IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2008-CA-00224

SALVADOR ARCEO, M.D. and ST. DOMINIC-JACKSON MEMORIAL HOSPITAL — **APPELLANTS**

VS.

MYRTIS TOLLIVER, AS ADMINISTRATRIX OF THE ESTATE OF TOMMIE C. TOLLIVER, DECEASED, INDIVIDUALLY, AND ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES OF TOMMIE C. TOLLIVER, DECEASED — **APPELLEE**

BRIEF OF APPELLEE

(Oral Argument Requested)

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Myrtis Tolliver – Appellee
2. Thomas Tolliver – Appellee
3. Meagan Tolliver – Appellee
4. Estate of Tommie C. Tolliver
5. Salvador Arceo – Appellant
6. St. Dominic-Jackson Memorial Hospital – Appellant
7. Jennifer Lyle – Appellant
8. W. Eric Stracener, Esquire; W. Andrew Neely, Esquire, Hawkins, Stracener & Gibson, PLLC – Attorneys for Appellee Myrtis Tolliver, et al.
9. E. Vincent Davis, Esquire – Attorneys for Appellee Myrtis Tolliver, et al.
10. Deborah McDonald, Esquire – Attorneys for Appellee Myrtis Tolliver, et al.

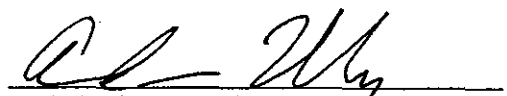
11. Sharon F. Bridges, Esquire; Jonathan R. Werne, Esquire, Brunini, Grantham, Grower & Hewes – Attorney for Appellant St. Dominic

12. Paul E. Barnes, Esquire; Kimberly N. Howland, Esquire; Gretchen W. Kimble, Esquire, Wise, Carter, Child & Caraway – Attorney for Appellant Salvador Arceo, M.D.

13. Honorable Bobby B. DeLaughter, Hinds County Trial Court Judge

14. Honorable W. Swan Yerger, Hinds County Trial Court Judge

15. Mississippi Attorney General's Office



W. Andrew Neely
Attorney of record for Appellee

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STATEMENT REGARDING ORAL ARGUMENT

Appellees request oral argument as they believe that it could be helpful to this Court in fully analyzing the issues before it. Further, several issues now before the Court on this Appeal are novel issues. Lastly, the Appellees bring into question whether the operation of the statute at issue would bring about an unconstitutional result as it would deprive the Plaintiffs of a remedy and of their day in court, in violation of the Constitution of the State of Mississippi and of the Federal Constitution. For these reasons, Plaintiffs request oral argument.

STATEMENT OF THE ISSUES

1. After the dismissal without prejudice of *Tolliver I*, does the "savings statute" (Miss. Code Ann. § 15-1-69) and/or the doctrine of equitable tolling apply to the Plaintiffs' instant action?

2. Considering the fact that the Defendants were on actual notice of the legal bases of the claim and the type of loss sustained, including the nature of the injuries suffered, pursuant to *Tolliver I*, was the Plaintiffs' February 28, 2007 Miss. Code Ann. § 15-1-36(15) notice letter necessary, or, alternatively, and if found to be necessary, did the notice letter, in fact, comply?

3. If the February 28, 2007 notice letters are deemed not to have been adequate, should the Plaintiff still receive the sixty (60) days tolling under the statute?

4. Should this Court determine that dismissal of this case is required due to failure to comply with the content requirements of 15-1-36(15), is dismissal without prejudice, as ruled by the trial court, the proper remedy for such failure to comply?

5. Would interpreting Miss. Code Ann. § 15-1-36(15) in such a way that the Plaintiffs were otherwise left without a remedy violate the Constitution of the State of Mississippi and/or the Federal Constitution?

STATEMENT OF THE CASE

I. Underlying Facts

This case involves the untimely death Tommie Tolliver, a 21 year old college student. (R.8) Tommie Tolliver was admitted to St. Dominic - Jackson Memorial Hospital (hereinafter "St. Dominic" or "Defendant") on July 9, 2002 with an acute onset of symptoms including fever, body aches, hypotension, breathing difficulty and a rash over her body. (R.8) At the time, Ms. Tolliver was alert and cooperative but complaining of being in pain. (R.8) She was treated by Salvador Arceo, M.D. and other employees of St. Dominic's Hospital. (R.8-10) Through a series of failures by the Defendants, Tolliver went into septic shock and became unresponsive and lost control of her organs and body functions on the evening of July 9, 2002. (R.9) She subsequently suffered brain death and died by Cardiac Arrest due to Meningoccocal Meningitis and Sepsis on July 13, 2002, all while under the exclusive care of the Defendants.[1] (R. 8-10)

II. Procedural Facts

On June 4, 2004, Plaintiffs/Appellee, Myrtis Tolliver, as Administratrix of the Estate of Tommie C. Tolliver, Deceased, Individually, and on Behalf of the Wrongful Death Beneficiaries of Tommie C. Tolliver, Deceased (hereinafter referred to as "Plaintiffs" or "the Estate") filed a Complaint for medical malpractice, negligence, and wrongful death against Salvador Arceo, M.D. and John and Jane Does 1-5.[2] *Arceo v. Tolliver* 949 So.2d 691, 692 (Miss. 2006). On June 25, 2004 and July 23, 2004, Plaintiffs subsequently filed their First Amended Complaint and Second Amended Complaint respectively, adding St. Dominic and specifically naming two other individual Defendants who were registered nurses involved in the care provided to Tommie Tolliver during the

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[1]Plaintiffs obtained an unequivocal expert opinion that Tommie Tolliver died as a result of the Defendants' negligence.

[2]For the sake of clarity and consistency with the Appellants' Brief, Appellees will likewise refer to the original lawsuit filed in this case as *Tolliver I.*

relevant time period.[3] *Id* at 693, n.1. The Plaintiffs did not send Miss. Code Ann. Section 15-1-36(15) notice letters to the Defendants prior to filing their Complaint.[4] *Id* at 693.

The Defendants filed a Motion to Dismiss the Plaintiff's Complaint or, in the alternative, for Summary Judgment, based on the fact that the Plaintiffs did not provide the Defendants with 15-1-36(15) notice letters prior to suit. *Id.* The trial court denied the motion, and the Defendants took an Interlocutory Appeal based on the trial court's judgment. *Id.* On August 3, 2005, this Court handed down its opinion in *Arceo v. Tolliver*, 2006 WL 2168180 (Miss. 2006), rendering judgment in favor of the Defendants and dismissing the Plaintiffs' case *with* prejudice due to the Plaintiffs' failure to meet the requirements of Miss. Code Ann. Section 15-1-36(15).[5] The Plaintiffs moved for rehearing on the basis that the Supreme Court erred in ruling that the dismissal was with prejudice and instead should have been one without prejudice, specifically arguing that either or both the principle of equitable tolling or the savings statute, Miss. Code Ann. Section 15-1-69, should apply. (R. 85, 167). Upon reconsideration, on November 16, 2006, the Supreme Court denied the motion for rehearing but, critically, altered the dismissal from one with prejudice to one *without* prejudice. *Arceo v. Tolliver* 949 So.2d 691, 697-98 (Miss. 2006).

The Supreme Court clerk issued the mandate dismissing the Plaintiffs' Complaint in *Tolliver I* without prejudice on March 15, 2007. (Supp. R. 8) Prior to the issuance of the mandate, the

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[3]The First Amended Complaint was served on St. Dominic and Arceo on July 13, 2004 and, as the Court indicated, the Supreme Court record was silent as to service of the Complaint and the Second Amended Complaint. *Id* at 693, n.1.

[4]In an attempt to fashion a remedy consistent with the Court's prior decisions and to serve the underlying purpose of the statute, Plaintiffs attempted to give the required statutory notice via notice letters to Defendants on November 30, 2004. *Id* at 693, n.2. The logic, in line with controlling case law at the time, was that the notice letters would have served to stay the case for sixty (60) days in order for the parties to attempt resolution after which time, if no resolution occurred, litigation would resume.

[5]Because the original opinion was subsequently withdrawn, that opinion was not reported in the Southern Reporter, and is likewise not available on online search engines. The Westlaw opinion now merely reads "Opinion withdrawn on denial of rehearing November 16, 2006. For substituted opinion, see 2006 WL 3317036." *Arceo v. Tolliver*, 2006 WL 2168180 (Miss. 2006) (not reported in Southern Reporter).

Plaintiffs, finding themselves in a legal quandary regarding proper procedure, sent Dr. Arceo and St. Dominic notice letters on February 28, 2007. (R. 101-02) Plaintiffs sent said "notice letters" to the Defendants out of an abundance of caution, despite the fact that the Defendants had been on actual notice of the "legal basis of the claim," and the "type of loss" sustained by the Plaintiff, "including with specificity the nature of the injuries suffered" since, and by virtue of, the Complaint, First Amended Complaint, Second Amended Complaint, and subsequent post-filing notice letters from from *Tolliver I. Arceo*, 949 So.2d at 691, n.1. The Plaintiffs refrained from filing suit for more than sixty (60) days per directive of the statute and on May 9, 2007, Plaintiffs filed the instant lawsuit (hereinafter "*Tolliver II*") against these same Defendants and based upon the exact same legal theories and underlying facts as *Tolliver I.* (R. 4-24)

The Defendants separately moved for summary judgment and/or to dismiss the Plaintiff's Complaint with prejudice based on the statute of limitations and/or due to the Plaintiffs' alleged "multiple failures" to comply with Miss. Code Ann. 15-1-36(15). (R. 54-65, 115-36). The Plaintiffs responded, and the trial court held hearing. At the motion hearing, the trial court granted the Defendants' motion to the extent that the Motions asked for dismissal of the Plaintiffs' Complaint, but the lower court refused to dismiss the Plaintiffs' Complaint *with* prejudice, ruling rather that dismissal without prejudice was proper.[6] (Tr. 23-25) The trial court ruled that the savings statute applied, having found that *Tolliver I* as it was initially filed was "duly filed . . . " and that "the defect ultimately found in the case by the Supreme Court was as a matter of form . . . , [as] evidenced by

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[6]Circuit Court Judge Bobby B. DeLaughter, presiding over the Circuit Court, held hearing on the Defendants' Motions on November 30, 2007, and issued his ruling from the bench. The Court's ruling can be found in full in the Supreme Court record at Tr. 23-25. In the lower court's Order of Dismissal, the judge did not go into further detail of its ruling, stating simply that it was ruling "consistent with the comments and ruling of the Court from the bench at the motion hearing that the Motion (sic) to Dismiss is granted and this case should be, and hereby is, dismissed *without* prejudice." (R. 241-42) (emphasis in original) As pointed out by the Defendants in their Brief, Judge DeLaughter recused himself from this case in all respects on February 28, 2008. (R. 264)

the fact that the Supreme Court's order of dismissal was one without prejudice."[7] (Tr. 24) Second, as to the content of the letter, the trial court ruled that substantial compliance is the proper standard for the content of a 15-1-36(15) notice letter. (Tr. 24) Next, the Court ruled that it interpreted the statute to mean that a 15-1-36(15) notice letter is required before any filing, and that it was required in the instant second filing. (Tr. 24-25) Because the content requirements were not met, reasoned the trial court, the Plaintiffs did not substantially comply, and dismissal without prejudice of the Plaintiff's Complaint was proper as the statute of limitations had been abated pursuant to the savings statute. (Tr. 25)

The Defendants then filed the instant appeal with this Court, disputing the lower court's conclusion that this matter should dismissed without prejudice, claiming that the matter should have rather been dismissed with prejudice. (R. 246-250) The Plaintiffs, while not wholly agreeing with the trial court's rationale and findings, believe that the trial court's conclusion as to the form of the instant dismissal – without prejudice – was correct, and that the Plaintiffs should be allowed to proceed consistent with the lower court's ruling and the Plaintiffs' other arguments set forth herein.

