IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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

VS. — **NO. 2008-CA-224**

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**

REPLY BRIEF OF APPELLANT, ST. DOMINIC-JACKSON MEMORIAL HOSPITAL

Appeal From The Circuit Court For
The First Judicial District Of Hinds County, Mississippi

ORAL ARGUMENT NOT REQUESTED

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SUMMARY OF THE ARGUMENT

For the first time on appeal, Plaintiff in her brief argues that section 15-1-36(15) of the Mississippi Code is unconstitutional. Plaintiff, however, failed to specifically plead this issue before the lower court; thus, Plaintiff is procedurally barred from raising her constitutional challenge to section 15-1-36(15) for the first time on appeal. Even if the Court addresses this constitutionality issue, Plaintiff's argument is without merit. This Court recently rejected such an argument and upheld section 15-1-36(15) as constitutional. *See Thomas v. Warden*, Nos. 2006-CA-01703-SCT, 2007-CA-00821-SCT, 2008 WL 5174087, *3 (Miss. Dec. 11, 2008).

The savings statute, section 15-1-69 of the Mississippi Code, is not applicable to Plaintiff's most recent complaint. Plaintiff's original complaint was not duly commenced as required by section 15-1-69. Plaintiff filed her original complaint in violation of section 15-1-36(15) and as recently determined by this Court, the complaint has no legal effect. Moreover, Plaintiff's original complaint was not dismissed as a matter of form. Thus, this Court should dismiss Plaintiff's complaint since the statute of limitations has long since run.

Although filing a complaint, as a general rule, tolls the statute of limitations, this rule should not apply in situations, like this one, when a complaint is filed in violation of Mississippi law. As previously stated, such a complaint has no legal effect. Here, Plaintiff is not entitled to the general rule. Since Plaintiff is not entitled to the tolling of the statute of limitations, this Court should dismiss Plaintiff's complaint with prejudice as time barred by the statute of limitations.

If this Court determines that the filing of a complaint in violation of Mississippi law tolls the statute of limitations, then Plaintiff's complaint should still be dismissed with prejudice as time barred. The Mississippi Supreme Court requires strict compliance with the notice provisions in section 15-1-36(15). Mississippi law required Plaintiff to send a new notice before

re-filing her most recent complaint, which in fact is what the Plaintiff attempted to do. Although Plaintiff sent a new notice to Defendants, the notice did not substantially comply with the content requirements for a notice as set forth in section 15-1-36(15). Plaintiff's notice was only one sentence long and did not notify Defendants of the type of loss sustained or the nature of the injuries suffered as required by the statute. For these reasons, Plaintiff's complaint should have been dismissed *with prejudice*.

ARGUMENT

I. SECTION 15-1-36(15) OF THE MISSISSIPPI CODE IS CONSTITUTIONAL.

A. *Plaintiff's Constitutional Arguments Are Procedural Barred From Being Raised For The First Time On Appeal.*

For the first time on appeal, Plaintiff argues that section 15-1-36(15) violates the Mississippi Constitution and "other Federal constitutional law . . . ."[1] *See* Brief of Appellee at 27. Mississippi law "is well-established regarding claims as to the constitutionality of statutes made for the first time on appeal." *See Cockrell v. Pearl River Valley Water Supply Dist.*, 865 So. 2d 357, 360 (Miss. 2004). "The law has been well settled that the constitutionality of a statute will not be considered unless the point is specifically pleaded." *Cockrell*, 865 So. 2d at 360 (quoting *Smith v. Fluor Corp.*, 514 So. 2d 1227, 1232 (Miss. 1987)). "A specifically pleaded issue is one that has been raised in a proper motion before the court." *Martin v. Lowery*, 912 So. 2d 461, 464-65 (Miss. 2005)(citation omitted). Since Plaintiff failed to specifically plead this issue before the lower court, Plaintiff is procedurally barred from raising it for the first time on appeal.

