

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

NO. 2008-CA-02074-SCT

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, MISSISSIPPI BAPTIST MEDICAL CENTER

Appealed From The Circuit Court of The First Judicial District
of Hinds County, Mississippi Cause No: 251-04-1012CIV

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CERTIFICATE OF INTERESTED PERSONS

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

1. Lavelle Meadows - Plaintiff/Appellant
2. Shane F. Langston, Langston & Langston, PLLC, 201 N. President Street, Jackson, MS 39201 - Counsel for Plaintiff/Appellant
5. Mississippi Baptist Medical Center - Defendant/Appellee
6. Eugene R. Naylor, Gaye Nell Currie, Wise Carter Child & Caraway, P.O. Box 651, Jackson, MS 39205-0651 - Counsel for Defendant/Appellee, Mississippi Baptist Medical Center
7. Kendall T. Blake, M.D.- Co-defendant/Appellee
8. J. Stuart Robinson, Jr., Pamela S. Ratliff, Robinson Biggs Ingram Solop & Farris, PLLC, P.O. Box 14028, Jackson, MS 39236-4028 - Counsel for Co-defendant/Appellee, Kendall T. Blake, M.D.
9. Honorable W. Swan Yerger - Hinds County Circuit Court Judge


GAYE NEEL CURRIE, ATTORNEY OF
RECORD FOR DEFENDANT/APPELLEE

TABLE OF CONTENTS

Certificate of Interested Persons	i
Table of Contents	ii
Table of Authorities	iii, iv
Statement of Issue	1
Statement of the Case	1-7
I. Nature of Case and Course of Proceedings	1-4
II. Statement of the Facts	4-7
Summary of the Argument	7-8
Argument	9-23
I. Meadows Complaint was a Nullity Which Did Not Toll the Statute of Limitations	10-18
A. Meadows Failed to Consult with an Expert Prior to Filing Suit as is Required by Law.	
B. Meadows Had No Justifiable Excuse for the Failure to Obtain an Expert Consultation Prior to Filing Suit.	
C. Certificate of Consultation Should Have Been Stricken	
D. Unlawfully Filed Complaints Are Null and Void, Having No Legal Force or Effect, and Therefore, Cannot Toll the Limitations Period.	
II. Because the Meadows Complaint Was A Nullity, The Subject Matter Jurisdiction of the Court Was Never Invoked and Waiver Is Not At Issue	18-22
A. Lack of Subject Matter Jurisdiction is Not Subject to Waiver.	
B. Defendants Did Not Waive Their Other Defenses.	
III. Rule 25 Requires Dismissal of Meadows Complaint	22-23
Conclusion	23-24
Certificate of Service	25

TABLE OF AUTHORITIES

	Page
<u>Bean v. Broussard</u> , 587 So. 2d 908, Miss. 1991	16
<u>Benedict v. City of Hattiesburg</u> , 693 So.2d 377, 381 (Miss. 1997)	18
<u>Burnette v. Hartford Underwriters Ins. Co.</u> , 770 So. 2d 948, 949 (Miss. 2000)	18
<u>Crawford Commercial Constructors, Inc., v. Marine Indus. Residential Insulation, Inc.</u> , 437 So. 2d 15, 16 (Miss. 1983)	17
<u>Daulton v. Miller</u> , 815 So. 2d 1237,1241 (¶ 17) (Miss. 2002)	23
<u>Delta Health Group, Inc. v. Payne</u> , 995 So. 2d 123, 126 (¶ 16)	18
<u>Dual, Inc. v. Lockheed Martin Corp.</u> , 383 Md. 151, 162-63, 857 A.2d 1095, 1011 (Ma.Ct.App. 2004)	17
<u>Eatman v. City of Moss Point</u> , 809 So. 2d 591, 595 (¶ 15) (Miss. 2000)	12, 16
<u>Ellis v. Mississippi Baptist Medical Center</u> , 997 So. 2d 996, 1001 (¶ 15)	11
<u>Georgia Pac. Ry. Co. v. Baird</u> , 76 Miss. 521, 24 So. 195, 196 (1898)	17
<u>J & J Timber Co. v. Broome</u> , 932 So.2d 1, 6 (¶ 19) (Miss. 2006)	23
<u>Johnson v. Thomas</u> , 982 So. 2d 405 (Miss. 2008)	22
<u>Illinois Central R.R. Co., v. Broussard</u> , 1008 WL 4405166 (Miss. App 2008)	15
<u>Lange v. Burd</u> , 800 A.2d 336, 341 (¶ 14) (PA Super 2002)	17
<u>McClain v. Clark</u> , 992 So. 2d 636 (¶ 7) (Miss. 2008)	11
<u>McNair v. United States Postal Service</u> , 768 F.2d 730, 737 (5 th Cir.1985)	18
<u>MS Credit Center, Inc., v. Horton</u> , 926 So. 2d 167, 180 (Miss. 2006)	19
<u>O’Hop v. Thomas</u> , 616 A. 2d 1214 (Del. Supr. 1992)	16
<u>Price v. Clark</u> , 2009 WL 2183271, Miss. 2009, ¶ 103	17, 18, 19
<u>Pruitt v. Hancock Med. Ctr.</u> , 942 So.2d 797, 801 (Miss. 2006)	18
<u>Sherrill v. Stewart</u> , 197 Miss. 880, 889, 21 So. 2d 11 (Miss. 1945)	15
<u>St. Louis & S.F.R. Co. v. Bradfield</u> , 18 Okla. 154, 88 P. 1050 (Ok 1907)	16
<u>Thigpen v. The Mississippi Central Railroad Co.</u> , 3 George 347, 32 Miss. 347 (Miss. Err.&App.), 1856 WL 2685 (Miss. Err.&App.)	15

<u>Thomas v. Warden</u> , 999 So. 2d 842, 846 (Miss. 2008)	16, 17
<u>Wimley v. Reid</u> , 991 So. 2d 135, 139 (¶ 19) (Miss. 2008)	11
<u>Xarras v. McLaughlin</u> , 66 Mass.App.Ct. 799, 801, 850 N.E. 2d 111 (App.Ct.Mass. 2006)	17

OTHER AUTHORITIES

STATUTES

Page

§11-1-58, Code of Mississippi Ann. (1972)	1, 2, 3, 4, 6, 7, 9, 10, 11, 13, 14, 16, 21
§11-1-58(4), Code of Mississippi Ann. (1972)	4, 5, 14, 15
§11-1-60, Code of Mississippi Ann. (1972)	2, 4, 9, 10, 15, 20, 24
§15-1-36, Code of Mississippi Ann (1972)	1, 6, 13
§15-1-36(2), Code of Mississippi (Rev. 2009)	18
§ 15-1-36(15), Code of Mississippi Ann. (1972)	17

RULES

Rule 4(h), Mississippi Rules of Civil Procedure	22
Rule 11, Mississippi Rules of Civil Procedure	7, 9, 10, 14, 15, 16, 18, 23
Rule 11(h), Mississippi Rules of Civil Procedure	7, 8
Rule 25, Mississippi Rules of Civil Procedure	8, 10, 21, 22, 23, 24

STATEMENT OF THE ISSUES

1. Whether the trial court appropriately granted Defendants' motion to dismiss on Plaintiffs' failure to comply with the substantive pre-suit requirement contained in § 11-1-58 to consult with a qualified expert prior to filing suit.
2. Whether the trial court's dismissal with prejudice was appropriate since the statute of limitations had passed prior to the time plaintiffs' consulted with an expert.
3. Whether the trial court's dismissal with prejudice was appropriate since Plaintiffs failed to substitute a proper party plaintiff after a suggestion of death was filed and before the limitations period expired.

