

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

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**DOCKET NO. 2008-TS-02074**

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**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**

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

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**BRIEF OF APPELLANT  
(Oral Argument Requested)**

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

**NO. 2008-TS-02074**

**LOUISE MEADOWS and  
LAVELLE MEADOWS**

**APPELLANTS**

**VS.**

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

**APPELLEES**

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**CERTIFICATE OF INTERESTED PERSONS**

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

1. Lavelle Meadows – Plaintiff  
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## **I. STATEMENT OF THE ISSUES**

1. Defendants waived their objection to Plaintiffs' lack of strict compliance with Miss. Code Ann. §11-1-58(4) by actively litigating the case for nearly three years and by waiting until after Plaintiffs designated their experts before pursuing their defense. Accordingly, the lower court's dismissal of Plaintiffs' civil action for lack of strict compliance was erroneous.
2. Alternatively, the lower court's dismissal was erroneous in light of this Court's abandonment of the rule of strict compliance with Miss. Code Ann. §11-1-58 as stated in *Wimley v. Reid*, 991 So.2d 135 (Miss. 2008) and its progeny. This case should be remanded for an evidentiary hearing to determine if Plaintiffs complied with Miss. Code Ann. §11-1-58(4) i.e. whether or not Plaintiffs consulted with an expert within ninety (90) days of receiving Mrs. Meadows' medical records.
3. In the further alternative, the lower court erred when it dismissed Plaintiff's case with prejudice. As stated in *Wimley v. Reid*, if Plaintiffs failed to comply with the Constitutional requirements of Miss. Code Ann. §11-1-58, then the Complaint should be dismissed without prejudice.

## **II. STATEMENT OF THE CASE**

### **A. Nature of the Case**

The lower court dismissed Plaintiffs' civil action with prejudice for not filing a Certificate of Consultation, pursuant to Miss. Code Ann. §11-1-58(4), within ninety (90) days of receiving Mrs. Meadows' medical records from Defendant Mississippi Baptist Medical Center, Inc. ("Baptist Hospital"). The lower court erred because Defendants waived their objection to the lack of strict compliance by conducting nearly three years of active litigation and by waiting until after the close of discovery and after Plaintiffs designated experts to pursue a defense that

each Defendant raised in its Answer. Additionally, the lower court rendered its decision before this Court rendered its opinion in *Wimley v. Reid*, in which this Court overruled the case upon which the lower court's decision is based - *Walker v. Whitfield*. Further, the lower court erroneously dismissed Plaintiffs' case with prejudice, in clear contradiction to the mandate contained in *Wimley v. Reid*. If a dismissal was proper, or is found by this Court to be proper, the dismissal must be without prejudice.

**B. Statement of Facts Relevant to the Issues, Course of Proceedings and Disposition in the Court Below.**

This civil action arises from substandard medical care rendered to Mrs. Louise Meadows by Dr. Kendall T. Blake and Baptist Hospital in or around February, 2004. Generally, Defendants' negligent care allowed a treatable foot lesion on an elderly diabetic patient to become a life-threatening infection which required multiple amputation procedures of Mrs. Meadows' leg and which ultimately caused her death. (R. at 7).<sup>1</sup>

After providing proper notice pursuant to Miss. Code Ann. 15-1-36(15), Plaintiffs filed their Complaint on August 31, 2004. (P.R.E. tab 4, R. at 5). Accompanying Plaintiffs' Complaint was a Certificate of Plaintiffs' Attorney, filed pursuant to Miss. Code Ann. §11-1-58(4), certifying that Plaintiffs had requested Mrs. Meadows' medical records from Baptist Hospital but had not received same at the time suit was filed.<sup>2</sup> (P.R.E. tab 4, R. at 12). On September 10, 2004, Plaintiffs obtained Mrs. Meadows' medical records from Baptist Hospital. (P.R.E. tab 5, R. at 350). In January, 2005, each Defendant served its Answer and Defenses and each raised the defense, *inter alia*, of failure to strictly comply with Miss. Code Ann. §11-1-58.

