IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DOCKET NO. 2008-TS-02074

LOUISE MEADOWS and LAVELLE MEADOWS

Plaintiffs / Appellants

VERSUS

KENDALL T. BLAKE, M.D.,
MISSISSIPPI BAPTIST HEALTH SYSTEMS, INC.
d/b/a MISSISSIPPI BAPTIST MEDICAL CENTER

Defendants / Appellees

APPEAL FROM THE CIRCUIT COURT OF HINDS COUNTY MISSISSIPPI,
FIRST JUDICIAL DISTRICT

REPLY BRIEF OF APPELLANT

Submitted by:

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Substitution of Appellants

This medical malpractice action was originally filed on August 31, 2004 by the malpractice victim Louise Meadows for various personal injuries including those injuries associated with the amputation of her leg. The original action was joined by co-plaintiff and husband Lavelle Meadows who sought damages for loss of consortium.

After she filed her complaint, Ms. Meadows then died on February 27, 2005. On July 20, 2005, prior to the filing of any suggestion of death under Miss. R. Civ. P. 25, Mr. Meadows filed his motion to amend the complaint. The proposed amended complaint, in addition to the advancement of a wrongful death claim, sought to add as party plaintiffs Ms. Meadows' sole surviving adult children Kaye Burt and Judy Brown and, of course, remove "Louise Meadows", deceased, as a named plaintiff. (See proposed First Amended Complaint, attached as Exhibit "A" to Plaintiff's Motion to Amend, R. 37.)

If the motion to file the proposed First Amended Complaint had been granted, the effect would have been to advance wrongful death claims on behalf of the sole heirs and wrongful death beneficiaries, namely Lavelle Meadows (husband and original named plaintiff), Ms. Burt (adult daughter) and Ms. Brown (adult daughter). And, while an estate for Louise Meadows had not yet been opened at the time of the filing of the motion to amend, the plaintiff Mr. Meadows and proposed plaintiffs Ms. Burt and Ms. Brown in the First Amended Complaint sought to continue Ms. Meadows' "survival" claims for pain and suffering, past medicals, disfigurement, etc. (First Amended Complaint, ¶20, etc., R. 42). Therefore, as discussed more fully below, the subject motion to amend though referencing Rule 15(a) and not Rule 25(a) in substance and

effect was a motion to substitute the heirs Mr. Meadows, Ms. Burt and Ms. Brown in the place of their deceased mother Louise Meadows, deceased.

On August 1, 2005, in response to Meadows' motion to file the First Amended Complaint, Defendants filed objections arguing that the motion should be denied because Meadows allegedly failed to comply with notice and certification requirements set forth in Miss. Code Ann. §§ 11-1-58 and 15-1-36(15) (2005), respectively. At this time, Defendants did not file a Rule 25 "Suggestion of Death."

The parties then for over two years continued litigating the merits of the claims including the "survival" and wrongful death claims. (See Plaintiff's Expert Designations, filed September 1, 2006, providing medical expert testimony as to breaches in the standard of care causing amputation of Ms. Meadows' leg as well as her "untimely demise", R. 188-89; Defendants' Expert Designations, filed November 15, 2005, R. 199-286; Defendants' Supplemental Expert Designations, December 15, 2005, R. 287-324.)

On February 11, 2008, just weeks before the scheduled trial date, the lower court entered its order dismissing with prejudice all claims against all Defendants. (R. 420) While the Meadows on January 2, 2008 brought on for hearing and in fact argued their motion to file the First Amended Complaint, the court expressly "declared" the Meadows' motion to amend to be "moot" in that it had dismissed all claims with prejudice.[1] Id.

The Meadows, while Mr. Meadows was still alive, timely perfected an appeal of the lower court's February 11, 2008 "Judgment of Dismissal With Prejudice" and "Order" dismissing with prejudice all claims against all Defendants. (R. 421.) The Meadows filed their

[1] The record fails to include the actual "notice(s) of hearing" regarding either the Defendants' motions to dismiss or the Meadows' motion to file the First Amended Complaint. The trial court docket, however, reflects that these motions were noticed for hearing. (R. 3) The parties to this appeal acknowledge that all motions were argued on January 14, 2008.

appellate brief before this Mississippi Supreme Court on July 27, 2009. Defendants filed their appellee briefs on October 30, 2009. While the undersigned counsel for the Meadows was preparing to file the Reply brief, Mr. Meadows passed away during the first week of November, 2009. The Meadows then filed with this Court their "NOTICE OF SUGGESTION OF DEATH; AND MOTION TO STAY BRIEFING SCHEDULE OR, IN THE ALTERNATIVE, FOR ENLARGEMENT OF TIME TO FILE REPLY BRIEF" notifying the Court of Mr. Meadows' death and the heirs' desire to continue prosecuting this appeal. On November 13, 2009 this Court granted the Meadows' motion and allowed the Meadows until January 12, 2009 to file their Reply brief. In the meantime, on December 11, 2009 the Chancery Court of Rankin County, Mississippi appointed Kaye Burt as administratrix of the estate of Louise Meadows, deceased; and, as well, appointed Ms. Burt administratrix of the estate of Lavelle Meadows, deceased. (See Letters of Administratrix of Estate of Louise Meadows, deceased, and Letters of Administratrix of Estate of Lavelle Meadows, deceased, attached hereto as Exhibits "A" and "B", respectively.)

Contemporaneous with the filing of this Reply brief, and in light of the recently issued letters of administration, the Meadows move this Court pursuant to Miss. R. App. P. 43(a) to substitute as named plaintiffs and appellants in place of appellant Lavelle Meadows, deceased, and Louise Meadows, deceased, the following: Kaye Burt, individually and as administratrix, heir and wrongful death beneficiary of the estate of Louise Meadows, deceased, and as administratrix and heir of the estate of Lavelle Meadows, deceased; and Judy Brown, individually and as heir and wrongful death beneficiary of the estate of Louise Meadows, deceased, and as heir of the estate of Lavelle Meadows, deceased.[2]

[2] Along with the Miss. R. App. 43 suggestion of death filed with this Court on November 10, 2009, the Meadows incorporated a motion to substitute pursuant to Rule 43(a). The Meadows hereby renew the motion.