SUMMARY OF THE ARGUMENT

The Defendants have appealed the trial court's ruling, asking this Court to dismiss the Plaintiffs lawsuit under various theories. Defendants first argue that the Plaintiffs' "repeated failures to comply with Miss. Code Ann. § 15-1-36(15)" warrant dismissal of the Plaintiffs' action with prejudice. Second, the Defendants argue that the trial court erred in applying a "substantial compliance" standard to the content requirements for pre-suit notice contained in Miss. Code Ann. § 15-1-36(15), arguing that instead "non-compliance" was the only issue. Finally, the Defendants

[7]Though the trial court did not specifically attribute its ruling in the foregoing language to the savings statute, towards the end of the bench ruling the judge stated that the statute of limitations had not run against the Plaintiff pursuant to the savings statute. (Tr. 25)

argue that the statute of limitations has run against the Plaintiffs under two separate but distinct theories: 1) that because the Plaintiffs should not receive the benefit of the savings statute, Miss. Code Ann. § 15-1-69, the statute of limitations ran against the Plaintiffs, at the latest, two (2) years after Tommie Tolliver passed away; or 2) that even if the principle of equitable tolling applies and the Plaintiffs' complaint in *Tolliver I* tolled the statute of limitations, the Plaintiffs cannot receive the additional sixty (60) days of tolling due to their allegedly deficient 15-1-36(15) notice letter and thus, the statute would have run approximately thirty-nine (39) days after the Supreme Court mandate issued in *Tolliver I.*

As opposed to the Defendants' conclusions that they ask this Court to reach, the Plaintiffs would argue first and foremost that this Court should find, consistent with Mississippi case law, that the savings statute, Miss. Code Ann. § 15-1-69, and the theory of equitable tolling – that "the filing of a complaint tolls the statute of limitations" – apply. *Owens v. Mai*, 891 So. 2d 220, 223 (Miss. 2005). Further, the Defendants urge this Court to impermissibly hold that neither tolling nor the savings statute can apply when there has been a 15-1-36(15) defect because a complaint cannot be considered to have been "filed," "duly filed," or "commenced" under the Mississippi Rules of Civil Procedure without strict compliance with Miss. Code Ann. § 15-1-36(15). Because such an interpretation of 15-1-36(15) would be unconstitutional, consistent with *Wimley v. Reid*, --- So.2d. ---- 20078 WL 4254587, *3 (Miss. 2008) (No. 2007-CA-00593-SCT, Sept. 18, 2008), and other long standing Mississippi case law, a constitutional construction of 15-1-36(15) should be given to the statute rendering the Defendants' argument as to the application of tolling or the savings statute, along with a finding that *Tolliver I* was dismissed "as a matter of form," without merit.

Second, the Plaintiffs would urge this Court to find that the February 28, 2007 Miss. Code Ann. § 15-1-36(15) notice letter was not required considering the fact that the Defendants were fully

aware – and on *actual* notice – of the precise legal bases of the claim and the type of loss sustained, including the nature of the injuries suffered, pursuant to Plaintiffs' *Tolliver I* Complaint, First Amended Complaint, Second Amended Complaint, post-filing notice letters, and the ensuing two-and-a-half years of litigation. Because the instant Complaint, *Tolliver II*, was filed on May 9, 2007, well within one year of the dismissal of *Tolliver I* given under the savings statute, the Plaintiffs' Complaint was timely filed and dismissal was not proper.

Third, even if the Court determines that a notice letter was required prior to the filing of *Tolliver II*, the Plaintiffs would urge this Court to find, under a similar rationale, that because the Defendants were on actual notice of the legal bases of the claim and the type of loss sustained, including the nature of the injuries suffered pursuant to *Tolliver I*, the notice letter was adequate under the circumstances and tolled the statute for sixty (60) days pursuant to 15-1-36(15). Alternatively, should this Court find that the notice letter was both necessary and insufficient, even under these particular circumstances, the Plaintiffs would urge this Court to rule, as it did in *Tolliver I*, that the dismissal should be, as ruled by the trial court, a dismissal *without* prejudice.

In any instance, should this Court rule that dismissal of the Plaintiff's Compliant without prejudice is proper, the Plaintiffs would urge this Court to rule, for the same reasons that it should rule that the savings statute and tolling apply after *Tolliver I*, that the savings statute and tolling apply after *Tolliver II*. The Plaintiffs would further submit, though the Court likely will not need to address this issue, that even in the event that their notice letters were deemed necessary and insufficient, that they should still be afforded sixty (60) days tolling under Miss. Code Ann. § 15-1-36(15).

Lastly, and alternatively, any interpretation of Miss. Code Ann. § 15-1-36(15) that would leave the Myrtis Tolliver, on behalf of the Estate of Tommie Tolliver, without even *access* to a

court for a remedy for the death of Tommie Tolliver would be unconstitutional as applied to the facts of this case. The Constitution of the State of Mississippi provides that "All courts shall be open; and every person for an injury done to him, in his land, goods, person or reputation, *shall have a remedy by due course of the law*, and right and justice shall be administered, without sale, denial, or delay." Miss. Const. Art. III, sec 24 (emphasis added). Further, "[n]o person shall be debarred from prosecuting or defending any civil cause for or against him or herself, before any tribunal in the state, by him or herself, or counsel, or both." Miss. Const. Art. III, sec 25. Consistent with the foregoing, and other Federal constitutional laws, should Miss. Code Ann. § 15-1-36(15) otherwise be interpreted to deprive the Estate of Tommie Tolliver of fundamental constitutional rights, any such interpretation of Miss. Code Ann. § 15-1-36(15) would be unconstitutional under these limited circumstances only.

In sum, a ruling dismissing the Plaintiff's case with prejudice relating either to the Plaintiffs' deficiencies in *Tolliver I* or for any deficiencies in the February 28, 2007 Miss. Code Ann. § 15-1-36(15) notice letter, would be nothing more than an elevation of form over substance, all at the expense of the family of a deceased child, and to the benefit of the alleged tortfeasors. The Defendants cannot make any plausible argument that they have been prejudiced by the Plaintiffs' alleged defect in notice as they have now been on actual notice of the pertinent facts and law of this case for years. The Plaintiffs should be able to, at last, proceed to the merits of their case.

ARGUMENT

STANDARD OF REVIEW

This Court applies a *de novo* standard of review to questions of law. *University of Miss. Med. Ctr. v. Easterling*, 928 So.2d 815, 817 (Miss. 2006). This Court is well-aware of the standard of review in motions to dismiss. "When considering a motion to dismiss, this Court's standard of

review is *de novo*. When considering a motion to dismiss, the allegations in the complaint must be taken as true and a motion should not be granted unless it appears beyond doubt that the Plaintiff will be unable to prove any set of facts to support his claim." *Scaggs v. GPCH-GP, Inc.*, 931 So. 2d 1274, 1275 (Miss. 2006); *See also Lang v. Bay St. Louis/Waveland Sch. Dist.*, 764 So.2d 1234 (Miss. 1999); *T. M. v. Noblitt*, 650 So.2d 1340, 1342 (Miss. 1995).

Courts are advised to exercise caution when determining whether a motion for summary judgment under M.R.C.P. 56 shall be granted. Only if no genuine issue of material fact exists, and the movant is entitled to judgment as a matter of law, should the motion be granted. Miss. R. Civ. Pro. 56(c). The purpose of a motion for summary judgment is not to resolve issues of fact but to determine whether issues of fact exist. *Spartan Foods Systems, Inc. v. American Nat'l Ins. Co.*, 582 So. 2d 399, 402 (Miss. 1991).

> Above all, a trial court should take great care in granting a motion for summary judgment. *Palmer v. Anderson Infirmary Benevolent Ass'n*, 656 So. 2d 790, 794 (Miss. 1995). If the trial court is doubtful as to whether a genuine issue of material fact exists, it should deny the motion for summary judgment. *American Legion Ladnier Post Number 42, Inc. v. City of Ocean Springs*, 562 So. 2d 103, 106 (Miss. 1990).

Davidson v. North Cent. Parts, Inc., 737 So. 2d 1015, 1016 (Miss. Ct. App. 1998). This Court must review carefully all of the evidence before it, including admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. *American Legion Ladnier Post No. 42, Inc. v. City of Ocean Springs*, 562 So. 2d 103, 105-106 (Miss. 1990). The evidence must be viewed in the light most favorable to the non-movant plaintiffs. *Id.* "Issues of facts sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite." *Id.*

"The proponent of a summary judgment motion bears the burden of showing that there are

no genuine issues of material fact such that he is entitled to judgment as a matter of law." *Bowie v. Montfort Jones Memorial Hosp.*, 861 So. 2d 1037, 1040-41 (Miss. 2003). Additionally, the court must view all "the evidence in a light most favorable to the nonmoving party," and if there are triable issues of fact, summary judgment must be denied. *Id.* at 1041. A fact will be considered material if it has a tendency to decide any of the issues of the case which have been properly raised by the litigants. *Pearl River County Bd. of Supervisors v. South East Collections Agency, Inc.*, 459 So. 2d 783, 785 (Miss. 1984). "Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite." *Quinn v. Mississippi State University*, 720 So. 2d 843, 846 (Miss. 1998). The moving party carries the burden of demonstrating that no genuine issue of fact exists and the non-movant should be given the benefit of the doubt. *Id.*

I. Both the principle of Equitable Tolling and the Savings Statute apply such that the Plaintiffs' instant Complaint is filed within the applicable statute of limitations

The Plaintiffs' failure to strictly comply with the notice statute has already resulted in a remedy from the this Court – dismissal of *Tolliver I without* prejudice. Defendants now ask this Court to return to the dismissed earlier case and exact a punitive measure upon the Plaintiffs, notwithstanding the new civil action and the previous resolution of this matter. As this Court is aware, it has already implicitly passed on Defendant's reasoning offered as to why the Plaintiffs' *Tolliver I* lawsuit should have been dismissed with prejudice. (R. 85, 167) Plaintiffs' argument to the Supreme Court based on the savings statute and the principal of tolling upon rehearing resulted in a new opinion and a dismissal without prejudice so that the Plaintiffs could re-file within the applicable statute of limitations and have their day in court. *Tolliver*, 949 So. 2d at 692, 98. ("The motion for rehearing is denied. The original opinions are withdrawn, and these opinions are

substituted therfor.")[8] *Id* at 692.