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<sup>1</sup> All citations to the Record will be made as (R. at \_\_\_\_). All citations to Plaintiffs/Appellants' record excerpts will be made as (P.R.E.), followed by the tab number, and the page number from the record i.e. (P.R.E. tab \_\_\_\_, R. at \_\_\_\_).

<sup>2</sup> Plaintiffs' Complaint alleges personal injuries sustained by Mrs. Meadows and a loss of consortium claim on behalf of Mr. Meadows.



(R. at 14, 30). Each Defendant's Answer contains a motion to strike and dismiss Plaintiffs' Complaint for failure to comply with Miss. Code Ann. §11-1-58. *Id.*

On June 13, 2005, Plaintiffs served its second Certificate of Plaintiffs' Attorney pursuant to Miss. Code Ann. §11-1-58(1) and (4). (P.R.E. tab 6, R. at 153-154). In the second Certificate, Plaintiffs' counsel certified that after receiving Mrs. Meadows' medical records from Baptist Hospital, an expert was consulted and that based on said consultation, a reasonable basis existed to pursue the civil action.<sup>3</sup> *Id.* The parties then embarked upon extensive litigation including written discovery, motion practice, the entry of scheduling orders, designation of experts and a trial setting. (P.R.E. tab 1, R. at 1-4). Throughout the course of this litigation, the parties entered into three (3) scheduling orders and an agreed order setting the case for trial. (P.R.E. tabs 7, 8, 9, and 10, R. at 137, 197, 325 and 418). Notably, each scheduling order provided deadlines for the parties to either designate experts or to finalize "expert discovery." *Id.* Further, the last scheduling order entered established a discovery deadline of April 16, 2007. (P.R.E. tab 9, R. at 325).

On September 1, 2006, Plaintiffs designated their experts. (P.R.E. tab 11, R. at 188-194). On November 15, 2006, Defendant Baptist Hospital designated its experts. (R. at 199). On December 13, 2006, Defendant Kendall T. Blake, M.D. designated his experts, which he then supplemented on December 14, 2006. (R. at 212, 287). Finally, on March 30, 2007, after over two years since first raising the defense and after receiving Plaintiffs' designation of experts and otherwise conducting extensive litigation, Defendants filed a motion to dismiss stating that Plaintiffs did not file its second Certificate of Plaintiffs' Attorney within 90 days after receiving

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<sup>3</sup> On July 20, 2005, Plaintiffs filed a motion for leave to file its first amended Complaint. (R. at 34). The purpose of the first amended Complaint was to add a wrongful death claim to the existing civil action. *Id.* Said motion was ultimately denied as moot after the lower court dismissed the action with prejudice.

Mrs. Meadows' medical records from Baptist Hospital, pursuant to Miss. Code Ann. §11-1-58(4). (R. at 327). Seven (7) months later, on October 26, 2007, Defendants noticed their motion for a hearing to be conducted on January 14, 2008. Indeed, Defendants waited until the close of discovery to file a motion which could have been raised in lieu of an Answer. Further, Defendants waited until six months after discovery closed to notice said motion for hearing. All the while, Plaintiffs expended a great amount of time, effort and money in the pursuit of the Meadows' claim.

On February 8, 2008, less than three weeks before trial, the trial judge granted Defendants' motion and dismissed Plaintiffs' case with prejudice.<sup>4</sup> (P.R.E. tab 2, R. at 420). On February 11, 2008, a judgment of dismissal with prejudice was entered by the Circuit Clerk. (P.R.E. tab 3, R. at 419). On March 12, 2008, Plaintiffs timely filed their notice of appeal. (R. at 421). Plaintiffs request this Court to reverse the lower court's decision and remand the case to the First Judicial District of Hinds County Mississippi as discussed more fully herein.