Argument

I. Compliance with Miss. Code Ann. §11-1-58.

a. Defendants' Claim That Undersigned Counsel Filed "False", "Sham", etc., "Certificate(s) of Plaintiff's Attorney" Is A Desperate, Meritless Argument.

It is unfortunate that the Meadows and undersigned counsel must devote space in this Reply brief to respond to Defendants' ridiculous claim that undersigned counsel for the Meadows in his "Certificates of Plaintiff's Attorney" lied about not having received the pertinent medical records before suit was filed. The below facts are UNDISPUTED:

a. Counsel for the Meadows first requested medical records from defendant Mississippi Baptist on August 2, 2004. (Letter from legal assistant Haas to Mississippi Baptist dated August 2, 2004, R. 348.)

b. Legal Assistant Haas visited Mississippi Baptist on August 25, 2004 to review records to identify which of the thousand plus pages of records should be produced so that the records could then be forwarded to appropriate medical experts. (R. 348-49.)

c. This Court may take judicial notice of the fact that the production of thousands of pages of medical records can be very expensive. Blanket requests for production can be burdensome and a waste of money. On August 25th, legal assistant Haas (with no medical training), was not reviewing the records for purposes of forming a medical opinion on liability; but, of course, was undertaking a cursory review of the records to gather some minimal information and to identify which of the records should be produced so that counsel for the Meadows could get them to the appropriate medical experts. This fact is not only well understood by Defendants and their counsel, but is evident from the subject record in that Ms. Haas began her review at Mississippi Baptist on the afternoon of August 25th, returned to Langston & Langston's office on this same date, prepared a letter to Mississippi Baptist on this same date, and at 3:45 P.M. on this same date faxed the letter to Mississippi Baptist requesting actual production of some 1, 348 pages of records covering two separate admissions. (R. 349.)

d. On August 31, 2004, Mr. and Mrs. Meadows filed their original complaint along with their "Certicficate of Plaintiff's Attorney" ("Certificate I") executed by undersigned counsel. Certificate I TRUTHFULLY and ACCURATELY verified that the relevant records had been requested [i.e., on August 25th] but had not yet been produced. (R. 5, 12-13.)

e. Soon after the Au gust 31st filing, photocopy of the relevant records was completed by Mississippi Baptist; payment for the records was made by Langston & Langston to Mississippi Baptist; and Langston & Langston office currier Ken Wells on September 10, 2004 traveled to Mississippi Baptist and physically retrieved the records. (R. 349-50.) This date, September 10th, was in fact the date of PRODUCTION within the meaning of Miss. Code Ann. §11-1-58(4) (Laws 2002, effective Jan. 2003).

f. After the relevant medical records were produced on September 10, 2004, the records were delivered to a qualified medical expert who opined that Defendants' breached the applicable standard of care.[3] (R. 1, 345.) On June 13, 2005, the Meadows filed another "Certificate of Plaintiff's Attorney" ("Certificate II") consistent with Miss. Code Ann. §11-1-58(4). This certificate, executed by undersigned counsel, TRUTHFULLY and ACCURATELY reiterated that while relevant medical records had not been produced before the original complaint was filed, the records had since been produced and reviewed by a qualified medical expert who opined that the Defendant medical providers breached the applicable standard of care. (R. 345.)

Notwithstanding the above uncontradicted facts, Defendants in the lower court and throughout their Appellee briefs have advanced a false and shameful argument that undersigned counsel filed "sham" Certificates falsely claiming that medical records had not been produced before the original complaint was filed. (Mississippi Baptist Appellee Brief, pp. 6-7, 12-16; Blake Appellee Brief, pp. 7, 12-15). Importantly, Defendants in their argument are NOT merely claiming that they and the Meadows have different interpretations of the term "produced" as used in § 11-1-58(4). Defendants go much further. They are argue that notwithstanding Ms.

[3] The record does not reflect the exact date that an expert for the Meadows reviewed the records and found medical negligence. If relevant, however, the Meadows on remand would be prepared to show that this review and finding occurred within ninety (90) days of the Meadows' receipt of the records as contemplated by Miss. Code Ann. §11-1-58(4).

Haas' August 25th letter confirming her "review" of the records (again, a "review" to determine what should be produced), undersigned counsel through the filing of the Certificates attempted to mislead Defendants and the Court; that undersigned counsel attempted to conceal the August 25th "review" and falsely lead everyone to believe that the records were "produced" on September 10th when in fact undersigned counsel knew that the records had been "reviewed" by a paralegal at Mississippi Baptist on August 25the before suit was filed.

And why have these Defendants and their counsel so blatantly overreached and advanced such a bad faith argument? The reason is the application of Miss. R. Civ. P. 11 (b) which provides: "If the pleading or motion . . . is signed with the intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading or motion had not been served." Id. (Emphasis added.) Defendants then leap to their statute of limitations argument claiming that the limitations period on the Meadows' claims had long expired since the original complaint was null and void as a "sham" pleading.

There is no evidence that the Meadows or their counsel in the still of the night snuck into Mississippi Baptist before August 31st, copied or stole relevant medical records, and then filed a false Certificates lying about it. Defendants to advance their desperate argument point to a motion to compel production of documents filed by the Meadows on April 13, 2006. (Mississippi Baptist brief, pp. 6, 15, n. 10; Blake brief, p. 10.) Paragraph 2 of the subject motion to compel includes the following superfluous and grammatically nonsensical statement: "Prior to filing suit, Plaintiff's counsel secured MBHS medical records for Mrs. Meadows' relevant medical records." (R. 113.) This smoking-gun "admission", Defendants' argue, provides the requisite intent for this Court to declare the two Certificates to be "sham" pleadings; thus, null and void under Miss. R. Civ. P. 11(b).

