IN THE SUPREME COURT AND COURT OF APPEALS
OF THE STATE OF MISSISSIPPI

GENE JONES, ASHLEY CRAFT RALPH SCOTT, HARDY GORDON, JAMES WILLIAMS AND REGGIE WILLIAMS	**APPELLANTS**
VERSUS	**NO. 2008-CA-00456**
FLUOR DANIEL SERVICES CORPORATION	**APPELLEE**

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.

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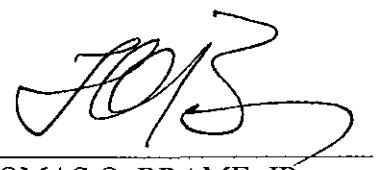

THOMAS Q. BRAME, JR.

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STATEMENT OF THE CASE

This is the second appearance of this matter before this Honorable Supreme Court. It first appeared here as cause no. 2005-CA-00825-SCT, resulting in reversal and remand for further proceedings on the issue of intentional infliction of emotional distress. The Mandate to the Honorable Circuit Court was dated August 2, 2007.

The Plaintiffs in this case, all African-American males, were employees of Fluor Daniels Services Corporation in the late Summer and early Fall of 2001. While under Fluor Daniels employ, the Plaintiffs worked directly for a Supervisor named Rudy Amaro, who was of Hispanic descent. Mr Amaro was named a Defendant in the Circuit Court but was never found to be served with Summons.

Plaintiffs contend that in the course and scope of their employment with Fluor Daniel, Defendant: subjected them to a repeated, continual course of outrageous conduct, such as repeatedly calling them names ("niggers", "specs", "monkeys"; repeatedly told them they could "go to work or go to the rope"; segregated Plaintiffs from workers of other races in their work duties; assigned Plaintiffs the nastiest, hottest and most unsavory jobs, while employees of other races were spared those tasks; refused equal opportunity of overtime to the African American employees; refused equal opportunity of advancement to African American employees; constantly harassed and demeaned them; instructed these employees to stay away from a female co-worker of Mexican descent; daily joked about, ridiculed and laughed at African American employees; and withheld the African American employees' paychecks until well after other employees received their paychecks.

COURSE OF PROCEEDINGS IN LITIGATION

Gene Jones filed his original Complaint in this action on April 4, 2003. Before Service of Process, a *First Amended Complaint for Damages* was filed June 12, 2003, an Alias Summons issued for Fluor Daniel and Rudy Amaro. Plaintiffs traveled on several legal theories, including Intentional Infliction of Emotional Distress.

Amaro was never found for service of process and is believed to have returned to Mexico. Fluor Daniel was served, and filed its *Fluor Daniel's Defenses, Answer and Affirmative Defenses* on August 14, 2003, in response to the First Amended Complaint. (R.19)

Subsequently an Order granting leave to file a Second Amended Complaint was filed on October 30, 2003, and the *Second Amended Complaint for Damages* was filed on October 30, 2003. (R.1, 5). Defendant never filed any Answer to the *Second Amended Complaint for Damages* (until January 22, 2008) but did actively participate in the litigation throughout the course of same.

The litigation proceeded, and after a removal to federal court and remand (as cause no. 4:03cv399LN in the United States District Court for the Southern District of Mississippi), written discovery, various motions and motion hearings, and many days of depositions, Defendant filed for summary judgment in toto, which was granted by the Honorable Circuit Court on March 30, 2005. Plaintiffs perfected their appeal to this Honorable Supreme Court, as cause no. 2005-CA-00825-SCT, resulting in reversal and remand for further proceedings on the issue of intentional

infliction of emotional distress. The Mandate to the Honorable Circuit Court was dated August 2, 2007.

Upon remand, there was again a flurry of activity in State Court, including a peremptory setting of the case for jury trial to start February 4, 2008, discovery motions, comprehensive *limine* motions and hearings thereon, status conferences, other motion hearings, and Court ordered mediation (R.3-4). Through it all, Defendant actively participated in the entire litigation process.

Defendant served it's first set of interrogatories on Plaintiff on January 15, 2008, only 20 days before trial (R.79). Plaintiffs promptly responded with their Motion for Protective Order served January 17, objecting to the grossly delinquent service of initial Discovery (R.28).

