

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2009-TS-00299-SCT

E

DELTA REGIONAL MEDICAL CENTER

DEFENDANT/APPELLANT

VS.

MILTON GREEN

PLAINTIFF/APPELLEE

**INTERLOCUTORY APPEAL FROM THE CIRCUIT COURT
OF WASHINGTON COUNTY, MISSISSIPPI**

CIVIL ACTION NO. CI2008-0177CI

CERTIFICATE OF INTERESTED PERSONS

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

1. Milton Green, Plaintiff/Appellee
2. George F. Hollowell, Jr., Attorney for Plaintiff/Appellee
3. Delta Regional Medical Center, Defendant/Appellant
4. L. Carl Hagwood, Attorney for Defendant/Appellant
5. Mary Frances S. England, Attorney for Defendant/Appellant
6. Christopher W. Winter, Attorney for Defendant/Appellant
7. Honorable Richard A. Smith, Circuit Judge

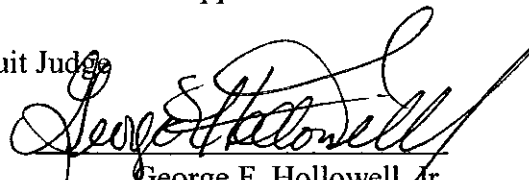

George F. Hollowell, Jr.
Attorney for Appellees

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STATEMENT OF THE CASE

This is a medical malpractice case in which Delta Regional Medical Center (DRMC) claims it is entitled to dismissal because suit was filed too soon under Miss. Code § 11-46-11. The Trial Court converted DRMC's Motion to Dismiss to a Motion for Summary Judgment and denied it on February 11, 2009. (R. at 29-32; RE 4) DRMC timely filed a Petition for Interlocutory Appeal on February 23, 2009. (R. at 45-49; RE 5) This Court granted that Petition on May 26, 2009. (R. at 87; RE 6)

STATEMENT OF FACTS

Milton Green was hospitalized from approximately July 26, 2007 through September 13, 2007. He claims that he did not receive proper treatment during this hospitalization. He has alleged that as a result of DRMC failing to properly treat him, he developed serious ulcers and had to be transferred to Select Speciality Hospital in Jackson, Mississippi on or about September 13, 2007 for treatment of a Stage IV sacral ulcer which had progressed to osteomyelitis, an infection of the bone. This injury required treatment as an inpatient at Select Specialty Hospital for about four weeks followed by wound flap and closure surgery and another four weeks of treatment at Central Mississippi Medical Center. After being discharged from Central Mississippi Medical Center on November 30, 2007, continued treatment by home health personnel was required. (R. at 4-19, 52-54; R.E. 1-2)

On or about May 28, 2008, Milton Green's attorney sent his first written Notice of Claim by certified mail to several medical care providers including DRMC. It was addressed to DRMC's chief administrator. This Notice was also sent to Washington County's Chancery Clerk. DRMC's copy of this Notice shows it was received on May 29, 2008. (R. at 35, 52-54; RE 1) On June 23, 2008, Milton Green's attorney sent a second Notice of Claim by certified mail

addressed solely to DRMC through its chief administrator. DRMC received this notice of claim on June 24, 2008. (R. at 29; Exhibits 1 & 3 to Green's Response to DRMC's Motion to Dismiss)

Green's attorney filed this suit on September 23, 2008, 117 days after DRMC received the first Notice of Claim and ninety one days after DRMC received the second Notice of Claim. (R. at 1-19; RE 2) The Complaint was served on DRMC on October 3, 2008, 127 days after DRMC received Green's first Notice of Claim and 101 days after it received his second Notice of Claim. (R. at 21)

On October 17, 2008, DRMC filed a combined Motion to Dismiss, Answer and Defenses. The Motion to Dismiss paragraph requested dismissal of the Complaint under the Mississippi Tort Claims Act alleging the Complaint "was filed within the tolling period provided by the Mississippi Tort Claims Act." (R. at 22-26; RE 3) Approximately three months later, on January 9, 2009, DRMC filed a Notice for Hearing on its Motion for February 2, 2009. (R. at 27-28).