Whatever the drafter[4] of the subject motion to compel intended by this superfluous statement, it is absolutely undisputed that the medical records were quickly "reviewed" by a paralegal on August 25th followed by a fax on this same date requesting production of 1,348 pages of records. (R. 349.) And, that following payment of photocopy charges the records were picked up by undersigned counsel's office on September 10th – nine (9) days after suit was filed! (R. 350-52.) These facts prior to the filing of either Certificate were confirmed in written communication between Plaintiff's counsel and Defendant/Appellee Mississippi Baptist. Obviously, the Certificates were neither intended nor did they in fact mislead Defendants or the lower court. The Certificates were and are TRUTHFUL and ACCURATE.

b. Meaning and Purpose of "Produced" under Miss. Code Ann. §11-1-58(4).

In actuality, there was no statutory requirement for the Meadows to file the August 31, 2004 "Certificate of Plaintiff's Counsel" (sometimes referred to as "Certificate I") along with their original complaint. Section 11-1-58(4) expressly waives the original "certificate of consultation" filing requirement when: " . . . 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 . . . . " §11-1-58(4)(emphasis added).

Certificate I, though not required to have been filed, was simply attached to the complaint to notify interested parties that the complaint was filed before the Meadows received the relevant records; thus, at least temporarily exempting the Meadows from the requirements of §11-1-58(1).

Defendants in their briefs suggest a sinister motive for the Meadows' decision to file suit on August 31, 2004, i.e., one day before the effective date of some applicable "tort reform" legislation that could have limited their claims to damages for disfigurement. See, e.g., Miss.

[4] Though undersigned counsel executed the subject motion to compel, he did not draft it and can only speculate as to the intended meaning of the statement.

Code Ann. §11-1-60 (Laws, 2004, 1st Ex. Sess., ch. 1, §2, effective from and after September 1, 2004, and applicable to all causes of action filed on or after September 1, 2004) (Legislation expanding caps on non-economic damages to includes damages for "disfigurement.") Defendants describe this decision as "calculated" and "designed to circumvent" the Legislature's medical malpractice reform. (Blake brief, p. 9, n. 7)

The Meadows make no apologies. Their decision to file before September 1, 2004 was indeed calculated – calculated in good faith to avoid possible application of legislative restrictions on their ability to collect damages for Ms. Meadow's disfigurement caused by the amputation of her leg. To attempt to take advantage of the arbitrary filing "window" expressly provided by the Legislature in §11-1-60 was not sinister. It was undersigned counsel's duty.

As Defendants well know, and as any legal practitioner well knows, it would be virtually impossible to comply with §11-1-58(1) without having in hand actual copies of relevant medical records. The statute obligates the attorney for the medical malpractice plaintiff to verify that he/she has:

> [c]onsulted 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 expert testimony as to standard of care or negligence and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis of such review and consultation that there is a reasonable basis for the commencement of such action;

Miss. Code Ann. §11-1-58(1) (emphasis added).

With perhaps limited exceptions that do not exist in the case *sub judice*, no attorney can comply with the above code section and verify to the court that based on "such review" by the expert "there is a reasonable basis for the commencement of such action" absent a literal review of the actual medical records by an expert. Id. In fact, when the lawsuit was filed on August 31st if undersigned counsel had attached a §11-1-58(1) certificate based solely on a legal assistant's

review of the records as opposed to a medical expert's review then perhaps Defendants in good faith could talk about a "sham," "fraudulent," "misleading" certificate.

The Mississippi Legislature clearly understood this reality when it crafted §11-1-58(4) that permitted the filing of the lawsuit without an expert opinion contemplated in §11-1-58(1) so long as the records at the time of filing had been requested but not yet "produced." Miss. Code Ann. §11-1-58(4) (emphasis added).

Again, for the obvious and practical reasons noted above, "produc[tion]" within the meaning of §11-1-58(4) necessarily must mean records that are in the physical possession and control of the plaintiff. On August 25, 2004, i.e., the date a legal assistant reviewed the records at Mississippi Baptist to determine which of them should be produced, the subject records were not within the control and possession of the Meadows. Nor were they in the control and possession of the Meadows on August 31, 2004 when the lawsuit was filed along with undersigned counsel's Certificate I. At all times prior to and during this period the records were in the control and possession of Mississippi Baptist and so remained until September 10th when the copies were purchased and the records were physically retrieved by the Meadows' counsel.

While the record before this Court shows that the medical records were retrieved on September 10, 2004 (R. 350-51), undersigned counsel as an officer of the Court represents that copies of the records were purchased with a check dated September 7, 2004 in the amount of $854.75 payable from Langston & Langston to Mississippi Baptist. Until such payment, Mississippi Baptist would not make the records available for the Meadows to take control and physical possession. (See letter from counsel for Mississippi Baptist to legal assistant Haas, R. 360, regarding subsequent production: "The records will be released upon pre-payment of the hospital's copying charges.")

No other interpretation of "produced" makes sense. See Price v. Clark, 2009-MS-0724.202, ¶19 (Miss. July 23, 2009) ("When interpreting a statute that is not ambiguous, this Court will apply the plain meaning of the statute. ***Claypool v. Mladineo,*** 724 So. 2d 373, 382 (Miss. 1998). In construing a statute, the Court must seek the intention of the Legislature, and knowing it, must adopt that interpretation which will meet the real meaning of the Legislature. ***Evans v. Boyle Flying Service, Inc.,*** 680 So. 2d 821, 825 (Miss. 1996). ").

c. The legislatively promulgated procedural requirement in Miss. Code Ann. §11-1-58(4), which mandates the filing of a §11-1-58(1) "Certificate of Consultation" within ninety (90) days after records "produced," is unconstitutional.

Admittedly, the Meadows' June 13, 2005 Certificate of Plaintiff's Attorney (executed by counsel and served on Defendants on June 10, 2005) (sometimes hereinafter referred to as "Certificate II") was not filed with the Court within ninety (90) days after the relevant records were produced. Defendants, however, appear to accept the fact that the Mississippi Supreme Court in Wimley v. Reid, 991 So. 2d 135, 138 (Miss. 2008) expressly found such legislatively promulgated procedural requirements to be unconstitutional as violative of the separation of powers doctrine set forth in Miss. Const. Art. I, §§1 and 2. The express holding in Wimley bears repeating: ". . . a complaint, otherwise properly filed, may not be dismissed, and need not be amended, simply because the plaintiff failed to attach a certificate or waiver." Wimley, 991 So. 2d at 138.

