent the mandatory strict timing requirements of §11-1-58 by way of an untimely amended complaint would render the protections of the statutes meaningless. The circuit court followed controlling authority and rendered the right result. The final judgment in favor of Mississippi Baptist Medical Center and Mississippi Baptist Health Systems should be affirmed.

Respectfully submitted,

MISSISSIPPI BAPTIST MEDICAL CENTER,
INC. AND MISSISSIPPI BAPTIST HEALTH
SYSTEMS, INC. D/B/A BAPTIST MEDICAL
CENTER, DEFENDANTS/APPELLEES

BY: 

D. COLLIER GRAHAM, JR, MSB 

OF COUNSEL:

WISE CARTER CHILD & CARAWAY
401 EAST CAPITOL STREET, SUITE 600
POST OFFICE BOX 651
JACKSON, MISSISSIPPI 39205-0651
TELEPHONE: (601) 968-5549

ATTORNEYS FOR DEFENDANTS-APPELLEES

CERTIFICATE OF SERVICE

I, D. Collier Graham, Jr., one of the attorneys for defendants-appellees, hereby certifies that I have this day caused to be mailed by U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing Corrected Brief of Appellees to the following:

Bob Owens
Rajita Iyer Moss
Barry H. Powell
Owens Moss, PLLC
Post Office Box 808
Jackson, MS 39205-0808

THIS, the 28th day January, 2008.


D. COLLIER GRAHAM, JR.