

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2009-IA-00299-SCT**

DELTA REGIONAL MEDICAL CENTER

DEFENDANT/APPELLANT

VS.

MILTON GREEN

PLAINTIFF/APPELLEE

REPLY BRIEF OF APPELLANT

**Appeal from the Circuit Court of Washington County, Mississippi
Cause No. 2008-0177-CI**

ORAL ARGUMENT REQUESTED

Prepared and submitted by:

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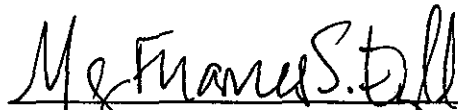
PLAINTIFF/APPELLEE

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 Court of Appeals may evaluate possible disqualification or recusal.

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

DELTA REGIONAL MEDICAL CENTER



MARY FRANCES S. ENGLAND

Mississippi Bar No. [REDACTED]

Attorney for Delta Regional Medical Center

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TABLE OF AUTHORITIES

CASES:

Arceo v. Tolliver, 19 So. 3d 67 (Miss. 2009)

City of Natchez v. Sullivan, 612 So. 2d 1087, 1089 (Miss. 1992)

Kerr-McGee Chemical Corp. v. Buelow, 670 So. 2d 12, 17 (Miss. 1995)

Page v. University of Southern Mississippi, 878 So. 2d 1003, 1005 (Miss. 2004)

Williams v. Clay County, 861 So. 2d 953, 960

Price v. Clark, 2009 WL 2183271 (July 2009)

STATUTES:

MISS. CODE ANN. § 11-46-11

REPLY

- I. Plaintiff filed his Complaint during the 120-day tolling period, “during which no action may be maintained by the claimant;” violating MISS. CODE ANN. § 11-46-11(3); therefore, his Complaint must be dismissed without prejudice.

Plaintiff filed his Complaint during the 120-day tolling period, “during which no action may be maintained by the claimant,” violating MISS. CODE ANN. § 11-46-11(3); therefore, Plaintiff’s Complaint must be dismissed. In his brief, Plaintiff confuses the issue by citing several cases concerning MISS. CODE ANN. § 11-46-11(1) and the ninety-day waiting period. However, the 120-day tolling period, “during which no action may be maintained by the claimant,” found in MISS. CODE ANN. § 11-46-11(3) is the sole issue on appeal.

This Court has stated that:

In considering a statute passed by the legislature,...the first question a court should decide is whether the statute is ambiguous. If it is not ambiguous, the court should simply apply the statute according to its plain meaning and should not use principles of statutory construction. Whether the statute is ambiguous or not, the ultimate goal of this Court is to discern and give effect to the legislative intent.

City of Natchez v. Sullivan, 612 So. 2d 1087, 1089 (Miss. 1992)(citations omitted). When interpreting a statute, “[t]he proper way to determine the real intent of the legislature is to study the words used by it in context.” *Kerr-McGee Chemical Corp. v. Buelow*, 670 So. 2d 12, 17 (Miss. 1995). MISS. CODE ANN. § 11-46-11(3) is not ambiguous, and the statute plainly states that during the 120-day tolling period, “no action may be maintained by the claimant.” MISS. CODE ANN. § 11-46-11(3) commands that:

All actions brought under the provisions of this chapter shall be commenced within one (1) year next after the date of the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based, and not after; provided, however, that the filing of the notice of claim as required by subsection (1) of this section shall serve to toll the statute of limitations for a period of... one hundred

twenty (120) days from the date the chief executive officer or other statutorily designated official of a municipality, county or other political subdivision receives the notice of claim, **during which no action may be maintained by the claimant** unless the claimant has received a notice of denial of claim. (Emphasis added).

MISS. CODE ANN. § 11-46-11(3). In the case *sub judice*, Plaintiff sent a notice of claim to DRMC on May 29, 2008, and filed his Complaint on September 23, 2008, 117 days after providing notice and within the 120-day tolling period, “during which no action may be maintained by the claimant.” Therefore, because Plaintiff filed suit during the tolling period, in violation of MISS. CODE ANN. § 11-46-11(3), his Complaint should be dismissed.