Only 13 days before trial, Defendant filed a written answer to the Second Amended Complaint, *without leave of Court*, this on January 22, 2008, well over ***four years*** past due (remember the Second Amended Complaint was filed October 30, 2003) (R.19). This unauthorized filing was followed by Defendant's *Motion for Leave to File the Answer Out of Time*, filed January 24, 2008. (R.3, 32). Plaintiffs promptly responded with *Plaintiffs' Motion to Strike Untimely Filed Answer and Defenses*, on January 25, 2008 (R.4).

Defendant raised in its said tardy Answer the affirmative defense of statute of limitations, arguing that the Plaintiffs' charge of intentional infliction of emotional distress was barred by a one year statute of limitations. (R.24). The Defendant had not previously raised this defense, except saying in it's answer to the *First Amended*

Complaint, filed on August 14, 2003 (R.88): "Second Defense: The Plaintiffs claims, to the extent any are stated, *may* be barred by statutes of limitation".[emphasis added]. Defendant had not before called up this statute of limitations argument, nor otherwise pled it, nor filed any motion thereon, nor advanced it in any way, through almost five years of litigation.

Defendant also filed, on January 22, 2008, its Motion for Summary Judgment (R.3, 24), alleging that the intentional infliction of emotional distress claims of the Plaintiffs were barred by the one year statute of limitations of MCA §15-1-35. Plaintiffs immediately countered with their *Plaintiffs' Response to Fluor Daniels Motion For Summary Judgment*, filed January 25, 2008 (R.35), arguing Defendant's waiver of this affirmative defense, if any it had, by it years of participation in the litigation without either raising or pursuing such defense; and arguing that the three year statute should apply.

Motion hearings on these matters were scheduled for January 25, 2008, and argument was preserved therein, constituting the transcript in this matter. The Honorable Circuit Court allowed the out of time filing of Defendant's Answer, in its Bench Ruling (T.12) followed by its *Order Granting Leave to File Answer Out of Time* filed January 30, 2008 (R.43). The Honorable Circuit Court went on to announce its Bench Ruling denying Defendant's Motion for Summary Judgment, finding that the tort of intentional infliction of emotional distress was not one of those intentional torts specifically enumerated in MCA §15-1-35, and therefore was not covered by the one year statute (T.21).

However later that same day, January 25, 2008, the Honorable Circuit Court reversed its Bench Ruling, announcing the reversal by its letter dated January 25, 2008 (R.82), granting Defendant's Motion for Summary Judgment on the statute of limitations.

Plaintiffs responded on February 5, 2008, with both their letter to the Honorable Circuit Court (R.57) and their motion for findings of fact and conclusions of law, pursuant to M.R.C.P. 52 (R.54), seeking understanding as to His Honor's reasoning, and to insure that this issue was well preserved for appeal. No Findings of Fact nor Conclusions of Law were handed down.

The Honorable Circuit Court entered its *Opinion and Order Grating Fluor Daniels Motion for Summary Judgment*, on March 6, 2008 (R.63). It is important to note that the Honorable Circuit Court specifically found that "Although intentional infliction of emotional distress is not included in this list [of intentional torts in MCA §15-1-35], the Supreme Court of Mississippi has held that the one year statute of limitations applies to this tort. . .". The Honorable Circuit Court contemporaneously entered its Final Judgment (R.62).

Plaintiffs, aggrieved at these rulings, promptly perfected their appeal on March 7, 2008. (R.66-68).

ARGUMENT

STANDARD OF REVIEW

It is well settled that this Honorable Supreme Court applies a de novo standard of review to the grant of a Summary Judgment by a trial court. *Aetna Cas. & Surety Co. v. Berry*, 669 So.2d 56 (Miss. 1996), *Leffler v. Sharp*, 891 So.2d 152 (Miss. 2004), *Jones v. Fluor Daniel Servs. Corp.*, 959 So.2d 1044 (Miss. 2007).

Likewise, statute of limitations issues as well as other questions of law, are also taken up by this Honorable Supreme Court de novo. *Stephens v. Equitable Life Assurance Society of The United States* 850 So. 2d 78 (Miss. 2003), *Chimento v. Fuller*, 965 So. 2d 668 (Miss. 2007).

