

THE ADULT NEXT FRIEND OF  
JERAMY JUAN JONES, A MINOR

APPELLANT

V.

No. 2008-CA-01490

LAUREL FAMILY CLINIC, P.A.  
DIVISION OF SOUTH CENTRAL  
REGIONAL MEDICAL CENTER  
AND SOUTH CENTRAL REGIONAL  
MEDICAL CENTER

APPELLEE

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APPELLEE'S BRIEF

TO THE CIRCUIT COURT FOR THE SECOND JUDICIAL DISTRICT OF  
JONES COUNTY, MISSISSIPPI

CIVIL ACTION NO. 2004-224-CV10

BARBARA JONES, NATURAL MOTHER  
AND ADULT NEXT FRIEND OF  
JERAMY JUAN JONES, A MINOR

PLAINTIFF

VS.

LAUREL FAMILY CLINIC, P.A.  
DIVISION OF SOUTH CENTRAL  
REGIONAL MEDICAL CENTER  
AND SOUTH CENTRAL REGIONAL  
MEDICAL CENTER

DEFENDANTS

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V.

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LAUREL FAMILY CLINIC, P.A.  
DIVISION OF SOUTH CENTRAL  
REGIONAL MEDICAL CENTER  
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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 disqualifications or recusal.

- 1) Appellant/Plaintiff, Barbara Jones.
- 2) Attorneys for Appellant/Plaintiff, James W. Nobles, Jr., Esq. and William R. Ruffin, Esq..
- 3) Defendants, Laurel Family Clinic, P.A. a division of South Central Regional Medical Center, Laurel, Jones County, Mississippi.
- 4) Attorneys for Petitioner/Defendant, Richard O. Burson and Grayson Lacey, Gholson Burson Entrekin & Orr, PA, 535 North 5<sup>th</sup> Avenue, P.O. Box 1289, Laurel, MS 39441-1289
- 5) Honorable Billy Joe Landrum, Circuit Court Judge, Jones County, Mississippi.

  
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description of the issues raised in Appellant's brief as follows:

1. Whether the trial court properly dismissed the instant action for failure to comply with the notice provisions of Mississippi Code Annotated Section 11-46-11(1) when Plaintiff's Complaint was filed less than ninety (90) days after the Hospital received the notice of claim letter.
2. Whether Plaintiff's constitutional challenges to the Mississippi Tort Claims Act should be considered on appeal when Plaintiff failed to raise the constitutional arguments at the trial court level and Plaintiff has failed to put the Attorney General on notice of the same pursuant to Rule 24(d) of the Mississippi Rules of Civil Procedure.
3. Whether Plaintiff's remaining issues on appeal should be considered when Plaintiff failed to raise them at the trial court level.

Jones, a minor, commenced the instant medical negligence action against South Central Regional Medical Center ("the Hospital"), the only named defendant in this action, by filing her Complaint on October 2, 2007, just eighty-five (85) days after providing the Hospital with a notice of claim letter. [R 3; RE 3]<sup>1</sup> The Hospital filed its Motion to Dismiss For Failure to Strictly Comply With Mississippi Code Annotated § 11-46-11(1) ("Motion to Dismiss") on October 31, 2007. [R 16; RE 4]

While Plaintiff never filed a formal response arguing the merits of the Hospital's Motion to Dismiss, Plaintiff did file a Motion for Continuance of Motion to Dismiss, a Motion to Amend Complaint Pursuant to Rule 15 Mississippi Rules of Civil Procedure, and a Motion to Compel on February 8, 2008. [R 46; RE 7] and [R 68; RE 8]. The Hospital filed Responses to each of these motions on February 19, 2008. A hearing was conducted on all pending motions on February 25, 2008.

After considering the parties' arguments and conducting a hearing on the same, the Circuit Court entered its Order Granting Defendant's Motion to Dismiss and Judgment of Dismissal dismissing the action *without* prejudice for Plaintiff's failure to strictly comply with Mississippi Code Annotated § 11-46-11(1) on August 11, 2008. [R 127; RE 10] The instant appeal followed.

undisputed that Plaintiff commenced the instant action without affording the only named defendant, the Hospital, a community hospital entitled to the protections of the Mississippi Tort Claims Act, with sufficient notice as required by the Mississippi Tort Claims Act. The clear and consistent caselaw of this Court mandates dismissal under such circumstances, and therefore, the trial court's dismissal of the instant matter should be affirmed.

