IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2008-CA-02074

LOUISE MEADOWS AND
LAVELLE MEADOWS — PLAINTIFFS/APPELLANTS

VS.

KENDALL T. BLAKE, M.D., AND
MISSISSIPPI BAPTIST HEALTH SYSTEMS, INC.
D/B/A MISSISSIPPI BAPTIST MEDICAL CENTER — DEFENDANTS/APPELLEES

BRIEF OF APPELLEE, KENDALL T. BLAKE, M.D.

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 28(b) of the Mississippi Rules of Appellate Procedure, the undersigned counsel of record certifies that the following listed parties and/or persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Mississippi Supreme Court may evaluate possible disqualification or recusal.

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2. Defendant/Appellee, Mississippi Baptist Health Systems, Inc. d/b/a Mississippi Baptist Medical Center.

3. Plaintiff/Appellant, Lavelle Meadows.

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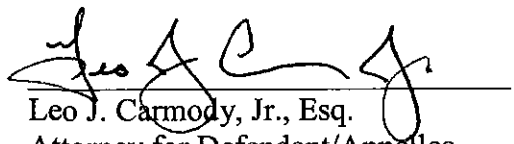

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

Cases

Statutes

Other Authorities

STATEMENT OF THE ISSUES

Because the Statement of the Issues and Statement of the Case offered by Plaintiffs/ Appellants do not completely detail the facts or properly frame the issues relevant to this appeal, Defendant/Appellee, Kendall T. Blake, M.D., hereby submits the following Statement of the Issues and Statement of the Case, pursuant to Rule 28(b) of the Mississippi Rules of Appellate Procedure:

1. Whether Plaintiffs/Appellants' claims were properly dismissed with prejudice where Plaintiffs/Appellants' failed to comply with the substantive pre-suit expert consultation requirements of Miss. Code Ann. § 11-1-58?
2. Whether dismissal of Plaintiffs/Appellants' claims with prejudice was further warranted where Plaintiffs/Appellants' failed to timely substitute parties, in accordance with the mandatory language of Rule 25 of the Mississippi Rules of Civil Procedure, and the statute of limitations had expired?

STATEMENT OF THE CASE

Appellee, Kendall T. Blake, M.D. ("Dr. Blake"), was a Defendant in the case *sub judice*, a medical malpractice action filed by Plaintiffs/Appellees, Louise Meadows, now deceased, and Lavelle Meadows (collectively, "Plaintiffs"). (R.E. 007; R. 5). In addition to Dr. Blake, Plaintiffs also named Mississippi Baptist Health Systems, Inc. d/b/a Mississippi Baptist Medical Center and "John Does # 1-5" as Defendants. (*Id.*). Plaintiffs filed their Complaint on August 31, 2004, alleging medical negligence as a result of the care and treatment Defendants provided to Plaintiff, Louise Meadows ("Mrs. Meadows"), between January 27, 2004 and March 30, 2004, as well as a claim for loss of consortium by Plaintiff, Lavelle Meadows ("Mr. Meadows"). (R.E. 007-13; R. 5-11 [¶¶ 7-8, 20]).

Attached to Plaintiffs' Complaint was a "Certificate of Plaintiffs' Attorney." (R.E. 014-15; R. 12-13). Ostensibly, this certificate was submitted pursuant to Miss. Code Ann. § 11-1-58, which requires the attorney filing an action against a licensed physician or health care provider to certify that they have consulted with a qualified medical expert prior to filing the lawsuit. (*Id.*). Rather than certify that Plaintiffs' counsel had consulted with a medical expert, the certificate submitted by Plaintiffs' counsel stated that "[p]ursuant to Mississippi Code Annotated § 15-1-36 (Supp. 2003), ***I hereby certify that I have requested the medical records from the Defendants but they have not yet been produced***." (R.E. 14; R. 12 [¶ 3]) (emphasis added).[1] Subsequently, on or about June 10, 2005, Plaintiffs' counsel submitted a second certificate of consultation, which reiterated that "***I had requested the medical records from the Defendants but they had not been produced at the time of filing the complaint in this matter***." (R.E. 016; R. 345 [¶ 3])

[1] While the certificate submitted by Plaintiffs' counsel references Miss. Code Ann. § 15-1-36, it appears that such was intended to refer to Miss. Code Ann. § 11-1-58(4), which provides that "[i]f a request by the plaintiff for the records of the plaintiff's medical treatment by the defendants has been made and the records have not been produced, the plaintiff shall not be required to file the certificate required by this section until ninety (90) days after the records have been produced."

(emphasis added). This certificate further stated that "after receiving the medical records from the Defendants, I reviewed the facts of this case and consulted with at least one (1) expert qualified pursuant to the Mississippi Rules of Civil Procedure and the Mississippi Rules of Evidence who is qualified to give testimony as to the standard of care or negligence and who I reasonably believe is knowledgeable in the relevant issues involved in the particular action, and that I have concluded on the basis of such review and consultation that there is a reasonable basis for the commencement of this action against the Defendants." (R.E. 016-17; R. 345-46 [¶ 4]).[2]

Notwithstanding the representations contained in the two (2) separate certificates of consultation discussed above, Plaintiffs' counsel admitted in a subsequent sworn pleading that "***[p]rior to filing the complaint, Plaintiff's [sic] counsel secured MBHS medical records for Mrs. Meadows' relevant medical records.***" (R.E. 020; R. 113 [¶ 2]) (emphasis added). A review of the correspondence wherein Plaintiffs' counsel requested the relevant medical records further revealed that that "a HIPPA-compliant Medical Record Authorization," requesting "Louise Meadows' entire medical record for the time period beginning January 1, 2004 through June 30, 2004" was submitted on August 2, 2004, approximately one (1) month prior to the filing of Plaintiffs' Complaint. (R.E. 024; R. 348). Moreover, in faxed correspondence transmitted by Plaintiffs' counsel the week ***prior*** to the filing of Plaintiffs' Complaint, it was confirmed that at least some of the relevant medical records had, in fact, already been received and reviewed on or before August 25, 2004. (R.E. 025; R. 349). Additionally, less than two (2) weeks after Plaintiffs' Complaint was filed, on September 10, 2004, a representative from Plaintiffs' counsel's law firm retrieved additional medical records (totaling approximately 1348 pages, upon information and belief), from Mississippi Baptist Medical Center. (R.E. 026-27; R. 350-

[2] It should be observed that the June 10, 2005 certificate of consultation did not state or otherwise indicate the precise date upon which Plaintiffs' counsel received the relevant medical records.

51). Notwithstanding the fact that these records were received on September 10, 2004, Plaintiffs' counsel did not submit a certificate confirming that the records had been reviewed and that a qualified expert had been consulted until some nine (9) months later, on June 10, 2005. (R.E. 016-18; R. 345-47).

