

**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

BRIEF OF APPELLANT

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

ORAL ARGUMENT REQUESTED

Prepared and submitted by:

**L. CARL HAGWOOD
Mississippi Bar No. [REDACTED]
CHRISTOPHER W. WINTER
Mississippi Bar No. [REDACTED]
MARY FRANCES S. ENGLAND
Mississippi Bar No. [REDACTED]
Wilkins, Stephens & Tipton, PA
Post Office Box 4537
Greenville, Mississippi 38704
Telephone (662) 335-5555
Facsimile (662) 335-5700**

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of 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

TABLE OF CONTENTS

Certificate of Interested Persons	i
Table of Contents	ii
Table of Authorities	iii
Statement of the Issue	1
Statement of the Case	2
Summary of the Argument	3
Argument	3
I. Facts	3
II. Case Law	4
A. Standard of Review	4
B. Analysis	4
Conclusion	7
Certificate of Service	9
Certificate of Filing	9

TABLE OF AUTHORITIES

CASES:

<i>Bolivar Leflore Medical Alliance, LLP v. Williams</i> , 938 So. 2d 1222, 1227 (Miss. 2006)	4
<i>City of Natchez v. Sullivan</i> , 612 So. 2d 1087, 1089 (Miss. 1992)	4
<i>Clayton v. Mladineo</i> , 724 So. 2d 373, 382 (Miss. 1998)	7
<i>Coker v. Wilkinson</i> , 142 So. 886 (Miss. 1926)	6
<i>Kerr-McGee Chemical Corp. v. Buelow</i> , 670 So. 2d 12, 17 (Miss. 1995)	4
<i>Lenoir v. Madison Cty.</i> , 641 So. 2d 1124, 1128 (Miss. 1994)	6
<i>Miss. Dep't of Transp. v. Allred</i> , 928 So. 2d 152, 154 (Miss. 2006)	4
<i>Reaves v. Randall</i> , 729 So. 2d 1237, 1240 (Miss. 1999)	7
<i>UMC v. Easterling</i> , 928 So. 2d 815 (Miss. 2006)	5, 6
<i>Warner v. Bd. of Trustees of Jackson Municipal Separate Sch. Distr.</i> , 359 So. 2d 345, 347 (Miss. 1978)	6

STATUTES:

MISS. CODE ANN. § 11-46-11	2
MISS. CODE ANN. § 11-46-11(1)	5, 6
MISS. CODE ANN. § 11-46-11(3)	1, 2, 3, 4, 5, 6, 7, 8
MISS. CODE ANN. § 41-13-10(c)	4

STATEMENT OF THE ISSUE

I. The circuit court erred in denying Defendant's Motion to Dismiss on the grounds that Plaintiff filed his Complaint in violation of the one-hundred twenty (120)-day tolling period found in MISS. CODE ANN. § 11-46-11(3). Defendant's motion was based on the following: DRMC is a community hospital. On May 29, 2008, Plaintiff provided notice of intent alleging medical negligence which occurred between August 28, 2007 and September 13, 2007. Defendant did not issue a denial. Plaintiff filed suit on September 23, 2008. MISS. CODE ANN. § 11-46-11(3) provides that the notice of claim tolls the statute of limitations for 120 days "during which time no action may be maintained by the claimant unless the claimant received a notice of denial of claim." As suit was filed on September 23, 2008, one hundred seventeen days after notice of intent was given, the Complaint should have been dismissed for failure to comply with MISS. CODE ANN. § 11-46-11(3).

