IN THE SUPREME COURT OF MISSISSIPPI
2009-M-00495-SCT

**TALLAHATCHIE GENERAL HOSPITAL;
TALLAHATCHIE GENERAL HOSPITAL
EXTENDED CARE FACILITY; and
BARBARA CRISWELL, FNP** — **APPELLANTS**

VS

**SUSAN EDWARDS HOWE and
WAYNE EDWARDS, Wrongful Death
Beneficiaries of Myrtice Edwards,
Deceased** — **APPELLEES**

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

BRIEF OF APPELLEES

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COUNSEL FOR APPELLEES

CERTIFICATE OF INTERESTED PERSONS

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

1. Susan Edwards Howe, Appellee
2. Wayne Edwards, Appellee
3. William H. Liston, Liston/Lancaster, PLLC, Counsel for Appellees
4. Alan D. Lancaster, Liston/Lancaster, PLLC, Counsel for Appellees
5. Honorable Richard B. Chamberlain, Circuit Court Judge
6. Tallahatchie General Hospital, Appellant
7. Tallahatchie General Hospital Extended Care Facility, Appellant
8. Barbara Criswell, FNP, Appellant
9. Gaye Nell Currie, Wise, Carter, Child and Caraway, Counsel for Appellants
10. Mississippi Hospital Association ("MHA") Amicus Curie, consisting of the following public hospital members: (Set forth on **Attachment "A"** hereto)
11. John G. Wheeler, Mitchell, McNutt and Sams, Counsel for Amicus Curiae
12. Bobby Joe Brunson, Jr., Chief Executive Officer of Tallahatchie General Hospital
13. Justin S. Cluck, Smith & Whatley, PLLC, Previous counsel for Appellees
14. Thomas Reynolds, Attorney for Board of Supervisors of Tallahatchie County, Mississippi
15. Anita Mullen Greenwood, Chancery Clerk of Tallahatchie County, Mississippi

SO CERTIFIED on this the 30TH day of March, 2010, in order that Justices of this Court may evaluate possible disqualification or recusal.

WILLIAM H. LISTON Counsel for Appellees

ATTACHMENT "A"

Baptist Memorial Hospital - Golden Triangle	Boswell Regional Center	Calhoun Health Services
Central MS Residential Center	Claiborn County Hospital	Covington County Hospital
Delta Regional Medical Center	Ellisville State School	Field Memorial Community Hospital
Forrest General Hospital	Franklin County Memorial Hospital	George County Hospital
Greenwood Leflore Hospital	Grenada Lake Medical Center	Hancock Medical Center
Hardy Wilson Memorial Hospital	Hudsspeth Regional Center	Humphries County Memorial Hospital
Jasper General Hospital	Jefferson County Hospital	Jefferson Davis Community Hospital
Kilmichael Hospital, Inc.	Lawrence County Hospital	Madison County Medical Ctr.
Magnolia Regional Health Center	Marion General Hospital	Montford Jones Memorial Hospital
Natchez Regional Medical Center	Neshoba County Hospital	North MS Regional Center
North Sunflower County Hospital	Noxubee General Hospital	Ocean Springs Hospital
Oktibbeha County Hospital	Pearl River Hospital	Sharkey-Issaqunea Community Hospital
Simpson General Hospital	Singing River Hospital System	South General Regional Medical Center
South Mississippi Regional Center	South Sunflower County Hospital	Southwest MS Regional Medical Center
Tallahatchie General Hospital	Tippah County Hospital	Tri-Lakes Medical Center
Tyler Holmes Memorial Hospital	Walthal County General Hospital	Wayne General Hospital
Yalobusha General Hospital	East Mississippi State Hospital	Mississippi State Hospital
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2. WHETHER STRICT COMPLIANCE IS REQUIRED FOR THE SERVICE PROVISIONS OF *MISS. CODE ANN.* § 11-46-11(1) WHEN A GOVERNMENTAL ENTITY WAS SERVED NOTICE OF CLAIM NINETY (90) DAYS PRIOR TO THE FILING OF THE COMPLAINT REFLECTING AN INTENT TO FILE SUIT AGAINST THE ENTITY?

3. IN THE EVENT THIS COURT RULES THAT THE NOTICE OF CLAIM SERVED ON THE CHIEF EXECUTIVE OFFICER OF TGH DID NOT CONSTITUTE SUFFICIENT NOTICE UNDER *MISS. CODE ANN.* § 11-46-11(1), WHETHER THE FILING OF THE COMPLAINT TOLLED THE ONE (1) YEAR STATUTE OF LIMITATIONS?

4. WHETHER MISSISSIPPI HOSPITAL ASSOCIATION LACKED STANDING TO FILE A MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF.

STATEMENT OF THE CASE

A.

Nature of the Case and Course of Proceedings:

This is a wrongful death case filed by Susan Edwards Howe and Wayne Edwards for the death of their mother, Myrtice Edwards, on June 9, 2007, while she was a patient in Tallahatchie General Hospital and in its Extended Care Facility (hereinafter "TGH"). Mrs. Edwards admitted herself to the Defendants' facilities because she had a stroke, was unable to use her right leg adequately, and did not "want someone taking care of her all the time". Complaint ¶ 16, p. 6, P.R.E. 1.