Additionally, Rule 24(d) of the Mississippi Rules of Civil Procedure requires plaintiffs to provide the Attorney General of the State of Mississippi with notice of their constitutional challenges. In this case, Plaintiff attempted to provide notice to the Attorney General by sending him a copy of her brief. However, this does not satisfy the requirements of Rule 24(d). *See Powers v. Tiebauer*, 939 So. 2d 749, 754-55 (Miss. 2005). In *Powers*, plaintiff, like the Plaintiff in this case, did not provide notice to the Attorney General of her "constitutional challenge until he received her appellate brief." *Powers*, 939 So. 2d at 754. The Court held that plaintiff's

[1] Specifically, Plaintiff argues that Section 15-1-36(15) violates Section 24 and 25, Article III of the Mississippi Constitution. *See* Brief of Appellee at 27. Although Plaintiff appears to be arguing that Section 15-1-36(15) violates Federal Constitutional law, Plaintiff, however, fails to specifically cite to any Federal Constitutional law that Section 15-1-36(15) violates. *Id.*

attempt to provide notice would not satisfy the requirements of Rule 24(d) and thus, the Court held that was "procedurally barred from raising her constitutional challenge . . . for the first time on appeal." *Id.* at 755.

Since Plaintiff did not specifically plead her constitutional challenge before the lower court and failed to provide proper notice to the Attorney General as required by Rule 24(d), Plaintiff is procedurally barred from raising her constitutional challenge for the first time on appeal.

B. *Mississippi Supreme Court Recently Rejected A Constitutional Challenge To Section 15-1-36(15).*

In the recent case of *Thomas v. Warden*, the Mississippi Supreme Court considered the constitutional challenge to section 15-1-36(15). Nos. 2006-CA-01703-SCT, 2007-CA-00821-SCT, 2008 WL 5174087, *3 (Miss. Dec. 11, 2008). Plaintiff in her brief, similar to the plaintiff in *Thomas*, argues that section 15-1-36(15) conflicts with section 24 of the Mississippi Constitution, which guarantees "[a]ll courts shall be open; and every person for an injury done to him . . . shall have a remedy by due course of the law, and right and justice shall be administered without sale, denial, or delay." The Court, however, recognized that under Mississippi law, "[t]here is no absolute right of access to the courts. All that is required is a reasonable right of access to the courts - a reasonable opportunity to be heard." *Thomas*, 2008 WL 5174087, at *4 (citing *Arceo v. Tolliver*, 949 So. 2d 691, 697 (Miss. 2006)). The right of access "is coupled with responsibility, including the responsibility to comply with legislative enactments, rules, and judicial decisions." *Thomas*, 2008 WL 5174087, at *4 (quoting *Arceo*, 949 So. 2d at 697). The Court's previous statement from the *Arceo* opinion regarding this case is still applicable today: "While the plaintiff in today's case had the constitutional right to seek redress in our state courts for the unfortunate death of her daughter, she likewise had the responsibility to comply with the applicable rules and statutes, including section 15-1-36(15)." *Arceo*, 949 So. 2d at 697.

Although not specifically raised by Plaintiff, the Court in *Thomas* further considered whether section 15-1-36(15): (1) violated "the Separation of Powers Clause of the Mississippi Constitution by unconstitutionally usurping judicial rule-making power"; (2) "conflict[ed] with Rule 3 of the Mississippi Rules of Civil Procedure, which sets out the procedure for the commencement of an action, and which contains no such notice requirement"; or (3) "suspend[ed] application of the Mississippi Rules of Civil Procedure with regard to medical-malpractice plaintiffs, who have a constitutionally protected right to file a complaint and preserve their rights and claims on the date of accrual just like any other tort victim." *Thomas*, 2008 WL 5174087, at *4. For each of these, the Court held that these arguments were without merit. *Id.* at *5.

The Court, once again, confirmed the Legislature's authority "to set forth in legislation whatever substantive, pre-suit requirements for causes of action and prerequisites to filing suit, it deems appropriate [and that] pre-suit requirements are clearly within the purview of the Legislature, and do not encroach upon this Court's rule-making responsibility." *Thomas*, 2008 WL 5174087, at *4 (quoting *Wimley v. Reid*, 991 So. 2d 135, 139 (Miss. 2008)). The authority of the Legislature "to make law gives way to this Court's rule-making authority when the suit is filed, not before." *Thomas*, 2008 WL 5174087, at *5. Thus, the Court upheld section 15-1-36(15) as constitutional and the Plaintiff's argument in this case is without merit.