As the Court is well aware, the Mississippi Tort Claims Act (Miss. Code Ann. § 11-46-1, et seq.) provides the exclusive avenue of recovery against the State of Mississippi, its government agencies, and political subdivisions. Mississippi Code Annotated Section 11-46-11 sets forth mandatory notice provisions that are to be met prior to the commencement of a suit against an entity covered by the Mississippi Tort Claims Act. The threshold notice requirement is that a claimant must provide the protected entity with notice of its claims at least ninety (90) days prior to commencing the suit. Miss. Code Ann. § 11-46-11(1). The Supreme Court of Mississippi has described this ninety (90) day notice requirement as "a 'hard-edged, mandatory rule which the Court strictly enforces.'" *University of Mississippi Medical Center v. Easterling*, 928 So.2d 815, 820 (Miss. 2006) (quoting *Ivy v. GMAC*, 612 So.2d 1108, 1116 (Miss.1992)).

The trial court's dismissal should be affirmed, because Plaintiff does not dispute that she commenced the instant action less than ninety (90) days after providing the Hospital with her notice of claim letter. In fact, Plaintiff does not address the issue of



the Mississippi Tort Claims Act rather than the application of the statutory requirements to the instant facts. In addition to the fatal posture Plaintiff finds herself in having not raised these issues at the trial court level, Plaintiff's constitutional challenges of the Mississippi Tort Claims Act are procedurally barred by Rule 24(d) of the Mississippi Rules of Civil Procedure since she has neglected to give notice of the constitutional attacks to the Attorney General. In accordance with this Court's routine practice of requiring compliance with the strenuous notice requirements of Rule 24(d) of the Mississippi Rules of Civil Procedure, Plaintiff should be precluded from raising the instant constitutional challenges to the Mississippi Tort Claims Act.

The only other issue raised by Plaintiff on appeal is whether the application of the Mississippi Tort Claims Act medical clinics and individual physicians amounts to a violation of the Sherman Anti-Trust Act. Again, Plaintiff is procedurally barred from arguing this issue for the very first time on appeal, because she failed to raise it at the trial court level. Even if Plaintiff had preserved this issue for appeal, though, it has no merit and is simply a red herring. South Central Regional Medical Center is the only named defendant in this matter. [R 3; RE 3] The only summons issued or served at the commencement of this action was to South Central Regional Medical Center. Plaintiff chose not to sue Laurel Family Clinic or Dr. James Doran in an individual capacity.<sup>2</sup> Now, after her claims against the only named defendant, South Central Regional Medical Center, have been dismissed, Plaintiff seeks to have her suit reinstated so that

will have been dismissed. If Plaintiff wished to pursue such claims and legal theories of liability against Dr. Doran, individually, she should have done so by naming him as a defendant at the outset of this litigation. At this time, however, she may only do so by filing a separate cause of action, because the trial court has properly dismissed the instant action due to Plaintiff's failure to provide the Hospital with adequate notice of her claims under the Mississippi Tort Claims Act.

**Instant Action Less Than Ninety (90) Days After Serving the Hospital With a Notice of Claim Letter In Direct Contravention of Mississippi Code Annotated Section 11-46-11(1)**

The trial court correctly dismissed Plaintiff's Complaint due to her failure to provide the Hospital with at least ninety (90) days of notice prior to filing her Complaint in the instant action as required by Mississippi Code Annotated Section 11-46-11(1).<sup>3</sup> Since the Hospital received Plaintiff's notice letter eighty-five (85) days prior to filing her Complaint, Plaintiff failed to comply with the statutory requirement of providing at least ninety (90) days notice. Accordingly, Plaintiff's Complaint was properly dismissed, and the trial court's dismissal should be affirmed.

