IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 2007-[redacted]-01512

* * *

JANICE CALDWELL AND HUSBAND,
ROBERT C. CALDWELL

APPELLEES

V.

NORTH MISSISSIPPI MEDICAL CENTER, INC.,
AND ELIZABETH BROWN, EXECUTRIX OF THE
ESTATE OF ALAN PAUL BROWN, M.D., DECEASED

APPELLANTS

ON INTERLOCUTORY APPEAL FROM THE
CIRCUIT COURT OF LEE COUNTY, MISSISSIPPI
CAUSE NO. CV06-072-(A)L

REPLY BRIEF OF APPELLANTS

ORAL ARGUMENT IS REQUESTED

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BROWN, EXECUTRIX OF THE ESTATE
OF ALAN PAUL BROWN, M.D.,
DECEASED

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I. The filing of a complaint lacking a certificate of expert consultation as required by Miss. Code Ann. § 11-1-58 does not result in an equitable tolling of the statute of limitations during the pendency of that action.

After extensive argument that the filing of a complaint commences a civil action and tolls the statute of limitations until that action is dismissed, the Caldwells essentially confess the correctness of the position of NMMC and Dr. Brown that the general rule of tolling does not apply where a plaintiff does not comply with section 11-1-58 when they concede in their brief that "it would be unreasonable to allow a plaintiff who did not have an expert opinion simply to file suit . . . without complying" with the statute's certification requirement. (Brief of Appellees at 20.) The Caldwells argue, however, that tolling should nevertheless be allowed in this case, because their counsel substantially complied with the statute because he consulted with an expert before filing suit even though he did not file the required certificate with the complaint. However, the Caldwells failed to make that argument before the trial court; their argument below was solely that filing a complaint tolled the statute of limitations in all cases. [R. 60-63.] Thus, the Caldwells have waived the "inadvertence exception" or "substantial compliance exception" argument on appeal. *Jones v. Fluor Daniel Services Corp.*, 959 So.2d 1044, 1048 (Miss. 2007). In any event, whether a case is filed in time to satisfy the statute of limitations does not depend on a plaintiff's good faith, and a plaintiff's inadvertence is not an excuse for failing to file a complaint prior to the expiration of the limitation period and does not prevent a cause of action from being time-barred. Excusable neglect cannot toll or stay a statute of limitations. *City of Tupelo v. Martin*, 747 So. 2d 822, 829 (Miss. 1999). The Caldwells' argument that tolling should be recognized on the specific facts of this case is equivalent to an argument that a claim

should not be time-barred where a plaintiff drafts the complaint, prepares the summons for issuance, and writes out the check for the filing fee before the statute of limitations expires, but forgets the expiration date and fails to file the complaint before the statute runs. That action in that situation is just as much time-barred as an action where the plaintiff took no action at all to prepare the case for filing. The argument that a "technical non-compliance" with section 11-1-58 should be excused would be (and should have been in this case) more aptly asserted in response to a motion to dismiss an action filed without compliance. Indeed, the Caldwells made that argument in *Caldwell I*, and this Court rejected it, holding that strict compliance was required and that the failure to file the certificate with the complaint could not be cured by filing it (or an expert disclosure) at a later date before the action was dismissed. If a "technical non-compliance" excuse is not available to avoid dismissal in the first instance, in a context where the rules provide for liberal allowance of amendments, it certainly is not available to avoid a failure to meet a limitations deadline, where strict compliance is the rule.

Moreover, even if substantial compliance would suffice to toll the statute of limitations, that would not help the Caldwells, since this Court has already held in *Caldwell I* that the plaintiffs did not substantially comply with section 11-1-58. *Caldwell v. North Mississippi Medical Center*, 956 So. 2d 888, 892 (Miss. 2007). Also, the Court in *Walker v. Whitfield Nursing Center,* 931 So. 2d 583, 589 (Miss. 2006), expressly rejected the argument that the plaintiff had substantially complied with section 11-1-58 because her counsel had consulted with an expert before filing suit.