A. The principle of Equitable Tolling applies in this instance

It is bedrock Mississippi law that the filing of a complaint tolls the running of the statute of limitations. *Owens v. Mai*, 891 So. 2d 220, 223 (Miss. 2005). The filing of an action tolls the statute of limitations for the 120-day service period of Rule 4(h); if, after that time period, no process has been served, the clock resumes ticking. *Watters v. Stripling*, 675 So. 2d 1242, 1244 (Miss. 1996) (citing *Erby v. Cox*, 654 So. 2d 503 (Miss. 1995)).

In both *Watters* and *Erby*, this Court analyzed the principle of tolling in the context of medical malpractice claims. The law is clear that while a plaintiff's case is pending, the statute of limitations is tolled, assuming timely service of process. See *Jackson, Jeffery, Miss. Civil Procedure* § 2.13, *Chapter 2 Territorial Jurisdiction and Service of Process.* (2006). Likewise, this Court held in *Deposit Guaranty National Bank v. Roberts* that filing a suit five days before the statute of limitations would have run tolled the statutory period until the suit's dismissal, which occurred some twenty months later. 483 So. 2d 348, 352 (Miss.1986). *See also Canadian Nat'l./Illinois Cent. Ry. Co. v. Smith*, 926 So. 2d 839, 845 (Miss. 2006); *Triple "C" Transp., Inc. v. Dickens*, 870 So. 2d 1195, 1199 (Miss. 2004) (citing *Watters*, 675 So.2d at 1244).

In *Tolliver I*, the Complaint and First Amended Complaint were timely filed and timely served. *Tolliver* 949 at 693, n.1. The dismissal did not occur until the mandate issued on March 15, 2007. (Supp. R. 8). Therefore, the statute of limitations, under the principle of tolling – notwithstanding applicability otherwise of the savings statute – would have began running again on

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[8]While the original withdrawn opinion was not reported in the Southern Reporter and is no longer accessible, the fact that the original opinion dismissing *Tolliver I* was changed from one with prejudice to one without prejudice is not in dispute. Plaintiffs made this factual statement before the lower court and it was never disputed by the Defendants in their only rebuttal, that of Dr. Arceo, to the Plaintiffs' Response to the Defendants Motions for Summary Judgment, or in the alternative, to Dismiss. (R. 181-193) The factual assertion was likewise never disputed by the Defendants at the motion hearing. (Tr. 1-25)

March 16, 2007. Assuming that the February 28, 2007 Miss. Code Ann. § 15-1-36(15) notice letter was necessary and that it tolled the statute for sixty (60) days pursuant to the statute, despite any alleged deficiencies, only 8 additional days had run against the statute when Plaintiffs filed their Complaint on May 9, 2007, leaving at least 31 remaining days against the statute.[9] *Tolliver II* was, therefore, timely filed.

B. The Savings Statute, Miss. Code Ann. § 15-1-69, also applies to the present case

In addition to applicability of the principle of tolling, the saving statute, found at Miss. Code Ann. section 15-1-69, provides a one-year time period after dismissal for *timely-filed* cases in which a plaintiff may file a new action for the same claim if the original action was defeated *as a matter of form*. Critically, the statute applies to causes being reversed on appeal:

> If in any action, duly commenced within the time allowed, the writ shall be abated, or the action otherwise avoided or defeated, by the death of any party thereto, or for any matter of form, or if, after verdict for the plaintiff, the judgment shall be arrested, or if a judgment for the plaintiff *shall be reversed on appeal*, 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, or after reversal of the judgment therein . . . .

Miss. Code Ann. § 15-1-69 (emphasis added).

This Court has previously emphasized the weight and importance the saving statute carries, noting its consistency with our state constitution in stating:

> [O]ne of the designs of the statute is, with which section 147 of the Constitution is in keeping, to protect parties who have mistaken the forum in which their causes should be tried, who simply entered the temple of justice by the door on the left, when they should have entered by the door on the right.

Ryan v. Wardlaw, 382 So. 2d 1078, 1080 (Miss. 1980) (quoting *Hawkins v. Scottish Union & National Ins. Co*,110 Miss. 23, 69 So. 710, 713 (1915). In *Ryan*, an unsigned document that was

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[9]Plaintiffs affirmatively re-assert herein that the discovery rule applies to this case. (R. 93, 178).

entered styled "dismissed" was later found to be error by the trial court and grounds for reinstatement of the cause on the docket. *Id.* at 1079. The defendants challenged jurisdiction on the grounds that when the initial dismissal order was placed in the court minutes on the last day of the term, the day the minutes were normally signed, the court thereafter had no jurisdiction to reinstate the cause. *Id.* The trial court agreed with this contention and executed an order removing the cause from the issue docket. *Id.* On appeal, this Court found that section 15-1-69 applied to that last order of dismissal for lack of jurisdiction. *Id.* Though the facts in *Ryan* are distinguishable somewhat, this Court focused on the fact that the statute was to be liberally interpreted in favor of allowing plaintiffs their day in court:

> It [the saving statute] is a highly remedial statute and ought to be liberally construed for the accomplishment of the purpose for which it was designed, namely, to save one who has brought his suit within the time limited by law from loss of his right of action by reason of accident or inadvertence, and it would be a narrow construction of that statute to say that because, if plaintiff had, by mistake, attempted to assert his right in a court having no jurisdiction, he is not entitled to the benefit of it.

Id. (quoting *Tompkins v. Pac. Mut. Life Ins. Co.*, 53 W.Va. 479, 484, 44 S.E. 439, 441 (1903)).

I. "Matter of Form"

Several Mississippi cases have addressed the issue of when a case might fall under the "matter of form" clause of the saving statute. In one of the earliest cases discussing the issue, the Court declared that "[w]here the plaintiff has been defeated by some matter not affecting the merits, some defect or informality, which he can remedy or avoid by a new process, the statute shall not prevent him from doing so, provided he follows it promptly, by suit within a year." *Hawkins*, 69 So. at 713. (emphasis added, internal citations and quotation omitted). More simply, it is fundamental that a case dismissed for a non-merits based reason, like this case, falls under the protection of the saving statute.

One "matter of form" that has been repeatedly held to fall under the non-merits based exception of the saving clause is dismissal for lack of jurisdiction. *Deposit Guar. Nat'l Bank*, 483 So. 2d at 353; *Lowry v. International Broth. of Boilermakers, Iron Ship Builders and Helpers of America*, 220 F.2d 546, 548 (5th Cir. 1955). Indeed, our state's case law is replete with holdings that dismissal for a lack of jurisdiction unquestionably qualifies as a "matter of form" within the statute's meaning and triggers the saving statute. *See, e.g., Canadian Nat'l/Ill. Cent. Ry. Co. v. Smith*, 926 So. 2d 839, 845 (Miss. 2006) (dismissal based on misjoinder and improper venue constitutes dismissal as matter of form); *Ryan*, 382 So. 2d 1078, 1079; *Hawkins*, 69 So. 710, 712 (case dismissed by trial for lack of subject matter jurisdiction); *Wertz v. Ingalls Shipbuilding, Inc.*, 790 So. 2d 841, 845 (Miss. Ct. App. 2000) (claims filed in federal district court were dismissed for lack of subject matter jurisdiction and eventually re-filed later in state court). The Fifth Circuit holds similarly. *See Lowry*, 220 F.2d 546 (case dismissed for lack of jurisdiction of a party defendant).

Recently, in a case altogether omitted by the Defendants in their Appellant's Brief, this Court declared that "the notice requirement of section 15-1-36(15) is mandatory and *jurisdictional*." *Saul v. Jenkins*, 963 So.2d 552, 554 (Miss. 2007) (citing *Arceo v. Tolliver* 949 So.2d 691, 695) (emphasis added). Thus, the Court made clear, even citing to *Tolliver I*, that notice requirements of section 15-1-36(15) are, in fact, jurisdictional. As such, the dismissal of *Tolliver I* amounted to a dismissal for lack of subject matter jurisdiction. *Tolliver I*, therefore, having now been determined by this Court to have been dismissed for a lack of subject matter jurisdiction, meets the requirement of having been dismissed as "a matter of form," thus fulfilling that requirement of the savings statute.

Likewise, this Court has stated that the fact that a court does not have subject matter jurisdiction does not mean that the plaintiff did not "duly commence" his complaint. *Crawford v.*

Morris Transportation, Inc., 990 So.2d 162, 172 (Miss. 2008) ("Even though the federal court ultimately dismissed the matter [for lack of subject matter jurisdiction], Crawford's federal court complaint was nevertheless 'duly commenced' as defined under Section 15-1-69.") Miss. Code Ann. § 15-1-69 (Rev. 2003); see *Hawkins*, 69 So. at 713 (1915) ("duly commenced" does not require that the action be commenced in a court having subject matter jurisdiction).

II. "Duly Commenced"

To that end, the Defendants' primary argument in their brief is that the Plaintiffs did not *duly commence* their original action – *Tolliver I* – a prerequisite to gaining the benefit of the savings statute. Appellants' Brief at 16, 17.[10] Defendants' argument is simple: because section 15-1-36(15) states that "no action . . . may be begun"[11] without sixty (60) days notice, and because Plaintiffs failed to meet such requirement in *Tolliver I*, that the Plaintiffs' complaint in *Tolliver I* could not have been "duly commenced" to meet that requirement of the savings statute. (Appellant's Brief at 16). While the simplicity of the argument is certainly enticing, the interpretation of section 15-1-36(15) that the Defendants ask this Court to make would be constitutionally impermissible consistent with *Wimley v. Reid*, --- So.2d. ---- 20078 WL 4254587, *3 (Miss. 2008) (No. 2007-CA-00593-SCT, Sept. 18, 2008).

In *Wimley*, this Court confronted the "attorney certificate of consultation" attachment requirement of section 11-1-58 – a statute promulgated from similar legislative cloth as that of 15-1-36(15). This statute requires an attorney, in sum, to attach a certificate to a medical malpractice

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[10]The Defendants likewise employ the same rationale to their argument that the principle of equitable tolling should not apply to the instant case. (Appellants' Brief at 13). To the extent that the Appellants employ said rationale to the principle of equitable tolling, the Plaintiffs' response and analysis herein within the savings statute framework shall apply equally to their argument that the principle of equitable tolling is applicable.