II. PLAINTIFF IS NOT ENTITLED TO RELIEF UNDER THE SAVINGS STATUTE.

The savings statute, section 15-1-69 of the Mississippi Code, provides in pertinent part, "[i]f in any action, duly commenced within the time allowed . . . [shall be] defeated . . . for any matter of form . . . the plaintiff may commence a new action for the same cause, at any time within one year after the . . . determination of the original suit . . . ." MISS. CODE ANN. § 15-1-69. In order to receive the benefit of the saving statute, a plaintiff must establish: (1) the

original action was "duly commenced within the time allowed"; and (2) the dismissal of the original action was for a "matter of form."

A. *A Complaint Filed Without Providing Pre-Suit Notice Is Not Duly Commenced.*

The savings statute by its very terms applies only to actions which are "**duly commenced** within the time allowed . . . ." MISS. CODE ANN. § 15-1-69 (emphasis added). "Duly commenced" has been defined as "a complaint properly filed and not an appeal." *Bowling v. Madison County Bd. of Sup'rs*, 724 So. 2d 431, 441 (Miss. Ct. App. 1998). The term "duly" has been defined as "[i]n a proper manner; in accordance with legal requirements." BLACK'S LAW DICTIONARY (8th ed. 2004).

Section 15-1-36(15) states on its face that "[n]o action based . . . may be begun unless the defendant has been given at least sixty (60) days' prior written notice of the intention to begin the action." More specifically, the pre-suit notice required under section 15-1-36(15) is a condition precedent to filing a complaint. *See, e.g., Wimley*, 991 So. 2d at 139; *see also Pope v. Brock*, 912 So. 2d 935, 938 (Miss. 2005)(holding plaintiff was "prohibited by law" from filing suit without waiting sixty days). Furthermore, the Mississippi Supreme Court recently held that a lawsuit filed without providing pre-suit notice is "not lawfully filed, and it is of no legal effect." *Thomas*, 2008 WL 5174087, at *3. Logically, a complaint that is not lawfully filed or has no legal effect is not duly commenced as contemplated by the savings statute. Since Tolliver's original cause of action was not "duly commenced", the savings statute is inapplicable to her current lawsuit. Thus, this Court should dismiss Tolliver's complaint against Defendants for her failure to file a cause of action within the applicable statute of limitations.

Plaintiff in her brief side steps whether her original complaint was duly commenced as required by the saving statute and simply argues that the interpretation argued by Defendants is "unconstitutionally impermissible." *See* Brief of Appellee at 15. Plaintiff further argues that

"the Mississippi Rules of Civil Procedure dictate that the commencement of an action is accomplished by the filing of a complaint." *Id.* at 15-16. Thus, according to the Plaintiff's suggested interpretation of section 15-1-69, any complaint filed, whether lawfully filed or not, is considered "duly commenced."

Plaintiff's interpretation renders this requirement meaningless. Specifically, Plaintiff's interpretation ignores the modifier in the phrase "duly commenced"; the modifier "duly" clearly limits the word "commenced". The Mississippi Court of Appeals gave effect to the modifier when it defined "duly commenced" as "a complaint **properly filed** . . . ." and not a complaint simply filed. *See Bowling*, 724 So. 2d at 441. It is clear that the Legislature did not intend for every complaint filed to be considered "duly commenced." In this case, Plaintiff's complaint was not "duly commenced" since it was filed in violation of section 15-1-36(15) and has no legal effect.

Plaintiff's argument additionally ignores the fact that the Legislature and not the court system created the savings statue. If the Legislature has the right to create a statute that permits plaintiffs to re-file certain complaints, then the Legislature has every right to define how the statute it created should be applied. The Legislature appropriately limited the application of the saving statute to complaints that were duly commenced. Since Plaintiff's complaint was not duly commenced as required by the statute, this Court should dismiss her complaint as time barred for her failure to file the complaint within the statute of limitations.