STATEMENT OF THE CASE

I. Nature of Case and Course of Proceedings

Louise and Lavelle Meadows filed their Complaint in this action on August 31, 2004, alleging that defendants breached the standard of care in their care and treatment of a non-healing diabetic ulcer on Louise Meadow's right foot during or about January 27, 2004, thereby causing her to undergo surgical revisions to her right foot and leg for which plaintiff claimed damages for, among other things, disfigurement. R. 5-11. Previously, on August 25, 2004 a representative from Plaintiff's counsel's firm had reviewed the records of Louise Meadows at Mississippi Baptist Medical Center. R. 349, R.E. 13. On September 10, 2004, Plaintiffs retrieved copies of the medical records. R. 350, R.E. 14. Plaintiff's counsel attached to the Complaint a "Certificate of Plaintiff's Attorney" attesting that "[p]ursuant to Mississippi Code Annotated § 15-1-36 (Supp. 2003) (sic), I hereby certified that I have requested the medical records from the Defendants but they have not been produced yet." R. 12, R.E. 5. It is undisputed that Plaintiffs had not consulted with an expert witness prior to filing their Complaint. Plaintiffs did not serve process on either of the local defendants until December 17, 2004 (MBMC) and December 20, 2004 (Dr. Blake).¹ R.E.1.

¹Over 108 days after filing the complaint and over 48 days after the time in which to consult with an expert after filing the complaint.

Defendant, Mississippi Baptist Health Systems, Inc. (erroneously denominated as Mississippi Baptist Health Systems Inc., d/b/a/ Mississippi Baptist Medical Center)² filed it's Answer on January 14, 2005, alleging as one of its affirmative defenses that Plaintiffs' failed to comply with the pre-suit requirements of § 11-1-58, Mississippi Code Ann. (1972). R. 14-21. Defendant, Dr. Kendall T. Blake, filed his Separate Answer and Defenses on January 20, 2005. R. 22-33. Dr. Blake alleged, "all rights, defenses and/or limitations of damages provided for in the legislative enactments of the Mississippi Legislature in all regular and extraordinary sessions during 2002, 2003, and 2004." R. 29.

Effective September 1, 2004, Legislative amendments to § 11-1-60, which included claims for disfigurement, in the non-economic damage cap, and applied a hard cap on non-economic damages even in punitive damages cases, became applicable, to cases filed on or thereafter. Miss. Code. Ann. (1972).

A second "Certificate of Plaintiffs' Attorney" was filed on June 13, 2005, wherein counsel affirmed, "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. 153, R. E. 9. Prior to this filing, as the record demonstrates, Plaintiff still had not consulted with an requisite expert. Louise Meadows died on or about February 21, 2005 (R. 70). Thereafter, on July 20, 2005, Plaintiff Lavelle Meadows filed a motion for leave of court to file his first amended complaint to assert a claim for wrongful death. R. 34-36. However, Lavelle Meadows did not at any time prior to dismissal of this cause of action bring the motion on for hearing. Defendants filed responses in opposition to the motion to amend based upon the fact that nearly one year had passed after filing the original complaint and no notice had been given pursuant to statutory requirements of a new claim against these defendants. R. 45-60. A Suggestion of Death of Louise Meadows was filed by Defendant MBMC on January 9, 2006,

²An Agreed Order Substituting and Dismissing Defendant was entered on August 2, 2006, dismissing "Mississippi Baptist Health Systems, Inc. d/b/a Mississippi Baptist Medical Center", a non-existent entity and substituting "Mississippi Baptist Medical Center" as the party defendant. R. 186. Mississippi Baptist Medical Center will be hereinafter referred to in its brief as "MBMC."

pursuant to Miss. R. Civ. P. 25(a)(1). There was no substitution of the Estate of Louise Meadows as party plaintiff.

Over fourteen months later, on April 13, 2006, Lavelle Meadows filed a motion to compel MBMC to produce additional medical records of Louise Meadows noting therein that “[p]rior to filing the complaint, Plaintiff’s counsel secured MBHS (sic) medical records for Mrs. Meadows [for the relevant time period],” but that she had been subsequently hospitalized at MBHS (sic) numerous times and thus additional records were being requested. R. 113. Plaintiff’s counsel also unilaterally noticed the trial deposition of Lavelle Meadows allegedly because of his impending death and to preserve his testimony. Concerned about going forward with an evidentiary deposition without having any information regarding the basis of Plaintiff’s claims, MBMC filed a Motion to Quash and Reschedule Trial Deposition of Plaintiff Lavelle Meadows. An Order was entered on May 5, 2006, denying MBMC’s motion but requiring Meadows to supplement discovery responses at least 10 days prior to the taking of Lavelle Meadows’ trial deposition. R. 135. In addition, the Court instructed the parties to enter into a Scheduling Order, which was filed on August 15, 2006. R. 137. This Order set deadlines for completion of discovery, designation of experts, joinder of parties, and motion deadlines. Id.

On September 13, 2006, Plaintiff’s Expert Designation was filed and an Agreed Amended Scheduling Order was entered on November 15, 2006. R. 188 and 197, respectively. Pursuant to this order, MBMC designated its expert witnesses on November 15, 2006. R. 199-206. A Second Agreed Amended Scheduling Order was entered on January 22, 2007, to extend the deadlines for expert discovery. R. 325.

Defendants’ Joint Motion to Dismiss for Plaintiff’s Failure to Comply with the Requirements of Miss. Code Ann. § 11-1-58 was filed on March 30, 2007. R. 327. Likewise, on March 30, 2007, Defendants’ filed their Joint Motion to Dismiss Suit Without Prejudice for Failure to Substitute Parties. R. 361. Plaintiff’s filed his Response to Defendants’ Motion to Dismiss for Failure to Comply with Miss. Code Ann. § 11-1-58 on April 16, 2007, wherein it was reaffirmed that “[a]t the time of filing suit, plaintiffs submitted a Certificate of Attorney which declared, pursuant to Miss.

Code Ann. § 11-1-58(4) that the medical records of the plaintiff had been requested from the defendant and had not yet been received at the time of filing.” R. 388. Plaintiff also filed his response Defendants’ Motion to Dismiss Suit Without Prejudice for Failure to Substitute Parties following the filing of the Suggestion of Death.

During a docket call of every case pending on the court’s docket, an Order setting this case for trial was entered on May 2, 2007, setting the case for trial on March 3, 2008 (6th setting). R. 418. A hearing was held on the Defendants’ pending motions and an Order was entered on February 8, 2008, granting Defendants’ Joint Motion to Dismiss for Failure to Comply with Miss. Code Ann. § 11-1-58 and dismissing this matter with prejudice. R. 419, R. E. 16.