Since the argument advanced by Defendants in the trial court which formed the sole basis for the court's dismissal with prejudice was expressly and unequivocally rejected in Wimley, Defendants must shift gears.

While now accepting the fact that the Meadows need not have filed any sort of certificate whatsoever, Defendants refocus and argue that the lower court nonetheless properly dismissed

the complaint "with prejudice" because there was no showing that the Meadows actually consulted with a medical expert **prior to filing suit.** (Mississippi Baptist brief, pp. 10; Blake brief, pp. 8-12.) In fact, Defendant Blake pointedly framed its primary argument as follows :

> 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.

(Blake brief, p. 11-12.) (Emphasis added.)

The Meadows did not consult an expert prior to filing the lawsuit; nor, as discussed above, was such a consultation mandated. Section 11-1-58(4) expressly authorizes the filing of a lawsuit without first having consulted an expert. Contrary to Defendants arguments, this express exception to the "expert consultation" requirement is not limited to a claimant's desire to toll the running of an applicable limitations period. The exception is completely silent as to motive. Moreover, even if motive was an issue public policy would favor a legitimate and good faith filing to avoid future application of an arguably arbitrary and unfair damage cap applicable to extreme disfigurement such as that associated with the loss of a leg. See Miss. Code Ann. §11-1-60 (Laws, 2004, . . . applicable to all causes of action filed on or after September 1, 2004) (eliminates "disfigurement" as an exception to the non-economic damage caps).

As pointed out by Defendant Blake in his brief, the lower court dismissed the Meadows' complaint with prejudice before September 2008 when the Mississippi Supreme Court issued its ruling in Wimley. (Blake brief, p. 12, n. 12.) Defendant Blake observed that at the time of the hearing on these dispositive motions the parties and the lower court believed that the law required "strict compliance" with the procedural mandates in §11-1-58 as formerly announced in Walker v. Whitfield Nursing Ctr., Inc., 931 So. 2d 583 Miss. 2006), *overruled* by Wimley v. Reid, 991 So. 2d 135 (Miss. 2008).

Given the above acknowledgement by Defendants combined with the fact that this Court in Wimley remanded the case to the trial court for further hearings on whether the "substantive" pre-suit filing requirements had been met, it is intellectually dishonest for Defendants to now argue that the Meadows already had their one shot to show that an expert was consulted within ninety (90) days after production of the records; intellectually dishonest to argue that notwithstanding the fact that Walker was the law at the time of the January 14, 2008 hearing, the Meadows should have known to introduce evidence to establish when they first consulted with an expert. (Mississippi Baptist brief, p. 12.) Thus, argues Defendants, the Meadows should be forever barred from showing that they in fact timely satisfied all substantive post-suit consultation requirements in §11-1-58(4).[5]

Defendants' desperate arguments notwithstanding, the doctrine of *stare decisis* requires that this Court, as it did in Wimley, reverse the trial court and remand this case for an evidentiary hearing to determine if the Meadows complied with the substantive requirements of §11-1-58(4). Wimley v. Reid, 991 So. 2d 135, 139 (Miss. 2008)(remanded for evidentiary hearing on whether plaintiff complied with §11-1-58(1) pre-suit expert consultation); see also Price v. Clark, 2009-MS-0724.202, ¶30 (Miss. July 23, 2009)(since trial court dismissed suit on other grounds and never addressed the motion to dismiss for improper service, Court remanded case for an evidentiary hearing on this issue.) If they did, there can be no dismissal grounded on §11-1-58. If they did not, the lower court at worst may dismiss without prejudice.[6]

[5] Actually, §11-1-58(4) does not specify when the expert consultation must occur. It only addresses when the post-suit §11-1-58(1) "certificate" must be filed; again, a procedural requirement that this Court found to be unconstitutional.

[6] An evidentiary hearing on substantive compliance with §11-1-58(1) and (4), of course, would be unnecessary if the Court accepts the Meadows' claim that Defendants waived their §11-1-58 non-compliance defense by extensively litigating the merits of this case for several years before filing and noticing their motions to dismiss.

d. Waiver

Defendant Mississippi Baptist's brief responding to the Meadows' "waiver" argument aptly begins:

> 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.

(Mississippi Baptist brief, p. 19, citing MS Credit Center, Inc. v. Horton, 926 So. 2d 167, 180 (Miss. 2006)). This much the parties can agree.

The Meadows will not repeat the waiver arguments advanced in their original brief. (See Meadows "Brief of Appellant," pp. 7-11.) Defendants in their responsive briefs argue that the three (3) years of litigation on the merits did not constitute a waiver of their §11-1-58 non-compliance defense because: a) the multiple scheduling orders that were entered extended the motion deadlines and forced Defendants to litigate the merits; b) hiring experts, disclosing full Rule 26(b)(4) opinions, taking Mr. Meadows' deposition, filing, defending and arguing discovery motions, etc., were the fault of the trial court and the Meadows and somehow (inexplicably) justified an almost three year delay in filing and pursuing their "non-compliance" motions; and c) the Meadows had "unclean hands" and are "equitably stopped" from claiming that Defendants waived the "non-compliance" defense because they delayed serving summons for just over three months after suit was filed,[7] delayed until June 2005 (just over three months after Mrs. Meadow's death) before filing their motion to amend, and delayed bringing their motion to amend up for hearing until January 14, 2008. (Mississippi Baptist brief,19-22 ; Blake brief, pp. 12-19.)

These arguments have no merit. Though the Meadows will not waste their limited pages pointing out the many obvious fallacies in these arguments, this Court need only look to the fact

[7] Though not relevant, the Meadows' delayed serving summons until after they consulted with a medical expert.

that Defendants advanced their affirmative "non-compliance" defenses in their January 2005 answers to the complaint; litigated thereafter for years; filed their "non-compliance" motions to dismiss in March 2007 (more than two years after they answered the complaint); litigated another ten (10) months; and in late December 2007 first noticed their motions to dismiss for hearing. If ever "waiver" were applicable this is it.[8]

Finally, there is no merit to Defendant Mississippi Baptist's argument that the Meadows' alleged failure to comply with §11-1-58(1) is jurisdictional and, therefore, "cannot be waived." The argument is premised solely on Defendants' claim that the originally filed complaint was a "sham" and "fraud." That issue has already been addressed.