The Caldwells erroneously argue that NMMC and Dr. Brown's position is contrary to "the clear dictates of Rule 3." This argument misapprehends both the text and the purpose of Rule 3. To be cognizable, a cause of action must be commenced

before the expiration of the limitations period. Rule 3 fixes the point at which an action is commenced; it provides that an action is commenced by the filing of a complaint.[1] Once a civil action has been properly commenced within the limitations period, the statute of limitations is satisfied, and, if the case proceeds to a conclusion on the merits, the question of whether any time remained in the limitations period is moot, and the concept of tolling—that is, suspending—the limitations period is irrelevant. Tolling may come into play before a suit is filed to extend the time for commencing an action (for example, tolling during a claimant's infancy or mental incapacity). The issue of tolling may also arise if a timely-filed action is dismissed without prejudice after the time prescribed by the statute of limitations has elapsed; the issue in such case is whether the running of the limitations period was suspended during the period between the commencement and the dismissal of the suit. Rule 3, in fixing commencement with filing a complaint, merely addresses what a claimant must due to *satisfy* the statute of limitations; it says nothing about whether the commencement of an action will *toll* the statute of limitations during the time the action is pending before the court. Contrary to the Caldwells' assertion, Rule 3 does not provide that filing a complaint tolls the statute of limitations; the rule does not mention tolling, much less "clearly and unambiguously" provide for tolling during the pendency of an action. Addressing Rule 3 of the Federal Rules of Civil Procedure, on which the state rule was patterned, the United States Supreme Court, in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), stated that here was no indication that Rule 3 was intended to toll statutes of limitations, noting that "Rule 3 simply provides that an action is commenced by filing the complaint and has as

[1] This is in contrast to other schemes under which a civil action is not commenced by until process is served.

its primary purpose the measuring of time periods that begin running from the date of commencement; the rule does not state that filing tolls the statute of limitations." *Id.* at 750 & n.10 (citation omitted). The rule that the limitations period is tolled during the pendency of an action is a judicially-created principle separate and apart from Rule 3. For example, Virginia Supreme Court Rule 3.2, like Mississippi's Rule 3, provides that an action is commenced by filing a complaint.[2] However, under Virginia law, tolling of the limitations period during the pendency of the action is not recognized except in situations specifically prescribed by statute. *Prohm v. Anderson*, 255 S.E. 2d 491 (Va. 1979). Rule 3 of the North Carolina Rules of Civil Procedure[3] also provides that an action is commenced by filing a complaint or by seeking an extension to do so; however, in that state, commencement of the action, by filing a complaint or seeking an extension, tolls the limitations period only if process is served within a specified time; otherwise, it is as if the suit had not been commenced. *See Latham v. Cherry*, 111 N. C. App. 871, 874, 433 S. E. 2d 478 (1993). And, as noted in NMMC and Dr. Brown's initial brief, even in jurisdictions that apply a general rule of tolling, there are numerous exceptions.

The Caldwells note that the comment to Rule 3 provides that the fixing of the commencement point is significant in determining whether an action is barred by a statute of limitations. However, that simply means that Rule 3 answers the question whether an action is timely if the complaint is filed before the limitation period expires, but process is not served until after expiration. The rule does not address at all the question whether a *subsequent* action on the same claim would be barred by a statute of limitations. *Schneider v. Schneider*, 585 So. 2d 1275 (Miss. 1991), cited by the

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[2] The text of Rule 3.2 is set out at http://leg1.state.va.us/cgi-bin/legp504.exe?000+scr+vscr-3Z2.

[3] The text of Rule 3 is available at the website of the North Carolina General Assembly, http:// www. ncga.state.nc.us.

Caldwells, addressed only the first issue, not the second; there was only one suit at issue in *Schneider*, and the question was whether an action was timely where the plaintiff filed a complaint during the limitations period but did not accomplish service of process until after the statute had run.

That being said, NMMC and Dr. Brown, as set forth in their principal brief, do not contest that the general rule applied in Mississippi is that the statute of limitations is tolled between the date a suit is timely filed and the date it is dismissed. However, that general rule of tolling, as well as Rule 3's provision that an action is commenced by the filing of "a complaint," must be understood in the context that, in the vast majority of cases, and in every case absent special legislative qualification, there is no document required to be filed other than the complaint. All of the cases cited by the Caldwells stating the general rule involved situations where there was no statutory prerequisite to filing suit. At the time this Court adopted the general rule that the limitations period is tolled during the pendency of an action, section 11-1-58, with its expert certification requirement, was not in existence; indeed, it appears that at that time there was no type of claim for which the Legislature prescribed that some act be done before filing suit was permitted or that some document be filed along with the complaint. Thus, neither the language of Rule 3, nor the general rule of tolling during the pendency of an action, contemplates a situation where the Legislature has prescribed some prerequisite or co-requisite to bringing suit and that prerequisite or co-requisite has not been met. Thus, a rule that in such cases the mere filing of a complaint does not commence the action or toll the statute of limitations would not be contrary to Rule 3 nor the equitable principles underlying the general rule.