Evidence was presented to the trial court that medical records pertaining to Louise Meadows had been reviewed on August 25, 2004, prior to suit being filed and that a duplicate set of records from MBMC was produced on September 10, 2004. R. 348-351, R. E. 12-15. Although he had the opportunity to do so, Meadows presented no evidence to the trial court that any expert had been consulted either prior to filing suit or prior to the expiration of the applicable limitations period. The trial court did not enter a ruling on the pending Motion to Dismiss for Failure to Substitute Parties or Plaintiffs’ Motion to Amend Complaint, as the trial court found these motions were moot as a result of its prior ruling. R. 420. A Judgment was entered on February 8, 2008, dismissing this matter with prejudice. R. 419.

II. Statement of the Facts

Louise and Lavelle Meadows did not consult with an expert witness as required by § 11-1-58, Miss. Code Ann. (1972), prior to filing their complaint on **August 31, 2004**. Instead, in what may only be seen as a strategic attempt to avoid a change in the law, the Meadows ignored their lawful obligation to consult with an expert to verify that a basis existed for their claims. Significantly, the Mississippi Legislature had passed amendments to § 11-1-60 with regard to limitations on damages, which amendments became effective with all filings on and after **September 1, 2004** (the day after the Meadows Complaint was filed). The previous version of the statute exempted disfigurement from the limitations imposed on non-economic damages claims. Furthermore, the previous version

of the statute provided that in cases where punitive damages were appropriate, the limitations on non-economics damages did not apply. Louise and Lavelle Meadows asserted that Louise Meadows suffered disfigurement as a result of the alleged medical negligence in the treatment and care of a non-healing diabetic ulcer on Ms. Meadow's right foot, which treatment they claim required Ms. Meadows to undergo revisions to her foot and ultimately amputation. R. 5-11. Likewise, the Meadows asserted a claim for punitive damages. Id.

In an attempt to excuse their blatant disregard of the legal obligation to consult with an expert before filing a complaint, they attached to the filing on August 31, 2004, a certificate from counsel averring that he had "requested the medical records from the Defendants but they have not been produced yet," thereby ostensibly complying with subsection (4) of the statute. § 11-1-58(4), Miss. Code Ann. (1972). However, the information contained in the certificate was incorrect and in opposite to information contained in later filings of the Meadows.

On August 2, 2004, a representative from the office of plaintiffs' counsel sent a letter to Medical Records Department of MBMC requesting Louise Meadows' medical records from January 1, 2004 through June 30, 2004. R. 348, R. E. 12. On August 25, 2004, the requested records were reviewed. R. 349, R. E. 13. On September 10, 2004, copies of the records were produced to Plaintiffs. R. 350-351, R. E. 14-15. In a later filed motion to compel, counsel pled that "[p]rior to filing the complaint, Plaintiffs' counsel secured MBHS (sic) medical records for Mrs. Meadows." R. 113.

Although the Meadows hastily filed their Complaint, they did not serve process on the defendants for several months. MBMC was served on December 17, 2004, approximately 108 days later. R. 1 Dr. Blake was not served until December 20, 2004, approximately 111 days after the Complaint was filed. R. 1.

Louise Meadows died on February 27, 2005. R. 34. Prior to her death, Plaintiffs had taken no action to prosecute their claim, though it had been pending for six months. After her death, Lavelle Meadows took no action for an additional five months. On July 20, 2005, Lavelle Meadows filed his Motion for Leave of Court to File First Amended Complaint seeking to add a claim for

wrongful death. R. 34. However, no hearing date on this motion was requested and Plaintiff took no further action. Defendants responded to Meadows motion to amend on August 1, 2005, including the defenses of failure to adhere to the requirements of § 15-1-36 and § 11-1-58, Miss. Code Ann. MBMC filed a Suggestion of Death on January 10, 2006. No motion for substitution was made within 90 days of the filing of the Suggestion of Death, or at any time.

Prior to the filing of the Suggestion of Death, the activity in the proceeding consisted of plaintiffs' filing of a notice an evidentiary deposition on October 14, 2005, to preserve Lavelle Meadows' testimony for trial. R. 1. Since there had been no discovery and therefore insufficient information to defend an evidentiary deposition, MBMC filed a motion to quash the trial deposition. The motion to quash was denied and a scheduling order was entered on May 15, 2006. R. 135. The Scheduling Order was amended on November 15, 2006, and January 22, 2007. On March 30, 2007, defendants filed their Joint Motion to Dismiss for Failure to Substitute Parties and Joint Motion to Dismiss for Plaintiff's Failure to Comply with the Requirements of Miss. Code Ann. §11-1-58, noticing their motions for hearing. During a mandatory docket call of the trial court, the matter was set for trial on March 3, 2008 (6th setting). Defendants re-noticed their pending motions for hearing thereafter.

After considering the motion, argument and supporting legal briefs of the parties, the trial court granted Defendants' Joint Motion to Dismiss for Plaintiffs' Failure to Comply with the Requirements of Miss. Code Ann. § 11-1-58. R. 420. The trial court correctly found that Meadows had not complied with the substantive requirement of the statute that his counsel to confer with an expert prior to filing suit. Id. In fact, evidence was presented to the court that, contrary to the statements contained in Meadows' counsel's "Certificate of Plaintiffs' Attorney", medical records had been made available and reviewed on August 25, 2004, prior to suit being filed. R. 348-351, R. E. 12-15. In addition, Meadows admitted in his Motion to Compel that "[p]rior to filing the complaint, Plaintiff's counsel secured MBHS (sic) medical records for Mrs. Meadows." R. 113. Although given the opportunity to do so, Meadows did not produce any evidence to show that an expert had been consulted prior to the expiration of the statute of limitations. Meadows' only

evidence of actual consultation with an expert is contained in Plaintiff's Expert Designation filed September 25, 2006, more than two years after the statute of limitations period had expired. R. 188. Although a second "Certificate of Plaintiffs' Attorney" was filed on June 13, 2005, the affirmation contained therein was again 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. Because the information contained in the two Certificates of counsel was inaccurate at best these Certificates constitute sham pleadings under Rule 11, and were/are, therefore, null and void. Rule 11(h), MRCP. The trial court correctly determined that Meadows had not complied with the substantive requirements of § 11-1-58, Miss. Code Ann. (1972), and therefore the Complaint was a nullity. Accordingly, the filing did not toll the applicable limitations period, the Complaint was subject to dismissal with prejudice as by this time, the limitations period had long since expired.

SUMMARY OF THE ARGUMENT

This appeal does not involve a resolution of mere formalities of pleading or issues of form, rather this proceeding follows plaintiffs' disregard for the conditions precedent to filing suit and failure to comply with the MRCP and requirements of this Court. Further, at issue herein is whether Plaintiffs' conduct was calculated to avoid compliance with substantive conditions precedent to commencing an action and/or changes in statutory law affecting damage claims. If, despite these failures, the filing of a complaint alone is deemed sufficient to preserve a party's claim, then conditions precedent to the commencement of an action will be effectively eviscerated, all statutes of repose will be rendered meaningless, and the Constitutional distinctions between the legislative and judicial branches of government will be negated.