B. *A Dismissal For Failure To Provide Pre-Suit Notice Is Not A Dismissal As A Matter of Form.*

Even if this Court determines that Plaintiff's complaint was duly commenced, the Court must find that the dismissal of the original action was for a matter of form. This Court has not expressly ruled whether a dismissal for failure to comply with the notice requirements of section 15-1-36(15) should be considered a dismissal as a matter of form. Although the Court has

previously held that a dismissal for lack of jurisdiction is a matter of form, the Court has not consistently held whether a dismissal for failure to comply with the notice requirements is a dismissal for lack of jurisdiction. *Cf. Saul v. Jenkins*, 963 So. 2d 552, 554 (Miss. 2007)(holding "the notice requirements of section 15-1-36(15) is mandatory and jurisdictional") *with Thornburg v. Magnolia Reg'l Health Ctr.*, 741 So. 2d 220, 224 (Miss. 1999)("The statutory notice is, instead, merely a means of informing a governmental entity of the existence of a claim which might give rise to a lawsuit in the future [and] this issue is not a jurisdictional one . . . .").

As previously argued in its Appellant Brief, the dismissal for failure to provide pre-suit notice is analogous to the issue presented in *Owens v. Mai*, 891 So. 2d 220 (Miss. 2005) regarding a plaintiff's failure to serve process. Like in *Owens*, the Court should not permit plaintiffs, who failed to provide notice, to utilize the saving statute to extend the life of their claims beyond the applicable statute of limitations and completely undermine the intended effect of section 15-1-36(15). Nevertheless, even if the Court holds that a dismissal for failure to comply with the notice requirements is a dismissal for lack of jurisdiction, the Plaintiff's original complaint was not duly commenced as required by the savings statute and Plaintiff's complaint should be dismissed with prejudice.

III. FILING A COMPLAINT WITHOUT PROVIDING PRE-SUIT NOTICE AS REQUIRED BY LAW DOES NOT TOLL THE STATUTE OF LIMITATIONS.

All parties to this appeal agree that as a general rule, filing a complaint tolls the statute of limitations. *See, e.g., Owens*, 891 So. 2d at 223. The parties, however, disagree as to whether this general rule is applicable when a plaintiff fails to provide pre-suit notice as required by section 15-1-36(15) of the Mississippi Code. Section 15-1-36(15) specifically provides that "[n]o action based . . . may be begun unless the defendant has been given at least sixty (60) days' prior written notice of the intention to begin the action." As previously stated, pre-suit notice is a condition precedent to filing a complaint and failure to provide notice in violation of Mississippi

law results in a lawsuit with no legal effect. *See Thomas*, 2008 WL 5174087, *3; *Wimley*, 991 So. 2d at 139. Since filing a complaint without pre-suit notice has no legal effect, Plaintiff should not be entitled to the tolling of the statute of limitations and this Court should dismiss Plaintiff's complaint as time barred by the statute of limitations. Any other interpretation of the statute would render the mandatory requirements of section 15-1-36(15) meaningless.

In *University of Southern Mississippi v. Williams*, the Mississippi Supreme Court considered whether the statute of limitations continued to run due to plaintiff's failure to provide notice of the claim as required by the Mississippi Tort Claims Act. 891 So. 2d 160, 175 (Miss. 2004). The Supreme Court held that "[o]ur review of the record reveals that there was a total absence of any effort or intent on behalf of [plaintiff] to comply with the Mississippi Tort Claims Act. No notice of claim as required by Section 11-46-11 was ever filed. Thus, the statute of limitations has long since run, and any recovery under the tort claims act is barred." *See Williams*, 891 So. 2d at 175. Likewise, in this case, Plaintiff wholly failed to provide notice before filing her original complaint; thus, the statute of limitations has long since run and her cause of action should be dismissed as time barred.

IV. PLAINTIFF'S NOTICE DID NOT MEET THE REQUIREMENTS OF SECTION 15-1-36(15) AND SHOULD NOT RECEIVE AN EXTENSION OF THE STATUTE OF LIMITATIONS.

A. *Mississippi Law Requires Plaintiff To Send A Notice Before Filing A Complaint.*

Even if Plaintiff's original complaint tolled the statute of limitations, Plaintiff's second complaint should still be dismissed with prejudice as time barred. Plaintiffs must provide notice of their intention to file a medical malpractice action. *Pitalo v. GPCH-GP*, 933 So. 2d 927, 929 (Miss. 2006)(citing MISS. CODE ANN. § 15-1-36(15)). Upon providing proper notice, the applicable statute of limitation is extended by sixty (60) days. *See, e.g., Proli v. Hathorn*, 928 So. 2d 169, 174 (Miss. 2006). Proper notice "notif[ies] the defendant of the legal basis of the

claim and the type of loss sustained, including with specificity the nature of the injuries suffered." MISS. CODE ANN. § 15-1-36(15).