This Court has already recognized that the Legislature can supersede judicially created tolling principles. *See Caves v. Yarbrough*, -- So. 2d --, 2007 WL 3197505 (Miss. 2007) (holding that structure of Mississippi Tort Claims Act statute of limitations precluded application of equitable tolling principle applied to other statutes of limitations). As explained in the initial brief of NMMC and Dr. Brown, the Legislature, in enacting section 11-1-58, similarly abrogated the general rule of tolling with respect to medical negligence actions, by giving the statute its own tolling provision. The statute itself prescribes what a plaintiff must do in order to toll the statute of limitations if he cannot generate a certificate of consultation within the limitations period: he must file with the complaint what might be properly termed a "certificate of inability"—that is, a certificate stating either that he did not have sufficient time to consult an expert prior to the expiration of the limitations period or that he could not find an expert willing to review the case. Miss. Code Ann. § 11-1-58(1)(b), (c). By doing so, he tolls the statute of limitations for 60 days. Since the Legislature adopted this single tolling provision with respect to the absence of a certificate of consultation, it intended no others. *Expressio unius est exclusio alterius*. Therefore, this Court cannot, consistent with the statute, permit a plaintiff to toll the statute of limitations any other way.

Under the Caldwells' theory, a plaintiff could toll the statute of limitations simply by filing a bare complaint or (under the Caldwells' untimely asserted fall-back position) by filing a bare complaint and later filing a "certificate of inadvertence."[4] Since the tolling provision in the statute does not include either of those options, allowing tolling by either means would be in direct derogation of section 11-1-58. Therefore, a court

[4] Also, as noted in the principal brief of NMMC and Dr. Brown, the Caldwells, under their theory, would be able to toll the statute of limitations for far longer than the 60 days provided by section 11-1-58.

cannot properly apply the general rule of tolling where a plaintiff fails to file the prescribed certificate with the complaint.

The Caldwells attempt to distinguish *Walker v. Whitfield Nursing Center* and its holding that strict compliance with section 11-1-58 is required by asserting that *Walker* did not involve "mere technical error." However, in *Walker*, as in this case, the plaintiff asserted that her attorney had consulted with an expert before filing suit although the plaintiff had not filed a certificate attesting to such consultation, so that case also involved an assertion of "mere technical error." *See Walker,* 931 So. 2d at 586. Furthermore, the Caldwells' "mere technical error" was asserted in *Caldwell I*, and this Court reached the same result as in *Walker*.

The Caldwells assert that to deny tolling because of a plaintiff's failure to comply with section 11-1-58 would create mass confusion regarding whether a complaint in a particular action was sufficient to toll the statute of limitations. To the contrary, the rule is quite simple and easy to apply: Where a statute prescribes a certain action or actions prerequisite to filing an action, a complaint filed in derogation of those requirements will not be deemed to commence the action or toll the statute of limitations. Even if there were difficulties in application, that would not be sufficient reason to refuse to apply section 11-1-58 as written.

The argument that NMMC and Dr. Brown's position would disrupt the operation of Rule 12 and Rule 15 is plainly wrong. NMMC and Dr. Brown have not argued for an abandonment of the tolling general rule (which, in any event, has no relation to Rules 12 and 15). NMMC and Dr. Brown's argument is merely that the general rule does not

apply in every case,[5] and should not apply where a plaintiff fails to satisfy legislatively enacted prerequisites to filing suit, particularly where, as here, the Legislature provides its own tolling provisions related to those prerequisites; in such cases, a plaintiff must comply with the prerequisites in order to commence an action and toll the statute of limitations. Thus, filing a complaint would fail to toll the statute only where there was a statutory prerequisite to suit that had not been satisfied. The Caldwells' other arguments based on Rules 12 and 15 are misplaced, since this Court has already held in *Walker* and *Caldwell I* that an action filed without the requisite certificate must be dismissed and the certificate cannot be supplied by a subsequent filing, and thus an amendment of the pleadings is not available to cure a failure to file the required certificate along with the complaint.[6] Since the general rule of free and liberal amendment does not apply where a plaintiff fails to comply with section 11-1-58, it follows that the general rule of tolling likewise should not apply.