Mississippi law requires that prior to instituting action alleging medical negligence that the plaintiff consult with an medical expert who has given an opinion that a reasonable basis exists for pursuing such an action. § 1-11-58, Miss. Code Ann. (1972). Prior to filing suit, Meadows did not consult with an expert. Therefore, the Meadows Complaint was not properly filed, and the attached certificate which misstated the non-availability of medical records rendered the entire filing a nullity.

After hearing the evidence and arguments of counsel, the trial court properly dismissed this action with prejudice as the complaint did toll a statute of limitations and the claim was thus time barred.

Contrary to the representations in his brief, Meadows had the opportunity before and during the hearing on defendants' motions to prove he had met his burden under the law of consulting with an expert prior to filing suit, but they did not. The only evidence presented to the Court was that Meadows did not comply with the conditions precedent to filing suit. The "Certificate of Plaintiff's Attorney" which was attached to the complaint at time of filing stated that no such consultation had taken place. In an attempt to excuse such failure to abide by the legal prerequisites to filing suit, the Certificate contained a material misrepresentation that the failure to comply should be excused because the medical records had not been produced. However, the record before the trial court clearly demonstrated that as early as August 25, 2004, the medical records of Louise Meadows had indeed been made available for and were inspected. Because of the material misrepresentations contained therein, the "Certificate of Attorney" attached to Meadows Complaint constitutes nothing more than a sham pleading, and pursuant to Rule 11(h), can only be construed as having been interposed for purposes of delay.

Meadows made the decision to "file now, discover later" in direct contravention to the mandate requiring expert consultation. Meadows was not "under the gun" to file a Complaint, as more than 16 months remained in the limitations period at the time suit of filing. Meadows not only offered no evidence to the trial court as to why the pre-suit requirements were ignored, but he also offered no evidence that an expert was consulted prior to the expiration of the limitations period.

Meadows also disregarded Rule 25, MRCP, in failing to substitute Louise Meadows' estate as the party plaintiff after a Suggestion of Death had been filed. This failure to adhere to the Rules of Civil Procedure mandated that Meadows' Complaint be dismissed, and thereafter the claims were time-barred. Inasmuch Meadows did not consult with an expert prior to filing suit, or within requisite time thereafter the action was never duly commenced, the complaint did not toll the statute of limitations and because the limitations period had expired at the time the dismissal was entered, the trial court appropriately dismissed the case with prejudice.

ARGUMENT

This is not simply another case dealing with the sufficiency of notice or certification of compliance with conditions precedent to the filing of a complaint. The issue presented concerns plaintiffs' failure to consult with an expert witness before filing a complaint and before the expiration of the statute of limitations. When plaintiffs filed their complaint there were no exigent circumstances such as a looming statute of limitations or other contingency as contemplated by §11-1-58(1)(b), (1) (c) or (4).³ Indeed, as the record demonstrates and for which plaintiffs offer no explanation, there was not even an asserted consultation with an expert until ten (10) months after the complaint was filed, and no designation of expert testimony ten (10) months later. The Meadows admittedly did not abide by the substantive requirement of a consultation with an expert prior to filing suit. Instead, they raced to the courthouse and filed a complaint, despite the fact that more than sufficient time remained on the applicable statute of limitations to conduct the requisite due diligence, pre-suit investigation, and consultation with an expert. Thus, at the time of filing, the Complaint was a nullity, with no legal force or effect. In addition, the attached certificate materially misrepresented plaintiffs' access to medical records, ostensibly to excuse the failure to abide by pre-suit filing requirements but, nonetheless, in violation of Rule 11, Miss. R. Civ. P. Contrary to the representations contained in the certificate filed with the complaint, medical records were produced for inspection and were reviewed by plaintiffs' representative at MBMC prior to the filing of the Complaint. R. 348-49.

After Louise Meadows' death on February 7, 2005, Lavelle Meadows did not substitute her estate as the party plaintiff before or after the suggestion of death, filed on January 10, 2006. Dismissal of the Meadows' Complaint was therefore proper and as any claims of Lavelle Meadows

³ Given that in civil actions filed on or after September 1, 2004, the amendments in §11-1-60, Code of Mississippi, which (1) included "disfigurement in the non-economic damage cap and (2) legislating a hard cap on non-economic damages in punitive damages applied, it is apparent that the timing of the filing of plaintiff's complaint (August 31, 2004) was intended to avoid these statutory amendments

would be derivative of Louise Meadows' claims and were properly dismissed. Dismissal of plaintiffs' complaint and all claims asserted was proper for several reasons. The complaint was defective and a nullity upon filing; it was appended with a certificate is violative of Rule 11; following the death of a party plaintiff, a proper party was not substituted, and the statute of limitations, which had commenced again ninety (90) days after the filing of a suggestion of death⁴ rendered all claims time-barred. The trial court's dismissal with prejudice of the Meadows' Complaint was appropriate.

I. Meadows Complaint was a Nullity Which Did Not Toll the Statute of Limitations.

Because the Meadows failed to follow the statutory preconditions before filing suit, their Complaint was a nullity. Prior to filing their complaint, plaintiffs were required to review the facts of the case and consult with an expert duly qualified so as to aver the existence of a reasonable basis to commence this proceeding. This, they did not do. Although none of the statutory exigencies excusing the required consultation existed, plaintiffs nevertheless undertook no consultation within ninety (90) days of filing.⁵ Plaintiffs' Complaint, hastily filed before the September 1, 2004 effective date of amendments to §11-1-60, Code of Mississippi, did not toll the statute of limitations. Therefore, the trial court correctly dismissed the Complaint with prejudice.

A. Meadows Failed to Consult with an Expert Prior to Filing Suit as is Required by Law.

Mississippi law requires that prior to filing suit, a plaintiff must consult with a qualified expert to establish that a reasonable basis exists for bringing a medical malpractice action. §11-1-58, Miss. Code Ann. (1972). It is undisputed that the Meadows did not consult with an expert prior to filing suit. While this Court has held that the procedural requirement of attaching a certificate

⁴ Pursuant to Rule 25(a)(1), MRCP, "The action shall be dismissed without prejudice as to the deceased party if the motion for substitution is not made within ninety (90) days after the death is suggested upon the record . . .".

⁵ Although plaintiffs now request a remand to ostensibly show when they consulted an expert, they already had an opportunity in the trial court and made no proffer. The record demonstrates plaintiffs' failure to comply with statutory conditions precedent to filing a complaint.

attesting to the expert consultation to the complaint is one that exceeds the scope of the authority of the Legislature, it has “**consistently ... held that the Legislature has authority to establish pre-suit requirements as a condition precedent to filing particular kinds of lawsuits.**” Wimley v. Reid, 991 So. 2d 135, 139 (¶ 19) (Miss. 2008) (emphasis added). In fact, this Court has stated, “[W]e guard just as diligently the Legislature’s prerogative to set forth in legislation whatever substantive, pre-suit requirements for causes of action, and prerequisites to filing suit, it deems appropriate.” Id. at 139 (¶17). The Legislature, acting within its authority, mandated that unless a plaintiff consults with an expert prior to filing suit, and such expert gives an opinion that a reasonable basis for such a claim exists, no right of action under the law exists.