[11]Defendants state likewise that the Plaintiff was "prohibited from filing a medical malpractice action until she gave Defendants pre-suit notice and waited sixty days." (Appellants Brief at 16).

plaintiffs' complaint certifying that the attorney had consulted with a qualified expert and believed that, after such consultation, a reasonable basis exists for filing the lawsuit. Miss. Code Ann. 11-1-58(1). Specifically, the Court was asked to decide whether failure to attach such a certificate alone, irrespective of the actual consultation requirement, requires dismissal. *Wimley*, at *1. Looking to the constitutional doctrine of Separation of Powers, specifically that between the judiciary and the legislative branch, the Court found that the Legislature improperly overstepped its constitutional authority by implementing a law that encroached into the judiciary's rule-making authority insofar as it is within the judiciary's authority to promulgate procedural requirements through the Mississippi Rules of Civil Procedure ("M.R.C.P."). *Id* at *3. In other words, when the Legislature mandated attachment of a certificate to a plaintiff's complaint, it required a plaintiff to file and plead his complaint in a manner that is contrary to the pleading rules set forth in Rule 8 of the M.R.C.P A statute requiring such a direct contradiction with the M.R.C.P, stated the Court, was unconstitutionally impermissible under the Separation of Powers doctrine. *Id.* Critically, the Court in *Wimley* stated that there is a "constitutional imperative that the Legislature refrain from promulgating procedural statutes which require dismissal of a complaint, and particularly a complaint filed in full compliance with the Mississippi Rules of Civil Procedure." *Id.*

In the present case, though the Plaintiffs do not argue herein that the pre-suit notice requirements promulgated by the Legislature infringe upon the judiciary's procedural rule-making authority *per se*, the interpretation of Miss. Code Ann. § 15-1-36(15) that the Defendants urge this Court to accept would be, as in *Wimley*, unconstitutionally impermissible. To be specific, the Defendants are asking this Court to read 15-1-36(15) in such a way that 15-1-36(15) would dictate when a civil action can be considered "filed." (Appellant's Brief at 13, 16, 17). Of course, the Mississippi Rules of Civil Procedure dictate that the commencement of an action is accomplished

by the filing of a complaint. Miss. R. Civ. P. 3(a). ("A civil action is commenced with the filing of a Complaint."); see also, *Crawford v. Morris Transportation, Inc.*, 990 So.2d 162, 172 (Miss. 2008) ("A Complaint goes to the heart of whether a civil action exists."); *Nat'l Union Fire Ins. Co. v. Willis*, 296 F.3d 336, 341-42 (5th Cir. 2002) (A Complaint commences a civil proceeding). Therefore, should this Court accept the interpretation that the Defendants are urging it to take, the statute would be rendered unconstitutional under the concept of Separation of Powers consistent with *Wimley*. To allow construction of the statute in the way suggested by the Defendants, the Legislature would have overstepped their constitutional authority by making a law that controls when a Complaint can be considered "filed," a matter which is squarely within the prerogative of the judiciary. Miss. R. Civ. P. 3(a).

It has long been Mississippi law that where a reasonable reading of a statute can be read in two ways, one of which is constitutional and the other of which is not, the Court will construe the statute in such a way so as to not render the statute unconstitutional. ("In the case of a statute susceptible of two constructions, neither inherently unreasonable by reference to the words, we must read it so as to uphold it where one possible construction would render it unconstitutional"). *Chevron U.S.A., Inc. v. State*, 578 So.2d 644, 652 (Miss.1991) *see also, Robinson v. State,* 143 Miss. 247, 256, 108 So. 903, 904 (1926). As such, this Court must not give 15-1-36(15) the reading urged by the Defendants that would render the statute unconstitutional. Without such an interpretation, the Plaintiffs' complaint in *Tolliver I*, consistent with the Mississippi Rules of Civil Procedure, must be considered to have been duly filed. Because the Plaintiffs' Complaint in *Tolliver I* was duly filed, the Plaintiffs have satisfied that prerequisite of the savings statute.

III. "Good Faith"

The Defendants have pointed out to this Court that "good faith" in the filing of a complaint

by a plaintiff is an element in determining the right to invoke the savings statute. (Appellant's Brief at 18, 19). Boldly, the Defendants argue to this Court that the Plaintiffs do not meet this element. Describing "good faith" in the context of the savings statute, this Court stated in *Hawkins*, quoting the Supreme Court of the United States in *Smith v. McNeal*, 109 U. S. 426, 3 Sup. Ct. 319, 27 L. Ed. 986, that

> Cases might be supposed, perhaps, where the want of jurisdiction in the court was so clear that the bringing of a suit therein would show such gross negligence and indifference as to cut the party off from the benefit of the saving statute, as if an action of ejectment should be brought in a court of admiralty, or a bill in equity should be filed before a justice of the peace.

110 Miss. 23, 69 So. 710, 713 (1915). Here, the Plaintiffs filed their Complaint in *Tolliver I* in every way proper aside from one procedural defect, the failure to give notice under a new statutory scheme. The Plaintiffs then attempted to remedy such failure in *Tolliver I* by providing the Defendants with notice letters and asking the trial court to invoke a stay of the litigation for a sixty (60) day period in order to meet the requirements of 15-1-36(15). *Arceo*, 949 So.2d at 695. While eventually Plaintiffs' attempts to cure the defect were deemed improper, it cannot be said that the Plaintiffs filed their Complaint in bad faith as described in *Hawkins*. Rather, the Supreme Court in *Tolliver I* determined that the Plaintiffs made a mistake, and a costly mistake at that, depriving the Plaintiffs nearly of two and a half years while litigating matters not relating to the merits of this case. That mistake, a mere procedural defect, cannot be considered to amount to gross negligence as suggested by the Defendants.

For the foregoing reasons, the Plaintiffs satisfy the "good faith" element of the savings statute. Because the Plaintiffs likewise demonstrated that the remaining elements of the savings statute have been satisfied *supra*, section 15-1-69 should be invoked for the filing of *Tolliver II*.

II. Plaintiffs' February 28, 2007 Miss. Code Ann. § 15-1-36(15) notice letter was not required, or alternatively, the letter was adequate, under the specific circumstances of this case

This Court should next find that the Plaintiffs' February 28, 2007 Miss. Code Ann. § 15-1-36(15) notice letter was not even required considering the fact that the Defendants were fully aware of the legal bases of the claim and the type of loss sustained, including the nature of the injuries suffered, pursuant to Plaintiffs' *Tolliver I* Complaint, First Amended Complaint, Second Amended Complaint, post-filing notice letters, and the ensuing two and one half years of litigation. Should the Court so find it would, by such finding, and with application of the savings clause, render moot any of the further arguments set forth by the Defendants. Alternatively, should this Court find that the notice letters were required, it should find, for the very same reasons, that the notice letters were, in fact, adequate under the circumstances.[12]

A. The notice letter was not required

As described *supra* in the "Procedural Facts," when the *Tolliver I* opinion was issued on denial of the motion for rehearing, holding that dismissal without prejudice was proper, the Plaintiffs were left in a position where the proper procedure for refiling for the same cause of action was not at all clear. The Plaintiffs and Defendants, St. Dominic and Dr. Salvador Arceo, had just been through approximately two and one half years of litigation over a case whose underlying facts were intimately known by all parties involved including, critically, the Defendants themselves and all of

[12]As described by the Defendants in their Brief, the lower court ruled that "substantial compliance" is the standard that this Court would apply to the content of the notice and that the Plaintiffs were "not in substantial compliance with the requirements of the statute." (Tr. 25) Regarding the standard, the Defendants have asked this Court to rule that the lower court erred in applying the standard of substantial compliance, despite the fact that the lower court ruled that the Plaintiffs were not in substantial compliance. While the Plaintiffs would agree with the Defendants to the extent that, considering prior case law, strict compliance likely is the standard for the content "requirements" of 15-1-36(15), Plaintiffs would submit that this question in and of itself has no bearing on the outcome of the ultimate issues that this Court must decide. Rather, the Defendants are merely attempting to divert the attention of this Court from the questions of law before it which are otherwise ripe for consideration.

their attorneys.[13] At that point, it was unclear whether the Plaintiffs were required to send 15-1-

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[13]The First Amended Complaint in *Tolliver I*, almost identical to the Complaint in *Tolliver II*, was not merely a notice pleading alleging medical negligence by the Plaintiffs against the Defendants. Rather, the First Amended Complaint went into specific detail on the underlying facts of the medical negligence claim and went specifically into detail regarding how the facts of the case amounted to negligence on the part of Defendants St. Dominic and Dr. Arceo. The Complaint stated the following:

13. On July 9, 2002 at approximately 12:35 p.m., Tommie C. Tolliver, a 21 year old college student, presented by ambulance to the St. Dominic Emergency Room with acute onset of symptoms including fever, body aches, hypotension, breathing difficulty and a rash over her body. At this time, Tommie C. Tolliver was alert and cooperative but complaining of being in pain.

14. Upon her admission, Tommie C. Tolliver was available for care at St. Dominic Hospital for more than 8 ½ hours, parked in a hallway located in the hospital's Emergency Room during most of that time. At approximately 1:55 p.m., Salvador Arceo, M.D. performed a physical examination of Tommie C. Tolliver and noted mild-moderate respiratory distress. He also noted that she was anxious, tachycardia, with a heart rate greater than 100 beats per minute. He included the presence of petechiae, tiny pinpoint area of hemorrhage on her skin.

15. Within one and a half hours of her aforementioned arrival to St. Dominic, the laboratory reported to the emergency room staff that Tommie C. Tolliver had an elevated white blood cell count (greater than 23,000), indicative of a bacterial infection.

16. Thereafter, blood cultures were ordered and the blood collected at approximately 3:50 p.m. on July 9, 2002. An order for a Gram stain on the blood for cultures was not entered at this time.

17. At approximately 5:00 p.m. on July 9, 2002, the Emergency Room physician, Arceo, wrote an order for IV antibiotics but the nursing staff did not execute the IV antibiotic order at this time, neither did any other defendant. Tommie C. Tolliver did not receive her first dose of antibiotics until approximately 2:00 a.m. on July 10, 2002; being approximately nine (9) hours after first ordered. Regarding the care or treatment of Tommie C. Tolliver, no IV antibiotics were ordered by the defendants prior to 5:00 p.m. on July 9, 2002, despite her symptoms and condition.

18. Tommie C. Tolliver's clinical condition worsened over several hours as the virulent bacteria, "Neiserria Meningitidis" (which was confirmed by blood culture and Gram stain on July 10, 2002 and July 16, 2002) was permitted to promulgate freely, affecting her brain and Central Nervous System.

19. Tommie C. Tolliver went unobserved and was minimally reacted to by the Emergency Room staff and defendants until she went into a state of septic shock at approximately 7:00 p.m. on July 9, 2002. During this time, she became unresponsive and began to lose control of her organs and body functions.