II. Defendants' Rule 25 "Alternative" Argument.

Defendants well know that the lower court erred in dismissing the Meadows' complaint with prejudice. Thus, they each argue in the alternative that the lower court's dismissal with prejudice should be affirmed because the court could have dismissed the complaint under Rule 25(a)(1) of the Mississippi Rules of Civil Procedure since - they argue – the Meadows failed to file a timely motion to substitute a party in the place of the deceased Mrs. Meadows.

The lower court, of course, did not rule on Defendants' Rule 25 motion. Defendants nonetheless argue that the Mississippi Supreme Court "in the interests of justice" should invoke its plenary jurisdiction and decide this '" purely legal issue.'" (Blake brief, p. 18; Mississippi Baptist brief, p. 22.) (Citations omitted.) This argument as well must fail.

[8] Defendants' "scheduling orders" argument is particularly dubious since the orders show as a matter of law that Defendants intentionally delayed the prosecution of their "non-compliance" motions with actual knowledge that the Meadows were devoting time and resources preparing to timely file their expert disclosures.

a. The Meadows filed their motion to substitute Before Defendants filed their Rule 25 Suggestion of Death; therefore, rendering the 90 day period moot.

Mrs. Meadows died on February 27, 2005. On July 20, 2005, her husband/widower Lavelle Meadows, who was already a named plaintiff in this cause, and her two surviving adult daughters Kaye Burt and Judy Brown filed their "Plaintiff's Motion for Leave of Court to File First Amended Complaint." Attached to the motion was a proposed First Amended Complaint. The motion and proposed First Amended Complaint not only notified Defendants and the court that Mrs. Meadows had passed away; but, more importantly for purposes of the Rule 25 discussion, this pleading requested that the court allow Mr. Meadows and his adult daughters, i.e., the sole heirs and wrongful death beneficiaries, to dismiss Mrs. Meadows as a party plaintiff and add the two adult daughters as plaintiffs for purposes of prosecuting their wrongful death claims and M rs. Meadows' survival claim. (See Motion for Leave of Court to File First Amended Complaint, R. 34-35, ¶¶3, 6 (adding wrongful death beneficiaries as plaintiffs); proposed First Amended Complaint, R. 37-44, ¶20 (proposed amended complaint drops Mrs. Meadows as party plaintiff and adds daughter and continues "survival" claim of Mrs. Meadows.))

While the motion to amend properly referenced Miss. R. Civ. P. 15(a) as the procedural rule authorizing the requested relief, it as well could have (and perhaps should have) cited Rule 25(a) since the substance of the motion and proposed amended complaint strictly complied with Rule 25(a) in that Mr. Meadows (i.e., a co-plaintiff and "any party" within meaning of Rule 25(a)) through this motion expressly notified Defendants and the court of Mrs. Meadows' death and expressly requested the court to allow he and his daughters to continue the litigation in the place of his deceased wife. The fact that the motion failed to specifically reference Rule 25(a) as well as Rule 15(a) is of no consequence since substance prevails over form. See, e.g., Wilson v.

Freeland, 773 So. 2d 305, 308 (Miss. 2000) (the court's "Order of Dismissal" treated as requisite "notice of dismissal" under Rule 41(a) since, "'[A] court must look to the content of the pleading to determine the nature of the action. Substance is considered over form. The label is not controlling.'"), *quoting* Arnona v. Smith, 749 So. 2d 63, 66 (Miss. 1999)).

Since the Meadows' motion to amend complied with the substance of Rule 25(a) and requested that Mr. Meadows and his daughters be allowed to continue the deceased Mrs. Meadows' claim, Defendants' subsequently filed "Suggestion of Death" was moot and the ninety day period in Rule 25(a) was never triggered.[9] Estate of Baxter v. Shaw Assoc., Inc., 797 So. 2d 396, 402 (Miss. Ct. App. 2001) (ninety day period "never relevant" when motion to substitute filed before filing of Rule 25(a)(1) suggestion of death).

Finally, and in the alternative, if the trial court had considered Defendants' Rule 25 motion (which it did not), and if the trial court had ruled in favor of Defendants (which it did not), the trial court as a matter of law could only have dismissed Mrs. Meadows' survival claim "without prejudice." Miss. R. Civ. P. 25(a)(1) ("The action shall be dismissed without prejudice as to the deceased party . . . .") (emphasis added.) Defendants' argument to the contrary is discussed in part III.

b. Defendants failed to show any prejudice from the Meadows' delay in bringing on for hearing their motion to amend.

As previously discussed, the Meadows did in fact bring on for hearing their motion to amend. The notice of hearing was filed on January 2, 2008 to be heard on January 14, 2008 along with Defendants' motions to dismiss. (Trial court docket, R. 3.) The parties argued all of the motions. The trial court took the motions under advisement and on February 11, 2008 entered its order granting Defendants' motion to dismiss with prejudice (solely on grounds of the

[9] In fact, Defendants' "Suggestion of Death" was filed almost six months after the Meadows' filed their motion notifying the parties of Mrs. Meadows death and requesting substitution through their amended complaint.

Meadows' alleged failure to comply with §11-1-58). The court specifically found that this dismissal with prejudice rendered moot Defendants' motion to dismiss under Rule 25 and the Meadows' motion to amend. (R. 420.)

While the Meadows' motion to amend was pending the parties continued litigating the merits of the case. This litigation and trial preparation included discovery motions, entry of scheduling orders, the taking of a trial deposition and, importantly, full expert disclosures. Defendants suffered no prejudice from the Meadows' delay in bringing the motion on for hearing.[10] In fact, as a matter of law this Court must conclude that an earlier noticed hearing would have changed nothing since the lower court found in error that the lawsuit must be dismissed for failure to comply with §11-1-58.

c. Waiver

Just as Defendants' waived their claims of non-compliance with §11-1-58, they likewise waived their Rule 25(a)(1) argument for dismissal. As discussed above, the Meadows on June 20, 2005 filed their motion to amend and notified Defendants of Mrs. Meadows death. Defendants continued litigating the merits of this case for another seven (7) months before filing their "Suggestion of Death" on January 10, 2006. (R. 70.) Perhaps this delay was because Defendants, like the Meadows, knew that a Rule 25 "suggestion of death" was inappropriate since the Meadows had already filed a motion notifying Defendants of Mrs. Meadows death and requesting that her daughters and husband be allowed to continue her "survival" action. In any event, if Defendants in good faith believed their "Suggestion of Death" triggered the ninety (90) period under Rule 25(a)(1) Defendants could have moved for dismissal as early as April, 2006.