Unfortunately, on May 18, 2007, the second day of her admission, Mrs. Edwards was medicated by the TGH facility staff with *Digoxin* and *Lisinopril* - drugs prescribed for another patient. These improper drugs were administered to Mrs. Edwards from May 18, 2007 to June 4, 2007. Complaint ¶ 18, pp. 7-8, P.R.E. 1. On June 6, 2007, she was transferred to the Emergency Room of TGH. Complaint ¶ 19, p. 8, P.R.E. 1. On June 9, 2007, at 8:00 a.m., Mrs. Edwards died in Tallahatchie General Hospital.[1] Complaint ¶ 19, p. 20-21, P.R.E. 1.

On October 17, 2007, attorney Justin S. Cluck, Esquire[2] served a Notice of Claim by Certified Mail letter upon Anita Mullen Fountain (Greenwood), the Tallahatchie County Chancery Clerk, and upon Thomas Reynolds, the Tallahatchie County Attorney. R.E. 1-4. Mr. Cluck's

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[1] Counsel for TGH impermissibly misstated the evidence in this case relative to the cause of Mrs. Edwards' death in an attempt to exonerate TGH from its acknowledged mal-practice and its admission that the improper drugs administered Mrs. Edwards contributed to her death. (*See*, Brief of Appellants p.4; Complaint ¶ 24-26, pp. 9-11; P.R.E 1; and Notice of Claim. R.E. 1-4).

[2] Mr. Cluck had been retained by Mrs. Howe and Mr. Edwards prior to October 17, 2007, to represent them in connection with the death of their mother.

Notice contained the following required information pursuant to M.C.A. § 11- 46-11(2):

- "CLAIMANT: Wrongful Death Beneficiaries of Myrtice Edwards";
- "DATE OF OCCURRENCE: June 9, 2007";
- "PLACE OF LOSS: Tallahatchie General Hospital";
- MECHANISM OF INJURY: Wrongful Death";
- "EXTENT OF INJURY: Wrongful Death";
- "WITNESSES/TORTFEASORS: Dr. Barbara Criswell, Dr. Theodore T. Lewis, Kim Upton, Tara Hervey, Angie Burnett, Carol Knowles, Jay Parks, Rall Bethel, Lisa Smiley, A. Lamar, L. Garth, L. Suggs, P. Trontt, Amy Sykes, Ella C. Kimball, L.Hankins, Jason Smith, Angela Lana, Dr. McCune, Dr. C.M. Jordon, Dr. Mark Gunn, Valine McCord, B. Criswell";
- RESIDENTS OF CLAIMANT: Tallahatchie County, Mississippi";
- MONEY DAMAGES SOUGHT: $500,000.00".

Complaint, Exhibit "A" P.R.E. 1.

In addition to the above disclosures, Mr. Cluck advised Mrs. Fountain in the Notice of Claim that:

1. He was forwarding Mrs. Fountain the Notice of Claim in her capacity as Chancery Clerk for Tallahatchie County;

2. Mr. Cluck set forth the circumstances surrounding Mrs. Edwards from the time she was admitted to the Tallahatchie General Hospital and Extended Care Facility until June 9, 2007, and that she died of congestive heart failure. He further informed Mrs. Fountain that six (6) days prior to her death, it was discovered that Mrs. Edwards had been given the wrong medication by the nursing staff and she had taken this medication for nineteen (19) days. The nurse practitioner explained to the family after the death of Mrs. Edwards that two patients came in at the same time and Mrs. Edwards' prescription was transposed and that the medical personnel at TGH stated that a contributing cause of Mrs. Edwards' death was being on the wrong medication for nineteen (19) days and that her digoxin levels were critically high.

3. Mr. Cluck advised Mrs. Fountain in the Notice that Mrs. Edwards was alert and fully functioning when she entered the care of TGH and its extended care facility; not ill and did not suffer from any debilitating conditions; that in less than a month, she died resulting in the wrongful death beneficiaries having suffered the loss of a loved one, as well as the emotional anguish over her loss.

4. Mr. Cluck concluded the Notice of Claim letter by advising Mrs. Fountain that after the County had a chance to review the Notice to advise him of its response in writing. He further stated in his correspondence that if he did not receive a response from the County within ninety (90) days of its receipt of the letter, he would proceed forward with litigating the claim against Tallahatchie County.

Complaint, Exhibit "A" P.R.E. 1.

As noted above, Mr. Cluck served the attorney for the Board of Supervisors of Tallahatchie County, Mississippi, with the Notice of Claim. Mr. Reynolds acknowledged receipt of the Notice of Claim on October 22, 2007. He immediately forwarded the Notice of Claim served on him to Tim Tackett of the Tackett Insurance Agency, who provided liability insurance coverage for Tallahatchie County, Mississippi, all as reflected on Mr. Reynolds' facsimile transmittal along with a letter to Mr. Tackett wherein Reynolds advised Tackett that the Notice of Claim was against Tallahatchie General Hospital, et al., in connection with the alleged "wrongful death of Mrs. Myrtice Edwards". Deposition of Thomas U. Reynolds, Exhibit 3(b), p. 11, P.R.E. 5. Mr. Reynolds produced at his deposition a series of emails received by him reflecting that from March 5, 2008 up to May 9, 2008, representatives of TGH monitored the filings of any Complaints concerning the wrongful death of Myrtice Edwards. Deposition of Thomas U. Reynolds, Exhibit Under Seal 1, P.R.E. 5 [3].