The Circuit Court heard arguments on the Motion on February 2, 2009. DRMC argued Green was required to wait 120 days after DRMC received Notice of Claim under Miss. Code § 11-46-11 before filing suit. Green contended he had followed the existing case law interpreting that section which stated he only had to wait ninety (90) days after DRMC received his Notice of Claim to file suit. After agreeing the state of the law regarding Miss. Code § 11-46-11 was confusing and difficult to figure out on this point, the Circuit Court took the Motion under advisement. (R. at 33-43)

On February 10, 2009, the Circuit Court issued its ruling denying DRMC's Motion, holding Green had complied with Miss. Code § 11-46-11. It held Miss. Code § 11-46-11(1) set the period of time required for pre-suit notice for all Tort Claims Act defendants at ninety (90) days and Green had complied. It also held Miss. Code § 11-46-11(3) defined the tolling periods

for purposes of calculating the statute of limitations, but it did not establish a second and longer period of time required for pre-suit notice before a Plaintiff could file his action against a Tort Claims Act Defendant. (R. at 29-32; RE 4)

SUMMARY OF ARGUMENT

As this Court acknowledged in *Page v. Univ. of S. Miss.*, 878 So. 2d 1003, ¶ 5 (Miss. 2004), Miss. Code § 11-46-11(3) and the case law interpreting it are ambiguous and far from clear. On the other hand, this Court has repeatedly held “the ninety-day notice requirement under section 11-46-11(1) is a ‘hard-edged, mandatory rule which the Court strictly enforces.’” *Univ. of Miss. Med. Ctr. v. Easterling*, 928 So. 2d 815, ¶ 23 (Miss. 2006). This Court has never held any Plaintiff is required by Miss. Code § 11-46-11(3) to wait 95 or 120 days after the Defendant receives presuit notice before filing suit. It has consistently referred to and used the time periods set out in Miss. Code § 11-46-11(3) solely for purposes of calculating periods when the statute of limitations has been tolled and for purposes of determining the latest date on which a Plaintiff may file suit against a particular Defendant entitled to the protections of the Tort Claims Act.

Furthermore, in recent decisions, this court has made it clear that even when a Plaintiff errs by filing suit too soon after giving notice, such a premature suit, nevertheless tolls the statute of limitations. A Plaintiff is entitled to whatever remains of the balance of his statute of limitations after dismissal of such a premature suit within which to refile his suit complying with the presuit notice requirement. If less than a year remains within which to refile and the dismissed suit is the Plaintiff’s first suit against a particular Defendant, the savings statute allows the Plaintiff a full year to refile his action in compliance with Miss. Code § 11-46-11.

As this was Milton Green’s first lawsuit against DRMC and he waited at least 91 days after DRMC received notice to file suit, he complied with the presuit notice requirement. Even if

he had not complied with the presuit notice requirement, dismissal without prejudice would be the appropriate remedy as time remains to refile a complying action under the statute of limitations and the savings statute.

ARGUMENT

I. The Standard of Review

The standard of review on a Trial Court's grant or denial of summary judgment is de novo. *One South, Inc. v. Hollowell*, 963 So. 2d 1156, 1160 (Miss. 2007). Furthermore, interpretation of the requirements of Miss. Code § 11-46-11 are issues of law which are also reviewed de novo. *Wayne Gen. Hosp. v. Hayes*, 868 So. 2d 997, ¶ 11 (Miss. 2004).

II. The Circuit Court Correctly Held that Green Complied with the Ninety Day Pre-Suit Notice Requirement of Miss. Code § 11-46-11

Miss Code § 11-46-11 has four subsections. Subsection (1) addresses the requirement of and the period for giving presuit notice prior to suing a defendant entitled to the protection of the Tort Claims Act. Subsection (2) addresses the content required in the notice and the required methods of delivery. Subsection (3) addresses the statute of limitations for actions against defendants entitled to the protection of the Tort Claims Act and periods in which the statute of limitations is tolled. Subsection (4) contains a savings provision for Plaintiffs under disabilities of infancy and mental incompetence.