### **III. STANDARD OF REVIEW**

The lower court erroneously granted Defendants' motion and dismissed Plaintiffs' case with prejudice. On appeal, the standard of review for granting a motion to dismiss is de novo. *Scaggs v. GPCH-GP, Inc.*, 931 So.2d 1274, 1275 (Miss. 2006); *Carter v. Citigroup, Inc.*, 938 So.2d 809, 817 (Miss. 2006). De novo review means that the appellate court reviews the grant of summary judgment or motion to dismiss without according any deference to the trial court's decision. *Id.*

### **IV. SUMMARY OF THE ARGUMENT**

Defendants waived their objection to Plaintiffs' lack of strict compliance with Miss. Code Ann. §11-1-58(4) due to their unreasonable delay in pursuing the defense for nearly three years

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<sup>4</sup> The trial of this matter was set by agreement for March 3, 2008. (P.R.E. tab 10, R. at 418).

and until after Plaintiffs designated their experts and otherwise after actively litigating the merits of the case. Due to Defendants' waiver, the trial court must be reversed. Alternatively, the trial court's ruling must be reversed due to this Court's overruling *Walker v. Whitfield Nursing Center*, upon which the lower court's decision is based, and the "strict compliance" rule for which *Walker v. Whitfield* stood. See *Wimley v. Reid*, 991 So.2d 135 (Miss. 2008); *Walker v. Whitfield*, 931 So.2d 583 (Miss. 2006). Thus, this case must still be reversed and the case remanded for an evidentiary hearing to determine if Plaintiffs complied with the substance of Miss. Code Ann. §11-1-58(4) i.e. whether or not Plaintiffs consulted with an expert within ninety (90) days of obtaining Mrs. Meadows' medical records.<sup>5</sup> Further, if this Court remands the case for an evidentiary hearing, this Court should do so with instructions that if the lower court determines that Plaintiffs did not consult with an expert within the 90 days, that the case should be dismissed without prejudice. In the final alternative, the lower court's dismissal must be reversed as to prejudice. Even if this Court determines that the trial court's dismissal was proper, the dismissal should be without prejudice in accordance with *Wimley v. Reid*. Under each of the above-listed scenarios, however, the lower court must be reversed and the case must be remanded to the First Judicial District of Hinds County, Mississippi.

## V. ARGUMENT

Section 11-1-58(4) of the Mississippi Code provides:

(4) If a request by the plaintiff for the records of the plaintiff's medical treatment by the defendants has been made and the records have not been produced, the plaintiff shall not be required to file the certificate required by this section until ninety (90) days after the records have been produced.

*Miss. Code Ann. §11-1-58(4)*. It is undisputed that Plaintiffs' Complaint contained the Certificate required by Miss. Code Ann. §11-1-58(4). (P.R.E. tab 4, R. at 12). It is also

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<sup>5</sup> Plaintiffs can and will establish that they did consult with an expert soon after receiving Mrs. Meadows' medical records.

undisputed that Plaintiffs requested Mrs. Louise Meadows' medical records from Baptist Hospital prior to filing this civil action and that Plaintiffs received Mrs. Meadows medical records from Baptist Hospital on September 10, 2004.<sup>6</sup> (P.R.E. tab 5, R. at 350); (P.R.E. 12, R. at 348). It is further undisputed that Plaintiffs filed a second Certificate, pursuant to Miss. Code Ann. §11-1-58(1), on June 13, 2005 (more than ninety (90) days after receiving Mrs. Meadows medical records). (P.R.E. tab 6, R. at 153). Because Plaintiffs filed the second Certificate more than ninety (90) days post-receipt of Mrs. Meadows' medical records from Baptist Hospital, the lower court dismissed Plaintiffs' case with prejudice. The lower court's decision was erroneous, and must be reversed, because Defendants waived their objection to the untimely filing of the second Certificate.