20. By 9:00 p.m. on July 9, 2002, Tommie C. Tolliver was intubated and en route to ICU in a coma state.

21. The Emergency Room Physician's 5:00 p.m. IV antibiotic order was noted by the ICU nursing staff and Tommie C. Tolliver received the first dose of IV antibiotics on July 10, 2002 at approximately 2:00 a.m., being approximately nine (9) hours after the ER Physician wrote the order.

22. Repeat blood cultures done after 24 hours of IV antibiotic therapy confirmed the efficacy of antibiotic therapy, showing no growth.

23. Tommie C. Tolliver never regained consciousness but experienced loss of organ and body functions, brain death and loss her life on July 13, 2002, while under the care of the defendants. Tommie C. Tolliver died of Cardiac Arrest due to Meningococcal Meningitis and Sepsis. . . .

25. [St. Dominic] failed to exercise that degree of care and attention, and was negligent in the following respects:

a. Failed to enact and have in place standard operating policies and procedures to ensure adequate and proper patient care by its staff and nursing personnel or, in the alternative, failure to ensure that such staff and nursing personnel followed any such standard operating policies in the care of patients which were in effect during the time complained of herein;

b. Failure to provide in-house training to its staff and nursing personnel to ensure proper and adequate patient care during the time complained of herein;

c. Failure to provide adequate number of nursing personnel to ensure proper and adequate patient care;

d. Failure to ensure that staff and nursing personnel performed their respective duties in a fashion required to ensure proper, timely and adequate patient care;

e. Failure to require staff and nursing personnel on duty to be available in proximity of patients to ensure that patients' are and needs are promptly attended to timely;

f. Failure to ensure that staff and nursing personnel promptly and correctly comply with instructions rendered by patients' physician relating to the care and treatment of such patients while in the medical hospital facility;

g. Failure to ensure that staff and nursing personnel promptly notify the patients' physician of change of a patients' condition while in the medical hospital facility; and,

h. Failure to provide the quality and standard of care required by law;

i. Failure to ensure competent Medical Doctor coverage in the emergency room;

j. Failure to provide competent emergency room nursing staff to fulfill assigned responsibilities through comprehensive competency-based orientation and active preceptorship;

k. Failure to assign emergency nursing staff with consideration for the complexityand dynamics of the emergency room setting in accordance with their educational preparation and demonstrated proficiency;

l. Failure to provide an appropriate and adequate nurse/patient ratio;

m. Failure to have in place policies and/or contingency plans to assign staff members to meet patient care needs and/or failed to enforce any such plans that were in place;

n. Failure to have in place contingency plans including a Diversion (Divert) plan to manage the steady influx of patients to the Emergency Department and/or failed to enforce any such plans that were in place;

o. Failure to have in place policies to describe chain of physician responsibility in Emergency Department settings and/or patient "hands off" or failed to enforce such policies if they were in place;

p. Failure of the supervisors (Charge Nurse and Nursing Supervisor) to provide proper supervision of the nursing staff rendering direct care to Tommie C. Tolliver in the emergency department;

q. Failure to execute policy and procedures to ensure nursing staff timely and adequately implement physician orders. . . .

29. Defendant Salvador Arceo, M.D.['s] . . . failure, carelessness, negligence, omissions, and breaches of duties owed to Tommie C. Tolliver include, but are not limited to, the following:

a. Failure to provide the quality and standard of care required by law;

b.Failure to properly and timely recognize, appreciate, diagnose and treat the bacterial Meningococcal Meningitis from which Tommie C. Tolliver was suffering and ultimately lead to her death;

c. Failure to properly and timely recognize, appreciate, diagnose and treat the Sepsis from which Tommie C. Tolliver was suffering and ultimately lead to her death;

d. Failure to obtain an adequate history from the patient (Tommie C. Tolliver) to inform his impression of the patient's clinical state;

e. Failure to conduct and document a sufficiently comprehensive assessment and on-going reassessment of Tommie C. Tolliver from the time of her admission and through out her protracted stay in the Emergency Room;

f. Failure to assess Tommie C. Tolliver's neurologic status particularly in light of the progressive changes in her mental status and

36(15) notice letters to the Defendants, despite the fact that it was clear that the notice letters would serve no genuine purpose considering that the facts of the case were abundantly clear and known to all parties involved, or whether the Plaintiffs should simply file a new civil action upon issuance of the mandate. Though common sense dictated the latter choice, in that case, of course, the Plaintiffs risked that they would once again be found to have violated 15-1-36(15) by not sending formal notice prior to filing their Complaint. In the case of the former, the Plaintiffs risked the defense that no notice letters would be required at all due to the fact that the Defendants were on full notice of the underlying facts and legal theories of the case, thereby possibly rendering the Plaintiffs' *Tolliver II* Complaint being filed outside of the applicable statute of limitations in absence

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level of consciousness;

g. Failure to assume responsibility for appropriate management of the patient upon her admission to the Emergency Room until her disposition;

h. Failure to provide general medical supervisions and coordination of patient's care in the Emergency Room;

I. Failure to timely order appropriate antibiotics in excess of three hours after being made aware of grossly abnormal lab results, specifically a significantly elevated White Blood Cell (WBC) count and/or when noticing the presence of petechiae;

j. Failure to order appropriate lab tests (specifically Gram stain), which would provide critical diagnostic information within minutes versus days;

j. Failure to timely and properly initiate measures to facilitate transfer of Tommie C. Tolliver from the Emergency Room to the Intensive Care;

k. Failure to ensure accurate, complete and timely documentation of his complete involvement in the patient's care and therefore the failure to maintain a complete and accurate record of care;

l. Failure to maintain clear lines of physician responsibility;

m. Failure to recognize, appreciate, act upon and/or treat the early, but definitive signs and symptoms of meningitis, relating to Tommie C. Tolliver at all times mentioned herein;

n. Failure to refrain from treating patients whom he was not competent to treat and thereafter failing to timely attempt to learn the meaning and significance of symptoms which he did not recognize or understand the cause and/or meaning of;

o. Failure to follow and comply with the said medical hospital facility's standard operating policies and procedures, if any, relating to the care of patients, and particularly, Tommie C. Tolliver, instructed to them at said medical hospital facility. . . .

Plaintiffs' *Tolliver I* First Amended Complaint. Though the *Tolliver I* Complaint does not appear to be in the official Supreme Court record, pursuant to Defendants' Amended Designation of Record and the Agreed Order Granting Motion to Supplement Record, the Plaintiff's Complaint in *Tolliver I* is in the record. Because the *Tolliver I* First Amended Complaint is not in the record the Plaintiffs, out of an abundance of caution, have added it to the instant Brief as an Addendum.

of application of the savings statute.

Thus, finding themselves in a legal "Catch 22," the Plaintiffs mailed out new notice letters on February 28, 2007, to St. Dominic, Dr. Salvador Arceo, and one of the registered nurse Defendants sued in *Tolliver I.* (R. 21-23). The "re" line of the notice letter identified Ms. Tommie Tolliver as the matter to which the letter pertained. The letter then, albeit tersely, gave notice to the addressees of the letter, the same exact Defendants from *Tolliver I*, that the law firm of Baria, Hawkins & Stracener, on behalf of Tommie Tolliver, intended to bring a medical negligence lawsuit against them. (R. 21-23) The letter likewise included "carbon copies," specified by name on the copy of the letter, to several of the attorneys for the Plaintiffs in addition to several attorneys for the Defendants, including counsel of record for the Defendants in *Tolliver I*, who are also, as expected, counsel of record in *Tolliver II.* (R. 21-23) Though the letter did not specify each category a medical negligence Plaintiff is to identify in a typical 15-1-36(15) notice letter, it would be preposterous to believe that any of the letter's recipients, either the named Defendants or the Defendants' counsel, did not know precisely the subject matter to which the letter pertained. Of course, it related to the cause of action that the Defendants and their attorneys had been litigating, at that point, for nearly three years. Further, and more to the point, it is noteworthy that at no point do the Defendants in their Brief argue that they have been prejudiced in any way by the allegedly deficient notice letter. Rather, the Defendants are merely seeking to opportunistically benefit from the technicalities of a statute that provides no clear remedy for violation thereof.

In regards to whether the letters were, in fact, required, Plaintiffs would submit that, despite this Court's holdings that the requirements of 15-1-36(15) are mandatory, that under the circumstances of this case, 15-1-36(15) notice letters were not required, contrary to the finding of the trial court. Should this Court make the determination that the notice letters were not required,

it should find that, in conjunction with the fact that the Plaintiffs' filed *Tolliver II* with the one year after dismissal as provided by the savings statute, the Plaintiffs' Complaint was timely filed.

B. The February 28, 2007 notice letter was adequate under the circumstances

For the same reasons described in **subsection A** of this Argument, this Court should find that, under the circumstances, the Plaintiffs' 15-1-36(15) letter did comply and was adequate to toll the statute. Again, the same Plaintiffs of *Tolliver I* sent notice letters to the same Defendants of *Tolliver I* informing them that they intended to sue them for medical negligence. The Plaintiffs likewise copied the same attorneys on the notice letter who had previously been defending *Tolliver I.* The Defendants now raise in this Appeal that the "Plaintiff left out an entire category of information required by 15-1-36(15), namely "the type of loss sustained, including with specificity the nature of the injuries suffered." (Appellant's Brief at 11). Yet, as is abundantly clear from Plaintiffs' footnote 12, the Defendants and the attorneys they had retained to represent them in the matter were on full and actual notice of the categories of information in 15-1-36(15), the alleged omission of which Defendants assert that this lawsuit should be dismissed without prejudice. Further, the Plaintiffs again stress the fact that the Defendants do not claim that they had no notice and do not claim that they have been prejudiced. This fact alone speaks volumes to the sincerity of their argument that they were not provided with proper notice.

Because the Defendants were already on full, actual notice, the Plaintiffs February 28, 2007 notice letter manifesting the Plaintiffs' intent to sue the Defendants, along with the additional circumstances surrounding this case, was sufficient. Because the February 28, 2007 notice letter complied, the statute limitations was tolled for 60 days after the letters were mailed out. *Scaggs v. GPCH-GP, Inc.*, 931 So.2d 1274, 1276 -1277 (Miss. 2006); Miss. Code Ann. 15-1-36(15). After sixty (60) days elapsed, only eight (8) days expired when the Plaintiffs' filed their Complaint on

May 9, 2007, leaving another 31 days on the statute, and rendering the Complaint timely filed.[14]

III. If the February 28, 2007 notice letters are deemed not to have been adequate, should the Plaintiff should still receive the sixty (60) days tolling under the statute

Should this Court reach the conclusion that the February 28, 2007 notice letters were inadequate, this Court may then need to decide whether the Plaintiffs should receive the benefit of sixty (60) days tolling under the statute. It should first be noted that this Court need only reach this issue if concludes otherwise that the February 28, 2007 notice letters were both necessary and inadequate, and if this Court determines that the savings statute does not apply.[15] Should the Court determine that the notice letters were unnecessary or adequate under the circumstances, the issue need not even be decided.