[10] Undersigned counsel's former associate, Rick Patt, Esq., was assigned to work on this case and formerly withdrew as counsel by order of the lower court dated November 21, 2006. (R. 211.) Another associate, Robert Greenlee, Esq., was subsequently assigned to replace Mr. Patt on this file. Likely, through this transition counsel for the Meadows did not appreciate that the trial court had not ruled on their motion to amend.

Instead, for almost another two years they chose to continue litigating the merits of the case including but not limited to an extensive expert disclosure by Defendant Mississippi Baptist on November 15, 2006, an extensive expert disclosure by Defendant Blake on December 13, 2006 and a supplemental expert disclosure by Defendant Blake on December 14, 2006. (R. 199, 212 and 287.) Defendants did not move for dismissal under Rule 25(a)(1) until March 30, 2007. (R. 361.)

Again, as acknowledged by Defendant Mississippi Baptist in its brief: "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. (Mississisppi Baptist brief, p. 19, citing MS Credit Center, Inc. v. Horton, 926 So. 2d 167, 180 (Miss. 2006) (emphasis added)).

III. The trial court committed plain error in dismissing action "with prejudice"; statute of limitations as to all claims tolled upon filing of original complaint.

As argued above, the trial court should have outright denied Defendants' motions to dismiss for allegedly violating Miss. Code Ann. §11-1-58 and, further, must have outright denied (had it considered) Defendants' alternative motion to dismiss under Rule 25(a)(1) of the Mississippi Rules of Civil Procedure. In absolutely the worst case scenario for the Meadows, however, dismissal under either of these grounds must have been without prejudice. See Wimley v. Reid, 991 So. 2d 135, 138 (Miss. 2008) (failure to comply with substantive requirements of §11-1-58 mandates dismissal "without prejudice."); Miss. R. Civ. P. 25(a)(1) (dismissal, if appropriate, must be "without prejudice.").

At the time of the Meadows' original filing the applicable statute of limitations had only been running for approximately five (5) months. Had the trial court entered an order of dismissal without prejudice, the Meadows would have had another year and a half to refile. Price v. Clark,

2009-MS-0724.202, ¶¶27 and 53 (Miss. July 23, 2009)(two year medical malpractice limitations period under Miss. Code Ann. §15-1-36 tolled upon filing of original complaint; such tolling continues until order of dismissal entered).

Defendants attempt to avoid this well-settled law by arguing that the original complaint was a "sham." The Meadows addressed this argument above.

Assuming this Court rejects Defendants' "sham" pleading / no tolling argument, Defendants then advance completely different theories of why the limitations period had run and therefore dismissal with prejudice was proper. Defendant Mississippi Baptist argues that the tolling perfected by the filing of the original complaint ended on the date of Mrs. Meadows' February 27, 2005 death and, therefore, the limitations period applicable to the heirs' survival and wrongful death claims and Mr. Meadows' loss of consortium claim "would have expired, at the very latest, on February 27, 2007." (Defendant Mississippi Baptist brief, p. 25-26.) Defendant Mississippi Baptist, of course, cited no law in support of this theory.

Since the wrongful death claims against these same Defendants necessarily evolved out of the same nucleus of operative facts that caused Mrs. Meadows' injury and Mr. Meadows' loss of consortium, a second "wrongful death" and/or "survival" complaint could not have been filed while the first complaint was pending. The appropriate procedural mechanism to pursue these claims was to amend the original suit. A complaint amended pursuant to Miss. R. Civ. P. 15 to substitute parties and include a wrongful death claim relates back to the original complaint. See Price v. Clark, 2009-MS-0724.202, ¶¶27 and 53 (Miss. July 23, 2009)( ); Harris v. Darby, 2008-CA-00382-SCT, ¶¶ 7-9, 15 (Miss. Sept. 24, 2009); Necaise v. Sacks, 841 So. 2d 1098 (Miss. 2003). Since the original suit was timely filed neither the survival claims nor the wrongful death claims against Defendants are time barred. See Harris v. Darby, 2008-CA-00382-SCT, ¶¶ 7-9,

15 (Miss. Sept. 24, 2009)(death of personal injury plaintiff does not automatically abate action; amendment to continue survival action relates back to original filing) ; Burley v. Douglas, 2007-CA-02134-SCT, ¶33, *en banc* (Miss. Nov. 5, 2009) ("interested party" under Mississippi's wrongful death statute may initiate suit without first opening estate, amend and claim additional "survival" damages; additional claims relate back to original filing).

In multiple recent decisions handed down by this Mississippi Supreme Court, the Court has made clear that Miss. Code Ann. §91-7-237 (rev. 2004) expressly allows for the automatic continuation of a personal injury suit in the name of the original plaintiff when during the course of the litigation that plaintiff dies. See Harris v. Darby, 2008-CA-00382-SCT, ¶¶ 7-9, 15 (Miss. Sept. 24, 2009; Burley v. Douglas, 2007-CA-02134-SCT, ¶33, *en banc* (Miss. Nov. 5, 2009). Following Mrs. Meadows' death, then existing co-plaintiff Mr. Meadows and his two adult daughters through their motion to amend expressly sought to continue Mrs. Meadows' personal injury claim and add a wrongful death claim. Defendants argue that this Court should ignore the motion because at the time of its filing and continuing through the trial court's order of dismissal with prejudice the "estate" of Mrs. Meadows had not been opened, substituted or joined as a party plaintiff. (Blake brief, p. 22-23; Mississippi Baptist brief, p. 22-23.)