Dr. Blake filed his Separate Answer and Defenses to Plaintiffs' Complaint on January 20, 2005. (R.E. 028-39; R. 22-33).[3] Soon thereafter, however, on or about February 27, 2005, Mrs. Meadows passed away. (R.E. 040, 051; R. 34 [¶ 3], 70). Rather than file a Motion to Substitute the proper party in place of Mrs. Meadows, her husband, Mr. Meadows, subsequently sought leave to amend Plaintiffs' Complaint, "to add claims of wrongful death and to add as Plaintiffs Kaye Burt and Judy Brown, daughters and additional wrongful death beneficiaries of Louise Meadows," but did not include the administrator of Mrs. Meadows' estate as a party/plaintiff. (R.E. 040-41; R. 34-35 [¶ 3]).[4] Thereafter, on January 15, 2006, Mrs. Meadows' death was stated on the record via a Suggestion of Death, which was served on all parties. (R.E. 051-52; R. 70-71).

Having filed his Answer to the only Complaint on file with the Court, Dr. Blake subsequently entered into an Agreed Scheduling Order, to which all parties in the case agreed.

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[3] In his Answer, Dr. Blake specifically raised Plaintiffs' failure to comply with the pre-suit requirements of Miss. Code Ann. § 11-1-58 as an affirmative defense, pleading as follows:

> This Defendant moves to strike Plaintiff's Complaint based on Plaintiff's failure to comply with Miss. Code (1972) Ann. § 11-1-58, requiring a certificate that an expert witness has been consulted and that there exists a reasonable basis for pursuit of claims. This Defendant also moves to strike Plaintiff's complaint and to dismiss this matter based on Plaintiff's failure to comply with conditions precedent to the initiation of litigation.

(R.E. 036; R. 30 ["TWENTY-FIRST DEFENSE"]).

[4] Prior to the Trial Court's dismissal of this case, Mr. Meadows failed to notice or otherwise bring on for hearing his Motion for Leave to Amend. Indeed, at the time it was dismissed, Plaintiffs' Complaint remained one for medical negligence against Defendants.

(R.E. 053-54; R.137-38). As set forth in this Agreed Scheduling Order, the parties uniformly consented to a February 14, 2007 deadline for the filing of all motions, other than motions *in limine*. (R.E. 053; R. 137 [¶ 5]). Subsequently, "for good cause shown," all parties agreed to amend their Scheduling Order, including an extension of the motion deadline until March 14, 2007. (R.E. 055; R. 197 [¶ 3]). Thereafter, the parties mutually entered into a Second Agreed Amended Scheduling Order, based on the need "to accommodate defense counsel's current trial schedule," and which provided that the "[a]ll motions, except for motions in limine, shall be filed by May 28, 2007." (R.E. 057; R. 325 [¶ 2]).

Based on the deadlines agreed to by all parties, Dr. Blake, along with his co-defendant, Mississippi Baptist Medical Center, Inc., timely filed two (2) Joint Motions to Dismiss on March 30, 2007. (R.E. 059-64, 065-69; R. 327-32, 361-65). The first of these motions requested dismissal based on Plaintiffs' failure to "strictly" comply with the requirements of Section 11-1-58, in accordance with this Court's holding in *Walker v. Whitfield Nursing Ctr., Inc.*, 931 So.2d 583 (Miss. 2006). (R.E. 062-63; R. 330-31 [¶ 11]). The second sought to dismiss Plaintiffs' claims based on their failure to timely substitute parties in connection with the death of Mrs. Meadows, consistent with Rule 25 of the Mississippi Rules of Civil Procedure. (R.E. 065-69; R. 361-65).

Ultimately, the Trial Court granted Defendants' Motion to Dismiss based on Plaintiffs' failure to comply with Miss. Code Ann. § 11-1-58, and dismissed the action with prejudice. (R.E. 006; R. 420). In so ruling, the Trial Court expressly acknowledged that, "in view of the Court's ruling on the motion aforesaid, the Court does not reach Defendants' Joint Motion to Dismiss for Failure to Substitute Parties or Plaintiffs' Motion to Amend Complaint, and these motions are hereby declared moot." (*Id.*). Based on its ruling, the Trial Court further entered a Judgment of Dismissal With Prejudice, dismissing "all causes of action asserted herein by the

Plaintiffs against the Defendants ... ." (R.E. 005; R. 419). It is this Order and Judgment that Plaintiffs currently appeal. (R.E. 70-71; R. 421-22).

SUMMARY OF THE ARGUMENT

The Trial Court properly dismissed Plaintiffs claims with prejudice based on their failure to comply with the substantive pre-suit expert consultation requirements imposed by Mississippi law. Miss. Code Ann. § 11-1-58 requires plaintiffs filing suit against a physician or other health care provider to consult with a qualified medical expert prior to filing suit to confirm that a reasonable basis exists for bringing the action. While recent case law from the Mississippi Supreme Court has determined that the certification provisions of Section 11-1-58 are procedural in nature, and that non-compliance with these provisions does not require dismissal, the substantive nature of the pre-suit expert consultation requirements repeatedly has been re-affirmed. Thus, Plaintiffs' failure to fulfill the pre-suit expert consultation requirements of Section 11-1-58 is such that the Trial Court's dismissal of Plaintiffs' claims was both warranted and appropriate. Similarly, while Section 11-1-58 allows the required expert consultation to be delayed where a plaintiff has been unable to obtain the medical records relevant to their claim, the record in this matter demonstrates that Plaintiffs failed to timely consult with an expert witness even after the relevant records were obtained. Thus, based on Plaintiffs' failure to comply with the expert consultation requirements of Section 11-1-58, the Trial Court's Order and Judgment of Dismissal With Prejudice should be affirmed.

Apparently cognizant that their failure to comply with the substantive requirements of Section 11-1-58 was properly deemed fatal by the Trial Court, Plaintiffs primary argument in this appeal is that Defendants waived their right to assert the defenses afforded them under the statute. The facts of this case, however, clearly establish that Defendants timely raised Plaintiffs' failure to comply with Section 11-1-58 with the Trial Court, and that any delay in

asserting this defense via motion was justified under the circumstances, such that it cannot be said that Defendants intentionally or voluntarily relinquished the defenses afforded to them under this statute. Moreover, given Plaintiffs' own actions in delaying their submission of certificate of consultation, their claim that Defendants waived the defenses available to them under Section 11-1-58 is particularly tenuous, and should be rejected by this Honorable Court.

Even if this Court should find that the Trial Court erred in dismissing Plaintiffs' claims with prejudice pursuant to Section 11-1-58, the Court should nevertheless affirm the Trial Court's decision, based on Plaintiffs failure to timely substitute parties in accordance with Rule 25 of the Mississippi Rules of Civil Procedure, and the expiration of the applicable statute of limitations. The plenary scope of this Court's jurisdiction allows it to review the issue of Plaintiffs' failure to comply with Rule 25, and to order that dismissal of the case was proper based on the same. The fact that Plaintiffs failed to substitute a proper party in place of Mrs. Meadows following her death, coupled with the mandatory language of Rule 25, is such that dismissal of Plaintiffs claims was clearly warranted independent of Plaintiffs' failure to comply with Section 11-1-58. Moreover, given that Plaintiffs' Complaint was a nullity at the time of filing, it would be futile to reinstate claim now, as the statute of limitations governing the underlying medical malpractice claim has long since expired. Thus, the interests of justice demand that the Trial Court's ultimate decision in this matter not be disturbed.