STATEMENT OF THE CASE

On May 29, 2008, Plaintiff provided Delta Regional Medical Center (DRMC) with a notice of claim pursuant to MISS. CODE ANN. § 11-46-11, alleging medical malpractice against DRMC for injuries Mr. Green allegedly sustained at DRMC from August 28, 2007 to September 13, 2007. (R.E.1; R. 51-54). On September 23, 2008, Plaintiff filed a Complaint against DRMC. (R.E.2; R. 1-19). On October 17, 2008, DRMC filed its Motion, Answer and Defenses, which contained a Motion to Dismiss based on the fact that Plaintiff had filed his Complaint during the 120-day tolling period found in MISS. CODE ANN. § 11-46-11(3). (R.E.3; R. 22-26). DRMC's Motion came on for hearing on February 2, 2009, and the circuit court entered an Order denying the motion on February 11, 2009. (R.E.4; R. 29-32). Feeling aggrieved, DRMC filed a Petition for Interlocutory Appeal, arguing that the circuit court erred in denying Defendant's Motion to Dismiss which Defendant filed on the grounds that Plaintiffs filed their Complaint in violation of the one-hundred twenty (120)-day tolling period found in MISS. CODE ANN. § 11-46-11(3), and this Court granted Defendant's Petition. (R.E.5 and 6; R. 44-78 and 87).

SUMMARY OF THE ARGUMENT

ARGUMENT

I. FACTS

The statute at issue is MISS. CODE ANN. § 11-46-11(3), which states:

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 this case, Plaintiff provided DRMC notice of claim on May 29, 2008. (R.E.1; R. 51-54). Plaintiff then filed his Complaint on September 23, 2008. (R.E.2; R. 1-19). The Complaint was filed 117 days after notice was provided, and three days before the 120 day tolling period expired, during which no action may be maintained.

The time line of events as is as follows:

<u>Date</u>	<u>Event</u>	<u>Days</u>
8-28-07–9-13-07		Alleged negligence
5-29-08	Notice to DRMC	
9-23-08	Complaint filed	117 days after notice was given and 3 days before the 120-day tolling period expired pursuant to MISS. CODE ANN. §11-46-11(3)

9-26-08

120-day tolling period expired;
MISS. CODE ANN. §11-46-11(3)

Delta Regional Medical Center is a community hospital. “A ‘community hospital’ is defined as ‘any hospital, nursing home and/or related health facilities or programs ... established and acquired by boards of trustees or by one or more owners which is governed, operated and maintained by a board of trustees.’” MISS. CODE ANN. § 41-13-10(c). *Bolivar Leflore Medical Alliance, LLP v. Williams*, 938 So. 2d 1222, 1227 (Miss. 2006). According to the Mississippi Supreme Court, community hospitals are forms of municipal corporations. *Id.* Therefore, the tolling period applicable to DRMC is 120-days under MISS. CODE ANN. § 11-46-11(3).

II. CASE LAW

A. STANDARD OF REVIEW

As this interlocutory appeal involves “a question of law and interpretation of a statute...the standard of review is de novo.” *Miss. Dep’t of Transp. v. Allred*, 928 So. 2d 152, 154 (Miss. 2006).

B. ANALYSIS

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) states:

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). 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.” 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.

When read in conjunction with MISS. CODE ANN. § 11-46-11(1), arguably, some ambiguity is evident. MISS. CODE ANN. § 11-46-11(1) states:

After all procedures within a governmental entity have been exhausted, any 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.

MISS. CODE ANN. § 11-46-11(1). In *Easterling*, a case in which notice of claim was provided the same day as the Complaint was filed, this Court held that failure to comply with the *ninety*-day

notice requirement in MISS. CODE ANN. § 11-46-11(1) led to dismissal of Plaintiffs' Complaint. *UMC v. Easterling*, 928 So. 2d 815 (Miss. 2006). However, MISS. CODE ANN. § 11-46-11(3) was not addressed.