[3] Counsel for TGH objected to the production of the subject emails claiming that such emails were privileged pursuant to Rule 502 M.R.E. During the discussion concerning the admissibility of the these documents, Mr. Reynolds stated on the record that as "as an officer of the Court, I will tender these to Judge Chamberlin pending the hearing." Deposition of Thomas U. Reynolds, at p. 17, 1. 1-p. 23, 1. 10, P.R.E. 5, placing the emails Under Seal for the record, the string of emails were labeled Exhibit Under Seal 1 and placed in the deposition record. No Order was secured placing the Exhibits Under

Bobby Joe Brunson acknowledged receipt of the Notice of Claim around November 2007 in his capacity as Chief Executive Officer of TGH. Deposition of Bobby Joe Brunson, Jr., p. 19, P.R.E. 6. Deposition of Bobby Joe Brunson, Jr., pp. 10 & 11, P.R.E. 6. Mr. Brunson's receipt of the Notice of Claim clearly gave him sufficient notice that the tortfeasors were in fact, the entities listed within the Notice of Claim. This document was in Mr. Brunson's possession from at least November 27, 2007, to the date the Complaint was filed in this case on June 2, 2009, a period of one hundred eighty seven (187) days.

On June 2, 2008, one hundred eighty seven (187) days after the receipt by Mr. Brunson of the Notice of Claim, the Complaint against Tallahatchie General Hospital, Tallahatchie General Hospital Extended Care Facility, Brenda Criswell, FNP and Doe Defendants 1-15 was filed which was within the one (1) year Statute of Limitations. The Complaint was filed with the following attachments: Exhibit "A" (consisting of the Notice of Claim filed on October 17, 2007); Exhibit "B" (consisting of receipt of Certified Mail received by Honorable Anita Mullen Fountain, Tallahatchie Chancery Clerk); and Exhibit "C" (consisting of receipt of Certified Mail received by Thomas Reynolds, Esquire, Tallahatchie County attorney on October 22, 2007); and Exhibit "D" (Certificate of Consultation pursuant to M.C.A. § 11-1-58(1)(a)). Process was issued on Tallahatchie General Hospital on June 2, 2008. R. 22 and served on June 2, 2008. R.22.

On June 27, 2008, TGH pursuant to Rule 12, M.R.C.P., filed their Motion to Dismiss alleging that:

1. Plaintiffs failed to give notice pursuant to the provisions of M.C.A. to the Chief Executive Officer of Tallahatchie General Hospital prior to filing suit.

Seal and subsequently, the Exhibts were included in the original deposition of Mr. Reynolds. Deposition of Reynolds, P.R.E. 5.

2. Because the Plaintiffs failed to give notification of their claim prior to filing suit, the claim must be dismissed because the Statute of Limitations period has now passed and the Plaintiffs' claim should be dismissed with prejudice.

On January 26, 2009, the Plaintiffs filed their Response to the Defendants' Motion to Dismiss. R. 112. The trial court noticed a hearing on the Motion and Response which was conducted on January 30, 2009. Following arguments by counsel for TGH and Plaintiffs' counsel, the Court took the Motion under advisement.

On March 12, 2009, Honorable Robert Chamberlin, Circuit Judge, issued a written Order denying the Motion to Dismiss filed by TGH. R. 459. Thereafter, on March 26, 2009, TGH filed its Petition for Interlocutory Appeal with this Court.

Plaintiffs filed a Response and Memorandum In Objection to the Motion for Interlocutory Appeal on April 20, 2009.

On June 4, 2009, this Court granted the Motion of TGH for Interlocutory Appeal to this Court. Tallahatchie General Hospital, et al. filed the Brief of Appellants with this Court on December 18, 2009.

On December 28, 2009, Mississippi Hospital Association (hereinafter "MHA") filed a Motion for Leave to File Brief of Amicus Curiae, together with its Brief of Amicus Curiae. The Motion for Leave to File Brief of MHA and the proposed Brief was not timely filed pursuant to the time limits set forth in *Mississippi Rules of Appellate Procedure*, 29(b), which provides that:

> A Motion for Leave to File an Amicus Brief SHALL BE FILED NO LATER THAN SEVEN (7) DAYS AFTER THE INITIAL BRIEF OF THE PARTY WHOSE POSITION THE AMICUS BRIEF WILL SUPPORT..." (emphasis ours).

As the record reflects in this case, the Brief of Appellants was filed in this Court on December 18, 2009. Pursuant to the mandatory language of Rule 29(b), leave to file the Amicus

Brief should have been filed no later than seven (7) days after the filing of the Brief of TGH. MHA filed its Motion on December 30, 2009, two (2) days late.

Mississippi Rules of Appellate Procedure, 29(c), requires that any opposing party who objects to the Motion for Leave shall file a Response in Opposition within seven (7) days stating why the requirements of Rule 29(a) and (b), have not been met. The Appellees' timely responded in opposition to MHA's Motion for Leave to File Brief which was filed on January 6, 2010, seven (7) days after the initial filing of the Motion for Leave to File Brief of Amicus Curiae. On the same day of the filing of the Appellees' Response, this Court entered its Order through Honorable James E. Graves, Jr., Presiding Justice, granting MHA's initial Motion for Leave to File Brief of Amicus Curiae. This Court's Order did not address the Response filed by the Appellees to MHA's Motion.

On January 7, 2010, MHA filed its Motion for Enlargement of Time to Submit Motion for Leave to File Brief of Amicus Curiae. P.R.E. 7. On the very next day, this Court, acting through Honorable Justice George C. Carlson, Jr., Presiding Justice, entered an Order granting MHA's Motion for Leave to File Brief of Amicus Curiae.