Accordingly, Defendant/Appellee, Dr. Kendall T. Blake, respectfully requests that this Honorable Court affirm the decision of the Trial Court, dismissing Plaintiffs/Appellants' claims with prejudice, or in the alternative, that this Court remand this matter with instructions to enter an Order and/or Judgment dismissing Plaintiffs' claims with prejudice on the grounds that Plaintiffs failed to comply with the mandatory substitution requirements of Rule 25 of the Mississippi Rules Of Civil Procedure, and that the statute of limitations has expired.

ARGUMENT

I. PLAINTIFFS/APPELLANTS' CLAMS WERE PROPERLY DISMISSED WITH PREJUDICE BASED ON PLAINTIFFS/APPELLANTS' FAILURE TO COMPLY WITH THE SUBSTANTIVE PRE-SUIT EXPERT CONSULTATION REQUIREMENTS IMPOSED BY MISS. CODE ANN. § 11-1-58.

A. The Record Demonstrates That Plaintiffs/Appellants Failed To Timely Consult With A Qualified Expert Witness Prior To Filing Suit, As Required By Mississippi Law.

Miss. Code Ann. § 11-1-58 requires that plaintiffs bringing a medical malpractice claim consult with a qualified medical expert prior to filing suit, to confirm a reasonable basis exists for commencing the action, and that plaintiffs further certify this consultation with the Trial Court. Miss. Code Ann. § 11-1-58(1)(a) (2008). Section 11-1-58 further provides that "[i]f a request by the plaintiff for the records of the plaintiff's medical treatment by the defendants has been made and the records have not been produced, the plaintiff shall not be required to file the certificate required by this section until ninety (90) days after the records have been produced." Miss. Code Ann. § 11-1-58(4).

The issue of whether the certification requirements of Section 11-1-58 are a necessary prerequisite to filing a medical malpractice claim has received substantial attention from this Court in recent years. In *Walker v. Whitfield Nursing Center, Inc.*, 931 So. 2d 583 (Miss. 2006), this Court held that a plaintiff's failure to strictly comply with the mandatory provisions of Section 11-1-58 required dismissal. *Walker,* 931 So.2d at 590. Subsequently, in *Wimley v. Reid,* 991 So.2d 135 (Miss. 2008), this Court held that "a complaint, otherwise properly filed, may not be dismissed, and need not be amended, simply because the plaintiffs failed to attach a certificate or waiver," and that "[t]o the extent *Walker* and its progeny hold otherwise, they are hereby overruled." *Wimley*, 991 So.2d at 138. Significantly, however, the Court in *Wimley* further held that "***our opinion today in no way diminishes Section 11-1-58's requirement of consultation with an expert prior to filing suit.***" *Id.* (emphasis added).

In the current matter, it is apparent that Plaintiffs did not comply with Section 11-1-58's requirement that a qualified expert be consulted prior to filing suit. The certificate submitted by Plaintiffs' counsel at the time the original Complaint was filed makes no mention of any consultation with an expert witness, and instead merely asserts that the records had been requested, but not yet produced.[5] In this regard, it is important to observe that Plaintiffs' Complaint, which was filed August 31, 2004, expressly alleges that the conduct upon which Plaintiffs' claims are based occurred between January 27, 2004 and March 30, 2004.[6] Thus, at the time Plaintiffs' Complaint was filed, less than six (6) months had lapsed since the last event cited therein. Given that the statute of limitations governing Plaintiffs' claims would not have expired until approximately eighteen (18) months later, Plaintiffs had ample time to obtain the relevant medical records and consult with a qualified expert witness prior to filing suit. See Miss. Code Ann. § 15-1-36(2) (providing a two-year statute of limitations for medical malpractice actions).[7]

Regardless of the reason for their decision to proceed with filing the Complaint so far advance in advance of the statute of limitations, Plaintiffs remained obligated to state a statutorily permissible reason why they had failed to first consult with a qualified expert witness. Plaintiffs chose to rely on Section 11-1-58(4), which allows a litigant wishing to assert a medical malpractice claim, but who has been unable to obtain the relevant medical records, an additional

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[5] (R.E. 014; R. 12 [¶ 3]).

[6] (R.E. 7, 9; R. 5, 7 [¶¶ 7-8]).

[7] Plaintiffs' counsel subsequently certified that an expert witness had been consulted via the certificate of consultation submitted June 10, 2005, which also was within the statutory period. To the extent that Plaintiffs' decision to file suit on August 31, 2004 was designed to circumvent application of the statutory medical malpractice reforms that became effective September 1, 2004, including various limitations on damages, Plaintiffs decision to proceed with filing without having first obtained the required expert consultation can only be described as calculated move. Thus, Plaintiffs should be made to abide the consequences of this tactical decision.

ninety (90) days after the records are obtained to consult with an expert and submit the required certification. As set forth above, Plaintiffs' counsel expressly represented in his initial certification to the Trial Court he had "***requested the medical records from the Defendants but they have not yet been produced***."[8] Plaintiffs' counsel later repeated this allegation in certifying his consultation with an expert, stating that "***I had requested the medical records from the Defendants but they had not been produced at the time of filing the complaint in this matter***."[9] Subsequently, however, and contrary to the representations made in his two (2) certificates of consultation, it was revealed that Plaintiffs' counsel was, in fact, in possession of the relevant medical records at the time the Complaint was filed. Specifically, Plaintiffs' counsel admitted in a sworn pleading that "***[p]rior to filing the complaint, Plaintiff's [sic] counsel secured MBHS medical records for Mrs. Meadows' relevant medical records.***"[10] Moreover, the record in this matter demonstrates that Plaintiffs' counsel did not certify that the records had a qualified expert had been consulted until some nine (9) months after the numerous additional records were produced.[11]

Plaintiffs' counsel's conflicting representations concerning when the relevant medical records were received is certainly troubling. Twice Plaintiffs' counsel represented that the relevant medical records had not been obtained prior to the filing of Plaintiffs' Complaint, only to subsequently admit that these records were, in fact, already in his possession at the time suit

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[8] (R.E. 014; R. 12 [¶ 3]) (emphasis added).

[9] (R.E. 016; R. 345 [¶ 3]) (emphasis added).

[10] (R.E. 020; R. 113 [¶ 2]) (emphasis added); see also (R.E. 025; R. 349) (confirming that Plaintiffs' counsel had received and reviewed at least some of the relevant medical records prior to filing Complaint).

[11] (R.E. 026-27; R. 350-51) (confirming receipt of Mrs. Meadows' medical records by assistant to Plaintiffs' counsel on September 4, 2004); (R.E. 016-18; R. 345-47) (certificate of consultation submitted June 10, 2005).

was commenced. Significantly, the representation that the records had not been obtained at the time the Complaint was filed allowed Plaintiffs to avoid submission of a certificate memorializing that a qualified expert witness had been consulted and that a reasonable basis for filing suit existed.