As demonstrated in the record and discussed herein, Defendants clearly waived the defense of lack compliance with Miss. Code Ann. §11-1-58. The facts of this case are similar to those presented in *MS Credit Center v. Horton* and *East Mississippi State Hospital v. Adams* where this Court found that defendants had waived their respective defenses. *MS Credit Center, Inc. v. Horton*, 926 So.2d 167, 180 (Miss. 2006); *Mississippi State Hospital v. Adams*, 947 So.2d 887, 891 (Miss. 2007). As in *MS Credit Center v. Horton*, the Defendants in the present case asserted their defense of lack of compliance in their respective Answers. *MS Credit Center, Inc.* 926 So.2d at 180. Further, as in *MS Credit Center v. Horton*, rather than proceeding within a reasonable time to file a motion to dismiss and request a hearing on the motion, Defendants substantially engaged in the litigation process by consenting to three scheduling orders, engaging in written discovery and conducting the depositions of Mr. Meadows and his daughters. Defendants also waited until after Plaintiffs designated their experts before filing their motion

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<sup>6</sup> Plaintiffs' Complaint was filed on August 31, 2004.

and waited until nearly seven (7) months after the close of discovery to notice their motion for hearing.

The facts of this case are more egregious than those of *MS Credit Center v. Horton* wherein the defendants consented to only one scheduling order, took only one deposition and waited only eight (8) months. In the present case, Defendants consented to three (3) scheduling orders, took three (3) depositions and also filed various motions with the court and attended hearings on those motions. As in *East Mississippi State Hospital v. Adams*, the present Defendants “participated fully in the litigation of the merits for over two years without actively [pursuing their defense] in any way” and “they participated fully in discovery, filed and opposed various motions.” *East Mississippi State Hospital*, 947 So.2d at 891. Based on the record and this Court’s precedent, Defendants waived their defense of lack of compliance with Miss. Code Ann. §11-1-58. The lower court must be reversed and this case should be remanded for trial.

**A. Defendants waived their objection to Plaintiffs’ lack of strict compliance with Miss. Code Ann. 11-1-58(4).**

This Court has made clear that “[a] defendant’s failure to timely and reasonably raise and pursue the enforcement of any affirmative defense or other affirmative matter or right which would serve to terminate or stay the litigation, coupled with active participation in the litigation process, will ordinarily serve as a waiver.” *MS Credit Center, Inc.*, 926 So.2d at 167. In the present case, Defendants have both failed to timely and reasonably raise their defense and actively participated in the litigation of the merits of this case for nearly three years before pursuing their defense. Accordingly, Defendants have waived their objection and the lower court must be reversed.

**1. Defendants waited over two years to bring their defense to the attention of the Court and nearly three years to request a hearing on the issue.**

This Court has held on several occasions that to “pursue” an affirmative defense or other affirmative matter, such as the subject motion to dismiss, means to “plead it, bring it to the court’s attention, and request a hearing.” *MS Credit Center, Inc.*, 926 So.2d at 181; *Estate of Grimes v. Warrington*, 982 So.2d 365, 370 (Miss. 2008). Also, this Court has held that “absent extreme and unusual circumstances, an eight-month unjustified delay in the assertion and pursuit of any affirmative defense or other right which, if timely pursued, could serve to terminate the litigation, coupled with active participation in the litigation process, constitutes waiver as a matter of law.” *MS Credit Center, Inc.*, 926 So.2d at 181. As shown below, the Defendants created a nearly three-year unjustified delay in the assertion of their defense.

This civil action was filed on August 31, 2004. (P.R.E. tab 4, R. at 5). Further, each Defendant included in its Answer a motion to strike and dismiss Plaintiffs’ Complaint for Plaintiffs’ failure to comply with Miss. Code Ann. §11-1-58. (R. at 14, 30).<sup>7</sup> Given that Baptist Hospital filed its Answer on January 14, 2005, and that Defendant Kendall T. Blake, M.D. filed his Answer on January 20, 2005, each Defendant could have brought the subject motion to dismiss to the attention of the Court as early as January, 2005. (R. at 14, 22).