Appellees respectfully request this Court to consider their Response to MHA's Motion for Leave to File Amicus Curiae Brief and to rule on the following issues:

(1) The timeliness of the filing of MHA's Motion for Leave to File Amicus Curiae Brief; and

(2) To address the Rule 29(a), requirement for grant of leave to file an Amicus Brief in that said Rule provides that an Amicus Curiae desiring to file a Brief in a pending case before the Mississippi Supreme Court shall demonstrate that (i) Amicus has an interest in some other case involving a similar question; or (ii) counsel for the Appellant is inadequate or the initial Brief is insufficient; or (iii) there are matters of fact or law that may otherwise escape the Court's attention; or (iv) the Amicus has substantial legitimate interest that will likely be affected by the outcome of the case in which interest will not be adequately protected by those already parties to the case.

MHA has failed to demonstrate the grounds required for filing the Brief in that (a) the Motion for Leave to File Amicus Curiae Brief was not timely filed and (b) has not established that: (i) it has an interest in some other case involving a similar case; (ii) MHA has not set forth a claim that counsel for Tallahatchie General Hospital, Tallahatchie General Hospital Extended Care Facility and Barbara Criswell are inadequate or the Brief of the Appellant was insufficient; (iii) MHA in its submitted Brief has not set forth any matters of fact or law that could conceivably escape this Court's attention; and (iv) MHA has not shown that it will likely be affected by the outcome of the case and which interest will not be adequately protected by those already parties to this case.

Consequently, MHA has not demonstrated that it possesses the requirements set forth in Rule 29(a), *Mississippi Rules of Appellate Procedure*, and for this reason, standing alone. the Brief of Amicus Curiae should be stricken from this case.

B.

Statement of Facts

This action was initiated by Susan Edwards Howe and Wayne Edwards (hereinafter "Edwards") against Tallahatchie General Hospital and d/b/a Tallahatchie General Hospital Extended Care Facility, and Barbara Criswell, FNP, an employee of Tallahatchie General Hospital and Doe Defendants 1-15, on June 2, 2008, in the Circuit Court of the First Judicial District of Tallahatchie County, Mississippi. Myrtice Edwards, was born on July 19, 1919, and admitted herself to the TGH facility on May 17, 2007, having elected nursing home placement "because she had a stroke and was unable to use her right left adequately and did not want to someone taking care of her all the time." Complaint p. 6, ¶ 16, Exhibit 1, R.3.

At the time of Mrs. Edwards' admission, TGH operated a hospital facility and extended care facility in the City of Charleston, Mississippi, for the purpose of rendition of health care and nursing services to persons admitted to the facility and at all times, held itself out to be a competent and qualified provider of health care and nursing services. Complaint p. 6, ¶ 13, Exhibit 1, R. 3. Barabara Criswell, who held herself out as a duly licensed Family Nurse Practitioner under the laws of the State of Mississippi, and engaged in her profession at TGH, and its Extended Care Facility. Complaint p. 6, ¶ 14, Exhibit 1, R.3. The unknown nurses and other health care providers who were employees and agents of TGH and its Extended Care Facility were designated as Doe Defendants 1-15, and were acting within the scope of their employment with TGH and its Extended Care Facility. Complaint p. 6, ¶ 15, Exhibit 1, R.3. On May 18, 2007, the second day of her admission, Mrs. Edwards was medicated with the following improper drugs ordered by Criswell, namely, (a) Digoxin (trade name Digitek), which drug is used for the treatment of arthritis and heart

In addition, Mr. Cluck set forth the following information in his Notice of Claim:

1. He was forwarding Mrs. Fountain the Notice of Claim in her capacity as Chancery Clerk for Tallahatchie County;

2. Mr. Cluck set forth the circumstances surrounding Mrs. Edwards from the time she was admitted to the Tallahatchie General Hospital and Extended Care Facility until June 9, 2007, and that she died of congestive heart failure. He further informed Mrs. Fountain that six (6) days prior to her death, it was discovered that Mrs. Edwards had been given the wrong medication by the nursing staff and she had taken this medication for nineteen (19) days. The nurse practitioner explained to the family after the death of Mrs. Edwards that two patients came in at the same time and Mrs. Edwards' prescription was transposed and that the medical personnel at TGH stated that a contributing cause of Mrs. Edwards' death was being on the wrong medication for nineteen (19) days and that her digoxin levels were critically high.

3. Mr. Cluck advised Mrs. Fountain in the Notice that Mrs. Edwards was alert and fully functioning when she entered the care of TGH and its extended care facility; not ill and did not suffer from any debilitating conditions; that in less than a month, she died resulting in the wrongful death beneficiaries having suffered the loss of a loved one, as well as the emotional anguish over her loss.

4. Mr. Cluck concluded the Notice of Claim letter by advising Mrs. Fountain that after the County had a chance to review the Notice to advise him of its response in writing. He further stated in his correspondence that if he did not receive a response from the County within ninety (90) days of its receipt of the letter, he would proceed forward with litigating the claim against Tallahatchie County.