This Court consistently refers to Miss. Code § 11-46-11 (1) as governing how long a Plaintiff must wait after giving notice before filing suit. It has repeatedly held the waiting period is ninety (90) days as specified in § 11-46-11(1) regardless of what type of Tort Claims Act Defendant has been sued, including community hospitals, county hospitals, counties, municipalities, and other political subdivisions and instrumentalities. See e.g., *Bunton v. King*,

995 So. 2d 694 (Miss. 2008) (repeatedly referring to requirement to give notice to city housing authority 90 days prior to filing suit); *Parker v. Harrison County Bd. of Supervisors*, 987 So. 2d 435 (Miss. 2008) (repeatedly referring to a 90 day presuit notice requirement in a suit against a county); *Estate of Grimes v. Warrington*, 982 So. 2d 365, ¶ 10 (Miss. 2008) (noting the 90 day notice prior to filing suit as applicable to a community hospital); *South Cent. Reg'l Med. Ctr. v. Guffy*, 930 So. 2d 1252, ¶23 (Miss. 2006) (Plaintiff “failed to wait the statutory ninety days after providing notice before filing suit against” a regional hospital); *Wright v. Quesnel*, 876 So. 2d 362, ¶¶ 8-9 (Miss. 2004) (Plaintiff “did not wait the statutorily-prescribed ninety day period before filing suit” against a community hospital); *Wayne Gen. Hosp. v. Hayes*, 868 So. 2d 997, ¶ 14 (Miss. 2004) (“ninety days before filing suit [against community hospital], a Plaintiff must file a notice of claim”); *Black v. City of Tupelo*, 853 So. 2d 1221, ¶ 12 (Miss. 2003) (noting requirement of providing city with notice 90 days prior to filing suit). The Mississippi Court of Appeals has likewise repeatedly referred to the 90 day waiting period prior to filing suit being applicable to community hospitals, county hospitals, counties, municipalities, and other political subdivisions and instrumentalities. *Estate of Fedrick v. Quorum Health Res., Inc.*, NO. 2007-CA-00465- COA, 2008 Miss. App. LEXIS 672, ¶ 10 (November 4, 2008) (stating “MTCA also requires a plaintiff provide prospective defendants with notice of a claim ninety days prior to filing suit” in a suit against a county and a county owned nursing home); *Brown v. Southwest Miss. Reg'l Med. Ctr.*, 989 So. 2d 933, ¶ 6 (Miss. Ct. App. 2008) (“After the plaintiff gives notice, he must wait the requisite ninety days before filing suit.”)

In *Briere v. S. Cent. Reg'l Med. Ctr.*, 3 So. 3d 126 (Miss. 2009), the wrongful death beneficiaries of a nursing home resident sent a Notice of Claim to a community hospital on May 22, 2006. A second Notice of Claim was sent on July 10, 2006 clarifying the injuries suffered

while the decedent was a patient at the hospital. The wrongful death beneficiaries filed suit against the hospital on August 23, 2006 which was 93 days after the first notice of claim was received. In regard to the hospital's argument that the wrongful death beneficiaries failed to comply with the presuit notice requirements of Miss. Code § 11-46-11, this Court held:

Mississippi Code Section 11-46-11 states, in pertinent part:

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

... We hold that Briere's first notice letter complied with the notice requirements of the MTCA. The broad language in the first letter put SCRMC on notice of all of the claims of which Briere was aware at the time. ... Since Briere's first notice letter was statutorily sufficient, SCRMC's second assignment of error must fail as well. As the first notice letter was sufficient, the timing of the second letter is irrelevant. SCRMC received the first letter on May 22, 2006, and Briere did not file suit until August 23, 2006. Thus, Briere complied with the ninety-day notice requirement of Section 11-46-11(1). Therefore, SCRMC's issues on cross-appeal are without merit, and the trial judge did not err in denying its motion to dismiss.