Mississippi Code Annotated Section 11-46-11(1) sets forth the primary notice requirement under the Mississippi Tort Claims Act as follows:

After all procedures within a governmental entity have been exhausted, any person having a claim for injury arising under the provisions of this chapter against a governmental entity or its employee shall proceed as he might in any action at law or in equity; provided, however, that ninety (90) days prior to maintaining an action thereon, such person shall file a notice of claim with the chief executive officer of the governmental entity...

Miss. Code Ann. § 11-46-11(1) (emphasis added).

The ninety (90) day notice requirement of Mississippi Code Annotated Section 11-46-11 is not a recent statutory enactment. Indeed, it has been around for over fifteen years and its mandatory notice requirements have been addressed in multiple

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<sup>3</sup> To be abundantly clear, the Hospital does not concede that ninety (90) days notice would have been sufficient under the instant facts as Mississippi Code Annotated Section 11-46-11(3) specifically requires that Plaintiff may not file suit against the Hospital within one hundred twenty (120) days following service of the notice of claim unless a notice of denial letter is first issued. Since no notice of denial was ever issued in this matter, the Hospital is actually entitled to one hundred twenty (120) days notice pursuant to subsection three (3). Nevertheless, Plaintiff failed to provide the Hospital with adequate notice under the ninety (90) day catchall provision in subsection one (1), and therefore, the Hospital will

judgment due to the plaintiff's failure to wait the requisite ninety (90) days prior to filing suit as required by 11-46-11(1). In support of its holding, the Court reasoned that "[a]llowing a plaintiff to file suit before ninety days have passed since noticing the claim is tantamount to reading out the notice provisions of the MTCA." *Id.* at 333.

More recently, the Supreme Court of Mississippi announced that "strict compliance" with the ninety (90) day notice provisions of Miss. Code Ann. § 11-46-11(1) is required. See *University of Mississippi Medical Center v. Easterling*, 928 So.2d 815, 819-20 (Miss. 2006). "[T]he ninety-day notice requirement under section 11-46-11(1) is a 'hard-edged, mandatory rule which the Court strictly enforces.'" *Id.* at 820 (quoting *Ivy v. GMAC*, 612 So.2d 1108, 1116 (Miss.1992)). In *Easterling*, the Court abrogated the rule set forth in prior case law that placed the responsibility on the defendant to request a stay of the lawsuit if a plaintiff is not in compliance with the ninety-day notice requirement. *Id.* In reversing the trial court's denial of the defendant's motion for summary judgment, the Court stated, "[a]fter the plaintiff gives notice, he must wait the requisite ninety days before filing suit. Because [the plaintiff] failed to comply with the ninety-day waiting period, her case must be dismissed." *Id.* (emphasis added). However, according to the Supreme Court in *Lee v. Memorial Hospital at Gulfport*, "a plaintiff may file a complaint without waiting the full ninety days under Section 11-46-11(1) if the plaintiff receives a denial of notice of claim pursuant to Section 11-46-11(3)." *Lee v. Memorial Hospital at Gulfport*, 999 So.2d 1263, 1268 (Miss. 2008) (underline and bold emphasis added). Thus, dismissal is the appropriate remedy for failing to give at

The Hospital did not issue a denial of notice of claim under Section 11-46-11(3), and therefore, Plaintiff was obligated to wait the full ninety (90) days prior to filing her Complaint. See *Lee*, 999 So.2d at 1268. Plaintiff failed to do so in the instant action as she served the Hospital with her notice letter on July 9, 2007, and then she filed her Complaint eighty-five (85) days later on October 2, 2007. [R 3; RE 3] Consequently, her Complaint failed to strictly comply with the ninety (90) day notice requirement of Mississippi Code Annotated Section 11-46-11(1), "a 'hard-edged, mandatory rule which the Court strictly enforces.'" *Easterling*, 928 So.2d at 820 (quoting *Ivy v. GMAC*, 612 So.2d 1108, 1116 (Miss.1992)). Therefore, the trial court's order of dismissal stating "Plaintiff's Complaint must be dismissed due to her failure to wait at least ninety (90) days after serving the Hospital with her notice of claim letter before filing her Complaint" is appropriate and should be affirmed. [R 128; RE 10]

As the Supreme Court in *Easterling* succinctly put it, "since the [Mississippi Tort Claims Act]'s passage in 1993, a considerable amount of time has passed for the legal profession to become aware of the ninety-day notice requirement in section 11-46-11(1)." *Id.* at 820. The ninety (90) day notice requirement is not new, but rather it has withstood ample judicial scrutiny during its fifteen (15) plus years since enactment. The trial court recognized this fact and appropriately held Plaintiff accountable for her failure to abide by its mandatory notice requirements. This Court should do the same by affirming the trial court's dismissal in this regard.