Again, as explained *supra*, when *Tolliver I* had been rendered and the Plaintiffs were contemplating how to properly proceed and re-file their cause of action, the proper procedure was not at all clear. Plaintiffs did not know whether to send a 15-1-36(15) notice letter or whether to simply re-file upon issuance of the mandate. Regardless, the Plaintiffs opted to send what they believed, in good faith, was a proper notice letter under the circumstances manifesting their intent to sue the Defendants for medical negligence. (R. 101-02)As such, the Plaintiffs were under the good faith belief, not knowing at the time whether it would later be determined to have been a mistake, that they were prohibited from filing their Complaint under Miss. Code Ann. §§15-1-36(15) and 15-1-57, which states that:

When any person shall be prohibited by law, or restrained or enjoined by the order,

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[14]This analysis requires application also of either the principle of equitable tolling and/or the savings statute, Miss. Code Ann. 15-1-69.

[15]This is so because, if the savings statute applies, the Plaintiffs still filed *Tolliver II* within one year of dismissal of *Tolliver I*, thus satisfying that requirement of the savings statute. Further, as will be explained *infra*, dismissal without prejudice of the Plaintiffs claim would be the proper remedy for defect in notice and no time would have run against the Plaintiffs because they had an entire year within which to file pursuant to the savings statute.

> decree, or process of any court in this state from commencing or prosecuting any action or remedy, the time during which such person shall be so prohibited, enjoined or restrained, **shall not be computed** as any part of the period of time limited by this chapter for the commencement of such action.

Miss. Code Ann. §15-1-57 (emphasis added). After the Plaintiffs sent their notice letters, they had no way of knowing, and could only speculate, as to the future procedure of this case. After sending the notice letters, the Plaintiffs, in good faith, believed that they could not file suit, and indeed, did not. As such, the Plaintiffs should not be penalized with the ultimate sanction of dismissal with prejudice for their judgment, and should still receive the sixty (60) days of tolling as provided under the statute.[16]

IV. Should this Court determine that dismissal is proper, dismissal should be without prejudice

Should this Court determine that dismissal of this case is required due to failure to comply with the content requirements of 15-1-36(15), dismissal without prejudice, as ruled by the trial court, is the proper remedy for such failure to comply.[17] Such a remedy would be consistent with prior Mississippi case law, namely, from *Tolliver I. Arceo v. Tolliver* 949 So.2d 691, 692 (Miss. 2006) (holding dismissal without prejudice proper remedy for failure to strictly comply with 60 day notice provision of 15-1-36(15)). As this Court has already held that failure to strictly comply with 15-1-36(15), *stare decisis* dictates that dismissal without prejudice would likewise be the proper remedy for failure to strictly adhere to the "content requirement" of 15-1-36(15); further, it provides consistency. *Id* at 696. ("We also note that our decision today provides consistency"), *e.g., Newell*

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[16]As this argument only applies if the principle of equitable tolling applies but the savings statute does not, application of the argument set forth would still leave the Plaintiff with approximately thirty-one (31) days remaining on the statute should this Court determine, as it should, that dismissal without prejudice is otherwise proper.

[17]Should this Court determine that the notice letters were not necessary or were adequate under the circumstances then this Court need not reach this question as dismissal would not, in that instance, be proper.

v. Jones County, 731 So.2d 580, 582 (Miss.1999). Moreover, if it is otherwise determined that the Plaintiffs still have time remaining to file their cause pursuant to either equitable tolling, the savings statute, or both, the Plaintiffs' right to their cause of action is still alive and thus, should not be dismissed without prejudice.[18]

Defendants also argue on Appeal that because the Plaintiffs have allegedly failed to comply with the statute for a second time, that their cause of action should be dismissed with prejudice for the Plaintiffs' "multiple failures." This Court clearly ruled in *Tolliver I* that failure to comply with 15-1-36(15) results in a dismissal without prejudice. *Arceo,* 949 So.2d at 691, 697-98. Despite this, the Defendants, attempting to re-litigate issues decided by this Court, apparently ask this Court to create out of thin air a law that would, in sum, be a "two strikes and you are out" rule. (Appellant's Brief at 12.) It should not be lost on this Court that in the Defendants' argument they provide absolutely no authority, either from case law or from Miss. Code Ann. 15-1-36(15) itself, which would allow this Court to create such a rule. *Id.* Rather, the Defendants rely merely on an *ipse dixit* argument for this Court to conclude that the Plaintiffs should receive the ultimate sanction – dismissal with prejudice. *Id.* The Plaintiffs have already been sufficiently sanctioned – for over four years now they have not yet been able to even begin to reach the merits of their case. Consistent with its holding in *Tolliver I* this Court should rule that Plaintiffs alleged failure to comply results in a dismissal without prejudice should it find that the Plaintiffs failed to comply with the "content requirement" of 15-1-35(15). Moreover, such a ruling is in order, contrary to assertions by

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[18]Should this Court determine that the Plaintiffs' Complaint should be dismissed without prejudice the Plaintiffs would respectfully submit that it would be in the best interests of all parties, and in the interest of judicial economy, for this Court to decide that the principle of equitable tolling applies to *Tolliver II* and/or that all prerequisites would otherwise apply for application of the savings statute after dismissal without prejudice of *Tolliver II.* Plaintiffs would submit further that such matters would, in the event that this Court determines that dismissal with prejudice is proper, be ripe to be heard and decided. In that case, as there would be no material differences between the dismissal without prejudice of *Tolliver I* and *Tolliver II,* Plaintiffs arguments from the first section of the instant Brief regarding the application of the principle of equitable tolling and the application of the savings statute would apply equally to a dismissal of *Tolliver II.*

Defendants, irrespective of this Court's finding in *Tolliver I* that the Plaintiffs failed to comply with the 60 day notice requirement of 15-1-36(15).

V. If 15-1-36(15) operates to deprive the Plaintiffs of their day in court, is 15-1-36(15) constitutionally invalid as applied to the Plaintiffs in this instance?[19]

Lastly, and alternatively, any interpretation of Miss. Code Ann. § 15-1-36(15) that would leave the Myrtis Tolliver, on behalf of the Estate of Tommie Tolliver, without even *access* to a court for a remedy for the death of Tommie Tolliver would be unconstitutional as applied to the facts of this case. See, e.g. *Arceo*, 949 So.2d at 700, 703-04 (Graves, J., dissenting). The Constitution of the State of Mississippi provides that "All courts shall be open; and every person for an injury done to him, in his land, goods, person or reputation, *shall have a remedy by due course of the law*, and right and justice shall be administered, without sale, denial, or delay." Miss. Const. Art. III, sec 24 (emphasis added). Further, "[n]o person shall be debarred from prosecuting or defending any civil cause for or against him or herself, before any tribunal in the state, by him or herself, or counsel, or both." Miss. Const. Art. III, sec 25. Barring a procedural defect in *Tolliver I*, the Plaintiffs timely filed their cause of action between private parties within the applicable statute of limitations. To bar the Plaintiffs from the Courthouse door altogether would simply not be in keeping with the mandates of the State of Mississippi's constitution.

Consistent with the foregoing, and other Federal constitutional laws, should Miss. Code Ann. § 15-1-36(15) otherwise operate to deprive the Estate of Tommie Tolliver of fundamental constitutional rights, Miss. Code Ann. § 15-1-36(15) should be held unconstitutional in its application to these limited circumstances only.

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[19]The Mississippi Attorney General has been placed on notice that the Plaintiffs' are challenging the constitutionality of this statute and its application to these particular circumstances pursuant to M.C.R.P. 24(d), and have been added to the Certificate of Interested Persons and Certificate of Service.

CONCLUSION

In conclusion, a ruling dismissing the Plaintiff's case with prejudice relating either to the Plaintiff's deficiencies in *Tolliver I* or for any deficiencies in the February 28, 2007 Miss. Code Ann. § 15-1-36(15) notice letter would be nothing more than a elevation of form over substance, all at the expense of the family of a deceased child, and to the benefit of the alleged tortfeasors. The Defendants cannot make any plausible argument that they have been prejudiced by the Plaintiffs' alleged defects in notice as they have now been on actual notice of the pertinent facts and law of this case for years. Despite a procedural deficiency, the Plaintiffs timely filed their *Tolliver I* Complaint and the Defendants received notice of same prior to the expiration of the original statute of limitations. By application of both the principle of equitable tolling and the savings statute, Miss. Code Ann. §15-1-69, and otherwise consistent with the foregoing arguments, the Plaintiffs should be able to, at last, proceed to the merits of their case.

Respectfully submitted, this the 1st day of December, 2008.

MYRTIS TOLLIVER, ET AL. - PLAINTIFF

By: _____
W. Andrew Neely
W. Eric Stracener

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been this day forwarded by United States mail, postage prepaid, to the following:

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Jackson, MS 39205-0220

This the 1st day of December, 2008.

W. ANDREW NEELY

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

**MYRTIS TOLLIVER,
AS ADMINISTRATRIX OF THE
ESTATE OF TOMMIE C. TOLLIVER, DECEASED,
INDIVIDUALLY, AND ON BEHALF OF THE
WRONGFUL DEATH BENEFICIARIES OF
TOMMIE. C. TOLLIVER, DECEASED** **PLAINTIFFS**

V. **CAUSE NUMBER: 251-04-518 CIV**

**ST. DOMINIC – JACKSON MEMORIAL HOSPITAL;
SALVADOR ARCEO, M.D.;
AMY MOREHEAD, R.N.;
(FNU) CLEVELAND, R.N.; and,
JOHN AND JANE DOES 1 – 7** **DEFENDANTS**

FILED
JUN 25 2004
BARBARA DUNN, CIRCUIT CLERK
BY _____ D.C.

FIRST AMENDED COMPLAINT

(PLAINTIFF DEMANDS TRIAL BY JURY)

COMES NOW the Plaintiff, Myrtis Tolliver, as Administratrix of the Estate of Tommie Tolliver, deceased, individually, and on behalf of the wrongful death beneficiaries of Tommie C. Tolliver, deceased, by and through their attorneys, and files this their First Amended Complaint against St. Dominic - Jackson Memorial Hospital; Salvador Arceo, M.D.; Amy Morehead, R.N.; (FNU) Cleveland, R.N.; and, John and Jane Does 1-7, and states as follows:

I. INTRODUCTION

This is a Complaint for medical malpractice, wrongful death, and negligence brought by Myrtis Tolliver, as Administratrix of the Estate of Tommie

Exhibit "B"

Tolliver, deceased, individually, and on behalf of the wrongful death beneficiaries of Tommie C. Tolliver, deceased, against St. Dominic - Jackson Memorial Hospital; Salvador Arceo, M.D.; Amy Morehead, R.N.; (FNU) Cleveland, R.N.; and, John and Jane Does 1-7, for negligence, gross negligence, and wrongful death in the care, observation, monitoring and treatment of Tommie C. Tolliver, deceased, and for the failure to communicate with, and/or follow instructions of each other and of the attending physician of Tommie C. Tolliver, and other acts of errors and omissions constituting a breach of the standard of care of Tommie C. Tolliver while she was a patient at a hospital owned, operated and managed by St. Dominic - Jackson Memorial Hospital, in the City of Jackson, First Judicial District of Hinds County, Mississippi, on or about and between July 9, 2002 through July 13, 2002. The aforesaid acts of negligence, in addition to those set forth herein below, resulted in the death of Tommie C. Tolliver and related damages.