Under Mississippi law, the submission of material, false representations repeatedly has been held to justify dismissal. *Scoggins v. Ellzey Beverages, Inc.*, 743 So.2d 990, 997 (Miss. 1999) (affirming dismissal with prejudice of plaintiff's claims where plaintiff submitted false discovery responses concerning matters material to the case); see also *Pierce v. Heritage Properties, Inc.*, 688 So.2d 1385, 1390 (Miss. 1997); *Jones v. Jones*, 995 So.2d 706 (Miss. 2008); *Grant v. Kmart Corp.*, 870 So.2d 1210, 1219 (Miss. Ct. App. 2001). Further, it is well-established that "[a]n attorney is presumed to have the authority to speak for and bind his client." *Parmley v. 84 Lumber Co.*, 911 So.2d 569 (Miss. Ct. App. 2005) (citing *Fairchild v. General Motors Acceptance Corp.*, 254 Miss. 261, 265, 179 So.2d 185, 187 (1965)). Thus, the representations made concerning when Mrs. Meadows' medical records were received may be attributed to Plaintiffs, themselves. The fact that these representations ultimately were shown to be false, coupled with the potential that such was purposefully designed to afford Plaintiffs an advantage in this litigation, further demonstrates that the Trial Court's decision in this matter was both warranted and appropriate.

In their appeal brief, Plaintiffs go to great lengths to convince this Court that its decision in *Wimley* requires that the Trial Court's dismissal of this matter with prejudice must be reversed, and that the case further should be "remanded for an evidentiary hearing to determine whether Plaintiffs complied with the substance of the statute i.e. whether or not Plaintiffs consulted with an expert." See *Plaintiffs/Appellants' Brief*, at 12-13. The relevant issue in this case, however, is not merely whether Plaintiffs, at some point in the litigation, consulted with an expert. Rather, as

acknowledged in *Wimley*, the issue is whether Plaintiffs did so before filing their Complaint. *Wimley*, 991 So.2d at 138 ("[O]ur opinion today in no way diminishes Section 11-1-58's requirement of consultation with an expert ***prior to filing suit***.") (emphasis added); see also *Arceo v. Tolliver (Tolliver II)*, No. 2008-CA-00224-SCT, at ¶ 33 (August 20, 2009) ("Failure to comply with pre-suit requirements will result in dismissal."); *McClain v. Clark*, 992 So.2d 636, 638 (Miss. 2008) ("The plaintiff must nevertheless comply with the pre-suit requirements of Section 11-1-58); *Ellis v. Mississippi Baptist Medical Center, Inc.*, 997 So.2d 996 (Miss. Ct. App. 2008) (holding that plaintiffs must consult with qualified expert prior to filing suit).[12]

If any credence is to be given to Plaintiffs' representations regarding when the relevant medical records were received, the question of whether Plaintiffs consulted with an expert prior to filing suit has already been answered in the negative, such that the "evidentiary hearing" now requested by Plaintiffs is simply unnecessary. On the other hand, if no belief is extended to the representations, then the only conclusion that can be reached is that Plaintiffs have misrepresented matters material to this litigation. Either way, the Trial Court's Order and Judgment should not be disturbed.

B. Defendant/Appellee Did Not Waive Any Defense And/Or Objection Based On Plaintiffs/Appellants' Failure To Comply With The Pre-Suit Requirements Imposed By Miss. Code Ann. § 11-1-58.

In effort to avoid the penalty for their non-compliance with the pre-suit expert consultation requirements codified in Section 11-1-58, Plaintiffs devote the bulk of their appeal brief to the argument that Defendants in the case *sub judice*, including Dr. Blake, waived the

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[12] In fairness to the Trial Court, at the time it rendered its February, 2008 decision dismissing Plaintiffs claims with prejudice, this Court's decision in *Wimley*, issued in September, 2008, had not yet been handed down. (R.E. 005-06; R. 419-20). The most recent announcement from this Court on compliance with Section 11-1-58 at the time the Trial Court rules was *Walker*, which clearly embraced the notion that a plaintiff's failure to timely submit the certificate of consultation required by Section 11-1-58, in and of itself, warranted dismissal. *Walker*, 931 So.2d at 590.

right to assert the defenses available to them under Section 11-1-58. See *Plaintiffs/Appellants' Brief*, at 7-12. Specifically, Plaintiffs argue that Defendants waited too long to assert the defense, while actively participating in the litigation process. *Id.* The record in this matter, however, clearly demonstrates that Plaintiffs' waiver argument lacks merit.

Under Mississippi law, waiver is defined as "an intentional surrender or relinquishment" of a known right. *Union Planters Bank, Nat. Ass'n v. Rogers*, 912 So.2d 116, 119 (Miss. 2005) (citing *Ewing v. Adams*, 573 So.2d 1364, 1369 (Miss. 1990)). Similarly, "[w]hether there has been a knowing, intelligent and voluntary waiver is a fact question for the trial court to determine from the totality of the circumstances." *Busick v. State*, 906 So.2d 846, 855 (Miss. Ct. App. 2005) (citing *McGowan v. State,* 706 So.2d 231, 235 (Miss.1997)).

In the current matter, it cannot be said that Dr. Blake knowingly or intentionally relinquished any defense or other right to relief available to him. As an initial matter, Dr. Blake timely filed an Answer to Plaintiffs' Complaint, which expressly asserted Plaintiffs' failure to comply with the pre-suit requirements of Section 11-1-58 as an affirmative defense.[13] Having preserved this defense in his Answer, Dr. Blake then raised the same via a Motion to Dismiss, filed jointly with his co-defendant, Mississippi Baptist Medical Center, Inc.[14] Moreover, this motion was filed on March 30, 2007, nearly two (2) months prior to the motion deadline established by the applicable scheduling order, to which all parties mutually agreed.[15]

Dr. Blake respectfully submits that the filing of his Motion to Dismiss based on Plaintiffs' failure to comply with Section 11-1-58 within the deadline established by the parties' Second Agreed Scheduling Order dispels any notion that he waived the right to assert this

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[13] (R.E. 36; R. 30 ["TWENTY-FIRST DEFENSE"]).

[14] (R.E. 059-64; R. 327-32).

[15] (R.E. 057; R. 325 [¶ 2]) (providing that "[a]ll motions, except for motions in limine, shall be filed by May 28, 2007.").

defense. Given the existence of a specific motion deadline in the scheduling order, to which Plaintiffs expressly agreed, it simply cannot be said that Dr. Blake knowingly relinquished his right to raise this defense via a timely filed motion.[16] Clearly, Dr. Blake acted in good-faith in relying on the motion deadline contained in the parties' scheduling order, and he should not penalized for the same.[17] To hold otherwise would potentially discourage future litigants from entering into agreed scheduling orders, thereby impeding the efficient and orderly administration of judicial claims.