**B. Plaintiff's Constitutional Challenges to the Mississippi Tort Claims Act Should Not Be Considered On Appeal, Because They Are Improperly Raised For**

challenges to the Mississippi Tort Claims Act. Since Plaintiff did not raise these constitutional arguments at the trial court level, and therefore the trial court had no opportunity to address them, this Court is precluded from considering Plaintiff's constitutional arguments on appeal. Furthermore, even if Plaintiff's constitutional challenges had been raised at the trial court level, which they were not, appellate review of such constitutional challenges would still be prohibited, because Plaintiff has failed to put the Attorney General on notice of the same.

"This Court has long held that it will not consider matters raised for the first time on appeal." *Triplett v. Mayor and Board of Aldermen of City of Vicksburg*, 758 So.2d 399, 401 (Miss. 2000)(citing *Shaw v. Shaw*, 603 So.2d 287, 292 (Miss.1992)). Therefore, since Plaintiff failed to raise the issue of constitutionality of specific statutes of the Mississippi Tort Claims Act before the trial court, and the trial court was not afforded an opportunity to consider or rule on the issue of constitutionality, this Court is procedurally barred from addressing this issue on appeal.

Aside from the procedural bar due to Plaintiff's failure to raise the issue of constitutionality at the trial court level, Plaintiff cannot overcome the procedural hurdle created by her failure to provide the Attorney General with prior notice of her constitutional challenge of the Mississippi Tort Claims Act. Rule 24(d) of the Mississippi Rules of Civil Procedure governs intervention of third parties such as the Attorney General. Specifically, it requires that when a constitutional challenge to a state statute is made, "the party asserting the unconstitutionality of the statute shall notify the Attorney General of the State of Mississippi within such time as to afford him an

Similarly, Rule 44 of the Mississippi Rules of Appellate Procedure provides that:

If the validity of any statute...is raised in the Supreme Court or the Court of Appeals, and the state, municipal corporation, or governmental body which enacted or promulgated it is not a party to the proceeding, the party raising such question shall serve a copy of its brief, which shall clearly set out the question raised, on the Attorney General, the city attorney, or other chief legal officer of the governmental body involved.

Miss. R. App. P. 44(a)(emphasis added).

Rule 44 continues by warning that “in the absence of such notice neither the Supreme Court nor the Court of Appeals will decide the question until the notice and right to respond contemplated by this rule has been given to the appropriate governmental body.” Miss. R. App. P. 44(c). The simple fact of the matter is that under both the Mississippi Rules of Civil Procedure and the Mississippi Rules of Appellate Procedure, prior notice to the Attorney General by the party challenging the constitutionality of a statute is necessary in order for this Court to consider the issue of constitutionality.

Plaintiff has failed to provide such notice in the instant action, as the certificate of service attached to Plaintiff's Brief does not indicate that the Attorney General was provided with copies of Plaintiff's Brief which raises for the first time constitutional challenges to the Mississippi Tort Claims Act.<sup>4</sup> Under similar circumstances, the Supreme Court of Mississippi has time and again recognized the procedural bar to constitutional challenges of state statutes when a party fails to put the Attorney General

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<sup>4</sup> Plaintiff did not put the Attorney General on notice of her constitutional challenges prior to appeal either. However, such notice did not appear necessary at that time since Plaintiff did

*Oktibbeha County Hospital v. Mississippi State Department of Health*, 956 So.2d 207, 210-11 (Miss. 2007)(“a party challenging the constitutionality of a legislative enactment must serve of {sic} copy of his or her brief on the Attorney General”).<sup>5</sup> Such should be the fate of Plaintiff’s constitutional challenges in the instant action, as well, because Plaintiff failed to put the Attorney General on notice of her constitutional challenge of the Mississippi Tort Claims Act.