Bobby J. Brunson, Jr. was designated as Chief Executive Officer of TGH at all times pertinent to this action. The attorneys for TGH filed a Stipulation of Facts on behalf of TGH and the other Defendants admitting that: (1) Bobby J. Brunson, Jr. received a copy of the Notice of Claim dated October 17, 2007, addressed to Anita Mullen Fountain (now "Greenwood"), Chancery Clerk of Tallahatchie County, from Mr. Cluck, serving the Notice of Claim to Tallahatchie County, Mississippi, on behalf of the Wrongful Death Beneficiaries of Myrtice Edwards; (2) Mr. Brunson received this letter via facsimile letter from the office of Tim Tackett of Tackett Insurance Agency,

the insurance agent who provided liability insurance services for Tallahatchie County, Mississippi, but did not provide liability insurance services for TGH; and (3) the Tackett Insurance Agency facsimile letter was served on Mr Brunson on November 27, 2007. Mr. Brunson received the M.C.A. § 11-46-11(1), Notice of Claim approximately one hundred eighty seven (187) days before the Edwards' Complaint was filed on June 2, 2008. In addition to the M.C.A. § 11-46-11(1) Notice of Claim served on Mr. Brunson, the Edwards attached to the Complaint filed on June 2, 2008, the required Certificate of Consultation pursuant to M.C.A. § 11-1-58(1)(a). Complaint, R. 3.

Documents produced in the deposition of Thomas U. Reynolds, Esquire, reflected that TGH's liability insurance carrier was acutely aware of the receipt of the Notice of Claims by Mr. Brunson. Reynolds' Deposition, p.14, ll3-12, Exhibit 3(b) and Exhibit Under Seal, P.R.E. 5.

Notwithstanding the claims of TGH in its initial Brief that "no Notice of Claim was ever served upon the CEO of TGH, Bobby J. Brunson, Jr. of any intent to sue TGH." The undisputed facts before this Court establish (1) that Brunson was served with the Notice of Claim on or about November 27, 2007; (2) Brunson, after receipt of the Notice of Claim, clearly knew, or should have known, that TGH, its Extended Care Facility and employees of TGH were designated as Tortfeasors in Myrtice Edwards' death; and (3) Brunson furnished TGH's liability insurance carrier with the Notice of Claim, which was sufficient enough to place the carrier on fear of the filing of a Complaint against its insured for the death of Myrtice Edwards.

Under these factual circumstances concerning the Notice of Claim in this case, it is beyond legitimate argument that the Chief Executive Office of TGH was served in a timely fashion before the filing of the Complaint on June 2, 2008, and was afforded ample time to meet the objectives of M.C.A. § 11-46-11. Under these circumstances, Judge Chamberlin's Order and Opinion denying TGH's Motion for Summary Judgment was in keeping with the laws of this State relative to the

service of Section 11-46-11(1), Notice of Claim.

STANDARD OF REVIEW

The Edwards agree that the Standard of Review in this case is correctly set forth in the Brief of the Appellants at page 7.

SUMMARY OF ARGUMENT

The Chief Executive Officer of TGH manually received the Section 11-46-11(1) Notice of Claim one hundred eighty seven (187) days before the Complaint was filed. The Notice contained all of the information required by Section 11-46-11(2) clearly identified TGH, its Extended Care Facility, Barbara Criswell, and all other persons who attempted to care for Ms. Edwards during her stay at TGH.

Under these facts, TGH and its companion tortfeasors were thoroughly advised of the claim being asserted against them and took no action whatsoever for a period of one hundred eighty seven (187) days.

The Edwards' complied with the dictates of *Miss. Code Ann.* § 11-46-11 as to the manual Notice of Claim to the tortfeasor entities, and therefore, the ruling of Judge Chamberlin denying TGH's Motion for Full Summary Judgment was correct. The trial judges Order should be sustained by this Court.

In the event this Court overturns the lower court's denial of TGH"s Motion for Summary Judgment, the filing of the Complaint tolled the one (1) year Statute of Limitations.

Mississippi Hospital Association lacks standing to file a Motion for Leave to File Amicus Curiae Brief.

ARGUMENT

A.

WHETHER THE IMMUNITY OF TALLAHATCHIE GENERAL HOSPITAL, ET AL WAS WAIVED BY SERVICE OF NOTICE OF CLAIM ON THE CHIEF EXECUTIVE OFFICER OF TALLAHATCHIE GENERAL HOSPITAL ONE HUNDRED EIGHTY SEVEN (187) DAYS BEFORE THE PLAINTIFFS' COMPLAINT WAS FILED?

Notwithstanding the redundant claims of TGH and Amicus Curiae that the Chief Executive Office of TGH was not served with a M.C.A. § 11-46-11(1) Notice of Claim setting forth an intent to sue Tallahatchie General Hospital and other named employees of the hospital, all of the evidence establishes that:

(1) Bobby J. Brunson, Jr., the Chief Executive Officer of TGH, received the Notice of Claim within thirteen (13) days of the date the Notice was sent to the Chancery Clerk of Tallahatchie County by the Plaintiffs;

(2) The Notice received by Brunson unequivocally contained:

(i) a short and plain statement of the facts upon which the claim was based;

(ii) the circumstances which brought about Mrs. Edward's death on June 9, 2007, while a patient in Tallahatchie General Hospital;

(iii) the time and place the injury occurred;

(iv) the names of all persons known to be involved;

(v) the amount of money damages sought; and

(vi) the residences of the persons making the claim.

(3) Brunson knew, or should have known, for one-hundred eighty seven (187) days after his receipt of the Notice of Claim that the Plaintiffs intended to sue Tallahatchie General Hospital and the other named employees of the hospital.