3 So.2d at 129-130. There is absolutely no difference in the status of SCRMC and the status of DRMC under the Mississippi Tort Claims Act. Both are the same type of governmental hospital. Given that this Court held just a few months ago that a Trial Court did not err in refusing to dismiss the *Briere* suit filed 93 days after notice of claim was received, it follows that the Trial Court did not err in this case in refusing to dismiss this suit filed 91 to 117 days after Notice of Claim was received by DRMC.

Although both this Court and the Mississippi Court of Appeals have considered the requirements of the Mississippi Tort Claims Act in numerous cases against municipalities, counties, other political subdivisions, community hospitals and other instrumentalities and government entities, neither Court has ever held or even mentioned a requirement that any

Plaintiff wait at least 120 days after giving Tort Claims Act notice to any Defendant before filing suit. Yet, it is clear these Courts are aware of the reference to a 120 day tolling period in the provisions of Miss. Code § 11-46-11(3) on tolling the statute of limitations. This Court directly addressed the ambiguity of Miss. Code § 11-46-11 and the effect of the 120 day period under Miss. Code § 11-46-11(3) in *Page v. Univ. of S. Miss.*, 878 So. 2d 1003, ¶¶ 6-7 (Miss. 2004) saying:

Considering the statute in its entirety and affording deference to its literal meaning, parties are first instructed that all actions "shall be commenced within one (1) year next after the date of the tortious, wrongful or otherwise actionable conduct. . . ." Miss. Code § 11-46-11. . . . *The statute next states that the filing of notice is required pursuant to subsection (1).* Once a party has filed that notice "this section shall serve to toll the statute of limitations. . . from the date the notice is received. . . ." *Id.* If the action is against a state agency, the statute of limitations will be tolled for 95 days; however, if the action is against a county, municipality or other political subdivision, the statute of limitations will be tolled for 120 days. "Toll" is defined as "to suspend or stop temporarily." Black's Law Dictionary 488 (6th ed. 1990). If an action is stopped temporarily, the action which is stopped is allowed to commence again once the tolling period has ended. Therefore, once notice is received, the one-year statute of limitations is tolled for up to 95 or 120 days, depending upon the agency. After the tolling period has passed, the running of the statute resumes. This Court has previously failed to use the term "tolling" in this way and has *incorrectly* viewed the 95 or 120 day period as merely a break in the action *when nothing may be filed* until the State responds to the notice.

(emphasis added)

The same 120 day period is directly addressed in *Williams v. Clay County*, 861 So. 2d 953, 958-959 (Miss. 2003), *Moore v. Mem'l Hosp.*, 825 So. 2d 658, 666-667 (Miss. 2002), *Roberts v. New Albany Separate Sch. Dist.*, 813 So. 2d 729, 731-732 (Miss. 2002); *Hollingsworth v. City of Laurel*, 808 So. 2d 950, 953-955 (Miss. 2002). Each time, this Court applies the 120 day provision solely to tolling or extending the statute of limitations period. No reference is ever made to extending the length of the presuit notice waiting period in Miss. Code § 11-46-11(1) beyond 90 days even though presuit notice is addressed in several of these cases.

Given this history of interpretation of Miss. Code § 11-46-11(1) and (3), there was clearly no error in the Circuit Court finding Milton Green had complied with the presuit requirements of Miss. Code § 11-46-11 and denying DRMC's Motion.