In summary, this Court is procedurally barred from addressing Plaintiff’s constitutional challenges to the Mississippi Tort Claims Act. Plaintiff’s failure to argue the constitutionality of the Mississippi Tort Claims Act at the trial court level prevents this Court from addressing this issue on appeal, because the trial court was not afforded an opportunity to consider or otherwise rule on the constitutionality of the Mississippi Tort Claims Act. Even if Plaintiff had raised her constitutional arguments at the trial court level, though, this Court would still be precluded from considering the same on appeal, due to Plaintiff’s failure to put the Attorney General on notice of the same as required by the Mississippi Rules of Civil Procedure and the Mississippi Rules of Appellate Procedure. For the foregoing reasons, Plaintiff’s constitutional challenges of the Mississippi Tort Claims Act are prohibited and should be stricken by this Court.

To be thorough, however, even if Plaintiff’s constitutional challenges were not procedurally barred, the Supreme Court of Mississippi has held previously that the

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<sup>5</sup> See also, *Cockrell v. Pearl River Valley Water Supply Dist.*, 865 So.2d 357, 360 (Miss. 2004)(failure to give Attorney General procedural bars constitutional challenge); *Pickens v. Donaldson*, 748 So.2d 684, 691-92 (Miss. 1999)(same); *Barnes v. Singing River Hospital*



Mississippi Tort Claims Act "is rationally related to a proper legislative purpose," and it is therefore, constitutional). Recognizing that "there was no right to sue the State or its political subdivisions at common law," the Supreme Court has held that the fact that the legislature has continued to withhold such a right through its *limited* waiver of sovereign immunity establishes that there is no property right to sue the State or its political subdivisions, and therefore without a property interest, there can be no due process violation by the Mississippi Tort Claims Act. *Mohundro v. Alcorn County*, 675 So.2d 848, 852 (Miss. 1996).

In her Brief of Appellant, Plaintiff alleges that the Mississippi Tort Claims Act violates the right to trial by jury under the Seventh Amendment and the equal protection clause of the Fourteenth Amendment to the United States Constitution. The Seventh Amendment to the United States Constitution guarantees a right to trial by jury only "[i]n Suits at common law." U.S. Const. Amend. VII. Since "there was no right to sue the State or its political subdivisions at common law," it follows that the Legislature's limited waiver of sovereign immunity by passing the Mississippi Tort Claims Act, which provides for a bench trial in all actions brought against a governmental entity or political subdivision, does not violate the right to trial by jury "in Suits at common law" under the Seventh Amendment to the United States Constitution. *Mohundro*, 675 So.2d at 852 (Miss. 1996)(no right to sue State at common law, and therefore MTCA does not violate due process). Clearly, a suit brought under the Mississippi Tort Claims Act is not a

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<sup>6</sup> It should be noted that the analysis that follows is not exhaustive due to the fact that Plaintiff failed to raise these issues at the trial court level and failed to put the Attorney General

Plaintiff's argument that the Mississippi Tort Claims Act violates the equal protection clause of the Fourteenth Amendment to the United States Constitution is without merit, as well. In summary, Plaintiff argues that providing hospitals and physicians who fall under the Mississippi Tort Claims Act with a one year statute of limitations on claims asserted against them versus the two year statute of limitations applicable to private physicians and hospitals amounts to a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution. The Supreme Court of Mississippi has already considered and rejected this line of reasoning in *Smith v. Braden*, 765 So.2d 546, 559 (Miss. 2000). In fact, one need only look to the Supreme Court's analysis in *Braden* to realize it is well-settled that the Mississippi Tort Claims Act does not violate equal protection in the medical context:

The plaintiffs also assert the Act violates their right to equal protection. This argument is without merit as well. First, the plaintiffs apparently base this argument on the assertion that if [the defendant physician] is protected under the Act, he is treated differently from other physicians practicing medicine in Mississippi. This Court stated in *Mississippi Ins. Guar. Ass'n v. Gandy*, 289 So.2d 677, 679 (Miss.1973), that "one who is not prejudiced by the enforcement of an act of the legislature cannot question its constitutionality or obtain a decision as to its constitutionality on the ground that it impairs the rights of others." The plaintiffs fail to demonstrate that they are denied equal protection under the Act, that is, that they are treated differently from others similarly situated. They argue only that [the defendant physician] is treated differently from other physicians practicing medicine in this state. Furthermore, this Court has held that the Act does not violate equal protection, *Vortice v. Fordice*, 711 So.2d 894 (Miss.1998), as has the Fifth Circuit, *Grimes v. Pearl River Valley Water Supply Dist.*, 930 F.2d 441 (5<sup>th</sup> Cir.1991). Because the plaintiffs do not constitute a class which would require the use of strict or intermediate scrutiny, the rationale of both *Fordice* and *Grimes* applies to the case at hand.

United States Constitution or deprived Plaintiff of her right to equal protection under the Fourteenth Amendment, such a holding would have no bearing on the instant analysis. Indeed, such a holding would only invalidate Mississippi Code Annotated Section 11-46-13(1), which provides for a trial without a jury, and/or Mississippi Code Annotated Section 11-46-11(3), which sets the one year statute of limitations for claims under the Mississippi Tort Claims Act. Unfortunately for Plaintiff, neither of these statutes has any relevance to the issues present in the instant appeal. Simply put, Plaintiff's Complaint was properly dismissed by the trial court prior to trial due to her failure to provide at least ninety (90) days written notice to the Hospital prior to filing her Complaint pursuant to Mississippi Code Annotated Section 11-46-11(1), and the one year statute of limitations is not at issue either. [R 127; RE 10] Plaintiff has not challenged the constitutionality of the ninety (90) day notice requirement under Mississippi Code Annotated Section 11-46-11(1), and therefore, even if Plaintiff was not procedurally barred from challenging the constitutionality of various statutes under the Mississippi Tort Claims Act and even if Plaintiff's arguments concerning the same had merit, which they do not, this Court would still be obligated to affirm the trial court's dismissal.

**C. Plaintiff's Remaining Issues Raised On Appeal Should Not Be Considered, Because Plaintiff Failed To Raise Them At the Trial Court Level.**

Again, Plaintiff is procedurally barred from arguing on appeal that the Mississippi Tort Claims Act creates an unfair competitive advantage and violates the Sherman Anti-Trust Act, as well, because she did not raise such issues at the trial court level. See, *Triplett*, 758 So.2d at 401. (citing *Shaw v. Shaw*, 603 So.2d 287, 292 (Miss.1992)).

Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.”). The United States Supreme Court in *Parker* explained its reasoning as to why the Sherman Anti-Trust Act does not apply to state action:

We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

*Id.*

The Supreme Court further explained that the Sherman Anti-Trust Act's legislative history supported such a conclusion:

There is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only 'business combinations'. 21 Cong.Rec. 2562, 2457; see also at 2459, 2461. That its purpose was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations, abundantly appears from its legislative history.

*Id.* at 351

As an enactment by the Mississippi Legislature, the Mississippi Tort Claims Act certainly qualifies as a state act, and therefore does not fall within the purview of the Sherman Anti-Trust Act. Similarly, actions taken by the Hospital, a “community hospital” entitled to the protections of the Mississippi Tort Claims Act, pursuant to other statutory authority amounts to state action as well. For instance, Mississippi Code Annotated Section 41-13-35(5) sets forth certain powers and authorities of a “community

whether or not heretofore authorized to be offered, long-term care, extended care, home care, after-hours clinic services, ambulatory surgical clinic services, preventative health care services including wellness services, health education, rehabilitation and diagnostic and treatment services; to promote, develop, operate and maintain a center providing care or residential facilities for the aged, convalescent or handicapped; and to promote, develop and institute any other services having an appropriate place in the operation of a hospital offering complete community health care;

(n) To promote, develop, acquire, operate and maintain on a nonprofit basis, or on a profit basis if the community hospital's share of profits is used solely for community hospital and related purposes in accordance with this chapter, either separately or jointly with one or more other hospitals or health-related organizations, facilities and equipment for providing goods, services and programs for hospitals, other health care providers, and other persons or entities in need of such goods, services and programs and, in doing so, to provide for contracts of employment or contracts for services and ownership of property on terms that will protect the public interest;