In support of their "waiver" argument, Plaintiffs cite this Court's decisions in *MS Credit Center, Inc. v. Horton*, 926 So.2d 167 (Miss. 2006), *East Mississippi State Hospital v. Adams*, 947 So.2d 887 (Miss. 2007), and *Estate of Grimes v. Warrington*, 982 So.2d 365 (Miss. 2008). See *Plaintiffs/Appellants' Brief*, at 6-9. Each of these decisions may be distinguished from the current matter, however, as there is no indication that the defendants in *Horton*, *Adams* or *Grimes* could claim the benefit of a specific motion deadline agreed to by all parties, which

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[16] Dr. Blake further submits that his assertion of Section 11-1-58 in his Answer, followed by the filing of a Motion to Dismiss on this same basis, was consistent with traditional Mississippi practice, at least as it then-existed, such that no intentional waiver occurred. See *Heard v. Remy*, 937 So.2d 939, 941 (Miss. 2006) (observing that waiver occurs only where a defendant fails "to assert the defense in an answer, motion, or other responsive pleading ...") (citing *Young v. Huron Smith Oil Co.*, 564 So.2d 36, 39 (Miss.1990)); see also Miss. R. Civ. Proc. 12(b) (2008) ("[n]o defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion.").

[17] In light of Plaintiffs' waiver argument, it must be observed that this Court has recognized that a legitimate waiver argument is often accompanied by a failure on the part of the offending party to seek a continuance. See *Ford Motor Co. v. Tennin*, 960 So.2d 379, 394-95 (Miss. 2007); *Kindred v. Columbus Country Club*, 918 So.2d 1281, 1286 (Miss. 2005) ("This Court has often enforced waivers when there has been no request for continuance."). In the current matter, Dr. Blake specifically sought to preserve the right to continue the deadline for filing motions by requesting that the parties amend the scheduling order on two (2) separate occasions, and in both instances, Plaintiffs agreed to the same. (R.E. 055-56; 57-58; R. 197-98, 325-26). Based on the preceding cases, and given Dr. Blake's efforts to extend the motion deadline, in cannot be said that Dr. Blake waived his right to assert Plaintiffs' failure to comply with Section 11-1-58.

preserved the parties' right to raise a particular defense or other claim for relief via motion on or before a specified date.[18]

In further support of their waiver argument, Plaintiffs argue that "Defendants actively participated in the litigation process of the case for over two years before filing their motion to dismiss." See *Plaintiffs/Appellants' Brief*, at 9. Plaintiffs further discuss the various matters in which Defendants participated prior to filing their Joint Motion to Dismiss based on Plaintiff's failure to comply with Section 11-1-58. *Id.* at 9-11. Specifically, Plaintiffs point to the fact that Defendants participated in discovery, filed and opposed various motions, and entered into three (3) separate scheduling orders. *Id.*[19] Finally, Plaintiffs argue that Defendants' alleged waiver of their objection to Plaintiffs' non-compliance with Section 11-1-58 is further supported by the fact that Defendants' Motion to Dismiss was not filed until after Plaintiffs designated their expert witnesses. *Id.* at 11-12.

Plaintiffs' recitation of the Defendants' litigation activities is clearly intended to convince this Court that Defendants participation in the litigation is commensurate with the level of activities that resulted in a finding of waiver in *Horton*, *Adams* and *Grimes*. In this regard, the timing of Defendants' motion, as well as the release of the case upon which it was based, must be observed. Defendants' Motion to Dismiss based on Plaintiffs' failure to comply with Section

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[18] While the decisions in *Adams* and *Grimes* acknowledge that the defendants "consent[ed] to a scheduling order," neither opinion specifies that a specific motion deadline was contained therein. *Adams*, 926 So. 2d at 180; *Grimes*, 982 So.2d at 370.

[19] As regards the scheduling orders entered into by the parties, Plaintiffs argue that "[i]mportantly, each scheduling order contained a provision regarding experts," and that "{t]his fact is important because the central issue to the subject defense is that Plaintiffs did not timely file a certificate stating that an expert had reviewed the case ..." See *Plaintiffs/Appellants' Brief*, at 11. The irony in this argument is that Plaintiffs' primary defense to non-compliance with pre-suit expert consultation requirements on Section 11-1-58 is that Defendants waived the same by not filing a timely motion to dismiss. Again, the scheduling order also spoke to this matter, such that Plaintiffs' reliance on the parties' scheduling orders as evidence of waiver can only be described as misguided.

11-1-58 was filed on March 30, 2007.[20] As set forth therein, Defendants' based their request for dismissal upon this Court's holding in *Walker*, which changed the standard of compliance with respect to Miss. Code Ann. § 11-1-58 from "substantial" to "strict." *Walker*, 931 So.2d at 588-90.[21] *Walker* was not issued by the Supreme Court until June, 2006, such that Defendants possessed a good faith belief that a substantial basis for their motion did not exist until that time. Thus, Plaintiffs' assertion that "Defendants actively participated in the litigation process of the case for over two years," before pursuing the motion dramatically overstates the length of time and level of participation by Defendants in the litigation before their Motion to Dismiss was ripe for filing. See *Plaintiffs/Appellants' Brief*, at 9.

It must also be observed that *Horton* expressly states that waiver exists only where there is an "unjustified delay in the assertion and pursuit" of a particular defense. *Horton*, 926 So.2d at 181. In the course of litigating this matter, Defendants' counsel faced numerous conflicts arising from other matters, which ultimately caused Defendants to twice seek and obtain a continuance of the various scheduling order deadlines. Indeed, the parties Agreed Amended Scheduling Order, entered November 15, 2006, recognized the "good cause shown" to extend the deadlines contained therein.[22] Moreover, the parties' Second Agreed Amended Scheduling Order, entered January 22, 2007, expressly stated that the additional extension of the various scheduling deadlines was necessary "to accommodate defense counsel's current trial schedule ... ."[23] Thus, any delay in Defendants' pursuit of a dismissal under Miss. Code Ann. § 11-1-58 was justified, such that it cannot be fairly said that Defendants committed a waiver consistent with *Horton*,

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[20] (R.E. 059; R. 327).

[21] (R.E. 62-63; R. 330-31 [¶ 11]).

[22] (R.E. 055; R. 197).

[23] (R.E. 057; R. 325).

Adams and *Grimes*. Indeed, since issuing this line of cases, this Court has recognized that some level of participation in the litigation is permissible, even where a potentially dispositive motion might have been filed earlier. See *Lucas v. Baptist Memorial Hospital – North Mississippi, Inc.*, 997 So.2d 226, 233 (2008) ("Consequently, we find that the level of participation by BMH-NM did not constitute a waiver of the defenses.").

As a final point on Plaintiffs' waiver argument, Plaintiffs own actions in delaying their submission of a certificate of consultation renders their waiver claim particularly tenuous. The record in this matter establishes that Plaintiffs' counsel had already reviewed at least some of the relevant medical records prior to suit being filed,[24] and that numerous additional records were provided on or about September 10, 2004.[25] Nevertheless, Plaintiffs' counsel did not submit a certificate confirming that the relevant medical records had been reviewed and that a qualified expert had been consulted until some nine (9) months later, on June 10, 2005.[26] Given this delay, Plaintiffs claims of waiver and accompanying criticisms of Defendants' conduct can only be described as hollow. Accordingly, Plaintiffs' argument that Defendants have waived the provisions of Miss. Code Ann. § 11-1-58 not only lacks any basis in law, but also in fact, such that this Court should affirm the Trial Court's decision dismissing this matter with prejudice.