POINT ONE: THE HONORABLE CIRCUIT COURT ERRED IN DISMISSING, ON SUMMARY JUDGMENT, PLAINTIFFS' CLAIMS OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Plaintiffs submit that the Honorable Circuit Court erred in dismissing, on Summary Judgment, Plaintiffs lawsuit, and more specifically, that the Honorable Circuit Court erred in finding that the affirmative defense of statute of limitations had not been waived by Defendant.

Plaintiffs filed its Second Amended Complaint on October 30, 2003 (R.5). M.R.C.P. 15(a) required the service of Defendant's Answer to the Second Amended Complaint within ten days, or on or before November 9, 2003. M.R.C.P. 12(b)

requires every defense to be asserted in the responsive pleading. M.R.C.P. 8(c) directs that the statute of limitations must have been pled as an Affirmative Defense, and M.R.C.P. 8(d) states clearly that the averments of the Complaint are admitted when not denied in the required responsive pleading. Collectively, these rules leave no doubt that an Answer had to be served by November 9, 2003, plainly asserting the Affirmative Defense of Statute of Limitations, and the failure to do so left the averments of the Complaint admitted.

In this case the Defendant did file an Answer to the First Amended Complaint on August 14, 2003. (R.88). In that pleading the Defendant did not affirmatively assert the defense of statute of limitations; rather it wrote only that same "may" be barred by some unspecified "statutes of limitations" (R.88).

Much more critical to the determination of this point is the fact that the Defendant did absolutely nothing to advance or assert any argument that the statute of limitations had run, but rather remained absolutely moot on same, while participating in this litigation for years and years. Defendant perfected a removal to Federal District Court and suffered remand; it took many days of depositions of all of the Plaintiffs (R.1-2, 97); it propounded requests for admissions to Plaintiffs and motions to compel responses thereto (R.1-2) and finally propounded written interrogatories to the Plaintiffs days before trial (R.79); it answered Plaintiffs' written discovery requests (R.11) and defended Plaintiffs' Motions to Compel Discovery (T.26-27); it participated in status conferences and Motion hearings (R.1-4); it prosecuted a Motion for Summary Judgment to completion in 2005 (R.2-4); it

defended the appeal of that Summary Judgment to Partial Reversal and Remand, then it pursued Requests for Re-Hearing before the Mississippi Supreme Court (see docket in 2005-CA-00825-SCT); after remand from the Mississippi Supreme Court it participated in more status conferences, entered into an Agreed Order Setting Cause for Trial, participated in mediation, prosecuted an extensive Motion in Limine through Motion Hearing (R.1-4); and did in late January, 2008, belatedly file an Answer (R.19), then sought leave of the Court to approve the late filing of that Answer (R.32). As already mentioned, in late January, 2008 Defendant filed, for the first time, Interrogatories propounded to the Plaintiffs and its motion to shorten discovery time to 10 days (see R.28, T. 24-28).

Only after the litigation had proceeded for almost five years did the Defendant make any serious effort to advance its statute of limitations argument. That simply came too late.

Since the earliest days of Mississippi jurisprudence it has been well established law that the statute of limitations is an affirmative defense that can be waived if not promptly pursued. *M.G. Wilkinson v. R. Flowers,* 37 Miss. 579 (1859). *Patterson v. Ingraham & Reed,* 23 Miss. 87 (1851).

Very recently the Mississippi Supreme Court and Court of Appeals have had multiple occasions to address the waiver of affirmative defenses and to "flesh out" this point of law. Beginning with *Mississippi Credit Center, Inc. v. Horton,* 926 So. 2d 167 (Miss. 2006), the Mississippi Supreme Court stated:

> ". . . a Defendant's failure to timely and reasonably raise and pursue the enforcement of ***any affirmative defense*** or other

> affirmative matter or right which would serve to terminate or stay the litigation, coupled with active participation in the litigation process, will ordinarily serve as a waiver" *Mississippi Credit Center, Inc.*, Supra, at ¶44. [*emphasis added*].
>
> ". . . we do hold however that - absent extreme and unusual circumstances - an eight month unjustified delay in the assertion and pursuit of ***any affirmative defense*** or other right which, if timely pursued, could serve to terminate the litigation, coupled with active participation in the litigation process, constitutes waiver as a matter of law. *Mississippi Credit Center, Inc.*, Supra, at ¶45. [*emphasis added*].
>
> ". . .to pursue an affirmative defense or other such rights, a party need only assert it in a pleading, bring it to the Court's attention by Motion, and request a hearing." *Mississippi Credit Center, Inc.*, Supra, *Foot Note No. 9.*