III. Even If The Circuit Court Erred in Failing to Dismiss Green's Suit Because It Was Filed Less Than 120 Days After DRMC Received His Notice of Claim, Any Dismissal Should Be Without Prejudice As His Filing Tolloed the Statute of Limitations and Time Remains to Refile under *Price v. Clark*, 2009 Miss. LEXIS 365 (Miss. July 23, 2009)

Recently, in *Price v. Clark*, NO. 2007-CA-01671-SCT, 2009 Miss. LEXIS 365 (Miss. July 23, 2009), this Court reversed and remanded the Trial Court's dismissal of claims against instrumentalities of DRMC with prejudice for failure to comply with the presuit notice requirements of Miss. Code § 15-1-36(15) and 11-46-11(1). Although this Court found the Plaintiffs had failed to comply with the presuit notice requirements, it nevertheless found any dismissal of the claims against an instrumentality of DRMC should have been without prejudice because the suit which was filed served to toll the statute of limitations under the Mississippi Tort Claims Act even though it did not satisfy the presuit notice requirement. Since when that tolling was taken into account, time still remained within which the suit could be refiled complying with the presuit notice requirements, this Court held it was error to dismiss these claims with prejudice.

Albert Price died on August 14, 2004, four months after being diagnosed with cancer. For the last 24 years of his life, he went to what he thought was the same clinic for his primary medical care. Although the building remained the same, the doctors practicing in it went through a series of different business formats. Unbeknownst to Mr. Price, from October 1, 2003 to January 31, 2004, his physicians were employees of Cleveland Medical Alliance affiliated with Greenwood Leflore Hospital. From February 1, 2004 through Mr. Price's death, the business

operated under the name of Cleveland Medical Clinic and was affiliated with Delta Regional Medical Center. Mr. Price was hospitalized at Bolivar Medical Center previously known as Bolivar County Hospital. *Price* at ¶¶ 2-3.

Two weeks after Mr. Price's death, on August 30, 2004, his widow sent a Notice of Claim pursuant to Miss. Code § 15-1-36(15) to Dr. Clark individually, Dr. Clark in his capacity as a principal of Cleveland Medical Alliance, and to the registered agents of Bolivar Medical Center and Cleveland Medical Clinic. The next day, his widow filed suit against Dr. Clark, Cleveland Medical Alliance, Bolivar Medical Center, Cleveland Medical Clinic, Dr. Pande of Greenwood Neurology Clinic, and five John Does. These Defendants were served on December 4, 2004. On January 4, 2005, Dr. Pande filed a Motion to Dismiss claiming he was protected by the Tort Claims Act as an employee of Greenwood Neurology Clinic which was operated by Greenwood Leflore Hospital. The claims against him were dismissed without prejudice on February 2, 2005.

On February 3, 2005, Price's widow sent Tort Claims Act Notices of Claim to Greenwood Leflore Hospital and DRMC. One hundred and forty-four days after sending these Notices of Claim, without leave of the Court, Price's widow filed an Amended Complaint adding Greenwood Leflore Hospital and DRMC as Defendants and correcting the names of the Cleveland Medical Clinic and Cleveland Medical Alliance. On April 20, 2006, Price's widow sent new Notice of Claim letters to Dr. Clark and Cleveland Medical Alliance through its other physician members. A week later, on April 27, 2006, she filed a notice of voluntary dismissal of Dr. Clark and Cleveland Medical Alliance. On July 24, 2006, the Trial Court granted Price's widow's Motion to Amend her Complaint but also granted Partial Summary Judgment dismissing the claims of the remaining Defendants entitled to the protections of the Tort Claims

Act with prejudice.

On July 26, 2006, Price's widow filed her Third Amended Complaint naming the five doctors who had treated Mr. Price at the clinic from 1990 until his death in 2004 and the various limited partnerships and business entities the clinic had operated under during those years alleging all these Defendants had failed to diagnose his tumor. In March of 2007, the Trial Court dismissed all of Price's claims as barred by the Tort Claims Act except the claims against Dr. Clark and the Cleveland Medical Clinic, PLLC from October 1, 2003 to January 31, 2004. In August of 2007, the Trial Court granted summary judgment dismissing these remaining claims because Price could not demonstrate Dr. Clark had breached the standard of care at any time between October 1, 2003 and January 31, 2004. *Price* at ¶ 4.