II. DISMISSAL OF PLAINTIFFS/APPELLANTS' CLAIMS WITH PREJUDICE WAS WARRANTED BASED ON THE FAILURE TO TIMELY SUBSTITUTE PARTIES, IN ACCORDANCE WITH THE MANDATORY LANGUAGE OF RULE 25 OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE, AND THE EXPIRATION OF THE STATUTE OF LIMITATIONS.

In the event this Honorable Court determines that the Trial Court erred in dismissing Plaintiffs' claims with prejudice pursuant to Section 11-1-58, this ruling should nevertheless be

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[24] (R.E. 025; R. 349).

[25] (R.E. 026-27; R. 350-51).

[26] (R.E. 016-18; R. 345-47).

affirmed. Plaintiffs failed to timely substitute parties in accordance with Rule 25 of the Mississippi Rules of Civil Procedure, thereby warranting dismissal. Moreover, given that Plaintiffs' Complaint was defective at the time it was filed, based on the failure to comply with the pre-suit expert consultation requirements of Section 11-1-58, the two (2) year statute of limitations governing Plaintiffs' medical malpractice claims has expired, such that the Trial Court's dismissal of Plaintiffs' claims with prejudice should not be disturbed.

A. The Scope Of This Court's Appellate Jurisdiction Allows It To Review The Issue Of Plaintiffs/Appellants' Failure To Timely Substitute Parties.

The plenary scope of this Court's jurisdiction allows it to review the issue of Plaintiffs' failure to substitute the proper party in place of Mrs. Meadows, consistent with Rule 25, as well as whether the statute of limitations on Plaintiffs' claims has expired. *Public Employees Retirement System of Mississippi v. Hawkins*, 781 So.2d 899, 900 (Miss. 2001) (holding that "appellate jurisdiction extends to the full scope of the interests of justice, as it does in any properly appealed matter."); see also *Aguirre v. Armstrong World Industries, Inc.*, 901 F.2d 1256, 1258 (5th Cir. 1990) (allowing appellate review of "purely legal issue," where "refusal to consider it would result in a miscarriage of justice.") (citing *North Mississippi Communications, Inc. v. Jones,* 874 F.2d 1064, 1068 (5th Cir.1989)).

Rule 25 of the Mississippi Rules of Civil Procedure provides, in relevant part, as follows:

> If a party dies and the claim is not thereby extinguished, the court shall, upon motion, order substitution of the proper parties. The motion for substitution may be made by any party or by the successor or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of summons. ***The action shall be dismissed without prejudice as to the deceased party if the motion for substitution is not made within ninety days after the death is suggested upon the record by service of a statement of the fact of the death as herein provided for the service of the motion.***

Miss. R. Civ. Proc. 25(a) (2008) (emphasis added); Miss. R. Civ. Proc. 25(a), cmt. (2008) ("As the rule states, ***the action will be dismissed*** without prejudice if a motion for substitution is not

made within ninety days of the suggestion of death on the record.") (emphasis added); see also *Harris v. Darby*, No. 2008-CA-00382-SCT (September 24, 2009); *Estate of Baxter v. Shaw Assoc., Inc.*, 797 So.2d 396, 402 (Miss. Ct. App. 2001).[27]

In the current matter, it is unequivocally clear that Plaintiffs failed to timely file a Motion to Substitute Parties following the death of Plaintiff, Louise Meadows. The record establishes that Mrs. Meadows passed away on or about February 27, 2005.[28] The record further establishes that, on January 15, 2006, a Suggestion of Death was filed, and was served on all parties.[29] Despite this fact, no Motion to Substitute was ever filed. Instead, Mr. Meadows merely filed a Motion for Leave of Court to File First Amended Complaint, which sought "to add claims of wrongful death and to add as Plaintiffs Kaye Burt and Judy Brown, daughters and additional wrongful death beneficiaries of Louise Meadows."[30]

Given Plaintiffs failure to file a Motion to Substitute within ninety (90) days of the Suggestion of Death being filed, it is clear that Plaintiffs' claims were subject to dismissal, pursuant to plain language of Rule 25. In its Order granting Defendants' Motion to Dismiss based on Plaintiffs' failure to comply with Miss. Code Ann. § 11-1-58, the Trial Court expressly acknowledged that, "in view of the Court's ruling on the motion aforesaid, the Court does not reach Defendants' Joint Motion to Dismiss for Failure to Substitute Parties or Plaintiffs' Motion to Amend Complaint, and these motions are hereby declared moot."[31] Thus, the issue of

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[27] While Rule 25 speaks of "dismissal without prejudice," the fact that the statute of limitations on Plaintiffs' claims has expired, as discussed more thoroughly below, is such that the Trial Court's dismissal of Plaintiffs' claims with prejudice nevertheless was warranted.

[28] (R.E. 040, 051; R. 34 [¶ 3], 70).

[29] (R.E. 051-52; R. 70-71;).

[30] (R.E. 040-41; R. 34-35 [¶ 3]).

[31] (R.E. 006; R. 420).

Plaintiffs' failure to timely and/or properly substitute parties merged into the Trial Court's Order and Judgment of Dismissal, which allows this Court to review the same on this appeal. See *Trustees of Michigan Laborers' Health Care Fund v. Gibbons*, 209 F.3d 587, 594 (6th Cir. 2000) (holding that Court of Appeals had jurisdiction over denial of dispositive motion, even where such was not appealed, because denial "merged into the final judgment in the case.") (citing *Santaella v. Metropolitan Life Ins. Co.*, 123 F.3d 456, 461 (7th Cir. 1997)).

Federal law expressly allows appellate courts to "remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had ***as may be just under the circumstances.***" 28 U.S.C. § 2106 (2008) (emphasis added); see also *Nazay v. Miller*, 949 F.2d 1323, 1328 (3rd Cir. 1991); *Morgan Guaranty Trust Co. v. Martin*, 466 F.2d 593 (7th Cir. 1972). In the context of the current matter, the Seventh Circuit's decision in *Morgan* is particularly insightful. There, the Court offered the following relevant discussion:

> Whether or not the order denying summary judgment is itself before us, it is clear that the case is lawfully before us on appeal from the dismissal order.
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> * * *
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> ***This is not a complex case; it is a simple case with simple facts. We have reviewed the record and have concluded that there is no genuine issue of material fact which should be tried. It would be a waste of judicial resources to remand this case for trial. Accordingly, we think that it is "just under the circumstances" for this court to remand with directions that the district court enter summary judgment for plaintiff.***

Martin, 466 F.2d at 599-600 (emphasis added) (citing 28 U.S.C. § 2106).