There can be no legitimate dispute that Bobby J. Brunson, Jr. received the Notice of Claim on, or about November 27, 2007. *See*, Stipulation of Tallahatchie General Hospital, R.E.21-22 and Deposition of Bobby J. Brunson, Jr. at pp. 10 & 11 P.R.E. 4. The Plaintiffs' suit was not filed until June 2, 2008, which was within the time limits set for the filing of tort claim actions against the entities set forth in M.C.A. § 11- 46-11(3).

The avowed purposed underlying M.C.A. § 11-46-11(1) was first addressed in *City of Jackson v. Lumpkin*, 697, So. 2d. 1176, 1181 (Miss. 1997), as follows:

> "[T]here are many valid reasons underscoring the legislative requirement of Notice to a governmental entity prior to filing suit."

The year following *Lumpkin,* the Court expanded on the "valid reasons", referred to in *Lumpkin* in the case of *Vordice, et al v. Kirk Fordice,* 711, So. 2d. 294, 896 (Miss. 1998) as follows:

> "Notice provisions encourages settlement of claims prior to entering litigation, therefore conserving valuable governmental resources. Further, Notice to the governmental entity encourages corrective actions when necessary, prior to litigation, therefore, benefitting public health and welfare."

Id.

The *Fordice* opinion on this point was shortly followed by the Supreme Court opinion in *Carr v. Town of Shubuta*, 733 So. 2d. 261, 263 (Miss. 1999), wherein the Court set forth again the purpose of M.C.A. § 11- 46-11(1), notice of claim requirements. There the Court held:

> However, such a requirement should not act as a bearer of allowing the State to defeat totally the purpose of the act itself. Admittedly the act is intended to limit the governments' liability for tortious conduct, just as the Worker's Compensation Act was intended to limit the exposure of Mississippi employers, but it is also intended to allow for the orderly administration of legitimate claims against governments for such tortious conduct, and like the Worker's Compensation Act, serves an exclusive remedy for such claims. As the Indiana Supreme Court stated in *Collier, supra.*

> The purpose of the notice statute being to advise the city of the accident so that it may promptly investigate the surrounding circumstances, we see no need to endorse a policy which renders the statute a trap for the unwary *where such purpose has in fact been satisfied. Collier v Prater*, 544 N.E. 2d. 497, 498 (Ind. 1989).

Without question, Brunson was served with a proper Notice of Claim in this case in ample time to satisfy the requirements and intent of M.C.A. § 11-46-11(1). He had the benefit of being served with a Notice of Claim which met all of the requirements of Section 11-46-11(1), and, as he testified, he did nothing but forward the Notice to the hospital's attorney.[4] Regardless, TGH's conduct by any measure did not comport well with the objective of M.C.A. § 11-46-11 goals.

In the end, TGH's actions operated so as to defeat totally the purpose of the Act itself. It is noteworthy that neither TGH nor its Amicus Curiae in their multitude of discussions addressed the fact that the Chief Executive Officer of TGH received a copy of the M.C.A. § 11-46-11(1) Notice of Claim, one-hundred eighty seven (187) days before the Complaint was filed and thereafter made no effort to comply with the statutory basis for the inclusion of the Notice of Claim, but rather acted as a breaker "to defeat totally the purpose of the act itself." Essentially, TGH's was playing a game of "gotcha". Injured Mississippians are entitled to more than that.

Under these circumstances, TGH did in the most devious way forfeit its sovereign immunity, thereby completely justifying the denial of the Defendants' Motion for Summary Judgment rendered by Judge Robert T. Chamberlin on March 5, 2009, wherein the Court determined

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[4] This conduct by Brunson makes one wonder that maybe TGH's liability insurance carrier did not react to the service of the Notice of Claim hoping that Mrs. Edwards' case would not be filed before June 3, 2009, the date when the one (1) year Statute of Limitations would have run.

based on the case law and the Court's interpretation of the statute that the Notice was properly given, and that TGH was not entitled to judgment as a matter of law regarding the issue of the Notice provisions of *Miss. Code. Ann.* § 11-46-11(1).

B.

WHETHER STRICT COMPLIANCE IS REQUIRED FOR THE SERVICE PROVISIONS OF M.C.A. § 11-46-11(1) WHEN GOVERNMENTAL ENTITY WAS SERVED NOTICE OF CLAIM NINETY (90) DAYS PRIOR TO THE FILING OF THE COMPLAINT REFLECTING AN INTENT TO FILE SUIT AGAINST THE ENTITY.

TGH and Amicus Curiae in arguing that the standard of strict compliance applies to the manual service of M.C.A. § 11-46-11(1), relies exclusively on the decision of the Supreme Court in *University Medical Center v. Easterling*, 928 So. 2d. 815 (Miss. 2006) and dissent by then Justice Lanoir Prather in *Reeves, ex rel. Rouse v. Randle*, 729 So. 2d. 1237 (Miss. 1998). TGH's reliance on *Easterling* and the *Reeves* dissent is misplaced. Even a cursory reading of *Easterling* does not support a conclusion that actual manual service of the required Notice of Claim is subject to strict compliance standards.