In *Mississippi Credit Center, Inc. v. Horton,* Supra, the affirmative defense at issue was the right to arbitration. *East Mississippi State Hospital v. Adams,* 947 So. 2d 887 (Miss. 2007) is the next major case in this line, this time dealing with the defenses of insufficient process and insufficient service of process. Again the Mississippi Supreme Court announced that "a Defendant's failure to timely and reasonably ***raise*** and ***pursue*** the enforcement of ***any affirmative defense*** or other affirmative matter or right which would serve to terminate or stay the litigation, coupled with active participation in the litigation process, will ordinarily serve as a waiver." *East Mississippi State Hospital,* Supra, at ¶10 [*emphasis added*]. In the *East Mississippi State Hospital* case, the Defendants did properly raise in their answer their affirmative defenses (insufficient process and insufficient service of process), but participated in the litigation and waited twenty-one and one-half months to file their Motion for Summary Judgment. The Mississippi Supreme Court found that the Defendant's participation in the

litigation coupled with their failure to pursue those defenses for twenty-one and one-half months waived those defenses.

The Mississippi Court of Appeals came to the same conclusion and recognized and applied and this law in reversing the lower court, in *Whitten v. Whitten,* 956 So. 2d 1093 (Miss. 2007).

More recently the Mississippi Supreme Court took up the case of *Estate of Grimes v. Warrington,* 982 So. 2d 365 (Miss. 2008). In that case the affirmative defense deemed waived was immunity under the Mississippi Tort Claims Act, and the Mississippi Supreme Court again cited *East Mississippi State Hospital v. Adams,* supra, and *Mississippi Credit Center, Inc. v. Horton,* supra, and again re-emphasized, in very plain language, what a Defendant has to do to avoid the enforced waiver of any affirmative defenses:

> ". . . a Defendant's failure to timely and reasonably [1] raise and [2] pursue the enforcement of any affirmative defense or other affirmative matter or right which would serve to terminate or stay the litigation, coupled with active participation in the litigation process, will ordinarily serve as a waiver . . ." *Estate of Grimes,* Supra at ¶ 22 [Numbering added for emphasis].
>
> ". . . this Court advised that to "**pursue**" an affirmative defense meant to [1] plead it [2] bring it to the Court's attention, and [3] request a hearing." *Estate of Grimes,* Supra, at ¶ 23 (emphasis added).

The Supreme Court felt it important to point out that Dr. Warrington offered no explanation as to why he did not move the lower Court for Summary Judgment for years during the litigation process; he offered no evidence that any information needed to assert this affirmative defense was not available to him from the inception of the litigation; and he actively

participated in the litigation. The Supreme Court found that the entire litigation was an unnecessary and excessive waste of time and resources of both the parties and the Court if Dr. Warrington had intended to pursue his affirmative defense.

All of those same arguments apply with absolute equal force here. Fluor Daniel has offered no explanation as to why it did not move for summary judgment for well over four years; Fluor Daniel offers no evidence that the information needed to assert this affirmative defense was not available to it from the inception of the litigation; Fluor Daniel very actively participated in the litigation; and all of the litigation was an unnecessary and excessive waste of the time and resources of the parties and the Court if Fluor Daniel intended to assert a statute of limitations defense.

Accordingly, applicable case law leads inescapably to the conclusion that the Defendant has waived the defense of statute of limitations if any it had. Defendant did not adequately plead the statute of limitations in its 2003 Answer, saying only vaguely that the claims of the Plaintiffs "may" be barred by unspecified "statutes of limitations". However, the point more major that whether the Defendant adequately *pled* a statute of limitations defense in 2003, is that Defendant unquestionably actively participated in the litigation process for almost five years without *pursuing* that defense at all. The Defendant did not "bring it to the Court's attention" by filing any motion, affirmative defense, or otherwise, and further did not "request a hearing" for years and years, all the while actively participating in the litigation. *Estate of Grimes*, Supra, at ¶ 23 (emphasis added).

It is apparent from reading the transcript that the notion of the statute of limitations defense truly never occurred to the Defendant's attorney during the several years of this

litigation. Defense counsel admitted to the Court in the Motion hearing that he only recognized, during mediation, that there may be a statute of limitations defense (T.2, line 23).