Whether a certificate attesting to such a consultation is attached to the complaint at the time of filing or not, a “plaintiff must nevertheless comply with pre-suit requirements of [s]ection 11-1-58.” McClain v. Clark, 992 So. 2d 636 (¶ 7) (Miss. 2008). While the Legislature cannot condition the ability to pursue a lawsuit upon the act of attaching a piece of paper to a complaint, it can, however, require that a plaintiff first consult with an expert before suit can be instituted. Thus, although a complaint may not be dismissed simply because a certificate was not attached to the complaint at time of filing, dismissal is required where the plaintiff fails to consult with an expert prior to filing his complaint. Id. at (¶20). *See also*, Ellis v. Mississippi Baptist Medical Center, 997 So. 2d 996, 1001 (¶ 15) (where plaintiff failed to attach a certificate of consultation to complaint but did comply with the pre-suit requirement of consultation with an expert prior to filing suit dismissal was not appropriate).

The pre-suit requirement of consultation with an expert is similar in effect to the burden placed upon a plaintiff at the summary judgment stage in a medical malpractice action. In order to proceed to a jury, requisite expert testimony is required. Under its lawful authority, the Mississippi Legislature effectively mandated in §11-1-58, Miss. Code Ann., that a claimant in a medical malpractice action meet this burden not only at the summary judgment stage of the proceedings, but also prior to suit being filed. In other words, to avoid causing defendants to respond to complaints

asserting claims of medical negligence and fostering a practice of “sue now, discover later”⁶ the legislature required that plaintiffs meet the burden of demonstrating that a reasonable basis for the claim existed prior to filing suit. The plaintiff is under no requirement to use the consulting expert at trial, but may use another. In any event, absent exigent circumstances not present here, a qualified expert must be consulted prior to filing suit before a potential defendant can be brought into court and made to answer. The substantive legal requirement of requisite expert testimony in medical negligence cases is not a matter of form nor is it an affirmative defense which is subject to waiver. Just as the law requires that a complaint be dismissed at the summary judgment if a plaintiff has no qualified expert to testify at trial in support of his claim, with limited exception, not present here, a complaint containing claims which have not been verified by a qualified expert are subject to dismissal. Absent requisite pre-suit consultation, the complaint has no legal force or effect.

Although admitting no consultation was obtained prior to suit being filed, Meadows now requests remand of this matter in order that an evidentiary hearing may be held to determine when Meadows actually consulted with an expert. This argument ignores the fact that an evidentiary hearing was held and the uncontroverted evidence demonstrated that no expert was consulted prior to filing suit. Further, Meadows did not present any evidence to the trial court as to when any expert consultation actually took place. R. 153-54. Rather, plaintiffs rested upon an ambiguous certificate filed on or about June 13, 2005, ten (10) months after the complaint was filed.

In the Certificate dated August 31, 2004, attached to the Complaint, counsel for the Meadows affirmed counsel had “requested the medical records from the Defendants but they have not been produced yet.” (Hereinafter referred to as “Certificate 1.”) R. 12. This was a misstatement inasmuch as the records had, in fact, been produced for and inspected on August 25, 2004, at MBMC prior to suit being filed. As the Certificate I confirms that no pre-suit consultation occurred, Meadows’ Complaint was a nullity. Therefore, Plaintiffs’ Complaint was subject to dismissal, and because the

⁶ See, Eatman v. City of Moss Point, *infra*, holding a plaintiff may not require a defendant defend a claim without first having knowledge that there is good grounds to support such a claim.

applicable limitations period had passed prior to the later filed certificate of consultation, dismissal was appropriate.

B. Meadows Had No Justifiable Excuse for the Failure to Obtain an Expert Consultation Prior to Filing Suit.

In §11-1-58, Miss. Code Ann. (1972), the Legislature recognized circumstances beyond a party's control and/or time constraints which impact compliance with the statutory mandate of expert consultation prior to filing suit. If, at the time the plaintiff discovers he has a claim, the limitations period is about to expire and there is insufficient time to obtain a consultation, a complaint with appropriate certification may be filed. However, a consultation must be obtained within sixty (60) days after service of the complaint. Likewise, if prior to filing suit, a plaintiff has contacted three (3) different experts but none of these experts would agree to act as consultants, suit may also be properly filed. Again, however, a consultation with an expert must be obtained within sixty (60) days.⁷ In either circumstance, if no such consultation is obtained within sixty (60) days, the suit shall be dismissed. §11-1-58(1)(b) and (c), Miss. Code Ann. (1972). Significantly, neither of those situations existed in this case.

At the time the Meadows' Complaint was filed, more than sixteen (16) months remained in the applicable statutory period. Thus, there was no urgency requiring the Meadows to race to the courthouse steps without first consulting an expert. Plaintiffs presented no evidence of an actual expert consultation until the filing of a designation of expert witnesses on September 1, 2006. R. 188-94.

⁷The pertinent portions of the statute read:

(b) The attorney was unable to obtain the consultation required by paragraph (a) of this subsection because of a limitation of time established by Section 15-1-36 would bar the action and that the consultation could not reasonably be obtained before such time expired. . . . or

(c) the attorney was unable to obtain the consultation required by paragraph (a) of this subsection because the attorney had made at least three (3) separate good faith attempts with three (3) different experts to obtain a consultation and that none of those contacted would agree to a consultation;

Envisioning yet another situation wherein a potential plaintiff may be unable to comply with the pre-suit requirement of expert consultation, the Legislature provided one additional safe harbor. Section (4) of the statute provides that if a request for medical records has been made but the records have not been produced, a complaint may be filed, but consultation with an expert must occur within 90 days of the records being produced. §11-1-58(4), Miss. Code Ann. (1972). In this case, it was further undisputed the plaintiffs did not consult with an expert within ninety (90) days of the delivery of records to plaintiffs' counsel.

Certificate I, purportedly in compliance with §11-1-58(4), attached to the Complaint at the time of filing, contained a misleading if not false statement that the records had not been produced before suit was filed.⁸ Therefore, not only was the certificate a sham pleading under Rule 11, MRCP, but so too was the Complaint. Thus, as well as being a nullity due to the failure to adhere to the pre-suit requirements of §11-1-58, the Complaint had no legal force or effect at the time of filing as it violated the prescription set forth in Rule 11, MRCP: **(that) "[t]he signature of an attorney constitutes a certificate that the attorney has read the pleading or motion; that to the best of the attorney's knowledge, information and belief there is good ground to support it; and it is not interposed for delay".** MRCP Rule 11(a). There were not only no good grounds for the statements contained in the certificates, but they were also interposed to delay proceedings, if not the ends of justice.⁹ Therefore, the trial court's dismissal of the action with prejudice, was appropriate, as the limitations period has passed on Meadows' claim.

C. Certificate of Consultation Should Have Been Stricken.

"A sham pleading is . . . defined as one shown to be false, or appears to have been interposed in bad faith or for purposes of delay, or clearly not true in fact, without reference to the good or bad

⁸Significantly, it should be noted that not only did the evidence presented to the trial court by MBMC prove that the medical records were made available for and inspected prior to a complaint being filed, Plaintiffs admitted in a later filed Motion to Compel that "[p]rior to filing the complaint, Plaintiff's counsel secured MBHS (sic) medical records for Mrs. Meadows' relevant medical records." R. 113.