The *Easterling* Court had before it a factual situation where the Plaintiff failed to send Notice to the UMMC **before filing suit and failed to provide the appropriate claims within the notice as prescribed under Section 11-46-11(2)**. Under these circumstances, the Court ruled that these failures are subject to a strict compliance standard and the failure to abide by those standards require dismissal of the claim. The decision of the *Easterling* Court came nowhere near establishing a strict compliance standard to a situation applicable to the facts presented in the case *sub judice.*

The *Easterling* Court cited in support of its opinion, the cases of *Davis v. Hoss,* 869 So. 2d. 397 (Miss. 2004) and *Wright v. Quesnel,* 876 So. 2d. 362 (Miss. 2004) in support of its strict compliance holding as to the filing of a Complaint more than four (4) months before issuing notice. The *Easterling* Court clearly excluded from its ruling that strict compliance was required in connection with the **manual** service of the Notice of Claim. At page 817 of *Easterling*, the Court set the issues before it as follows:

> **WHETHER THE PLAINTIFF FAILED TO COMPLY WITH THE NINETY (90) DAY NOTICE REQUIREMENT WHEN SHE FILED HER COMPLAINT MORE THAN FOUR MONTHS BEFORE ISSUING NOTICE TO THE DEFENDANT;**
>
> **AND**
>
> **WHETHER THE PLAINTIFF FAILED TO SUBSTANTIALLY COMPLY WITH THE NOTICE PROVISIONS WHEN SHE FAILED TO INCLUDE HER MEDICAL MAL-PRACTICE AND WRONGFUL DEATH CLAIMS IN HER WRITTEN NOTICE.**

The Court addressed only the first issue concluding that Easterling failed to comply with the ninety (90) day Notice requirement when she filed suit on September 19, 2002, almost four months before giving notice. *Id.* at page 819. The Court then made "perfectly clear" that strict compliance was required insofar as the requirement that the statute prevented the filing of suit BEFORE the expiration of ninety (90) days after receipt of the Notice of Claim.

Judge Chamberlin in his Order denying TGH"s Motion for Summary Judgment clearly and correctly put to rest TGH's contention that *Easterling's* adoption of strict compliance to the service of Notice was not required in this case, citing *Powell v City of Pascagoula*, 752, So. 2d. 999 (Miss. 1999), ("service of Notice on the city clerk instead of the mayor or city manager was ***substantial***

compliance under the statute as related to the particular facts") and ("[T]his fulfilled the statutory purpose of giving the city an opportunity to investigate as well as permitting or encouraging amicable settlement"). *Id.* at 1004. Order R. 459.

Further, Judge Chamberlin noted that all cases decided by the Mississippi appellate courts post *Easterling* on the issue of M.C.A. § 11-46-11(1), specifically limited the requirement of strict compliance to the CONTENT of the ninety day notice. The trial court noted further that the subsequent cases dealt with situations where no notice was given or suit was filed within the ninety-days and that these cases were decided on issues other than who received the notice. *Id.* R. 459.

A cursory review of TGH's Brief on the issue of the basis of Judge Chamberlin's opinion established that the Judge had it exactly right. At page 22, of Brief of Appellants, TGH asserts that a failure to give Notice is fatal under the MTCA, citing *City of Jackson v. Lumpkin*, 697 So. 2d. 1179 (Miss. 1997), where the Plaintiff failed to submit **any Notice of Claim** and the Court held that that failure resulted in dismissal. In *Carter v. Dawson*, 701 So. 2d. 806 (Miss. 1997), the Notice was held insufficient in that the Plaintiff submitted a two sentence letter to the city's insurance adjustor. In *Little v. Mississippi Dept. of Human Resources*, 835 So. 2d. 9 (Miss. 2002), **no Notice** was filed and the Court held that it was fatal to the claim. In *Southern v. Mississippi State Hospital*, 853, So. 2d.1212 (Miss. 2003), the Plaintiff failed to comply with Notice of Claim requirements and the Court barred the Plaintiff from pursing claim against the State Hospital. In *Black v. City of Tupelo*, 853, So. 2d. 1221 (Miss. 2003), the *pro se* Plaintiff failed to send ANY Notice of Claim letter and was barred from pursuing a claim against the city. In *Montgomery v. Mississippi*, 498 F. Supp. 2d. 892 (S.D. Miss. 2007), the Court barred the Plaintiff from prosecuting the action because he failed to given Notice before filing suit.

These cases placed before this Court did not involve the undisputed facts in the case *sub judice* and not one of these cases are on all fours with the case *sub judice*.

No Mississippi case in the appellate courts have ever dismissed a case because of (i) when the Notice of Claim complied completely with the requirements of Section 11-46-11(2) as to the **content** of the Notice nor (ii) has the Appellate Court's who have addressed Section 11-46-11(1) required that the Notice must be filed ninety (90) days prior to the filing of the Complaint; when the Chief Executive Officer of the entity received the Notice of Claim letter more than ninety (90) days before the Complaint was filed and which contained within the Notice information required undered under Section 11-46-11(2). In *Powell v. City of Pascagoula*, 752, So. 2d. 999, 1005 (Miss. 1999), the Supreme Court without hesitation held that where the Plaintiff served Notice on the city clerk instead of the Mayor of Pascagoula such service constituted substantially compliance under the statute and therefore fulfilled the statutory purpose of giving the city an opportunity to investigate, as well as permitting or encouraging settlement. There the particular facts were that at the time of the service of Notice, Section 11-46-11(1) provided that service could only be had upon the mayor or city manager, but instead was served on the city clerk. On these facts, the trial court granted summary judgment on failure of the Plaintiff to serve the mayor. On appeal to this Court, the Court held that the service constituted substantial compliance, and remanded the case. The *Powell* decision has not been overruled or for that matter, criticized. Had the CEO of TGH not received the Notice of Claim within ninety (90) days before the filing of the Complaint it would present an entirely different outcome. That of course was not what happened. Everyone who touched the Notice of Claim, including the CEO, knew that the targets of the claim were TGH and the other Defendants and they had full knowledge of this for one hundred eighty seven (187) days. The Circuit Judge

faced with these facts rightfully concluded that justice would not be done by a dismissal of this claim, that TGH would suffer no prejudice and "that this constitutes substantial compliance under the statute and is the appropriate standard under *Powell* as relates to the person receiving the actual Notice". R.E. 60, p. 461.[5]