Plaintiffs urge this Honorable Court to find that the Defendant has waived any statute of limitation argument it might have had, both by failing to adequately plead it, and by active participation in the litigation process for years without pursuing it; and to remand for a trial on the merits.

POINT TWO: THE HONORABLE CIRCUIT COURT ERRED IN APPLYING A ONE YEAR STATUTE OF LIMITATIONS TO PLAINTIFFS' CLAIMS OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The correct statute of limitations to apply to the tort of *intentional infliction of emotional distress* has created a legal conundrum in the State of Mississippi.

At issue is the application of MCA §15-1-35 to the tort of intentional infliction of emotional distress. MCA §15-1-35 provides as follows:

> "All actions for assault, assault and battery, maiming, false imprisonment, malicious arrest, or menace, and all actions for slanderous words concerning the person or title, for failure to employ, and for libels, shall be commenced within one (1) year next after the cause of such action accrued, and not after."

Whether the tort of intentional infliction of emotional distress (hereafter "I.I.E.D") falls within the ambit of this statute has been quite problematic for Mississippi Courts, state and federal, and has spawned inconsistent results. For example, in Norman v. Bucklew, 648 So.2d 1246 (Miss. 1996), the Mississippi Supreme Court stated that both **"intentional and/or negligent infliction of emotional distress claims are governed by the three year statute of**

limitations." (*Norman v. Bucklew*, supra, at 1248). The same language was repeated a second time in that opinion, at page 1256. The three year statute of limitations for this tort in Mississippi was applied by the United States District Court for the Southern District of Mississippi in the case of *Hovard v. Mississippi Conference of the United Methodist Church*, 138 F. Supp. 2d 780 (S.D. Miss. 2001).

On the other hand, there has also been applied to this tort a one year statute of limitations. *Citifinancial Mortgage Company, Inc. v. Washington*, 967 So.2d 16 (Miss. 2007), and *Southern v. Mississippi State Hospital*, 853 So.2d 1212 (Miss. 2003). At times the Mississippi Court of Appeals has also applied the one year statute of limitations, such as in *Slaydon v. Hansford*, 837 2d 686 (Miss. 2002), and *Jones v. B.L. Development Corporation*, 940 So.2d 961 (Miss. 2006).

It has long been the law in the State of Mississippi that the maxim "inclusio unius est exclusio alterius" must always be followed. Modern day language states the maxim as "where a statute enumerates and specifies the subject or things upon which it is to operate, it is to be construed as excluding from its effect all those not expressly mentioned or, stated generally, all of those not of a like kind or classification as those enumerated." This has been called a "fundamental rule of construction", and is basic to our jurisprudence. *State ex rel. Whall v. Saenger Theatres Corporations*, 200 So. 442 (Miss. 1941), *Nichols v. Tri-State Brick and Tile Co.*, 608 So.2d 324 (Miss. 1992), *The Shelter Mutual Insurance Company v. Dale*, 914 So.2d 698 (Miss. 2005).

Plainly the one year statute of limitations, MCA-15-1-35, does not include, on it's face, the tort of I.I.E.D. Indeed the statute does not cover *many* intentional torts, and the Mississippi

Supreme Court has recognized that fact and ruled that many intentional torts are not covered thereby. Consider the well written opinion of the Mississippi Supreme Court, *Nichols v Tri-State Brick and Tile Company*, 608 So.2d 324 (Miss. 1992), wherein the Court said:

> Even a casual reading of the statute leads inescapably to the conclusion that it does not cover, and was not intended to cover, all intentional tortious conduct. . . .
>
> Thus, in *Brister v. Dunaway*, 149 Miss. 5, 115 So. 36 (1928) this Court held the one-year statute inapplicable to an action for alienation of affections, a tort involving the intentional interference with marital relations. *See, Stanton v. Cox*, 162 Miss. 438, 139 So. 458 (1932). Similarly, in *Dunn v. Dent*, 169 Miss. 574, 153 So. 798 (1934) this Court noted without discussion that the six-year period of limitations in the predecessor to Miss. Code Ann. § 15-1-49 applied to an action brought for deceit by false representation as to the number of acres in a tract of land sold. In *Bush v. City of Laurel*, 234 Miss. 93, 105 So.2d 562 (1958), we refused to apply the one-year statute to an action in trespass. More recently, in *Southern Land & Resources Co., Inc. v. Dobbs*, 467 So.2d 652 (Miss. 1985), we applied the six-year rather than the one-year statute to an action for wrongful foreclosure.
>
> ***333** Clearly then, the fact that wrongful conduct is alleged to be intentional does not determine which statute controls. *Dennis* means no more than that the absence of a label is, similarly, not controlling. **Where, as there, the conduct alleged may be fairly categorized as one of the enumerated torts, the one-year statute applies. Otherwise, it does not. We will not squeeze all intentional wrongs into the actions enumerated**." *Nichols, supra, at 332-333. [emphasis added]*