The Caldwells attempt to distinguish *Doyle v. Fenster*, 55 Cal. Rptr. 2d 327 (Cal. App. 1996) on the basis that the California Legislature was concerned with protecting the reputation of potential defendants as well as with avoiding baseless lawsuits. However, the specific reasons for the legislature's decision to require pre-suit consultation and certification are beside the point; what matters is that the California statute required the filing of certificates with the complaint and, like section 11-1-58, provided a tolling provision giving a plaintiff who certified his inability timely to obtain the certificates 60 days after filing the complaint to file the certificates of merit. The *Doyle* court

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[5] See Brief of Appellees at 14-15.

[6] The provision in Rule 12(b) regarding amendment of the complaint contemplates amendment *before* a final judgment of dismissal is entered; it does not require allowing the filing of a new action after a final dismissal despite the running of the statute of limitations.

recognized that applying equitable tolling was contrary to the structure of the statute, would render the statute's tolling provision superfluous, and would defeat the purpose of the certification requirement. The court did not mention the privacy provisions of the statute as a reason for rejecting the argument that filing a complaint without the required certificates tolled the statute of limitations. The Mississippi Legislature enacted a similar statute with virtually identical certification and tolling provisions, and thus the same logic applied by the California court applies to section 11-1-58.

The Caldwells' brief attempts to create the impression that *Scarsella v. Pollak*, 607 N.W. 2d 711 (Mich. 2000), is no longer good law in Michigan, by noting that the Michigan Supreme Court subsequently held, in *Kirkaldy v. Rim*, 734 N. W. 2d 201 (Mich. 2007), that the filing of a complaint with a defective affidavit of merit (as opposed to no affidavit at all) does toll the statute of limitations. However, the holding in *Kirkaldy* was not a retrenchment from *Scarsella*. The results in the two cases are consistent; the court's drawing a the distinction between not filing a certificate at all and filing a deficient certificate is analogous to this Court's insistence on strict compliance with the requirement that a written notice of claim be served in a Tort Claims Act case while accepting substantial compliance with respect to the contents of such a notice. *See Arceo v. Tolliver*, 949 So. 2d 691, 697 n. 5 (Miss. 2006)(noting distinction); c*ompare University of Mississippi Medical Center v. Easterling*, 928 So. 2d 815, 820 (Miss. 2006)(strict compliance as to giving notice), to *Suddith v. University of Southern Mississippi*, 977 So. 2d 1158, 1178-79 (Miss. App. 2007)(substantial compliance as to content of notice).

The Caldwells also cite the concurring opinions of two justices in *Kirkaldy* questioning the correctness of *Scarsella*. The Caldwells fail to note that five of the seven

justices rejected the opportunity to overrule *Scarsella*, and the majority opinion states, "Nothing in this decision calls into question our decision in *Scarsella*." *Kirkaldy*, 734 N. W. 2d at 584 n.5. Furthermore, although the Caldwells' brief states that the Michigan Court of Appeals had questioned the correctness of *Scarsella* in 2005, that court, in 2008, in *Jackson v. Detroit Medical Center*, 2008 Mich. App. Lexis 722, citing *Scarsella*, stated, "*It is now well settled* that to commence a medical malpractice action and thereby toll the running of the period of limitations, a plaintiff must file both a complaint and the affidavit of merit." *Id.* at *10 (emphasis added).

The Caldwells attempt to distinguish *Public Health Trust of Dade County v. Knuck*, 495 So. 2d 834 (Fla. App. 1986), and *Colby v. Columbia County*, 550 N.W. 2d 124 (Wis. 1996), on the basis that the statutes in question required pre-suit notice rather than a certificate of merit. With respect to *Knuck*, the Caldwells' factual premise is simply incorrect. In addition to mandating pre-suit notice, Florida law also required a pre-suit investigation and a certification of counsel's good-faith belief that the claim had merit, and the plaintiff had failed to comply with that requirement. *Knuck*, 495 So. 2d at 835-36 & n.4. Thus, the statutory scheme construed in *Knuck* is virtually identical to that of Mississippi in all relevant points. The court, in holding that compliance with statutory prerequisites was necessary to toll the statute of limitations, did not distinguish between the failure to give notice and the failure to file a certificate of merit. *Id.* at 836. Furthermore, as an additional ground for holding that the plaintiff had not tolled the statute of limitations, the court in *Knuck* relied on the fact that the statute at issue, like section 11-1-58, provided for a procedure by which a plaintiff could toll the statute for a brief period to comply with pre-suit requirements. The court's reasoning, directly

applicable to this case, was that where a statute affords tolling to those who comply with the prescribed procedure, it denies tolling to those who do not. *Id.* at 837.