This Court held that dismissal was the proper remedy under Miss. Code §§ 11-46-11 and 15-1-36(15) for Price's widow's filing of her original August 31, 2004 Complaint only one day after sending her Notice of Claim to Dr. Clark, Cleveland Medical Alliance, Cleveland Medical Clinic and Bolivar Medical Center. *Price* at ¶¶ 15-18 Furthermore, the August 30, 2004 Notices of Claim failed to substantially comply with the requirements of Miss. Code § 11-46-11(2). *Price* at ¶¶ 20-22. This Court then held it was error to dismiss the Complaints with prejudice because properly filed and served Complaints which fail to satisfy presuit notice requirements are, nevertheless, sufficient to toll the statute of limitations until a Trial Court rules on motions seeking dismissal for failure to comply with presuit notice requirements. *Id* at ¶¶ 23-31.

Defendants are correct in their assertion that Bunton stands for the premise that notice-of-claim letters and amendments filed after the suit is commenced will not constitute valid notice or prevent dismissal of a suit. ... Bunton should not, however, be interpreted as abrogating the Mississippi Rules of Civil Procedure in favor of statutory pre-suit notice requirements by invalidating complaints that

were properly filed and served.

While failure to provide proper statutory notice cannot be cured by serving notice-of-claim letters after a complaint is filed, a properly served complaint--albeit a complaint that is wanting of proper pre-suit notice--should still serve to toll the statute of limitations until there is a ruling from the trial court. ... Accordingly, we agree with Price that the August 31, 2004, complaint was properly filed and served within both the one-year statute of limitations under MTCA and the two-year statute of limitations under Section 15-1-36 as to defendants Dr. Clark and the Cleveland Medical Clinic. Because Price failed to comply with the requisite notice requirements, dismissal was the proper remedy; however, the trial court erred in dismissing these defendants with prejudice, given that the complaint served to toll the statute of limitations until the trial court's July 2006 ruling.

Id at ¶¶ 29-31.

If this Court should find the Circuit Court erred in failing to dismiss Milton Green's claims against DRMC because he failed to wait a full 120 days after DRMC received his Tort Claims Act Notice of Claim before filing suit, it should also apply *Price* and hold that any such dismissal should be without prejudice with Green's Complaint serving to toll the statute of limitations from the date it was filed until the date such dismissal without prejudice is ordered. Since DRMC received both Notices of Claim less than a year after Milton Green was first admitted to DRMC, less than 120 days elapsed between receipt of either Notice of Claim and the filing of this suit, and DRMC was served within 120 days of filing this suit, the statute of limitations has not yet expired. If this suit must be dismissed, it should be dismissed without prejudice because the statute of limitations will not have expired yet when dismissal is ordered. There will still be time to refile suit complying with the required presuit notice waiting period before the statute of limitations expires.

IV. Even If Green Did Not Strictly Comply With Miss. Code § 11-46-11(3), The Remedy Should Be Dismissal Without Prejudice and Green Should Be Permitted to Refile Under the Savings Statute and *Arceo v. Tolliver*, 2009 Miss. LEXIS 393 (Miss. Aug. 20, 2009) (*Tolliver II*)

This Court decided *Arceo v. Tolliver*, 2009 Miss. LEXIS 393 (Miss. Aug. 20, 2009) (*Tolliver II*) less than a month after *Price*. *Tolliver II* extends the circumstances under which plaintiffs who fail to strictly comply with presuit notice requirements should not have their claims dismissed with prejudice. *Tolliver II* holds such defects are defects of form, and such plaintiffs are given an additional year under the savings statute within which to properly refile their claims after dismissal. Although the notice defects in *Tolliver II* involved only the presuit notice requirements under Miss. Code §15-1-36(15), both the holding and the reasoning also applies to presuit notice defects under Miss. Code § 11-46-11 because this Court expressly equated the two statutory requirements and relied on precedent under the Tort Claims Act in reaching its decision. *Tolliver II* at ¶ 16.