Therefore, the one year statute can only apply if it is determined that the tort of I.I.E.D. is "of like kind or classification" as one of the eight or nine intentional torts specified in MCA §15-1-35. Various courts have wrestled with this dilemma. If I.I.E.D. could be said to fit under the statute at all, then it could only possibly be under the quite flawed assumption that I.I.E.D. is "of like kind or classification" as "menace". The Federal Courts of the State of Mississippi have more often discussed this bridge to the application of MCA § 15-1-35, than have our State Appellate Courts. See for example *Hervey v. Met Life*, 154

F. Supp. 2d 909 (S. D. Miss. 2001), and see *Guthrie v. J.C. Penney Company*, 803 F2d 202 (5th Cir. 1986). The Mississippi Court of Appeals has however, itself gone through some gymnastics trying to come to an appropriate conclusion on this issue. See for example *McCorkle v. McCorkle*, 811 So.2d 258 (Miss. 2001).

These problems all apparently stem from the application of *Dennis v. Traveler's Insurance Company*, 234 So.2d 624 (Miss. 1970), to this issue. In *Dennis*, a letter was sent by Defendant to Plaintiff, threatening criminal prosecution if a civil debt was not promptly paid. This threat of criminal prosecution to coerce payment of a civil debt was found to be a "menace", so that the one year statute was applied. Through the years the citing of this case has gone through a metamorphosis to include I.I.E.D., albeit with quite convoluted and often stretched logic to so arrive.

A comparison of the definition of the tort of I.I.E.D., with that of "malice" of MCA §15-1-35, shows that the two quite plainly are not "of like kind or classification". I.I.E.D. has been defined by the Mississippi Court of Appeals as conduct "so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency. It must be regarded as atrocious and utterly intolerable in a civilized community. [citation omitted] Liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppression or other trivialities. . . . *Diamondhead Country Club v. Montjoy*, 820 So.2d 676 (Miss. COA 2000). On the other hand, "menace" has been generally stated to mean a threat. *Dennis v. Traveler's Insurance Company*, 234 So.2d 624 (Miss. 1970), and *Nichols v Tri-State Brick and Tile Company*, 608 So.2d 324 (Miss. 1992).

As can be seen from the very definition of I.I.E.D. as set forth in *Diamondhead*,

supra, threats are not the basis of I.I.E.D.

A careful examination of the cases that brought us to the application of a one year statute of limitations to I.I.E.D. reveals that the logic is not sound. Rather it is indeed a convoluted attempt to plug this square peg into a round hole. It simply does not fit.

This stretch also does not fit the trend of Mississippi jurisprudence toward strict construction and application of applicable laws and rules, such as the requirement that requests for admissions be answered strictly within the 30 days provided or be deemed admitted M.R.C.P. 36(a), *Martin v. Simmons* 571 So.2d 254 (Miss. 1990); or that the several requirements governing the notice letter under the *Mississippi Tort Claims Act* be strictly complied with, failing in which the suit will be fatally flawed *MCA §11-46-11, South Central Reg'l Med. Ctr. v Guffy*, 930 So.2d 1252 (Miss. 2006); or that the requirement controlling the notice of intent to sue, and the timing thereafter before filing suit in medical malpractice cases, all be strictly complied with or the resulting suit will be fatally flawed. *MCA §15-1-36, Nelson v Baptist Memorial Hospital,* 972 So.2d 667 (Miss. 2007); or that the attachment of the certificate of consultation with expert to the complaint in medical malpractice cases be strictly complied with or the complaint will be fatally flawed *MCA §*11-1-58, *Community Hospital of Jackson v Goodlett*, 968 So. 2d 391 (Miss. 2007). The point is that *MCA §15-1-35* should be construed and applied by the same standard as are these and all other Mississippi laws, and if that is done, this writer believes that I.I.E.D. will not be found included within that statute.