With respect to *Colby*, the Caldwells posit a distinction without a difference. Whether the pre-suit requirement is investigation/consultation or notice, the point is that where the legislature imposes a requirement that some action be taken before or at the same time as the filing of a complaint, a plaintiff cannot fail to meet those requirements and then claim the benefits of equitable tolling. Whether the requirement is the giving of advance notice or the filing of a certificate of merit, the analysis is the same: to apply tolling despite the plaintiff's failure to comply with the requirements would defeat the purpose of the statute in imposing such requirements. As the court in *Knuck* stated, "compliance with statutory conditions precedent and allegations of compliance are essential to the complaint." *Knuck*, 495 So. 2d at 836. Tellingly, the Caldwells' brief cites no cases in which a court applied tolling in a case involving a failure to comply with such pre-suit requirements.

The Caldwells argue that even if section 11-1-58 precludes tolling, the statute is unconstitutional because it intrudes on the judicial branch's rule-making power. However, that argument does not save the Caldwells' claim, for at least two reasons.

First, the Caldwells did not raise this argument before the trial court and thus have waived it. *Adams v. Baptist Memorial Hospital Desoto, Inc.*, 965 So. 2d 652, 657 (Miss. 2007); *Jones v. Fluor Daniel Services Corp.*, 959 So.2d 1044, 1048 (Miss. 2007); *In re V.R.*, 725 So. 2d 241, 245 (Miss. 1998). Second, the statute simply does not present a separation-of-powers problem. Specifically, the Caldwells contend that the statute's intent to require the filing of a certificate of consultation (or a certificate of inability pursuant to subsection (1)(b) or (1)(c)) with the complaint before the limitation period

expires and to disallow the filing of a certificate of consultation after the limitation period had expired, either by filing an amended complaint or by filing a subsequent action, conflicts with Rule 3 of the Mississippi Rules of Civil Procedure, which, according to the Caldwells, provides that the filing of a complaint tolls the statute of limitations during the pendency of the action, and that the Legislature, in enacting such a statute, intruded on the paramount right of the Supreme Court to prescribe rules of procedure for civil actions. As noted above, Rule 3 makes no such provision, so there is no potential conflict between the statute and the Court's rule making powers. The issue is thus whether the legislature's enactment of a statute that curtails the judicially-created principle of equitable tolling during the pendency of an action violates the separation of powers. In *Hall v. State*, 539 So.2d 1338 (Miss. 1989), in which this Court held that a statutory modification of a hearsay rule violated the separation of powers, the Court explained the principle as follows:

> At its heart that doctrine of separation of powers provides that no officer of one department of government may exercise a power at the core of the power constitutionally committed to one of the other departments.

Id. at 1345.

The Court found that the legislative enactment intruded on the power of the judicial branch because "[t]he judicial power has been authoritatively read as including the power to make rules of practice, procedure and evidence." *Id.* According to the Court, changing the hearsay rule from that which the Court had enacted violated the separation of powers because "[a]dmitting evidence that has not been cured in the crucible of cross-examination challenges the soul of the trial process. Deciding when and where that fateful step may be taken is a matter lying 'at the core of the judicial function.'" *Id.* at 1346 (quoting *State v. Robinson*, 735 P.2d 801, 807 (Ariz. 1987)).

Applying these principles, it is clear that the anti-tolling effect of section 11-1-58 does not intrude on a "core" judicial power. A statute addressing tolling of a statute of limitation—either prescribing or proscribing tolling—is not a rule of procedure, much less one at the core of the judicial function. Unquestionably, legislatures have the power to prescribe limitations periods for bringing civil suits; thus, we have *statutes* of limitations. Surely a court would not think of usurping a legislature's authority in this area by prescribing by rule a longer or shorter limitation period. And since the prescribing of limitations periods is a legislative function, it follows that the declaring of exceptions or extensions of limitations periods, or the tolling of such periods, is likewise a matter of legislative prerogative. Indeed, the Mississippi Code contains numerous statutes in addition to section 11-1-58 that contain tolling or extension provisions. These include: Miss. Code Ann. § 15-1-59 (tolling statutes of limitations for minors and persons of unsound mind); § 15-1-57 (tolling during period when suit is barred); § 15-1-55 (tolling or extension by reason of death); § 15-1-67 (tolling by fraudulent concealment); § 15-1-63 (tolling during period of absence from state); § 11-46-11(3) (tolling by filing notice of claim); § 11-46-11(4) (tolling MTCA statute of limitations during infancy or incompetence); § 15-1-69 (extension of statute of limitations following dismissal for matter of form); § 15-1-36(3)-(8) (special tolling provisions related to minors and incompetents for medical negligence claims); § 15-1-36(15) (tolling during notice period). As noted above, this Court has recognized the Legislature's authority to supersede judicially adopted tolling rules. *Caves v. Yarbrough*, -- So. 2d --, 2007 WL 3197505 (Miss. 2007).