Despite no case law interpreting the cohesiveness of MISS. CODE ANN. §§ 11-46-11(1) and (3), the rules of statutory construction provide guidance. When construing conflicting provisions in the same statute, "the last expression of the Legislature must prevail over the former." *Warner v. Bd. of Trustees of Jackson Municipal Separate Sch. Distr.*, 359 So. 2d 345, 347 (Miss. 1978), citing *Coker v. Wilkinson*, 142 So. 886 (Miss. 1926). Applying this rule of construction, MISS. CODE ANN. § 11-46-11(3) prevails, and the plain language that during the 120-day tolling period, "no action may be maintained by the claimant" applies. 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 addition, this Court has acknowledged a longstanding rule of statutory construction that the terms of a specific statute control the terms of a general statute. *Lenoir v. Madison Cty.*, 641 So. 2d 1124, 1128 (Miss. 1994). MISS. CODE ANN. § 11-46-11(3) is more specific than MISS. CODE ANN. § 11-46-11(1) because MISS. CODE ANN. § 11-46-11(3) provides guidance concerning when to provide notice and specifically when the Complaint can be filed and also addresses the statute of limitations. MISS. CODE ANN. § 11-46-11(1) simply states that a notice of claim must be provided ninety days before maintaining an action. Applying this rule of construction, MISS. CODE ANN. § 11-46-11(3) prevails, and the plain language that during the 120-day tolling period, "no action may be maintained by the claimant" applies. Therefore, because Plaintiff filed suit during the tolling period, in violation of MISS. CODE ANN. § 11-46-11(3), his Complaint should be dismissed.

Finally, if MISS. CODE ANN. § 11-46-11(3) is deemed unclear or ambiguous, this Court must

look to not only the language of the statute but also to the purpose and policy behind the statute the Legislature had in mind. *Clayton v. Mladineo*, 724 So. 2d 373, 382 (Miss. 1998). MISS. CODE ANN. § 11-46-3, discussing the Legislative intent of the Mississippi Tort Claims Act, states:

The Legislature of the State of Mississippi finds and determines as a matter of public policy and does hereby declare, provide, enact and reenact that the “state” and its “political subdivisions,” as such terms are defined in Section 11-46-1, are not now, have never been and shall not be liable, and are, always have been and shall continue to be immune from suit at law or in equity....

MISS. CODE ANN. § 11-46-3. Although the Mississippi Tort Claims Act was adopted to reduce the harsh effect of the common law, which barred an injured party from recovery against a political subdivision, a proper notice of claim is the only way to reach a governmental entity. *Reaves v. Randall*, 729 So. 2d 1237, 1240 (Miss. 1999). When the requirements of the Act have been complied with, jurisdiction will attach for purposes of the Act. *Id.* Governmental entities are immune from liability, but the Mississippi Tort Claims Act provides an opportunity for injured parties to bring suit against a governmental entity in various situations. However, the injured party must comply with the Mississippi Tort Claims Act in order to properly bring suit. MISS. CODE ANN. § 11-46-11(3) must be complied with before an injured party may bring suit against a governmental entity. Because Plaintiff filed suit during the tolling period, in violation of MISS. CODE ANN. § 11-46-11(3), he did not comply with the Mississippi Tort Claims Act, and his Complaint should be dismissed.

CONCLUSION

Plaintiff failed to comply with the plain meaning of MISS. CODE ANN. § 11-46-11(3) and filed his Complaint during the 120-day tolling period during which time “no action may be

maintained by the claimant,” and his Complaint should therefore be dismissed. In addition, the rules of statutory construction and the Legislative intent evidence that MISS. CODE ANN. § 11-46-11(3) applies and that Plaintiff did not comply with MISS. CODE ANN. § 11-46-11(3). Because Plaintiff filed suit during the 120-day tolling period when “no action may be maintained by the claimant,” his Complaint should therefore be dismissed.

RESPECTFULLY SUBMITTED, this 16 day of November, 2009.

DELTA REGIONAL MEDICAL CENTER

BY: Mary Frances S. England
L. CARL HAGWOOD
Mississippi Bar No. [REDACTED]
MARY FRANCES S. ENGLAND
Mississippi Bar No. [REDACTED]

OF COUNSEL:

WILKINS, STEPHENS & TIPTON, P.A.
540 Main Street, Suite 403
Post Office Box 4537
Greenville, Mississippi 38704-4537
Telephone: (662) 335-5555
Facsimile: (662) 335-5700

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, 16 day of November, 2009.



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 November 16, 2009, to Ms. Kathy Gillis, Clerk, Supreme Court of Mississippi, P.O. Box 249, Jackson, Mississippi 39205.



MARY FRANCES S. ENGLAND