This Court in Burley expressly rejected Defendants' argument. In Burley, the plaintiff initiated a wrongful death suit seeking "survival" and wrongful death damages stemming from the deaths of his daughter and two grandchildren. The plaintiff was an heir at law but not a wrongful death beneficiary of his deceased grandchildren. An amended complaint included claims for funeral expenses and medical costs, i.e., damages which belong solely to the estates of the deceased. The lawsuit was filed a year and a half before any estates were opened. The defendants moved to dismiss all survival and wrongful death claims for the grandchildren's

deaths on grounds that the plaintiff, a non- wrongful death beneficiary, had no standing to file the original suit; thus, the original suit was a "nullity" and, in the meantime, the statute of limitations had run so final judgment of dismissal with prejudice should be entered. Burley, at ¶6. The trial court agreed and entered final judgment.

The Mississippi Supreme Court reversed the trial court. The Court found that the plaintiff had standing to bring the original wrongful death action as an heir of the estates, thus an "interested party" within the meaning of our wrongful death statute, even before the estates had been opened. Burley, at ¶41. Once the estates were opened post-filing, the plaintiff then had the "ability" to collect the wrongful death and survival damages. The clear language of the Burley decision is as follows:

> ¶33. Our holding today recognizes the statutory distinction between a party's authority to bring the wrongful-death action and the party's ability to recover damages from it. Burley brought this action as an "interested party," a status he held because of his qualification as an heir-at-law of Joshua and Jakura Hill. Burley's later-acquired status as administrator of their estates did not confer upon him standing, as personal representative or otherwise, to commence the wrongful-death *action*, but merely gave him authority to bring additional *claims* within that action for certain damages on behalf of the estates.
>
> ¶34. Hence, Burley brought many different claims within his wrongful-death action. He included claims for his own individual injuries (such as loss of society and companionship, etc.) and claims for property damage and medical and funeral expenses, which may be characterized as claims of the estates. *See Caves v. Yarbrough*, 991 So.2d 142, 149-50 (Miss. 2008) (holding that "the Mississippi wrongful-death statute . . . encompasses all claims including survival claims which could have been brought by the decedent, wrongful-death claims, estate claims, and other claims."). Burley was required to bring the so-called "estate claims" because the statute instructs that "there shall be but one (1) suit for the same death which shall ensue for the benefit of all parties concerned." Miss. Code Ann. § 11-7-13.[11] However, the fact that Burley happens to be seeking the same damages as Joshua's and Jakura's estates would seek, namely medical and funeral expenses, does not change the nature of Burley's suit nor his standing as an interested party to bring it.
>
> ¶35. Each wrongful-death claimant's ability to recover damages, and the point when that ability becomes available, is a separate question. The Statute's first paragraph sets out

the potential wrongful-death claimants, allowing the wrongful-death action to be brought by the personal representative of the decedent, by a listed relative, or by an interested party. Miss. Code Ann. § 11-7-13 (Rev. 2004). In a later paragraph, however, the Statute provides that the decedent's property damages and medical and funeral expenses may be recovered by the listed relatives or the interested parties, whether or not an estate has been opened. *Id.* "Personal representative" is left out of this section.

¶36. Therefore, each claimant's ability to recover these damages becomes available at different times. That difference is tantamount to the fact that the estate "must, of course, be opened and administered through the chancery court" before the claimant may pursue a wrongful-death claim on behalf of the estate. *Long*, 897 So.2d at 174. In other words, a claimant cannot bring claims on behalf of an estate that does not yet exist. Hence, Burley amended his complaint specifically to seek damages for property damage and medical and funeral expenses only after he was appointed administrator of Joshua and Jakura Hill's estates. Burley had *standing* to bring the suit as an interested party from the moment of Joshua's and Jakura's deaths, but he gained the *ability* to recover on behalf of the estates only after those estates came into existence and he was appointed administrator.

¶37. The estate has no greater right to bring the suit than does a listed relative or an interested party. *J.J. Newman Lumber Co.*, 91 So. at 11; *England*, 846 So.2d at 1066. Listed relatives, on the other hand, do have priority in recovering damages. All damages other than those for property damage and medical and funeral expenses are distributed according to the hierarchy of listed relatives discussed above. Miss. Code Ann. § 11-7-13. But if none of the listed relatives survives the decedent, those damages become an asset of the decedent's estate and are also used in payment of the estate's debts, with any residue to be distributed according to the will or under the laws of descent and distribution in the case of intestacy. *Smith v. Garrett*, 287 So.2d 258, 261 (Miss. 1973); *England*, 846 So.2d at 1066. Therefore, no matter who brings the suit, the damages recovered from the suit (other than for individual claims) necessarily will fall to the estate in the event that none of the Statute's listed relatives survives the decedent.

¶38. To sum up, because Burley brought this wrongful-death action as an interested party, he may recover damages for the children's property damage, if any, and for their medical and funeral expenses, even though he brought suit before the estates were opened. However, those damages are, pursuant to the Statute's clear terms, subject to the debts and liabilities of Joshua and Jakura Hill's estates. Furthermore, since Joshua and Jakura were not survived by any of the Statute's listed relatives, all other damages Burley may recover (other than his own individual damages)[12] will also become assets of those estates, subject to the estates' debts and liabilities.[13] However, Burley's ability, or the lack thereof, to seek and/or recover certain damages at specific times from the

wrongful-death suit does not determine the character of his standing as a particular type of wrongful-death claimant.

Burley, at ¶¶33-38.

At the time the lower court's dismissal with prejudice in the case *sub judice*, Mr. Meadows and his two daughters (all named plaintiffs in the proposed First Amended Complaint) were all heirs and wrongful death beneficiaries of Mrs. Meadows even though an estate had not yet been opened. According to Burley, they had the "authority" at that time to pursue the proposed wrongful death action. And, when an estate is subsequently opened these same plaintiffs then could acquire the "authority" or "ability" to collect damages owing to the estate. Burley, at ¶¶33-38; see also Burley, J. Kitchens, *concurring in part and in result*, at ¶45 ("At the time Mr. Burley filed this action, it was not that he lacked *standing* to sue on behalf of the deceased children's estates; he simply did not then have the *capacity* to sue as a personal representative.") (emphasis original.)