For the first time in her brief, Plaintiff argues that she was not required to provide notice before re-filing her complaint because "Defendants were fully aware of the legal bases of the claim and the type of loss sustained, including the nature of the injuries suffered . . . ." However, this ignores Mississippi law. "[R]equirements such as the one in section 15-1-36(15) are to be taken seriously." *Andrews v. Arceo*, 988 So. 2d 399, 402 (Miss. Ct. App. 2008). Furthermore, the Mississippi Supreme Court "require[s] strict compliance with the mandates of . . . section 15-1-36 such that failure to satisfy the pre-suit notice requirement mandates dismissal of the plaintiff's complaint." *Williams v. Skelton*, No. 2007-CA-00095-COA, 2008 WL 1795415, at *1 (Miss. Ct. App. April 22, 2008). As the lower court correctly noted, "a second notice was required. The Court interprets the statute to refer to the notice being required prior to the filing or any filing. It's not limited to the first filing. And if the Supreme Court is going to apply a strict compliance standard, then this Court is of the opinion that second notice was indeed required . . . ." (Tr. 23-25).

B. *Plaintiff's Notice Did Not Substantially Comply With The Content Requirements For Notice As Required By Section 15-1-36(15).*

As required by Mississippi law, Plaintiff sent notice to Defendants on February 28, 2007. (R. 101-02). The notice sent by Tolliver's counsel simply stated, "[t]his letter is being sent pursuant to Section 15-1-36(15) of the Mississippi Code of 1972, as amended. This letter is to inform you of our intention to file suit on behalf of Tommie Tolliver. The basis of the suit is negligence." *Id.* Plaintiff argues in her brief that she substantially complied with the notice statute and thus, she should receive the benefit of the sixty day extension of the statute of limitations. *See* Brief of Appellee at 10-11.

Although current Mississippi law is unclear, it appears that the Mississippi Supreme Court now requires only substantial compliance with the content requirements for notice. *See Lee v. Mem'l Hosp. at Gulfport*, No. 2007-CA-01762-SCT, 2008 WL 5174311, at *3 (Miss. December 11, 2008). Regardless, the lower court correctly held that Plaintiff's "notice was not in substantial compliance with the requirements of the statute." (Tr. 25). Plaintiff's notice does not notify the Defendants of the type of loss sustained or the nature of the injuries suffered as required by the statute. The notice only informs the Defendants that the "basis of the complaint is negligence." Thus, the Court should affirm the lower court's decision that the Plaintiff's notice was not in substantial compliance with the content requirements for a notice as required by section 15-1-36(15).

Assuming Plaintiff's original complaint tolled the statute of limitations, Plaintiff had only thirty-nine (39) days remaining to re-file her complaint. Although Plaintiff sent notice to Defendants, the notice was not in substantial compliance with section 15-1-36(15) and thus, the applicable statute of limitations does not extend by sixty days. Plaintiff re-filed her complaint on May 9, 2007, sixteen (16) days after the statute of limitations expired. Since Plaintiff filed this cause of action outside of the applicable statute of limitations, the circuit court should have dismissed this cause of action with prejudice.

CONCLUSION

The Plaintiff's constitutional challenge to section 15-1-36(15) is procedurally barred for being raised on the first time on appeal. Moreover, the Court rejected the same constitutional challenge in a recent opinion. This Court should dismiss Plaintiff's complaint with prejudice since Plaintiff failed to file her complaint within the applicable statute of limitations. Plaintiff's cause of action should not be saved by section 15-1-69 since Plaintiff's original complaint was not duly commenced. Finally, Plaintiff's original complaint did not toll the statute of limitations since it was filed in violation of Mississippi law and had no legal effect. For the foregoing reasons, this Court should dismiss Plaintiff's complaint *with prejudice*.

This the 16th day of January, 2009.

Respectfully submitted,

ST. DOMINIC-JACKSON MEMORIAL HOSPITAL

By: Sharon F. Bridges w/permission JRW
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CERTIFICATE OF SERVICE

I, one of the attorneys for St. Dominic-Jackson Memorial Hospital, do hereby certify that I have this date served a true copy of the above and foregoing Reply Brief of Appellant, via United States Postal Service, postage prepaid, on the following:

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