(o) To establish and operate medical offices, child care centers, wellness or fitness centers and other facilities and programs which the board determines are appropriate in the operation of a community hospital for the benefit of its employees, personnel and/or medical staff which shall be operated as an integral part of the hospital and which may, in the direction of the board of trustees, be offered to the general public. If such programs are not established in existing facilities or constructed on real estate previously acquired by the owners, the board of trustees shall also have authority to acquire, by lease or purchase, such facilities and real property within the service area, whether or not adjacent to existing facilities, provided that any contract for the purchase of real property shall be ratified by the owner. The trustees shall lease any such medical offices to members of the medical staff at rates deemed appropriate and may, in its discretion, establish rates to be paid for the use of other facilities or programs by its employees or personnel or members of the public whom the trustees may determine may properly use such other facilities or programs;

Miss. Code Ann. § 41-13-35(5)(m)-(o) (emphasis added).

The Supreme Court of Mississippi specifically applied the above statutory powers to a "community hospital's" purchase of a medical clinic and employment of physicians in *Boliver Leflore Medical Alliance, LLP v. Williams*, 938 So.2d 1222 (Miss. 2006). In

statutorily empowered ["community hospitals"] to contract with [physicians or other entities] in the general interest of serving and promoting the health and welfare of the citizens of the State of Mississippi." *Id.* at 1231 (quotations and citations omitted).


Thus, the Hospital's acquisition of clinics such as Laurel Family Clinic and employment of physicians like Dr. Doran are specifically contemplated by statute and held by the Supreme Court to be an appropriate exercise of power by a "community hospital." As such, they can hardly be considered violations of the Sherman Anti-Trust Act. To suggest otherwise would not only be preposterous, but such a conclusion would effectively prohibit "community hospitals" from hiring any employees, regardless of position, and eliminate any possibility of such hospitals acquiring clinics, property, or other assets necessary to provide medical services to the citizens of their respective communities and surrounding areas.

Despite the fact that Plaintiff's arguments regarding the Sherman Anti-Trust Act and unfair competition fail both procedurally and substantively, the Court should not overlook the fact that such arguments are irrelevant to the issue at hand, that is whether Plaintiff provided the Hospital, the only named defendant in this action, with at least ninety (90) days notice prior to filing her Complaint. See Miss. Code Ann. § 11-46-11(1). She did not, and therefore, the trial court properly dismissed her Complaint. The Hospital's relationship with Laurel Family Clinic and/or Dr. Doran is irrelevant as neither is a party to this action. Indeed, the only named defendant is the Hospital, and it conclusively demonstrated at the trial court level that the Plaintiff failed to provide at

## CONCLUSION

Again, the only issue raised at both the trial court level and on appeal is whether Plaintiff provided the Hospital, the only named defendant in this action, with at least ninety (90) days notice prior to filing her Complaint as required by Mississippi Code Annotated Section 11-46-11(1). Notably, Plaintiff does not dispute that she filed her Complaint less than ninety (90) days after the Hospital received a copy of her notice letter. Consequently, the trial court properly dismissed her Complaint as a result. Thus, despite Plaintiff's creative yet meritless arguments which are raised for the first time on appeal, this Court's decision is quite simple. It must affirm the trial court's dismissal.

Respectfully submitted, this the 1<sup>st</sup> day of May, 2009.



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RICHARD O. BURSON  
ATTORNEY FOR THE DEFENDANTS

**CERTIFICATE OF SERVICE**

I, Richard O. Burson, hereby certify that I have this date served a true and correct copy of Appellee's Brief to the following via United States Mail, postage prepaid:


Ms. Betty Sephton, Clerk (via hand delivery)  
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Honorable Billy Joe Landrum (via hand delivery)  
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This the 1<sup>st</sup> day of May, 2009.

A handwritten signature in black ink, appearing to read 'Richard O. Burson', written over a horizontal line.

RICHARD O. BURSON  
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