Tommie Tolliver died on July 13, 2002 at St. Dominic-Jackson Memorial Hospital after being treated by Dr. Arceo and various hospital personnel for four days for meningococcal meningitis and sepsis. His parents filed suit against Dr. Arceo and two fictitious defendants on June 4, 2004 without giving any presuit notice under Miss. Code § 15-1-36(15). Dr. Arceo filed a motion to dismiss which the Trial Court denied. This Court granted an interlocutory appeal, and on November 16, 2006, it reversed and rendered judgment dismissing the Complaint without prejudice for failure to comply with the presuit notice requirements. The Supreme Court Clerk issued the mandate dismissing the action without prejudice on March 15, 2007. Two weeks before the mandate issued, the Tollivers sent letters to Dr. Arceo and St. Dominic on February 28, 2007 which said:

This letter is being sent pursuant to Section 15-1-36(15) of the Mississippi Code of 1972, as amended. This letter is to inform you of our intention to file suit on behalf of Tommie Tolliver. The basis of the suit is negligence.

They filed suit against Dr. Arceo and St. Dominic again on May 9, 2007. Dr. Arceo and St.

Dominic again filed a Motion for Summary Judgment seeking dismissal with prejudice for failure to comply with the presuit notice requirement and expiration of the statute of limitations. The Trial Court again dismissed the action without prejudice finding the February 28, 2007 letter did not substantially comply with the presuit notice requirements, but the statute of limitations had not expired and the saving statute applied. *Tolliver II* at ¶¶ 2-8.

When a Plaintiff files a presuit notice substantially complying with the content requirements, *Tolliver II* holds that it tolls the statute of limitations for period of time specified in the statute setting out the requirement of presuit notice. *Id* at ¶¶ 17, 24. When a Plaintiff files suit and serves the Complaint in accordance with the Mississippi Rules of Civil Procedure, that filing also tolls the statute of limitation regardless of whether the Plaintiff has complied with statutory pre-suit requirements until such time as the final mandate issues confirming dismissal without prejudice. *Id* at ¶ 25 Finally, *Tolliver II* confirms that failure to comply with presuit notice requirements is a matter of form not touching on the merits under the savings statute, Miss. Code § 15-1-69. Thus, when the action being dismissed is the Plaintiff's original action, the dismissal must be without prejudice because the savings statute provides up to an additional year from the date of the final mandate dismissing the action without prejudice within which the plaintiff may refile his action complying with the presuit notice requirements. *Id* at ¶¶ 30-45.

Applying *Tolliver II*, even if dismissal of Green's action is required for failure to strictly comply with all requirements of Miss. Code § 11-46-11, any such dismissal should be without prejudice as time still remains within which Green can refile in full compliance with all requirements of Miss. Code § 11-46-11 for this case as determined by this Court's decision of

this appeal. The earliest date¹ the statute of limitations could have commenced running was July 26, 2007. He would have started with 365 days. There is no allegation that the Notices of Claim received by DRMC on May 29 and June 24, 2008 failed to substantially comply with the requirements of Miss. Code § 11-46-11(2). DRMC did not deny the claim. Therefore, Miss. Code § 11-46-11(3) would have tolled the statute of limitations for 120 days. Once that 120 day tolling period had passed, Miss. Code § 11-46-11(3) would give Green the balance remaining on his 365 days plus an additional ninety days within which to file. *Page v. Univ. of S. Miss.*, 878 So. 2d 1003, ¶¶ 6-9 (Miss. 2004). Thus, Miss. Code § 11-46-11(3) alone would have given Green until February 20, 2009 to file his claim.