In his brief, Plaintiff confuses the issue by citing several cases interpreting MISS. CODE ANN. § 11-46-11(1), part of the Mississippi Tort Claims Act providing for the ninety-day waiting period. Plaintiff also cites several cases interpreting MISS. CODE ANN. § 11-46-11(3), and the tolling of the one year statute of limitations. However, Plaintiff purposefully does not address the words, “during which no action may be maintained by the claimant,” which are found in MISS. CODE ANN. § 11-46-11(3) since the Plaintiff cannot avoid the fact that he violated the plain language of the statute. Plaintiff cites *Page v. University of Southern Mississippi*, 878 So. 2d 1003, 1005 (Miss. 2004), a case which addresses the expiration of the statute of limitations. *Page*, 878 So. 2d at 1006, citing *Williams v. Clay County*, 861 So. 2d 953, 960 n. 5. In *Page*, the Court stated, “[t]his 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*,” *Page*, 878 So. 2d at 1006, (emphasis added); therefore, *Page* does not specifically apply to the case *sub judice*. There is no Mississippi case which addresses the words, “during which no action may be maintained by the claimant” because this language is plain, straight

forward and unambiguous. Because Plaintiff filed his Complaint during the 120-day tolling period “during which no action may be maintained by the claimant,” in violation of MISS. CODE ANN. § 11-46-11(3), his Complaint must be dismissed.

- II. In his brief, Plaintiff cites to *Price v. Clark*, 2009 WL 2183271 (July 2009) and *Arceo v. Tolliver*, 19 So. 3d 67 (Miss. 2009), prematurely arguing that he may refile his Complaint and attempting to receive an advisory opinion from this Court.

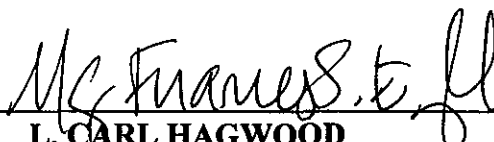
The issue in this appeal is Plaintiff filed his Complaint during the 120-day tolling period “during which no action may be maintained by the claimant,” in violation of MISS. CODE ANN. § 11-46-11(3), his Complaint must be dismissed. However, in his brief, Plaintiff prematurely requests another chance to correctly file suit and argues that even if it is found he did not comply with the pre-suit requirements provided for in MISS. CODE ANN. § 11-46-11(3), the filing of the Complaint tolled the one-year statute of limitations according to *Price v. Clark*, 2009 WL 2183271 (July 2009). Plaintiff also prematurely argues in his brief that according to *Arceo v. Tolliver*, 19 So. 3d 67 (Miss. 2009), if this Court reverses and remands the trial court’s decision, the dismissal should be without prejudice because the statute of limitations has not expired, and he would have one year from dismissal within which to properly provide notice and refile suit against DRMC. Plaintiff’s arguments regarding refiling have nothing to do with the issue at hand. The issue in this appeal is Plaintiff filed his Complaint during the 120-day tolling period “during which no action may be maintained by the claimant,” in violation of MISS. CODE ANN. § 11-46-11(3), his Complaint must be dismissed. In arguing *Price v. Clark*, 2009 WL 2183271 (July 2009) and *Arceo v. Tolliver*, 19 So. 3d 67 (Miss. 2009), Plaintiff in essence is requesting an advisory opinion for something that may or may not occur in this case; therefore, Plaintiff’s arguments regarding such are unfounded.

CONCLUSION

Plaintiff sent a notice of claim to DRMC on May 29, 2008, and filed his Complaint on September 23, 2008, 117 days after providing notice and within the 120-day tolling period, "during which no action may be maintained by the claimant." Therefore, because Plaintiff filed suit during the tolling period, in violation of MISS. CODE ANN. § 11-46-11(3), his Complaint should be dismissed.

RESPECTFULLY SUBMITTED, this 2 day of January, 2010.

DELTA REGIONAL MEDICAL CENTER

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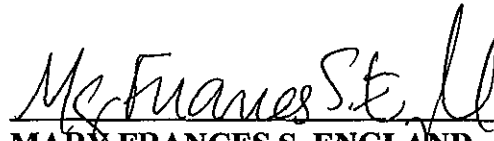
CERTIFICATE OF SERVICE

I, Mary Frances S. England, one of the attorneys of record for Defendant DRMC herein, certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing document to:

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

George F. Hollowell, Jr., J.D.
Hollowell Law Firm
P.O. Drawer 1407
Greenville, MS 38702-1407

THIS, 8 day of January, 2010.



MARY FRANCES S. ENGLAND

CERTIFICATE OF FILING

I, Mary Frances S. England, certify that I have this day delivered via United States First Class mail, postage prepaid, the original and three copies of, and a CD containing, Brief of Appellant on January 8, 2010, to Ms. Kathy Gillis, Clerk, Supreme Court of Mississippi, P.O. Box 249, Jackson, Mississippi 39205.



MARY FRANCES S. ENGLAND