Finally, Defendant Mississippi Baptist argues that ninety (90) days after the filing of their Rule 25 "Suggestion of Death"[11] the applicable statute of limitations automatically began to run again and had expired by the time that the lowered court entered its order dismissing the action with prejudice. Defendant Mississippi Baptist cites no case law in support of this argument. (Mississippi Baptist brief, p. 22.) Further, its reference to case law interpreting Miss. R. Civ. P. 4(h) is not persuasive for at least several fundamental reasons.

First, as discussed above, the ninety (90) day period in Rule 25(a) was never triggered because the "Suggestion of Death" was filed months after the Meadows filed their motion to amend notifying Defendants and the court of Mrs. Meadows' death and requesting that Mr.

[11] Again, the filing was months after the Meadows filed their motion to amend which notified Defendants and the court of Mrs. Meadows' death and requested that Mr. Meadows and her daughters be substituted in her place to continue her "survival" claims and their wrongful death claims.

Meadows and her daughters be substituted in her place to continue her "survival" claims and their wrongful death claims. Second, Defendants waived any "right of dismissal" under Rule 25(a) by fully and aggressively litigating this case on the merits: litigating for well over a year after filing their "Suggestion of Death"; and, after such delayed filing, continuing to litigate on the merits for another year (two years in total) before noticing their Rule 25(a) motion for hearing. Finally, since the original complaint was "duly commenced" and summons timely served, the "savings clause" under Miss. Code Ann. §15-1-69 (1972) would have allowed the Meadows another year from the February 11, 2008 order of dismissal to refile had the lawsuit been dismissed without prejudice as required by Rule 25(a).

Conclusion

The volumes of recent case law discussed above clearly show that the lower court's dismissal of this cause with prejudice under Miss. Code Ann. §11-1-58 was reversible error. The alternative argument of Defendants that dismissal nonetheless would have been proper under Miss. R. Civ. 25(a) had it been considered (which it was not) equally must fail. For these reasons, the Meadows respectfully request that the Court reverse the February 11, 2008 order of dismissal and remand this cause to the lower court with an order to substitute as proper party plaintiffs in the place of Mr. and Mrs. Meadows, deceased, the daughter Kaye Burt, individually and as wrongful death beneficiary and as administratrix and heir of the estates of Louise Meadows, deceased, and Lavelle Meadows, deceased, and the daughter Judy Brown, individually and as wrongful death beneficiary and heir of the estates of Louise Meadows, deceased, and Lavelle Meadows, deceased.

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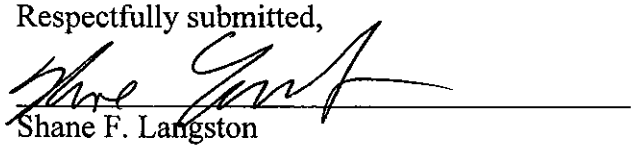
Respectfully submitted,



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Certificate of Service

I do hereby certify that a true and correct copy of the foregoing reply brief of Appellants has been delivered via United States mail, postage prepaid, to the following persons at their usual business address:

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Hon. W. Swan Yerger
Post Office Box 327
Jackson, Mississippi 39205
Circuit Court Judge

This the 12th day of January, 2010.

Shane F. Langston

IN THE CHANCERY COURT OF RANKIN COUNTY, MISSISSIPPI

IN THE MATTER OF THE ESTATE OF LOUISE MEADOWS, DECEASED NO.: 67645

LETTERS OF ADMINISTRATION

FILED
DEC 11 2009
LARRY SWALES
Chancery Clerk, Rankin County
Rec. in Bk. 39 Pg 390

STATE OF MISSISSIPPI
COUNTY OF RANKIN

TO ALL TO WHOM THESE PRESENTS SHALL COME - GREETINGS:

WHEREAS, Louise Meadows, deceased, late of said County, died intestate, and had at his death, credits and property in said State.

We therefore, by these Letters, authorize Kaye Burt, as Administratrix of the goods and chattels, rights and credits of said decedent faithfully, truly and promptly to perform and discharge all the duties required of her by law, or by the Order of this Court.

Witness the Honorable Dan Fairly, Chancellor of the Chancery Court, at the courtroom thereof, at Brandon, Mississippi, on the____ day of December, 2009, in seal of said Court.

ISSUED this the 11th day of December, 2009.

LARRY SWALES, CHANCERY CLERK
RANKIN COUNTY, MISSISSIPPI

BY: Mel Forbes, D.C.

CHANCERY COURT RANKIN COUNTY, MS

ATTEST: A true copy
LARRY SWALES, Chancery Clerk
By M. Forbes D.C.

EXHIBIT A

IN THE CHANCERY COURT OF RANKIN COUNTY, MISSISSIPPI

IN THE MATTER OF THE ESTATE OF LAVELLE MEADOWS, DECEASED **NO.:** 67,644

LETTERS OF ADMINISTRATION

FILED

DEC 11 2009

LARRY SWALES
Chancery Clerk, Rankin County, MS
Rec. in Bk. 39 Pg. 388

STATE OF MISSISSIPPI
COUNTY OF RANKIN

TO ALL TO WHOM THESE PRESENTS SHALL COME - GREETINGS:

WHEREAS, Lavelle Meadows, deceased, late of said County, died intestate, and had at his death, credits and property in said State.

We therefore, by these Letters, authorize Kaye Burt, as Administratrix of the goods and chattels, rights and credits of said decedent faithfully, truly and promptly to perform and discharge all the duties required of her by law, or by the Order of this Court.

Witness the Honorable Dan Fairly, Chancellor of the Chancery Court, at the courtroom thereof, at Brandon, Mississippi, on the 11th day of December, 2009, in seal of said Court.

ISSUED this the 11th day of December, 2009.

LARRY SWALES, CHANCERY CLERK
RANKIN COUNTY, MISSISSIPPI

BY: Merl Forbes, D.C.

CHANCERY COURT RANKIN COUNTY, MS

ATTEST: A true copy
LARRY SWALES, Chancery Clerk
By M. Forbes D.C.

EXHIBIT B