Like *Martin*, the facts of the case currently before this Court are also far from complex. As set forth above, Plaintiffs clearly failed to comply with the substitution requirements of Rule 25. In this regard, the mandatory language of Rule 25 cannot be ignored. Again, Rule 25 expressly provides that "***[t]he action shall be dismissed without prejudice as to the deceased party if the motion for substitution is not made within ninety days after the death is suggested***

upon the record ... ." Miss. R. Civ. Proc. 25(a) (emphasis added).[32] As this Court has acknowledged, the term "shall" eliminates "any possible interjections of judicial discretion." *D.D.B. v. Jackson County Youth Court,* 816 So.2d 380, 383 (Miss.2002); *Stone County Pub. Inc., v. Prout*, No. 2007-CA-02106-COA, at ¶ 9 (June 23, 2009); see also *Price v. Clark*, No. 2007-CA-01671-SCT, at ¶ 19 (July 23, 2009) ("Simply stated, "shall" is mandatory, while "may" is discretionary.") *Franklin v. Franklin,* 858 So.2d 110, 114 (Miss. 2003); *Poindexter v. Southern United Fire Ins. Co.,* 838 So.2d 964, 971 (Miss. 2003) (recognizing that, unlike the discretionary nature of "may," the word "shall" is a mandatory directive); *Anderson v. Yungkau*, 329 U.S. 482, 485, 67 S.Ct. 428, 430 (1947) ("The word 'shall' is ordinarily 'The language of command'.") (citing *Escoe v. Zerbst*, 295 U.S. 490, 493, 55 S.Ct. 818, 819, 820, 79 L.Ed. 1566 (1935)).

As established by the preceding authorities, even if the Trial Court had declined to dismiss the case with prejudice under Section 11-1-58, it nevertheless would have been ***required*** to dismiss the case pursuant to Rule 25. See *D.D.B.,* 816 So.2d at 383 (holding that "shall" eliminates "any possible interjections of judicial discretion."). Moreover, given that Plaintiffs' Complaint was defective at the time of filing, the statute of limitations would have run, such that dismissal with prejudice also would have remained appropriate. Thus, as in *Martin*, it would be a "waste of judicial resources" to remand this case for further proceedings, such that it likewise is "just under the circumstances" to affirm the Trial Court's decision. See *Martin*, 466 F.2d at 599-600. Accordingly, the interests of justice, which are always within the jurisdiction of this Honorable Court, clearly allow this Court to simply affirm the Trial Court's decision, or in the alternative, to remand this matter to the Trial Court with instructions to enter an Order and/or

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[32] To the extent Plaintiffs might argue that Defendants likewise waived the right to seek a dismissal under Rule 25, the plain language of the rule does not state that dismissal shall be ordered only "upon motion," such that Defendants were under no obligation to file a Motion to Dismiss, as the Trial Court simply could have dismissed this matter *sua sponte* once the ninety (90) day period following the filing of the Suggestion of Death expired.

Judgment dismissing Plaintiffs' claims with prejudice on the grounds that that Plaintiffs failed to comply with the substitution requirements of Rule 25 of the Mississippi Rules Of Civil Procedure, and that the statute of limitations has expired.

B. Plaintiffs' Attempt To Amend Their Complaint, Without Substituting A Proper Party, Was Fundamentally Flawed, And Affords Them No Relief From The Requirements Of Rule 25.

As set forth above, following the death of Mrs. Meadows, Mr. Meadows sought to convert the underlying claims into a wrongful death action by requesting leave to file an amended complaint.[33] Specifically, Plaintiffs sought "to add claims of wrongful death and to add as Plaintiffs Kaye Burt and Judy Brown, daughters and additional wrongful death beneficiaries of Louise Meadows."[34] This motion, which was filed on July 20, 2005, was never noticed for hearing, despite the fact that proceedings continued in the Trial Court for better part of three (3) additional years, before being dismissed on February 8, 2008.[35] Thus, at the time of its dismissal, Plaintiffs' Complaint remained one for medical negligence against Defendants.

Plaintiffs' attempt to simply file an amended complaint, without substituting the proper party in place of Mrs. Meadows, was fatally flawed as a matter of Mississippi law. While Plaintiffs' proposed First Amended Complaint was to be brought on behalf of Mrs. Meadows' wrongful death beneficiaries, the administrator of Mrs. Meadows' estate was not included as a party/plaintiff.[36] While the proposed wrongful death action would have preserved Mrs. Meadows' personal injury claims under Mississippi law, the administrator of Mrs. Meadows'

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[33] (R.E. 040-50; R. 34-44).

[34] (R.E. 040-41; R. 34-35 [¶ 3]).

[35] (R.E. 040, 005-06; R. 34, 419-20).

[36] Dr. Blake is unaware of any efforts undertaken by any party to actually establish an estate on behalf of Mrs. Meadows following her death, nor does the record in this matter contain any pleadings or other documents showing the same.

estate remained a necessary party to these claims. Accordingly, the proposed amended complaint, as submitted, was insufficient to allow Plaintiffs to avoid the substitution requirements of Rule 25.

The Court of Appeals' decision in *In re Estate of England*, 846 So.2d 1060 (Miss. Ct. App. 2003) is illustrative of the continuing obligations imposed by Rule 25, even after Plaintiffs half-heartedly sought to convert their claim to one for wrongful death. There, this Court offered the following relevant authorities and analysis:

> [I]t is definite that, if Rezulin proximately caused Betty England's death, any damages for Betty's personal injuries from Rezulin must be recovered in an action for wrongful death, and could not be recovered by the estate under the survival statute. ***On the other hand, it is definite that if Rezulin did not proximately cause Betty's death, there could be no recovery for the heirs under the wrongful death statute.*** **Wilks v. American Tobacco Co.**, ***680 So.2d 839, 843 (Miss. 1996);*** **Berryhill v. Nichols**, ***171 Miss. 769, 774, 158 So. 470, 471 (1935). In that situation, any recovery for Betty's personal injuries from Rezulin belongs to the estate under the survival statute.*** **Berryhill**, ***171 Miss. at 774, 158 So. at 471.***
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> **Wilks** ***makes clear that the proper resolution of this case is to allow the estate administrator to assert both a wrongful death action and a survival action against the manufacturers of Rezulin.*** If the jury finds that Rezulin caused Betty's death, then the estate is foreclosed from recovering in the survival action for any personal injuries caused by Rezulin; that recovery would belong solely to Betty's wrongful death heirs. Miss. Code Ann. § 11-7-13 (Supp. 2002); Miss. Code Ann. § 91-7-233 (Rev. 1994). ***If the jury finds that Rezulin did not cause Betty's death, the estate may recover for any personal injuries caused by Rezulin.*** Miss. Code Ann. § 91-7-233 (Rev. 1994).

In re Estate of England, 846 So.2d at 1068-69 (emphasis added).

As the above analysis makes clear, any cause of action for personal injury asserted on behalf of Mrs. Meadows could only be maintained by the administrator of her estate. While Mississippi law provides that Mrs. Meadows' personal injury claims could not exist separate from her proposed wrongful death action, such does not remove the need for the proper substitution of parties if her personal injury claim is to be maintained. See *Wilks*, 680 So.2d at 843 (holding that damages for personal injury were not recoverable where wrongful death

beneficiaries did not properly assert personal injury claim); see also Miss. Code Ann. § 91-7-233 (1972) ("Executors, administrators, and temporary administrators may commence and prosecute any personal action whatever, at law or in equity, which the testator or intestate might have commenced and prosecuted....").