II. PARTIES

1. Plaintiff, Myrtis Tolliver, is an adult resident citizen of Wilkinson County, Mississippi, and is the duly appointed and acting Administratrix of the Estate of Tommie C. Tolliver, Deceased, filed in the Chancery Court of Wilkinson County, Mississippi. Tommie C. Tolliver died survived by her mother, Myrtis Tolliver, father, Thomas Tolliver, and sister, Meagan Tolliver, being her sole legal heirs at law.

2. Defendant St. Dominic - Jackson Memorial Hospital (sometimes hereinafter referred to as "St. Dominic" or "St. Dominic Hospital") is a Mississippi Corporation operating and doing business on Lakeland Drive,

Jackson, Mississippi, in the First Judicial District of Hinds County, Mississippi. Defendant St. Dominic - Jackson Memorial Hospital may be served with process of this Court by serving its Registered Agent, Mary Dorothea Sondgeroth, 969 Lakeland Drive, Jackson, Mississippi.

3. Defendant Salvador Arceo, M.D., is an adult resident citizen of the State of Mississippi who, as a Medical Doctor, was an employee or agent during all pertinent times complained of herein of Defendant St. Dominic - Jackson Memorial Hospital. Defendant Salvador Arceo, M.D. may be served with process of this Court at his place of employment, St. Dominic – Jackson Memorial Hospital, 969 Lakeland Drive, Jackson, Mississippi.

4. Defendant Amy Morehead, R.N., is an adult resident citizen of the State of Mississippi who, as a Registered Nurse, was an employee or agent during all pertinent times complained of herein of Defendant St. Dominic - Jackson Memorial Hospital. Amy Morehead, R.N., may be served with process of this Court at her place of employment, St. Dominic – Jackson Memorial Hospital, 969 Lakeland Drive, Jackson, Mississippi.

5. Defendant (FNU) Cleveland, R.N. (whose first name is unknown by plaintiff), is an adult resident citizen of the State of Mississippi who, as a Registered Nurse, was an employee or agent during all pertinent times complained of herein of Defendant St. Dominic - Jackson Memorial Hospital. (FNU) Cleveland, R.N., may be served with process of this Court at her place of employment, St. Dominic – Jackson Memorial Hospital, 969 Lakeland Drive, Jackson, Mississippi.

6. John and Jane Does 1 through 7 are those individuals or entities whose names are presently unknown to Plaintiff and who, at all pertinent times complained of herein, were servants, agents and employees of Defendant St. Dominic - Jackson Memorial Hospital (including but not limited to the Charge Nurses, Nursing Supervisors and Head Nurses) and/or of other defendants.

7. At all pertinent times to the matters alleged herein, Defendants Salvador Arceo, M.D.; Amy Morehead, R.N.; (FNU) Cleveland, R.N.; and John and Jane Does 1-7 were servants, agents and employees of Defendant St. Dominic - Jackson Memorial Hospital at its medical hospital facility located at 969 Lakeland Drive, Jackson, Mississippi.

III. JURISDICTION AND VENUE

8. This Court has jurisdiction over the subject matter pursuant to §9-7-81 of the Mississippi Code, 1972, (as amended) and the amount in controversy exceeds Two Hundred Dollars ($200) exclusive of interest and costs.

9. Venue is proper in the First Judicial District of Hinds County, Mississippi, pursuant to §11-11-3 of the Mississippi Code, 1972, (as amended).

IV. FACTS

10. At all pertinent times to the matters alleged herein, Defendant St. Dominic - Jackson Memorial Hospital owned, possessed, controlled and/or managed the medical hospital facility known as St. Dominic – Jackson Memorial Hospital, located on Lakeland Drive, Jackson, Mississippi. The said medical hospital facility was an institution offering medical services through its medical staff and nurses to the community of Hinds County, Mississippi and the surrounding area.

11. At all pertinent times to the matters alleged herein, the said medical hospital facility held itself out, and represented to the public in general, to other physicians, and to Tommie C. Tolliver, in particular, as a medical institution offering trained, competent, skilled and capable staff and nurses in the care and treatment of patients who seen and/or confined therein for medical care and treatment.

12. At all pertinent times to the matters alleged herein, Defendants Salvador Arceo, M.D.; Amy Morehead, R.N.; (FNU) Cleveland, R.N. and John and Jane Does 1-7 were duly licensed medical doctors and/or registered nurses and/or medical personnel or entities who were providing medical care duties at the said medical hospital facility as employees or agents of Defendant St. Dominic - Jackson Memorial Hospital. As such, the said Defendants Salvador Arceo, M.D.; Amy Morehead, R.N.; (FNU) Cleveland, R.N. and John and Jane Does 1-7 held themselves out to the public in general, to other physicians, and to Tommie C. Tolliver, in particular, as doctors, nurses and/or medical personnel specially competent and able to care for patients who were entrusted to the said medical facility by their respective physicians.

13. On July 9, 2002 at approximately 12:35 p.m., Tommie C. Tolliver, a 21 year old college student, presented by ambulance to the St. Dominic Emergency Room with acute onset of symptoms including fever, body aches, hypotension, breathing difficulty and a rash over her body. At this time, Tommie C. Tolliver was alert and cooperative but complaining of being in pain.

14. Upon her admission, Tommie C. Tolliver was available for care at St. Dominic Hospital for more than 8 ½ hours, parked in a hallway located in the

hospital's Emergency Room during most of that time. At approximately 1:55 p.m., Defendant Salvador Arceo, M.D. performed a physical examination of Tommie C. Tolliver and noted mild-moderate respiratory distress. He also noted that she was anxious, tachycardia, with a heart rate greater than 100 beats per minute. He included the presence of petechiae, tiny pinpoint area of hemorrhage on her skin.

15. Within one and a half hours of her aforementioned arrival to St. Dominic, the laboratory reported to the emergency room staff that Tommie C. Tolliver had an elevated white blood cell count (greater than 23,000), indicative of a bacterial infection.

16. Thereafter, blood cultures were ordered and the blood collected at approximately 3:50 p.m. on July 9, 2002. An order for a Gram stain on the blood for cultures was not entered at this time.

17. At approximately 5:00 p.m. on July 9, 2002, the Emergency Room physician, Defendant Arceo, wrote an order for IV antibiotics but the nursing staff did not execute the IV antibiotic order at this time, neither did any other defendant. Tommie C. Tolliver did not receive her first dose of antibiotics until approximately 2:00 a.m. on July 10, 2002, being approximately nine (9) hours after first ordered. Regarding the care or treatment of Tommie C. Tolliver, no IV antibiotics were ordered by the defendants prior to 5:00 p.m. on July 9, 2002, despite her symptoms and condition.

18. Tommie C. Tolliver's clinical condition worsened over several hours as the virulent bacteria, "Neiserria Meningitidis" (which was confirmed by blood

culture and Gram stain on July 10, 2002 and July 16, 2002) was permitted to promulgate freely, affecting her brain and Central Nervous System.

19. Tommie C. Tolliver went unobserved and was minimally reacted to by the Emergency Room staff and defendants until she went into a state of septic shock at approximately 7:00 p.m. on July 9, 2002. During this time, she became unresponsive and began to lose control of her organs and body functions.

20. By 9:00 p.m. on July 9, 2002, Tommie C. Tolliver was intubated and en route to ICU in a coma state.

21. The Emergency Room Physician's 5:00 p.m. IV antibiotic order was noted by the ICU nursing staff and Tommie C. Tolliver received the first dose of IV antibiotics on July 10, 2002 at approximately 2:00 a.m., being approximately nine (9) hours after the ER Physician wrote the order.

22. Repeat blood cultures done after 24 hours of IV antibiotic therapy confirmed the efficacy of antibiotic therapy, showing no growth.

23. Tommie C. Tolliver never regained consciousness but experienced loss of organ and body functions, brain death and loss her life on July 13, 2002, while under the care of the defendants. Tommie C. Tolliver died of Cardic Arrest due to Meningococcal Meningitis and Sepsis.

V. CLAIMS FOR RELIEF

24. Plaintiff adopts and incorporates herein by reference the foregoing paragraphs numbered one through twenty-three, inclusive.

25. At all pertinent times, Defendant St. Dominic - Jackson Memorial Hospital operated, managed and maintained the medical hospital facility known as St. Dominic – Jackson Memorial Hospital, located at 969 Lakeland Drive,

Jackson, Mississippi, and had a duty and was required to exercise such reasonable care and attention for Tommie C. Tolliver's safety as her physical condition required and in administering care and treatment of her as a patient in said medical hospital facility. It failed to exercise that degree of care and attention, and was negligent in the following respects:

a. Failed to enact and have in place standard operating policies and procedures to ensure adequate and proper patient care by its staff and nursing personnel or, in the alternative, failure to ensure that such staff and nursing personnel followed any such standard operating policies in the care of patients which were in effect during the time complained of herein;

b. Failure to provide in-house training to its staff and nursing personnel to ensure proper and adequate patient care during the time complained of herein;

c. Failure to provide adequate number of nursing personnel to ensure proper and adequate patient care;

d. Failure to ensure that staff and nursing personnel performed their respective duties in a fashion required to ensure proper, timely and adequate patient care;

e. Failure to require staff and nursing personnel on duty to be available in proximity of patients to ensure that patients' are and needs are promptly attended to timely;

f. Failure to ensure that staff and nursing personnel promptly and correctly comply with instructions rendered by patients' physician relating to the care and treatment of such patients while in the medical hospital facility;

g. Failure to ensure that staff and nursing personnel promptly notify the patients' physician of change of a patients' condition while in the medical hospital facility; and,

h. Failure to provide the quality and standard of care required by law;

i. Failure to ensure competent Medical Doctor coverage in the emergency room;

j. Failure to provide competent emergency room nursing staff to fulfill assigned responsibilities through comprehensive competency-based orientation and active preceptorship;

k. Failure to assign emergency nursing staff with consideration for the complexity and dynamics of the emergency room setting in accordance with their educational preparation and demonstrated proficiency;

l. Failure to provide an appropriate and adequate nurse/patient ratio;

m. Failure to have in place policies and/or contingency plans to assign staff members to meet patient care needs and/or failed to enforce any such plans that were in place;

n. Failure to have in place contingency plans including a Diversion (Divert) plan to manage the steady influx of patients to the Emergency Department and/or failed to enforce any such plans that were in place;

o. Failure to have in place policies to describe chain of physician responsibility in Emergency Department settings and/or patient "hands off" or failed to enforce such policies if they were in place;

p. Failure of the supervisors (Charge Nurse and Nursing Supervisor) to provide proper supervision of the nursing staff rendering direct care to Tommie C. Tolliver in the emergency department;

q. Failure to execute policy and procedures to ensure nursing staff timely and adequately implement physician orders;

26. The defendant St. Dominic Hospital breached the aforesaid duties, and such breaches proximately caused or contributed to Tommie C. Tolliver's injuries, death and damages aforesaid and as enumerated hereinafter.