⁹Pursuant to MRCP 11 (b), "If a pleading or motion is not signed or is signed with intent to defeat the purpose of this rule, it may be **stricken as sham and false . . .**."

faith of the pleader.” Sherrill v. Stewart, 197 Miss. 880, 889, 21 So. 2d 11 (Miss. 1945)(emphasis added). In other words, a sham pleading is one which is good on its face, but false in fact. Id. The Complaint and certificates of consultation are such pleadings and should be stricken.

At the time of the filing, Certificate I was attached to the Complaint. This certificate contained the statement that counsel “certif[ies] that I have requested the medical records from the Defendant’s but they have not been produced yet.” R. 12. A second certificate was filed some ten months later, on June 13, 2005. (hereinafter referred to as “Certificate II”). The attestation contained therein read, “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. 153. On their face, these certificates appear to comply with 11-1-58(4). However, the evidence presented to the trial court demonstrates that the statements contained in Certificates I and II were not as represented.¹⁰ The medical records were made available and inspected at MBMC on August 25, 2004, prior to suit being filed, and were duplicated and received on September 10, 2004, nine months before Certificate II was filed.¹¹ Because of the misrepresentations contained therein, Certificates I and II, as well as the Complaint, constitute sham pleadings. Under common law, a sham pleading is considered a nullity. Id. Thigpen v. The Mississippi Central Railroad Co., 3 George 347, 32 Miss. 347 (Miss. Err.&App.), 1856 WL 2685 (Miss. Err.&App.)) (All pleas which are untrue are sham pleas and are to be treated as a nullity).

In addition, the Complaint and Certificates I and II violate Rule 11, and are therefore, nullities. MRCP Illinois Central R.R. Co., v. Broussard, 1008 WL 4405166 (Miss. App 2008) (holding lawsuit filed in violation of Rule 11 is a nullity from its inception).

Pursuant to Rule 11, a Plaintiff is not allowed to “drag a defendant into court to defend a

¹⁰In addition, Plaintiffs’ admission in their motion to compel that “[p]rior to filing the complaint, Plaintiff’s counsel secured MBHS (sic) medical records for Mrs. Meadows” demonstrates the inaccuracy of these statements.

¹¹At this point in time, there still remained 514 days in the applicable limitations period, but there remained only one day to out-manuever the effective date of amendments to §11-1-60. Gamesmanship such as being exercised here is not sanctioned by the MRCP or Mississippi Statute.

claim, prior to acquiring (sic) having knowledge, information or belief that there is good ground to support [the plaintiffs'] claim." Eatman v. City of Moss Point, 809 So. 2d 591, 595 (¶ 15) (Miss. 2000) r'hrg denied, Feb. 8, 2001. The Meadows did just that.

In Eatman, the plaintiff sued the employer of the driver of an automobile involved in an accident with the plaintiff. The plaintiff had no knowledge of whether the driver of the automobile was acting in the course and scope of his employment at the time of the accident or any reason to suspect same. Because the plaintiff had no basis in fact that the employer had anything to do with the accident, this Court held that the complaint violated Rule 11. Id. at 594. (¶14). Such is also the case here. The Meadows did not consult with an expert prior to filing their complaint. Furthermore, in an attempt to excuse their failure to abide by the requirements of §11-1-58, material misrepresentations were made to the court with regard to why no such consultation had been obtained. The Complaint and the accompanying Certificates violate Rule 11 and are/were legal nullities. *See, Bean v. Broussard*, 587 So. 2d 908, Miss. 1991.¹² *See also, O'Hop v. Thomas*, 616 A. 2d 1214 (Del. Supr. 1992) (holding petition which was timely filed was nonetheless a nullity as it did not comply with the requirements of Rule 11.)

Certificates I and II also violate Rule 11 as they were filed for purposes of delay. Pleadings which are filed for the sole purpose of bringing a matter before the Court before it is ripe are likewise considered sham pleadings. Any attempt to garner some advantage by filing a sham pleading is impermissible. *See, St. Louis & S.F.R. Co. v. Bradfield*, 18 Okla. 154, 88 P. 1050 (Ok 1907). Thus, Meadows should not be allowed to benefit from their premature filing of the Complaint.

D. Unlawfully Filed Complaints Are Null and Void, Having No Legal Force or Effect, and Therefore, Do No Toll the Limitations Period.

When a complaint is not lawfully filed, the suit has no legal effect. Thomas v. Warden, 999

¹²Although in Bean, this Court rejected the defendant's argument that the plaintiff's complaint violated Rule 11, and was therefore unlawful; the opinion is supportive of MBMC's position. At that time of the ruling in Bean, there was no statute which required a pre-suit expert consultation, thus, this Court held it was not improper to file suit before confirming that a reasonable basis existed. Significantly, however, this Court recognized that "[w]hile it may be the better practice to retain an expert early on, one is not required to do so." Agreeing with this premise, the Mississippi Legislature in passing §11-1-58, did, in fact, make it a legal requirement that an expert be consulted prior to filing suit, failing which the action will be unlawful.

So. 2d 842, 846 (Miss. 2008). In Thomas, plaintiff filed his complaint alleging medical malpractice without first giving the pre-suit notice required by § 15-1-36(15), Miss. Code Ann. (1972). Because the pre-suit requirement was not met, this Court held the “lawsuit was not lawfully filed, and it has no legal effect.” Id. at 846 (¶15). Likewise, because there was no consultation with an expert before the Meadows Complaint was filed, it too was not lawfully filed and had no legal force or effect. The Meadows’ right to commence an action was not complete as they had not consulted with an expert prior to filing suit and therefore, had no reasonable basis to believe a cause of action existed. “It is certainly an undisputable and invariable rule of law that a right of action must be complete when an action therefor is commenced. . . .” Crawford Commercial Constructors, Inc., v. Marine Indus. Residential Insulation, Inc., 437 So. 2d 15, 16 (Miss. 1983) (*quoting Georgia Pac. Ry. Co. v. Baird*, 76 Miss. 521, 24 So. 195, 196 (1898)). Although the Meadows Complaint was filed within the statutory period, the Complaint is/was without any legal force or effect. Therefore, the filing of the complaint did not toll the statute of limitations and dismissal with prejudice was proper.

Courts in other jurisdictions dealing with cases such as the one of bar concur. The Pennsylvania Superior Court has held that a complaint which is a legal nullity and is of no effect, cannot toll the applicable statute of limitations. Lange v. Burd, 800 A.2d 336, 341 (¶ 14) (PA Super 2002). Likewise, the Massachusetts Appeals Court has held “the filing of a claim, ordinarily sufficient to toll the statute of limitations, does not have that effect if such a proceeding is a nullity and void from the beginning.” Xarras v. McLaughlin, 66 Mass.App.Ct. 799, 801, 850 N.E. 2d 111 (App.Ct.Mass. 2006). In addition, the Maryland Court of Appeals has also held that null complaints are ineffective and cannot toll the running of the statute of limitations. Dual, Inc. v. Lockeheed Martin Corp., 383 Md. 151, 162-63, 857 A.2d 1095, 1011 (Ma.Ct.App. 2004).