Appellants urge this Honorable Court to review carefully the body of law and the underlying convoluted logic supporting it, whereby a very rickety bridge has been built from

I.I.E.D. to a (sometimes) one-year statute of limitations, and to clarify and rule, for the benefit of all Mississippi litigants, that the better, indeed legally sound, much stronger pronouncement, is that a three year statute of limitations appropriately applies to the tort of I.I.E.D.., and accordingly to reverse and render on this point.

POINT THREE: THE HONORABLE CIRCUIT COURT ABUSED IT'S DISCRETION IN ALLOWING THE DEFENDANT TO FILE IT'S ANSWER TO THE AMENDED COMPLAINT MORE THAN FOUR YEARS LATE

The Plaintiffs' Second Amended Complaint was filed, with leave of the Court, on October 30, 2003 (R.5). M.R.C.P.15(a) required the service of Defendant's answer within ten days after service of that Amended Complaint, or on or before November 9, 2003. It is undisputed that this was not done and in fact no answer was served until a few days before trial, on or about January 22, 2008 (R.19). Even at that time no leave of Court had been obtained, as Defendant's motion for leave to file its out of time answer was not filed or served until January 24, 2008 (R.32). Also on January 24, 2008, Plaintiffs served their motion to strike the untimely answer (R.93). At the January 25, 2008, motion hearing, The Honorable Circuit Court allowed Defendant to file the answer, and overruled Plaintiffs' motion to strike (T.12, R.56).

The only way the Defendant could be allowed to properly file and travel on such a delinquent answer, pursuant to M.R.C.P. 6(b), is upon the showing of ***excusable neglect.***

The Mississippi Supreme Court has stated, in discussing excusable neglect, that **"simple inadvertence or mistake of counsel or ignorant for the rules usually does not suffice."** *LeBlanc v. Allstate Insurance Company*, 809 So.2d 674 (Miss. 2002) at ¶ 12.

Defendant's problem is that "simple inadvertence" is exactly what it pled and asserted to the Court in the Motion Hearing. That's all.

The Defendant stated in its Motion for leave to file the grossly delinquent answer that it failed to file its answer simply through "oversight" (R.32, line 5 of text). No other reason was pled.

Likewise, at the oral argument of this matter, Defense Counsel offered no other explanation than "inadvertence" (T.2-7) and "strictly an oversight...I just overlooked it" (T.11).

Most of the cases that deal with excusable neglect have done so in considering Mississippi Rule of Appellant Procedure 4. Nonetheless, this writer assumes that "excusable neglect" as defined and discussed under M.R.C.P. 4 would be the same as "excusable neglect" under M.R.C.P. 6. Surely the term should have a uniform meaning. The Mississippi Supreme Court has said that " . . . **excusable neglect [is] a standard which is 'strict' and can be met only in extraordinary cases."** *Matter of Estate of Weir*, 573 So.2d 773 (Miss. 1990).

This writer suggests that for this Honorable Court to allow mere inadvertence - which is all that has been alleged by the Defendant in this case - to meet the threshold of excusable neglect places the bar far too low. For the Honorable Circuit Court to have allowed the filing of an Answer more than four years and two months late on mere inadvertence was an abuse of discretion and this Honorable Court should reverse on this point.

POINT FOUR: THE HONORABLE CIRCUIT COURT ABUSED IT'S DISCRETION IN ALLOWING THE DEFENDANT TO PROPOUND INITIAL DISCOVERY MORE THAN FOUR YEARS LATE

Plaintiffs' contend that the Honorable Circuit Court abused its discretion in allowing the initial service of Interrogatories and Requests for Production on January 15, 2008 (R.79). Defendant had never before served any Requests for Production nor any Interrogatories. Defendant offered no justification whatsoever for its failure to timely pursue written discovery.

This action had been pending since April 4, 2003, when the initial Complaint was filed (R.1). The Defendant had pursued discovery early on: it served Requests for Admissions which had drawn Plaintiffs' objection, as noted on the docket, all in September, 2003 (R.1); and it took the oral depositions of all Plaintiffs encompassing several days in November, 2003. In the over four and one-half years this litigation has been pending, no other written discovery requests were ever propounded by the Defendant.