Although *Hall* decreed the Court's prerogative to determine rules of procedure, statutes of limitation and tolling rules are substantive, not procedural, and thus do not

intrude in the least on the Court's domain, much less usurp a "core" judicial function. This is illustrated in federal court decisions applying the *Erie* doctrine to determine whether federal or state law will apply to a particular issue in a diversity case, based on whether the matter is procedural or substantive. The court in *Cambridge Mutual Fire Insurance Company v. City of Claxton*, 720 F.2d 1230 (11th Cir. 1983), summarized the pertinent law on this matter:

> Under the doctrine of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), a federal court in a diversity action must apply the controlling substantive law of the state. In *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), the Supreme Court held that state statutes of limitations are substantive laws and must be followed by federal courts in diversity actions. In *Reagan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), the Supreme Court held that a Kansas statute rather than Rule 3 of the Federal Rules of Civil Procedure dictated the commencement date of the suit for purposes of determining whether the statute of limitations was tolled. The state statute, which provided for commencement of a suit upon service of process, controlled because it was an integral part of the state statute of limitations. *Id.* at 534.

Id. at 1232 (internal parallel citations omitted). Since rules related to when a statute of limitations is satisfied, tolled, or extended are integral to the statute of limitations, which is substantive and within the legislative bailiwick, then such determinations cannot be at the core of the judicial function. Thus, neither section 11-1-58 nor any other statutory provision relating to tolling unconstitutionally infringes on the judiciary's power to enact rules of procedure. To the contrary, since statutes of limitations, and thus tolling provisions, are a legislative matter, it is courts which must tread carefully in this area lest they usurp the proper prerogative of the legislative branch. The application of equitable tolling is arguably a legitimate exercise of judicial power in situations where the Legislature did not preclude such tolling and it can be presumed that the Legislature would not have intended the inequitable results sought to be avoided by applying tolling. However, where the Legislature has expressed an intent that tolling not be applied—

either explicitly or by implication through the text and structure of a statute, as with section 11-1-58—this Court should not apply a judicially crafted tolling rule in the face of such contrary legislative intent. Consequently, it is the Caldwells' position—that tolling should be applied notwithstanding the text of section 11-1-58—that would present a separation-of-powers problem.

II. The failure of the Caldwells to serve the required certificate of consultation on NMMC and Dr. Brown along with the summons and complaint caused the statute of limitations to start running again 120 days following the filing of the complaint.

The Caldwells contend that this argument was not advanced by NMMC and Dr. Brown in the trial court and thus may not be considered by this Court on appeal. However, the motion for summary judgment of said defendants did refer to the interpretation of Rule 4(h) as authority for its position that the Caldwells' claim was barred by the statute of limitations, and the Caldwells stated below that "[t]he defendants base their entire argument on cases decided under Rule 4(h)." [R. 62.] Consequently, the Court should consider the argument of NMMC and Dr. Brown's estate that the Caldwells did not comply with Rule 4(h) and that consequently their claim is time-barred.

The Caldwell's brief argues that the cases cited by NMMC and Dr. Brown do not support their position because those cases involve only a failure to serve a summons and complaint. The point of the cases is that when a rule (or statute) prescribes what must be served on a defendant, the failure to serve exactly what is prescribed is not effective service of process. Since the Caldwells did not serve a certificate of expert consultation, their service was defective, and the limitations period was not tolled beyond the 120th day following the filing of the complaint.

III. The Caldwells' action was not preserved by the savings statute, Miss. Code Ann. § 15-1-69, because the first action was not "duly commenced" for purposes of the savings statute, and because the dismissal of that action due to the Caldwells' failure to file a certificate of consultation with the complaint was not a dismissal for a "matter of form" within the meaning of the statute.