Just as a party must demonstrate standing to file a complaint, absent compliance with pre-suit requirements being met, no action may be filed. The “failure to abide by such pre-suit. . . requirements, forecloses the possibility of a ‘properly filed,’ legally effective complaint.” Price v.

Clark, 2009 WL 2183271, Miss. 2009, ¶ 103. (dissent).¹³ To hold otherwise would allow “any person [to] commence an action, toll the statute of limitations . . . [and] keep the courthouse door open” thereby subverting not only the Rules of Civil Procedure but eviscerating the applicable statute of limitations. Delta Health Group, Inc. v. Payne, 995 So. 2d 123, 126 (¶ 16). The Meadows’ Complaint is a nullity, a sham pleading, having no legal force or effect, which did not, toll the statute of limitations. Therefore, the trial court’s dismissal with prejudice was appropriate.

The limitations period for a medical malpractice action is two years. §15-1-36(2), Miss. Code Ann. (Rev. 2009). The Meadows had until January 27, 2006, to file a viable complaint for medical malpractice action. The Meadows’ Complaint filed without complying with the statutory preconditions to filing suit and in violation of Rule 11 was a nullity. It did not toll the applicable limitations period, the claims became time-barred and dismissal with prejudice was proper.

II. Because the Meadows Complaint Was A Nullity, The Subject Matter Jurisdiction of the Court Was Never Invoked and Waiver Is Not At Issue.

A. Lack of Subject Matter Jurisdiction is Not Subject to Waiver.

When an action is not duly commenced, the subject matter jurisdiction of the Court cannot be invoked. Lack of subject matter jurisdiction is a defense which cannot be waived, and may be raised at any time, or *sua sponte* by the court. Benedict v. City of Hattiesburg, 693 So.2d 377, 381 (Miss. 1997). *See also*, Pruitt v. Hancock Med. Ctr., 942 So.2d 797, 801 (Miss. 2006) (*quoting* McNair v. United States Postal Service, 768 F.2d 730, 737 (5th Cir.1985)). It is also an issue which may be raised for the first time on appeal. Burnette v. Hartford Underwriters Ins. Co., 770 So. 2d 948, 949 (Miss. 2000). MBMC did not waive any rights to raise the lack of subject matter jurisdiction by participating in this litigation, albeit on a limited basis, and in response to orders of the court. As the Meadows’ Complaint was a nullity from time of filing and violated the Rules of Civil Procedure, jurisdiction never attached and the defense could be raised at any time. Moreover, Meadows should be equitably estopped from raising the issue of waiver by their dilatory conduct.

¹³Mandate has not yet been issued in Price v. Clark, and therefore, its holding is not yet final.

B. Defendants Did Not Waive Their Other Defenses.

Ordinarily, a defendant's failure to timely raise and pursue an affirmative defense or other right which would serve to terminate the litigation, coupled with active participation in the litigation process, would constitute a waiver of such a defense. MS Credit Center, Inc., v. Horton, 926 So. 2d 167, 180 (Miss. 2006.). However, the issue of waiver must be carefully examined by the trial court. Id. In cases where the delay in asserting a defense is the result of some action of the plaintiff, the defendant will not be held to have waived his defenses. Price v. Clark, 2009 WL 2183271, ____ So. 3d ____ 2009, (motion for rehearing pending). Meadows comes before the Court with unclean hands when he asserts that defendants waived their affirmative defense by proceeding with discovery in this matter. Plaintiffs' pleadings, which are equivocal, if not totally misleading, serve as no foundation upon which to launch such attacks against defendants. Further, Plaintiffs' characterization of Defendants' active participation in litigation for three (3) years is, like Plaintiffs' other filings, inaccurate.

First, this matter was not actively litigated for three (3) years. As the record shows, after racing to the courthouse to file their complaint before September 1, 2004, the Meadows did not even serve process on either of the local defendants until December 17, 2004 (MBMC) and December 20, 2004 (Kendall Blake, M.D.). (R1) No further activity ensued until plaintiffs' motion for leave to file an amended complaint was filed on July 20, 2005. (Approximately eleven (11) months after the complaint was filed and five (5) months after Louise Meadows' death). Lavelle Meadows did not bring the motion on for hearing. A Suggestion of Death was filed by MBMC on January 10, 2006 R. 70) and Lavelle Meadows never substituted parties. The subsequent entry of scheduling orders occurred at the direction of the court and the designation of experts was made pursuant to scheduling orders. While urging waiver to avoid the effect of non-compliance with statutory and procedural requirements, it is significant that Meadows: (a) never undertook to correct substantive and procedural deficiencies and (b) did not explain the obvious failure to consult with an expert witness in the trial court.

Even a cursory review of this proceeding reveals significant periods of inactivity. Indeed, the bulk of activity involves the filing and briefing of the motions to dismiss. There was no active litigation and Defendants did not waive their right to advance their defenses by participating in discovery before the resolution of issues related to their affirmative defenses. For ease of review, the following chart shows the time progression of the pleadings and motions to this argument:

August 25, 2004	Medical Records Produced/Inspected
August 31, 2004	Complaint Filed with Certificate I
September 10, 2004	Copies of Medical Records Delivered
December 17, 2004	MBMC served with process
December 20, 2004	Kendall Blake, M.D. served with process
February 27, 2005	Louise Meadows Dies
June 13, 2005	Certificate II filed
June 20, 2005	Motion to Amend Complaint
October 5, 2005	Kendall Blake M.D. filed a Motion for Partial Summary Judgment
October 14, 2005	Plaintiffs filed Notice of Trial Deposition of Lavelle Meadows
January 10, 2006	Suggestion of death filed
March 30, 2007	Defendants' filed Motions to Dismiss
May 4, 2007	Case Set for Trial (6 th setting) at docket call
December 26/29, 2007	Motions to Dismiss noticed for hearing

The Meadows pressed to beat the sunset on the prior version of §11-1-60, Miss. Code Ann., by filing a complaint without first obtaining an expert consultation as required by law and thereafter took no action to prosecute the matter for ten (10) months (including delaying service of process by over three (3) months). After Louise Meadows passed away on February 27, 2005, no action was taken to substitute parties. Nearly four months later, on June 13, 2005, Lavelle Meadows' counsel

filed Certificate II, which further perpetuated the misstatement of facts contained in Certificate I. One week later, Meadows filed a motion to amend the complaint to assert a claim of wrongful death but never brought the motion on for hearing. Another four months pass, and apparently out of concern for the deteriorating health of Lavelle Meadows, a “trial” deposition is unilaterally noticed.

In response to the notice, the Defendants opposed the deposition and requested the information necessary to defend such a deposition.¹⁴ MBMC certainly had the right to obtain as much information as possible to be able to defend what would effectively be Lavelle Meadows’ trial testimony. Defendants had no choice but to prepare, yet plaintiff would penalize defendants for preparing to defend a trial deposition.