However, on September 23, 2008 Green's attorney filed this suit and DRMC was served within the 120 day service period. According to *Tolliver II*, even if Green failed to wait the requisite time before filing suit, this filing tolls the statute of limitations unless and until there is a final mandate dismissing the suit. On September 23, 2008, Green still had 150 days remaining until February 20, 2009 in which to file suit under Miss. Code § 11-46-11(3). Under *Tolliver II*, those 150 days will still remain when this Court has decided this appeal. Thus, if this Court were to decide Green did not comply with full waiting period required by Miss. Code § 11-46-11 before filing suit, under *Tolliver II*, this Court should find the statute of limitations has not run and any dismissal should be without prejudice. Furthermore, even if for some unknown reason this court were to decide Green had failed to comply with the presuit requirements of Miss. Code

¹The latest date on which the statute of limitations commenced to run against Green cannot be determined on this record because the one year statute of limitations in Miss. Code § 11-46-11 is subject to a discovery rule. The current record does not contain sufficient information to determine when Milton Green knew or should have known "of both the damage or injury, and the act or omission which proximately caused it." *Naomi Ruth McDonald v. Mem'l Hosp.*, 8 So. 3d 175, ¶¶ 9-10 (Miss. 2009)

§ 11-46-11 and the statute of limitations had run, under *Tolliver II*, Green would still be entitled to one year within which to properly give notice and refile his action against DRMC pursuant to Miss. Code § 15-1-69 because this suit is his original suit against DRMC.

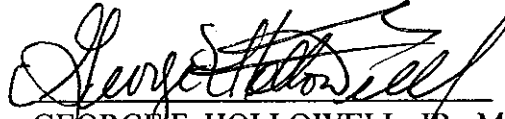
CONCLUSION

Miss. Code § 11-46-11 is one of the most litigated sections in our entire Code. This Court has acknowledged that both the statute itself and the case law interpreting it is and has been ambiguous. See e.g., *Caves v. Yarbrough*, 991 So. 2d 142, ¶ 22 (Miss. 2008), *Page v. Univ. of S. Miss.*, 878 So. 2d 1003, ¶ 5 (Miss. 2004). Yet one point remains remarkably consistent throughout the numerous cases citing, interpreting and applying Miss. Code § 11-46-11. The length of presuit notice waiting period is always specified as 90 days regardless of the type of Tort Claims Act Defendant. This is as it should be as the plain language of Miss. Code § 11-46-11(1) specifies the length of presuit notice required at 90 days for all governmental entities.

If the tolling periods in Miss. Code § 11-46-11(3) defined the length of the presuit notice, then no case since the amendments to Miss. Code § 11-46-11(3) should have referred to a presuit notice period of 90 days because the tolling period under Miss. Code § 11-46-11(3) is either 95 days or 120 days for all Defendants. But as DRMC admits, there is no case among the hundreds citing Miss. Code § 11-46-11 which supports their position that they are entitled to 120 days presuit notice. Milton Green followed the plain language of Miss. Code § 11-46-11(1) and the many cases, including some involving DRMC, stating that the presuit notice period is 90 days. The Trial Court did not err in finding he complied with the statute. He absolutely should not lose his right to a hearing on the merits of his claims against DRMC when he did what Miss. Code § 11-46-11(1) and the case law told him and his attorney to do.

Accordingly, this Court should affirm the Circuit Court's denial of DRMC's Motion.

RESPECTFULLY SUBMITTED,



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Attorney for Appellee

CERTIFICATE OF SERVICE

Pursuant to M.R.A.P. Rule 25(a), I hereby certify that I have mailed the original and three (3) true and correct copies of the above and foregoing Brief of Appellee via First Class U.S. Mail to:

Hon. Kathy Gillis
Clerk, Supreme Court of Mississippi
P.O. Box 249
Jackson, Mississippi 39205-0249

I further certify that I have mailed a true and correct copy of the above and foregoing Brief of Appellee via First Class U.S. Mail to:

Honorable Richard A. Smith
Circuit Court Judge
P.O. Box 1953
Greenwood, MS 38935-1953

Mary Frances S. England
L. Carl Hagwood
Wilkins, Stephens & Tipton, P.A.
P.O. Box 4537
Greenville, MS 38704-4537

I further certify that pursuant to M.R.A.P. 28(m), that I have also mailed an electronic copy of the above and foregoing on an electronic disk and state that this brief was written in Wordperfect format.

This the 23rd day of November, 2009



GEORGE F. HOLLOWELL, JR., MSBN [REDACTED]
ATTORNEY FOR APPELLEE