The Caldwells' cause of action is not preserved by the savings statute, Miss. Code Ann. § 15-1-69, for at least three reasons: (1) the statute cannot revive a claim as to which the statute of limitations has run prior to the dismissal; (2) the action was not "duly commenced" in light of the Caldwells' failure to file the certificate of consultation as required by the statute; and (3) the dismissal of a medical negligence action for failure to file the certificate of consultation with the complaint is not a dismissal for a "matter of form" within the meaning of the savings statute.

"The savings statute cannot save a complaint from the expiration of the applicable statute(s) of limitations." *Owens v. Mai*, 891 So. 2d 220, 223-24 ¶ 17 (Miss. 2005). In other words, if the statute of limitations has expired by the time the case is dismissed for a matter of form, the savings statute is of no effect.[7] If, as NMMC and Dr. Brown contend, the filing of the complaint in *Caldwell I* did not toll the statute of limitations, then the limitations period had expired prior to the date the case was dismissed, and, as in *Owens*, the savings statute is inapplicable.

Even if section 15-1-69 could revive a time-barred claim, the statute nonetheless would not be applicable in this case. The statute provides in pertinent part as follows:

> If in any action, duly commenced within the time allowed, the writ shall be abated, or the action otherwise avoided or defeated . . . for any matter of form . . . the plaintiff may commence a new action for the same cause, at any time within one year after the abatement or other determination of the original suit . . . .

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[7] In *Owens*, the statute had run at the time of dismissal because the plaintiff had failed to serve process within 120 days, thus restarting the running of the limitations period. *Id.* at 223.

Miss. Code Ann. § 15-1-69. By its terms, in order for the savings statute to be applicable, the prior action must have been "duly commenced," and the dismissal of that action must have been for a "matter of form."

"Duly" is defined as "in a proper manner." American Heritage Dictionary, 2d College Ed. (1985). Thus, in order for the prior action to have been "duly commenced," that action must have been commenced in a proper manner. Since the Caldwells improperly failed to file a certificate of consultation with the complaint as section 11-1-58 requires, the prior action was not "duly commenced," and the savings statute does not apply. In *Estrada v. Burnham*, 341 S. E. 2d 538, 542 (N. C. 1986), the North Carolina Supreme Court held that in order for the savings statute to apply, the complaint "must conform in all respects to the rules of pleading." In *Robinson v. Entwistle*, 132 N.C. App. 519, *cert. denied*, 350 N.C. 595, 537 S. E. 2d 482 (1999), the North Carolina Court of Appeals, applying *Estrada*, stated that the savings statute was available only "in an action where the complaint complied with the rules that govern its form and content" and held that because the complaint did not contain a statement that the medical care provided by the defendant had been reviewed by an expert as required by law, the complaint was not properly filed so as to toll the statute of limitations and provide the benefit of the savings statute. *Robinson*, 132 N.C. App. at 522-23.[8] Here, as in *Robinson*, the complaint in the prior action did not comply with the law mandating that its form and content include a certificate of consultation. Accordingly, the defective

[8] Although the North Carolina Supreme Court later abrogated the holding of *Robinson* as it applied to situations where the plaintiff had voluntarily dismissed the action, the court reaffirmed the correctness of the holding otherwise, stating that, given the plaintiffs' failure to make the required certification of expert consultation, if the trial court had involuntarily dismissed the action, the statute of limitations would not have been tolled, the savings statute would not have applied, and the plaintiffs' claims set forth in the second complaint would have been barred by the statute of limitations. *Brisson v. Santoriello*, 351 N.C. 589, 595, 528 S.E.2d 568 (2000).

filing of the previous action did not afford the Caldwells the benefit of the savings statute.

In addition, the prior action was not dismissed for a "matter of form." In *Marshall v. Kansas City Southern R. Co.*, -- So. 2d --, No. 2006-CA-00519-COA, 2007 WL 3257011 (Miss. App. 2007), the court of appeals analyzed the purposes of section 15-1-69, noting that the statutory savings for suits dismissed for a "matter of form" was designed to protect a plaintiff whose cause was dismissed for "some matter not affecting the merits." For this analysis, the court in *Marshall* relied on *Hawkins v. Scottish Union & National Insurance Co.*, 110 Miss. 23, 69 So. 710 (1915), which interpreted section 3116 of the Code of 1906, a predecessor to section 15-1-69 which is identical to the current statute.[9] *Hawkins* held that the dismissal of an action for lack of subject matter jurisdiction was a dismissal for a matter of form, since the matter of jurisdiction was unrelated to the merits of the action. 69 So. at 712. In contrast, the failure to file a certificate of expert consultation is not a matter of mere form, because the purpose of the certificate is to demonstrate, based on medical review, that the claim has putative scientific merit. Since a plaintiff generally cannot prevail on the merits of a medical malpractice action without expert testimony, the requirement of a certificate indicating that such expert testimony can likely be offered in due course is intimately related to the merits of the claim. That the failure to file a certificate of consultation is not a defect of "form" is confirmed by this Court's holding in *Walker v. Whitfield Nursing Center*, 931 So. 2d 583, 591 (Miss. 2006), that the defense of a plaintiff's failure to file a certificate of consultation was preserved by pleading the affirmative defense of failure to state a claim upon which relief can be granted. Since a dismissal for failure to state a claim