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<sup>7</sup> Baptist Hospital’s Answer states: Defendant makes its motion to strike plaintiffs’ complaint based upon plaintiffs’ failure to comply with §11-1-58, Code of Mississippi, requiring a certificate that an expert witness has been consulted and that there exists a reasonable basis for pursuit of claims. Defendant also moves to strike plaintiffs’ complaint and to dismiss this matter based upon plaintiffs’ failure to comply with conditions precedent to the initiation of litigation.

Kendall T. Blake’s Answer states: This Defendant [Kendall T. Blake, M.D.] moves to strike Plaintiffs’ Complaint based on Plaintiffs’ failure to comply with Miss. Code (1972) Ann. §11-1-58, requiring a certificate that an expert witness has been consulted and that there exists a reasonable basis for pursuit of claims. This Defendant also moves to strike Plaintiffs’ Complaint and to dismiss this matter based on Plaintiffs’ failure to comply with conditions precedent to the initiation of litigation.

Notwithstanding Defendants' ability to terminate the litigation as early as January, 2005, each failed to file its motion to dismiss for over two years - until March 30, 2007. (R. at 327). Further, Defendants waited an additional seven (7) months before noticing the motion for hearing. Specifically, Defendants did not notice the motion for hearing until October 26, 2007 (hearing to be conducted on January 14, 2008). (R. at 3). Defendants' unreasonable delay in pursuing their defense satisfies the first element of this Court's two-prong waiver analysis.

Not only did Defendants unreasonably delay the pursuit of their motion for nearly three years, but they also actively and aggressively litigated the merits of this case prior to pursuing their defense.

**2. Defendants actively participated in the litigation process of this case for over two years before filing their motion to dismiss and for nearly three years before noticing their motion for hearing.**

After the filing their respective Answers, rather than noticing their motion for hearing, the Defendants chose to waive their defense by actively litigating the merits of the case for several years before pursuing the defense. As shown by this Court's opinion in *East Mississippi State Hospital v. Adams*, participating in litigation for over two years only to raise a defense which could have terminated the litigation near its inception will operate as a waiver of that defense. *East Mississippi State Hospital*, 947 So.2d at 891. In the present case, the record reflects ample litigation activity to warrant a finding that Defendants waived their defense of non-compliance with Miss. Code Ann. §11-1-58.

**a. During the unreasonable three-year delay, Defendants conducted extensive discovery.**

Rather than pursue their defense, Defendants each engaged in extensive discovery. Generally, each Defendant propounded written discovery to Plaintiffs, to which Plaintiff responded. (P.R.E. tab 1, R. at 1-4) Further, Plaintiffs propounded written discovery to

Defendants, to which each Defendant responded. (R. at 73 – 78). In addition to written discovery, Defendants noticed and conducted the depositions of Lavelle Meadows, Kaye Burt and Judy Brown (Plaintiffs' daughters). *Id.* Defendants also issued subpoenas for Mrs. Meadows' medical records and otherwise conducted full discovery. *Id.* Afterall, Defendants did not notice their motion for hearing until nearly seven (7) months after discovery had closed pursuant to an agreed scheduling order. Defendants left no stone unturned during discovery, only to file a motion at the conclusion of discovery stating that the case should have been dismissed years ago.

**b. During the unreasonable three-year delay, Defendants filed and opposed various motions.**

In addition to conducting extensive discovery, Defendants engaged in extensive motion practice. For example, on October 5, 2005, Defendants filed a motion for partial summary judgment on Plaintiffs' claims that Miss. Code Ann. §15-1-56 and §85-5-7, as amended in 2002, were unconstitutional. (R. at 61, 66). The same day, Defendants noticed the motion for a hearing to be conducted on January 9, 2006. (P.R.E. tab 1, R. at 1 – 4). Defendants also filed a motion to compel and a motion to quash and reschedule a trial deposition. (R. at 72). There is no justification for Defendants to file a motion for partial summary judgment or motions to compel discovery when a known defense existed which could terminate the entire litigation. Rather than terminate the litigation however, Defendants chose to litigate the merits of this case.