Plaintiffs' served their Motion for Protective Order objecting to the untimely Interrogatories and Requests for Production, on January 17, 2008, and the pleading was filed at the Courthouse on January 22, 2008 (R. 28-31). At the Motion Hearing conducted January 25, 2008, the Honorable Circuit Court ruled that the discovery did have to be answered, and had to be answered by February 4, 2008 (T 24-26).

U.C.C.C.R. 4.04 mandates that all written discovery be completed within 90 days after service of an Answer by the Defendant. While no answer was appropriately filed to the Second Amended Complaint, Defendant did file an Answer to the First Amended Complaint, which was served on August 13, 2003 (R. 88-92). U.C.C.C.R 4.04(A) only allows additional discovery time with leave of Court "upon written motion setting forth good cause for the extension". No good cause was pled nor proven by the Defendant to justify the grossly delinquent discovery requests.

Plaintiffs' contend that the allowance of this written discovery, including both

Interrogatories and Requests for Production, when none had been pursued for years and years, and with no good cause pled or proven, was an abuse of discretion.

The Mississippi Supreme Court has stated that "the term 'discretion' contemplates a process of reasoning which depends on facts that are in the record or are reasonably derived by inference from the record, and yields a conclusion based on logic **and founded on proper legal standards**" *January v. Barnes*, 621 So.2d 915 (Miss. 1993). Discretion has also been generally described as the decision making powers of the Court exercised for the purpose of giving effect to the purpose, or the "will" of the law. *White v. State*, 742 So.2d 1126 (Miss. 1999).

However, it is neither the purpose nor the will of the law that written discovery be propounded for the first time a few days before trial though the case has been pending for four and one-half years without even the first service of Defendant's first interrogatories or requests for production.

We all know that the law favors the vigilant and that litigants have a responsibility to properly manage their litigation matters. Defendant simply failed to do that in this case and the Honorable Circuit Court should not have allowed the grossly tardy service of written discovery.

Plaintiffs contend that the Honorable Circuit Court abused it's discretion by allowing the Defendant to propound this discovery at this belated time, and by requiring Plaintiffs to answer same on an abbreviated schedule a very few days before trial. Plaintiffs urge this Honorable Court to agree and to enter its Judgment reversing on this point upon remand, ruling that Plaintiffs need not respond to said discovery and rendering unto Plaintiffs the Protective Order they sought below.

CONCLUSION

In conclusion, and for the reasons stated herein, Plaintiffs' urge this Honorable Court to find that the Defendants have waived any affirmative defense of statute of limitations by litigating this case for years and years without raising that point, and to reverse the lower Court's grant of

Summary Judgment on the statute of limitations issue; to resolve the disparities in Mississippi Law, including a careful analysis of applicable law and the basis of the law, and clarify that the appropriate statute of limitations to apply to an I.I.E.D. Claim is three years, reversing the lower Court on that point; to disallow the grossly tardy filing of the Defendant's Answer to the Second Amended Complaint and to disallow the grossly tardy discovery propounded by the Defendant unto Plaintiffs, all as abuse of discretion, reversing and rendering on all points, and remand the case back for jury trial on the merits of the Plaintiffs' I.I.E.D Claims.

Respectfully submitted,

GENE JONES, ASHLEY CRAFT,
RALPH SCOTT, HARDY GORDON,
JAMES WILLIAMS, and
REGGIE WILLIAMS

By: _____
THOMAS Q. BRAME, JR.,
Their Attorney

CERTIFICATE OF SERVICE

I, Thomas Q. Brame, Jr., attorney for Plaintiffs, do hereby certify that I have this day deposited in the United States Mail, postage prepaid, a true and correct copy of the above foregoing instrument to Honorable Steven J. Allen at P.O. Box 580, Flat Rock, North Carolina 28731, and to Honorable Gary Friedman, a true and correct copy of the above foregoing instrument by telephone facsimile machine to 1-601-360-9777, and have this day deposited in the United States Mail, postage prepaid, a true and correct copy of same addressed to said attorney at Phelps, Dunbar, LLP, P.O. Box 23066, Jackson, Mississippi 39225-3066, all on this the 7th day of January, A.D., 2009.

THOMAS Q. BRAME, JR.

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