[9] The text of section 3116 is set out in *Hawkins*, 69 So. at 711.

shows a deficiency in the merits of the claim as pleaded, it follows that a dismissal for failure to file a certificate of consultation relates to the merits of the claim. Furthermore, this Court has held that a dismissal for failure to state a claim is not a dismissal for a matter of form. *Lee v. Thompson*, 859 So. 2d 981, 984, 990 n. 8 (Miss. 2003).

Furthermore, even some reasons for dismissal that are unrelated to the merits of the claim are not matters of form. These include: voluntary dismissal, *W.T. Raleigh Co. v. Barnes*, 109 So. 8, 143 Miss. 597, 601 (Miss. 1926); *Marshall* at *3-4; failure to serve process within 120 days of filing the complaint, *Owens v. Mai*, 891 So. 2d 220, 222-23 (Miss. 2005); and staleness, *Jackpot Mississippi Riverboat, Inc. v. Smith*, 874 So.2d 959, 961 (Miss. 2004); *Deposit Guaranty National Bank v. Roberts*, 483 So.2d 348, 354 (Miss. 1986). In light of these exclusions, it appears that, as *Hawkins* suggests,[10] a "matter of form" for purposes of section 15-1-69 is limited to defects related to the proper court or parties. The annotation to section 15-1-69 in the Westlaw database related to the "matter of form" issue includes no cases applying the savings statute to a case dismissed for any reason other than lack of jurisdiction, improper venue, or misjoinder, and the Caldwells have cited no such cases.

For the foregoing reasons, the dismissal of *Caldwell I* was not for a "matter of form," and the savings statute does not apply. Therefore, contrary to the Caldwells' argument, the savings statute did not extend the time to file a second suit. Accordingly, for the reason set forth above, this action is barred by the statute of limitations.

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[10] The court in *Hawkins* noted that all the decisions it had examined from other jurisdictions holding that similar savings statutes preserved a claim involved dismissal for lack of jurisdiction. 69 So. at 712.

CONCLUSION

For the reasons set forth above and in the initial brief of NMMC and Dr. Brown, the complaint in this action was not timely filed and the claims of the Caldwells are barred by limitations. Therefore, the trial court erred in denying the defendants' motion for summary judgment. Consequently, this Court should reverse the order of the trial court and render judgment in favor of NMMC and Dr. Brown.

Respectfully submitted,

NORTH MISSISSIPPI MEDICAL CENTER, INC. AND ELIZABETH BROWN, EXECUTRIX OF THE ESTATE OF ALAN PAUL BROWN, M.D., DECEASED,
Appellants

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CERTIFICATE OF SERVICE

I, John G. Wheeler, one of the attorneys for the Appellants, North Mississippi Medical Center, Inc. and Elizabeth Brown, Executrix of the Estate of Alan Paul Brown, M.D., Deceased, hereby certify that I have this day served a true and correct copy of the above and foregoing REPLY BRIEF OF APPELLANTS by placing said copy in the United States Mail, postage prepaid, addressed to the following:

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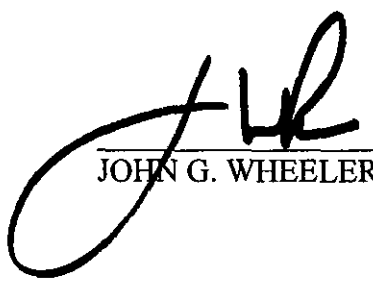
This the 5th day of August, 2008.



JOHN G. WHEELER

CERTIFICATE OF FILING

I hereby certify that I have mailed via first-class, United States mail, postage prepaid, the original and three copies of the Reply Brief of Appellants and an electronic diskette containing same on August 5, 2008, addressed to Ms. Betty W. Sephton, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi 39201.

JOHN G. WHEELER