Additionally, on July 20, 2005, Plaintiffs filed a motion to amend their Complaint. (R. at 34). Both Defendants opposed Plaintiffs' motion. (R. at 45, 58). Plaintiff also filed a motion to substitute the proper Baptist Hospital entity as a party plaintiff, which Baptist Hospital initially opposed, only to later acquiesce to the substitution. (R. at 161, 186). The opposition to Plaintiffs' motion and the later acquiescence is significant. First, the opposition evidences



continued participation the litigation process of the case. Second, why would a defendant voluntarily put itself into a lawsuit if it intended to pursue a defense which could have terminated the litigation over one year prior? The answer is simple: Defendants chose to litigate the merits rather than terminate the litigation. Defendants waived their defense of noncompliance with Miss. Code Ann. §11-1-58.

**c. Defendants entered into three scheduling orders and an agreed order setting the case for trial.**

Not only did Defendants engage in extensive written discovery and file and oppose various motions, but they also entered into three separate scheduling orders and one agreed order setting the case for trial. (P.R.E. tabs 7, 8, 9 and 10, R. at 137, 197, 325, 418). Importantly, each scheduling order contained a provision regarding designation of experts. *Id.* This fact is important because the central issue to the subject defense is that Plaintiffs did not timely file a certificate stating that an expert had reviewed the case and that based on the consultation, that reasonable grounds exist to pursue the action. *Miss. Code Ann. §11-1-58(1)*. By agreeing to a date for Plaintiffs to designate their experts, Defendants were clearly establishing that they did not intend to pursue a motion based on the lack of a pre-filing consultation. Clearly the Defendants had moved past the question of whether or not the case had merit and they were concerned about what Plaintiffs' experts may or may not say at trial.

**3. Defendants delayed the pursuit of their motion until after Plaintiffs designated their experts.**

It is axiomatic that in medical malpractice cases, the plaintiff is generally required to present expert medical testimony, first, identifying and articulating requisite standard of care under circumstances, and thereafter, establishing that defendant physician failed in some causally significant respect to conform to required standard of care. *Boyd v. Lynch*, 493 So.2d 1315 (Miss. 1986). Further, with regard the pre-suit consultation requirement stated in Miss. Code

Ann. §11-1-58, “the primary purpose of the [11-1-58] statute is to prevent the filing of frivolous suits that are not well founded in the law.” *Johnson v. Rao*, 952 So.2d 151, 164 (Miss. 2007) (Diaz, dissenting). Accordingly, the fact that Defendants waited until after Plaintiffs designated their experts to raise their objection to the lack of compliance with Miss. Code Ann. §11-1-58 is significant.

Plaintiffs designated their experts on September 1, 2006, pursuant to an agreed scheduling order deadline. (P.R.E. tab 11, R. at 188; P.R.E. tab 7, R. at 137). Defendants filed their motion to dismiss on March 31, 2007, long after receiving Plaintiffs designation of experts. As such, at the time the motion was filed, there was no longer a question as to whether or not Plaintiffs’ case had merit. Defendants never challenged the sufficiency of Plaintiffs’ designation or the qualifications of Plaintiffs’ experts. Defendants also never filed a motion for summary judgment challenging Plaintiffs ability to satisfy her burden of production.

Accordingly, Defendants delayed the pursuit of their defense for nearly three years. Further, during that three-year time period, they conducted extensive discovery, filed and opposed various motions, entered into three scheduling orders, agreed to an order setting the case for trial and waited until after the purpose of Miss. Code Ann. §11-1-58 had been rendered moot - by Plaintiffs’ designation of experts - to pursue their defense. In light of these facts and this Court’s precedent, Defendants have clearly waived their objection to Plaintiffs’ lack of compliance with Miss. Code Ann. §11-1-58. For this reason, the lower court should be reversed and the case remanded for trial.