At no point in the case *sub judice* did Plaintiffs articulate any reason why their failure to timely and properly file a motion for substitution, as required by Rule 25(a), should have been excused. See Miss. R. Civ. Proc. 25(a), cmt. (providing that substitution may be made after the expiration of the ninety day period only upon a showing of "excusable neglect"); see also *Gadsden v. Jones Lang Lasalle Americas, Inc.*, 210 F. Supp. 2d 430, 436 (S.D. N.Y. 2002) (holding that mere oversight is not "sufficient to satisfy the standard for excusable neglect."); *Ashley v. Illinois Cent. Gulf R.R. Co.*, 98 F.R.D. 722 (S.D. Miss. 1983) (evidence of plaintiff's lack of diligence included failure to voluntarily substitute proper party for deceased plaintiff until after filing of suggestion of death by defendant). Plaintiffs failed to set forth any set of facts that might have allowed the Trial Court to find that their failure to timely seek the substitution of the administrator of Mrs. Meadows' estate in her place was the product of excusable neglect. Accordingly, as set forth in detail above, the Trial Court would have been obligated to dismiss Plaintiffs' claims pursuant to Rule 25, even if it had denied Defendants' Motion to Dismiss based on Plaintiffs' noncompliance with Section 11-1-58.

C. The Trial Court's Order Of Dismissal With Prejudice Should Not Be Disturbed, Nor Should Plaintiffs' Claims Be Reinstated, Given That The Statute Of Limitations Has Long Since Expired On Plaintiffs' Claims.

As discussed more thoroughly in the extremely thoughtful and well-reasoned brief of Dr. Blake's Co-Defendant/Appellee, Mississippi Baptist Medical Center, which Dr. Blake hereby adopts and incorporates by reference herein, Plaintiffs' Complaint was a nullity at the time of filing, based on the fact that Plaintiffs failed to comply with the pre-suit expert consultation

requirements of Section 11-1-58. Accordingly, the statute of limitation was not tolled during the time this matter was pending in the Trial Court, such that it would be futile to remand the case to the Trial Court with instructions allowing Plaintiffs to re-file the Complaint in the name of a properly substituted party. See *Tolliver ex rel. Wrongful Death Beneficiaries of Green v. Mladineo*, 987 So.2d 989, 996-96 (Miss. Ct. App. 2007) ("It follows, then, that ***an amended complaint filed in a case where the original complainant lacks standing cannot relate back to the filing of the original complaint, because a complaint cannot relate back to a nullity.***") (emphasis added); see also *Boles v. National Heritage Realty, Inc.*, -- F. Supp. 3d --, 2009 WL 1783545 (N.D. Miss. June 23, 2009) ("[I]f the issue before the Court were whether a void complaint may toll the statute of limitations, *Tolliver* would not only be applicable, but would likely be determinative."); *Black v. Baptist Medical Center,* 575 So.2d 1087 (Ala.1991) (dismissing claim based on statute of limitations, where Complaint was deemed nullity based on fact that filing attorney was a nonresident, unlicensed attorney who was not admitted *pro hac vice*).

There can be no question that the statute of limitations in this matter is governed by Miss. Code Ann. § 15-1-36(2), which provides a two (2) year statute of limitations for medical malpractice actions. In their Complaint, Plaintiffs allege that Defendants were negligent in their care of Mrs. Meadows during the period January 27, 2004 through March 30, 2004.[37] Thus, given that Plaintiffs' defective Complaint failed to toll the statute the limitations, such expired no later than March 30, 2004. Even in the event Plaintiffs were to claim that the running of the statute of limitations did not commence until the date of Mrs. Meadows' death, on or about February 27, 2005,[38] such would have expired, at the very latest, on February 27, 2007.

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[37] (R.E. 009; R. 7 [¶¶ 7-8]).

[38] (R.E. 040, 051; R. 34 [¶ 3], 70).

Moreover, given that the only claim stated by Mr. Meadows is for loss of consortium, his claim is wholly derivative of Mrs. Meadows' and must likewise fall. See *McCoy v. Colonial Baking Co., Inc.*, 572 So.2d 850, 853-54 (Miss. 1990) ("When a loss resulting from injury to a person may be recovered by either the injured person or another person [*e.g.,* for loss of consortium] ... [a] judgment for or against the injured party has preclusive effects on any such other person's claim for the loss to the same extent as upon the injured person.").

Given that the statute of limitations has long-since expired on Plaintiffs' claims, reinstatement of those claims through remand would be futile, such that the Trial Court's decision should be affirmed. In the alternative, any remand to the Trial Court should be with instructions to enter an Order and/or Judgment dismissing Plaintiffs' claims with prejudice on the grounds that Plaintiffs failed to comply with the substitution requirements of Rule 25 of the Mississippi Rules of Civil Procedure, and that the statute of limitations has expired.

CONCLUSION

This is not a case where Plaintiffs simply failed to satisfy the procedural requirement that a certificate of consultation be attached to their Complaint. Rather, Plaintiffs in this matter failed to fulfill the substantive obligations imposed by Section 11-1-58 -- that a qualified expert witness be consulted prior to commencing suit to confirm that a reasonable basis exists for filing the Complaint. Moreover, the certificates of consultation submitted by Plaintiffs' counsel were misleading in their statements concerning when the relevant medical records were received. Plaintiffs used these misstatements to justify their failure to consult an expert prior to filing suit, which further supports the dismissal of Plaintiffs' claims as a matter of Mississippi law. Because Plaintiffs failed to consult a qualified expert witness prior to filing their Complaint, which has long been recognized as a substantive requirement under Mississippi law, this Court should affirm the Trial Court decision dismissing this matter with prejudice.

The Trial Court's decision dismissing Plaintiffs' claims with prejudice should further be affirmed based on Plaintiffs failure to timely substitute parties in accordance with the mandatory requirements of Rule 25 of the Mississippi Rules of Civil Procedure. Given that Plaintiffs' failure to comply with Section 11-1-58 renders their Complaint defective, the statute of limitations continued to run, and has long since expired. In light of these facts, the interests of justice would not be served by reinstatement of Plaintiffs' claims, as further substantive proceedings would be waste of judicial resources. Mississippi law clearly recognizes that, under these circumstances, the scope of this Court's appellate jurisdiction allows it to affirm the Trial Court's decision on the additional grounds that Plaintiffs failed to substitute a proper party in place of Mrs. Meadows and the expiration of statute of limitations.

Accordingly, for the reasons set forth herein, Defendant/Appellee, Dr. Kendall T. Blake, respectfully requests that this Honorable Court affirm the decision of the Trial Court, dismissing Plaintiffs/Appellants' claims with prejudice, or in the alternative, that this Court remand this matter to the Trial Court with instructions to enter an Order and/or Judgment dismissing Plaintiffs' claims with prejudice on the grounds that Plaintiffs failed to comply with the mandatory substitution requirements of Rule 25 of the Mississippi Rules Of Civil Procedure and the expiration of statute of limitations.

Respectfully submitted, the 30th day of October, 2009.

KENDALL T. BLAKE, M.D.

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CERTIFICATE OF SERVICE

I, Leo J. Carmody, Jr., one of the attorneys for Defendant/Appellee, Kendall T. Blake, M.D., do hereby certify that I have this day mailed via United States Mail, postage prepaid, a true and correct copy of the above and foregoing *Brief of Appellee, Kendall T. Blake, M.D.*, to the following counsel of record:

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This the 30th day of October, 2009.

LEO J. CARMODY, JR.