27. At all pertinent times, Defendant Salvador Arceo, M.D.; and John and Jane Does 1-7 owed a duty to Tommie C. Tolliver to use the medical knowledge which they possessed, or had reasonable access to, as licensed medical

doctors and/or medical personnel to attend to and treat Plaintiff Tommie C. Tolliver with such reasonable diligence, care, skill, competence and prudence as are practiced by minimally competent medical doctors in the same specialty or general field of medicine, and/or healthcare, throughout the United States who have available to them the same general facilities, services, equipment and options.

28. Defendants Salvador Arceo, M.D.; and John and Jane Does 1-7 breached the aforesaid duties, and such breaches proximately caused or contributed to Tommie C. Tolliver's injuries, death and damages aforesaid and as enumerated hereinafter.

29. In connection with the care and treatment of Tommie C. Tolliver by Defendants Salvador Arceo, M.D. and John and Jane Does 1-7, said Defendants negligently failed to exercise and employ the aforesaid degrees and standard of care and skill in attending to, treating of, and observations of, Tommie C. Tolliver, which failure, carelessness, negligence, omissions and breaches of duties owed to Tommie C. Tolliver include, but are not limited to, the following:

a. Failure to provide the quality and standard of care required by law;

b. Failure to properly and timely recognize, appreciate, diagnose and treat the bacterial Meningococcal Meningitis from which Tommie C. Tolliver was suffering and ultimately lead to her death;

c. Failure to properly and timely recognize, appreciate, diagnose and treat the Sepsis from which Tommie C. Tolliver was suffering and ultimately lead to her death;

d. Failure to obtain an adequate history from the patient (Tommie C. Tolliver) to inform his impression of the patient's clinical state;

e. Failure to conduct and document a sufficiently comprehensive assessment and on-going reassessment of Tommie C. Tolliver from the time of her admission and through out her protracted stay in the Emergency Room;

f. Failure to assess Tommie C. Tolliver's neurologic status particularly in light of the progressive changes in her mental status and level of consciousness;

g. Failure to assume responsibility for appropriate management of the patient upon her admission to the Emergency Room until her disposition;

h. Failure to provide general medical supervisions and coordination of patient's care in the Emergency Room;

i. Failure to timely order appropriate antibiotics in excess of three hours after being made aware of grossly abnormal lab results, specifically a significantly elevated White Blood Cell (WBC) count and/or when noticing the presence of petechiae;

j. Failure to order appropriate lab tests (specifically Gram stain), which would provide critical diagnostic information within minutes versus days;

k. Failure to timely and properly initiate measures to facilitate transfer of Tommie C. Tolliver from the Emergency Room to the Intensive Care;

l. Failure to ensure accurate, complete and timely documentation of his complete involvement in the patient's care and therefore the failure to maintain a complete and accurate record of care;

m. Failure to maintain clear lines of physician responsibility;

n. Failure to recognize, appreciate, act upon and/or treat the early, but definitive signs and symptoms of meningitis, relating to Tommie C. Tolliver at all times mentioned herein;

o. Failure to refrain from treating patients whom he was not competent to treat and thereafter failing to timely attempt to learn the meaning and significance of symptoms which he did not recognize or understand the cause and/or meaning of;

p. Failure to follow and comply with the said medical hospital facility's standard operating policies and procedures, if any, relating to the care of patients, and particularly, Tommie C. Tolliver, instructed to them at said medical hospital facility;

30. At all pertinent times, Defendants Amy Morehead, R.N.; (FNU) Cleveland, R.N.; and John and Jane Does 1-7 owed a duty to Tommie C. Tolliver to use the medical knowledge which they possessed, or had reasonable access to, as licensed registered nurses and/or medical personnel to attend to and treat Tommie C. Tolliver with such reasonable diligence, care, skill, competence and prudence as are practiced by minimally competent nurses in the same specialty or general field of nursing, and/or healthcare, throughout the United States who have available to them the same general facilities, services, equipment and options.

31. Defendants Amy Morehead, R.N.; (FNU) Cleveland, R.N.; and John and Jane Does 1-7 breached the aforesaid duties, and such breaches proximately caused or contributed to Tommie C. Tolliver's injuries, death and damages aforesaid and as enumerated hereinafter.

32. In connection with the care and treatment of Tommie C. Tolliver by Defendants Amy Morehead, R.N.; (FNU) Cleveland, R.N.; and John and Jane Does 1-7, said Defendants negligently failed to exercise and employ the aforesaid degrees and standard of care and skill in attending to, treating of, and observations of, Tommie C. Tolliver, which failure, carelessness, negligence, omissions and breaches of duties owed to Tommie C. Tolliver include, but are not limited to, the following:

a. Failure to provide the quality and standard of care required by law;

b. Failure to follow and carry out properly and timely the instructions and orders of Tommie C. Tolliver's emergency room and/or attending physician;

c. Failure to monitor and observe Tommie C. Tolliver's condition while entrusted to their care;

d. Failure to follow and comply with the said medical hospital facility's standard operating policies and procedures, if any, relating to the nursing care of patients, and particularly, Tommie C. Tolliver, instructed to them at said medical hospital facility;

e. Failure to respond to Tommie C. Tolliver's pleas for help;

f. Failure to render care and treatment to Tommie C. Tolliver when it was discovered that she had an elevated WBC count, was losing control of organs and body functions;

g. Failure to adequately assess and re-assess Tommie C. Tolliver's condition in a timely manner causing her condition to worsen steadily over several hours to significant respiratory distress and cardiac distress; Failure to inform their care of the patient by conducting a sufficiently comprehensive assessment of Tommie C. Tolliver during the lengthy stay in the emergency department;

h. Failure to ensure an accurate and complete record of Tommie C. Tolliver's care including the patient's history;

i. Failure to heed patient complaints reasonably;

j. Failure to take proper actions in the face of foreseeable complications and thereby compromised Tommie C. Tolliver's care;

k. Negligent compromise of Tommie C. Tolliver's right to privacy, confidentiality, dignity and respectful care;

l. Failure to accurately interpret changes in the patient's level of consciousness as reflections of cerebral irritation affecting cerebral perfusion and/or hypoxia;

m. Failure to aggressively monitor Tommie C. Tolliver's vital signs with subsequent encounters despite the irregularities documented on admission;

n. Failure to provide for proper nursing care and monitoring capabilities;

o. Failure to timely note and administer physician Orders for antibiotics, directly contributing to the progression of the fulminating meningococcal infection;

p. Negligent administration of a potent narcotic pain reliever without a physician order;

q. Failure to adequately evaluate Tommie C. Tolliver's clinical state, to include an assessment of her complaints of pain prior to the administration of Demerol;

r. Failure to timely and properly initiate life-saving measures with an acute and serious decline in her overall clinical state;

33. Defendant St. Dominic - Jackson Memorial Hospital, in operating, managing, maintaining and staffing of the medical hospital is vicariously liable under the doctrine of respondent superior for the failures, carelessness, negligence, omissions and breaches of the standard of care and duties of its employees, Defendants Salvador Arceo, M.D., Amy Morehead, R.N.; (FNU) Cleveland, R.N.; and John and Jane Does 1-7, as enumerated hereinabove.

34. Defendants, individually, jointly and severally, owed to Tommie C. Tolliver an ordinary duty of care, specifically, a duty to exercise reasonable care in the treatment and care of Tommie C. Tolliver as a patient in the said medical hospital facility and to exercise that standard of care and skill required of medical hospital facilities and its physician and/or nursing staff as practiced by minimally competent medical hospital facilities and physician and/or nursing staffs throughout the United States. The aforementioned wrongful or negligent acts,

omissions, and/or failures of the defendants and their breaches of the stated duties resulted in and were the proximate cause of the death of Tommie C. Tolliver.

VI. DAMAGES

35. As a direct and proximate result of one or more of the aforesaid breaches, violations, acts and omissions of negligence on the part of the Defendants, as hereinabove enumerated, respectively, Tommie C. Tolliver and the Estate of Tommie C. Tolliver, deceased, has been caused to suffer the following damages:

a. Pain and suffering, both physical and mental;

b. Physical and mental injuries;

c. Wrongful Death;

d. Loss of support, companionship and society;

e. Embarrassment and humiliation of being left on a stretcher in the hallway and allowed to lose control of her body functions and plea for help in the presence of other patients and visitors;

f. Loss of wage-earning capacity;

g. Anxiety and depression;

h. Psychological damage;

i. Hedonic damages;

j. Funeral and burial expenses;

k. Medical expenses and health care costs; and,

l. All other damages allowed by the laws of the State of Mississippi.

36. The sole or contributory proximate cause of the aforesaid damages and injuries to Tommie C. Tolliver are one or more of the aforementioned violations, breaches, acts or omissions of the Defendants named herein individually, jointly and severally.

37. The negligence of the Defendants named herein individually, jointly and severally, as described in Paragraphs 24 through 34 hereinabove, was so gross as to the evidence of a reckless disregard for the rights of Tommie C. Tolliver and/or plaintiffs herein as to justify an award of punitive damages.

VII. ATTORNEY CERTIFICATE OF CONSULTATION

38. Pursuant to Section 11-1-58 of the Mississippi Code Annotated, the undersigned attorney for the plaintiff has reviewed the aforementioned facts of this case and has consulted with at least one (1) expert qualified pursuant to the Mississippi Rules of Civil Procedure and the Mississippi Rules of Evidence who is qualified to give expert testimony as to the standard of care or negligence and who the undersigned attorney reasonably believes is knowledgeable in the relevant issues involved in this action and said attorney has concluded on the basis of such review and consultation that there is a reasonable basis for the commencement of this action.

VIII. DEMAND FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Plaintiff demands a judgment of and from Defendants St. Dominic - Jackson Memorial Hospital;

Salvador Arceo, M.D.; Amy Morehead, R.N.; (FNU) Cleveland, R.N.; and John and Jane Does 1-7 jointly and severally, for actual and compensatory damages and punitive damages within the jurisdictional limits of this Court to be set by a jury in accordance with §11-1-59 of the Mississippi Code, 1972, (as amended), along with prejudgment interest, post-judgment interest, and all costs of this proceeding.

Respectfully submitted,

Myrtis Tolliver, Plaintiff

By: E. Vincent Davis
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