The unilateral notice of Lavelle Meadows trial deposition set off a course of filings and hearings, all of which took time to resolve. For instance, MBMC filed a motion to quash the deposition of Lavelle Meadows and it was denied, allowing the deposition to proceed. Furthermore, if the situation were not so serious, Meadows’ current assertions about the alleged failure of defendants to pursue their affirmative defenses in a timely manner would be amusing, especially given that Lavelle Meadows did not pursue his motion to amend the complaint for nearly two years after it was filed. In addition, despite MBMC’s filing of a Suggestion of Death, Meadows, to this day, has not taken action to substitute the proper party plaintiff. In fact, it was not until two weeks before Defendants’ Motions to Dismiss were set to be heard, that Lavelle Meadows even sought to have the Motion to Amend the Complaint heard.

Even if one were to assume for the sake of argument that the Complaint was validly filed, which it was not, or that defendants waived defenses under §11-1-58, Miss. Code Ann. (1972), which they did not, the trial court nevertheless appropriately dismissed this matter with prejudice. Meadows’ failure to adhere to the requirements of Rule 25 mandated a dismissal of his claim.

¹⁴MBMC filed a motion to quash the deposition of Mr. Meadows because Meadows had not adequately responded to the discovery sent to him in anticipation of such a deposition. Because of Meadows failure to respond, MBMC was forced to seek a hearing on its Motion, which, of course, took additional time. The trial court denied the Motion to Quash, thus, MBMC had no choice but to engage in sufficient discovery to defend the claim.

MRCP. As the applicable limitations had expired by the time the trial court ruled, the dismissal was and should have been with prejudice.

III. Rule 25 Requires Dismissal of Meadows Complaint.

Rule 25 provides that if a party dies during the pendency of an action, the action shall be dismissed without prejudice as to the deceased party if no substitution of a proper party is made within 90 days after the death is suggested upon the record. MRCP. Louise Meadows died on February 27, 2005. A suggestion of her death was filed by MBMC on January 10, 2006. Prior to the filing of defendants' motion to dismiss, no substitution of the proper party plaintiff has been made. As of April 10, 2005, the complaint stood dismissed for failure to substitute parties. Therefore, the statute of limitations commenced to run again and the cause of action became time-barred on or about September 27, 2007. As Lavelle Meadow's claims are derivative of Louise Meadow's claims his claims likewise were time-barred and dismissal with prejudice was proper.

The requirements of Rule 25 and consequences for violating them are similar to those found in Rule 4(h). MRCP Rule 4(h) requires that if service of process is not completed within 120 days after filing, the suit should be dismissed. MRCP Rule 25 requires that if no substitution is made within 90 days after the suggestion of death is filed, the suit shall be dismissed. In both cases, the dismissals are generally without prejudice. However, after the time periods under both rules expire, the limitations periods applicable to the claim begins to run again. In other words, under Rule 4(h), the limitations period begins to run again at the end of the 120-day tolling period. Johnson v. Thomas, 982 So. 2d 405 (Miss. 2008). Likewise, under Rule 25, the limitations period begins to run again after the expiration of the 90-day period if no substitution is made. Thus, the limitations period herein began to run again on April 10, 2006, the 91st day after the Suggestion of Death was made upon the record.

If one were to assume for purposes of this section of the argument that the Complaint was lawfully filed, which is denied, at the time of filing the Meadows Complaint, 216 days had already elapsed on the limitations period. Thus, 514 days remained on the two-year limitations period and on September 6, 2007, the claim was time-barred. Thus, when the trial court dismissed this matter

on February 8, 2008, the limitations period had already expired. Furthermore, as Lavelle Meadows loss of consortium claim is a derivative action which cannot survive the dismissal of the primary action, it too was subject to dismissal with prejudice. J & J Timber Co. v. Broome, 932 So.2d 1, 6 (¶ 19) (Miss. 2006) (holding loss of consortium claim is a derivative action which cannot be maintained on its own).¹⁵ Since Louise Meadows estate was never substituted as the proper party plaintiff after the suggestion of death was filed, the statute of limitations began to run again. When the trial court dismissed the claim, the limitations period had run and a dismissal with prejudice was appropriate as to all claims.

CONCLUSION

The trial court's dismissal of this action with prejudice is well founded. Plaintiffs did not consult with an expert prior to suit being filed as is required by law and they were not under no legal compulsion to commence litigation as the limitations period was not looming. Beginning with the hurried August 31, 2004 filing, continuing with the delay of almost 120 days in serving process, the failure to prosecute or substitute parties, the wholesale non-compliance with substantive law as well as the expiration of the period of limitations the dismissal of this matter with prejudice was warranted. Ostensibly, in attempting to excuse their failures the Meadows filed sham pleadings containing misstatements of fact with regard to the production of medical records. These pleadings, while facially valid, were misleading as was demonstrated by the evidence presented to the trial court. Therefore, these pleadings violated the provisions of Rule 11.

Plaintiffs also ignored Rule 25, Miss. R. Civ. P., by failing to properly substitute a party plaintiff after filing of the suggestion of death. By the time Meadows consulted with an expert and filed a designation, the limitations period have passed. Further, because Meadows did not consult with an expert prior to filing suit, the action was not duly commenced, and the complaint did not toll the limitations period. Because the limitations period had expired at the time the dismissal was granted, the dismissal with prejudice was appropriate.

¹⁵ “[A] spouse can have no better claim in court than the primary claimant.” Daulton v. Miller, 815 So. 2d 1237, 1241 (¶ 17) (Miss. 2002).

Plaintiffs' effort to avoid the application of statutory amendments to §11-1-60, Miss. Code Ann (1972), and disregard for the substantive and procedural law and should not be rewarded. The period of limitations was not tolled simply by the Meadows filing a complaint. To hold otherwise would effectively eviscerate all periods of limitation. Furthermore, there is no place to condone a party's misstatements in pleadings and abide a claim of waiver.




The trial court properly found that plaintiffs failed to comply with conditions precedent to filing a complaint; that there was no waiver of defenses; plaintiffs' claims were time-barred and dismissal of plaintiffs' claims with prejudice was appropriate.

Accordingly, MBMC respectfully requests that this court affirm the judgment of the Trial Court, dismissing Plaintiffs/Appellants' claims with prejudice, or in the alternative, that the 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.

Dated this the 30th day of October, 2009.

Respectfully submitted,

MISSISSIPPI BAPTIST MEDICAL
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CERTIFICATE OF SERVICE

I, Gaye Nell Currie, one of the attorneys for defendant, Mississippi Baptist Medical Center, do hereby certify that I have this date caused to be mailed, U. S. Mail, postage pre-paid, a true and correct copy of the above and foregoing to the following:

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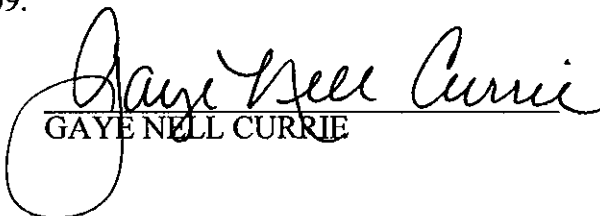
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Dated this the 30th day of October, 2009.



GAYE NELL CURRIE