**B. Alternatively, given this Court’s holding in *Wimley v. Reid*, the case should be remanded for an evidentiary hearing to determine whether Plaintiffs complied with the substance of Miss. Code Ann. §11-1-58.**

Should this Court determine that Defendants did not waive their objection to Plaintiffs’ lack of compliance with Miss. Code Ann. §11-1-58, the lower court must still be reversed and

this case remanded for an evidentiary hearing to determine whether Plaintiffs complied with the substance of the statute i.e. whether or not Plaintiffs' consulted with an expert. In September, 2008, this Court issued its opinion in *Wimley v. Reid*. In *Wimley*, this Court ruled that "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. While *Wimley* addressed Miss. Code Ann. §11-1-58(1), the same logic applies to this case since the ultimate basis for the dismissal was Plaintiffs' failure to file the certificate required by Miss. Code Ann. §11-1-58(1) within the time frame provided by Miss. Code Ann. §11-1-58(4) (90 days after receiving Mrs. Meadows' medical records). *Miss. Code Ann. §11-1-58(4)*.

As in *Wimley*, the record in this case does not contain the available evidence that Plaintiffs did in fact consult with an expert within ninety (90) days of receiving Mrs. Meadows' medical records. Accordingly, as in *Wimley*, the lower court must be reversed and this matter remanded for a hearing to determine whether or not the post-filing requirements were met.

**C. If the evidentiary hearing shows that Plaintiff did not consult with an expert prior to the 90 days, then the dismissal should be without prejudice.**

The lower court improperly dismissed Plaintiffs' case with prejudice. As this Court held in *Wimley*, if the statutory requirements of Miss. Code Ann. §11-1-58 are not met, the complaint should be dismissed "without prejudice." *Wimley*, 991 So.2d at 139. Accordingly, should this case be reversed for an evidentiary hearing and said hearing reflects that Plaintiff had not consulted with an expert within ninety (90) days of obtaining Mrs. Meadows' medical records, then the dismissal should be without prejudice in accordance with *Wimley*. In the final alternative, if this Court finds that none of Plaintiffs' issues are well-taken, the lower court's dismissal should be reversed and changed from "with prejudice" to "without prejudice," as consistent with *Wimley*.

## **VI. CONCLUSION AND PRAYER FOR RELIEF**

The lower court erred when it dismissed Plaintiff's case with prejudice. Defendants clearly waived their objection to Plaintiffs' lack of strict compliance with Miss. Code Ann. §11-1-58 by waiting nearly three years to pursue their defense and by fully participating in litigating the merits of the case. Defendants engaged in written discovery, filed and opposed various motions, conducted depositions and waited until after Plaintiffs designated experts to file their motion (then waited another seven (7) months to notice the motion for hearing). Under these facts and in light of this Court's precedent, Defendants have waived their defense and the lower court must be reversed.

Alternatively, the lower court must be reversed and the case remanded for an evidentiary hearing in accordance with *Wimley v. Reid*. Strict compliance with Miss. Code Ann. §11-1-58 is no longer the standard so the substantive question to be answered is whether or not Plaintiffs consulted with an expert within ninety (90) days of receiving Mrs. Meadows' medical records. If the evidence determines that Plaintiffs did not perform such a consultation with the ninety (90) days, then the case should be dismissed without prejudice in accordance with *Wimley*. In the final alternative, if this Court finds that Plaintiffs' case should have been dismissed, then the lower court must still be reversed and the dismissal should be changed from "with" prejudice to "without" prejudice.

Further, Plaintiffs request all other relief deemed proper in the premises and for all costs of this appeal to be taxed to the Appellants.

Respectfully submitted,

LOUISE MEADOWS and LAVELLE MEADOWS

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**Certificate of Service**

I do hereby certify that a true and correct copy of the foregoing 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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This the 27<sup>th</sup> day of July, 2009.



Robert V. Greenlee