Further, the trial court noted that TGH did not assert that it was prejudiced. The reason it did not do so was that it, in fact and law, was not prejudiced. Consequently, strict compliance should not be required for the service provisions of M.C.A. § 11-46-11(1) when a governmental entity identified in the Notice that the Notice of Claim was served ninety (90) days prior to the filing of the Complaint reflecting an intent to file suit against the entity.

In the case of *Trailer Express, Inc. v. Gammill*, 403 So. 2d. 1292 (Miss. 1981), in a case involving service of process in Mississippi, on an interstate motor carrier of Indiana relied in dissent on the following Latin maximum:

FIAT JUSTITIA RUAT COELUM

Justice Smith dissent. *Id.* at 1304. The dissenting judges seeking to be helpful to those Mississippians who are not affluent in Latin - including this writer - concluded their dissent with a translation of the maximum, i.e. "*Let justice be done though the heavens fall.*" Although wrongfully plead by the dissenting judges in *Gammill*, the maximum speaks loud and clear to the issues in this case. Considering that the Edwards lost their mother because of negligence, probably gross negligence, when she was administered the incorrect medications which lead to her death at the

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[5] Opposing counsel attempts to counter the trial judge's conclusions by arguing that the MTCA does not contain a "no harm - no foul" provision to alleviate the Plaintiffs of the responsibility of following the law. Contrary to counsel's assertion, this Court, in *Powell*, clearly held that since the City of Pascagoula suffered no actual prejudice as a result of Powell's service on the mayor of the city.

hands of TGH, but TGH, notwithstanding the fact of the tragedy, seeks absolution by claiming that every "i" and "t" was not doted or crossed by the Edwards.

What's wrong with this scenario is that TGH did not present to the trial judge any evidence at all that it was somehow prejudiced due to the manner in which Mr. Brunson received the Notice of Claim. Nor, did TGH present in its filings with this Court any legitimate evidence of prejudice in this regard.

Suffice it to say, that the law and facts before this Court require that this Court "*Let justice be done though the heavens fall.*"

C.

IN THE EVENT THIS COURT RULES THAT THE NOTICE OF CLAIM SERVED ON THE CHIEF EXECUTIVE OFFICER OF TGH DID NOT CONSTITUTE SUFFICIENT NOTICE UNDER MISS. CODE ANN. § 11-46-11(1), WHETHER THE FILING OF THE COMPLAINT TOLLED THE ONE (1) YEAR STATUTE OF LIMITATIONS.

TGH included in the Motion for Summary Judgment a claim that the one year Statute of Limitations applicable to this case had run, therefore the Edwards' claim should be dismissed with prejudice, claiming that the Complaint was filed on the last day of the tolling of the statute. As in so much of the allegations in the Brief are concerned, TGH, intentionally or negligently, computed the Statute of Limitations from the date that the wrongdoers finally realized that Ms. Edwards had been receiving incorrect medications for nineteen (19) days. There is no dispute that Ms. Edwards died on June 9, 2007, therefore, the one (1) year Statute of Limitations, would have run on June 8, 2008. *See, Caves v. Yarbrough*, 991 So. 2d. 142 (holding "that MTCA claims do not begin to run until all of the elements of a tort exists, and the claimant knows or, in the exercise of reasonable

diligence, should know of both the injury and the act or omission which caused it) ." Id. ¶ 53.

On July 23, 2009, the Supreme Court of Mississippi in the case of *Price v. Clark,* 21 So. 3d. 509, ¶ 31 rendered an opinion holding that because Price failed to comply with the requisite notice requirements, dismissal was the proper remedy but then held that "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.* (emphasis ours)

The *Price* Court agreed with Price's position and further noted that the Complaint was properly filed and served within the one (1) year Statute of Limitations under MTCA. Here TGH has not made a claim that the Complaint filed by the Edwards on June 5, 2008, was improperly filed and served within the one (1) year Statute of Limitations.

The law is now clear that even if the claim served on Billy Joe Brunson, Jr., did not constitute sufficient notice under *Miss. Code. Ann.* § 11-46-11(1), the filing of the Complaint within the Statute of Limitations tolled the one (1) year Statute of Limitations. Consequently, in the event this Court rules that the manner of service of the Notice of Claim on Brunson did not constitute notice under Section 11-46-11(1), Section 11-46-11(3) provides that the filing of a proper Notice "shall serve to toll the Statute of Limitations...for one hundred twenty (120) days from the date the Chief Executive Officer or other statutorily designated official of an municipality, county, or other political subdivision receives the Notice of Claim, during which time no action may be maintained by the claimant unless the claimant has received a Notice of Denial of Claim" and "after the tolling period has expired, the claimant shall then have an additional ninety (90) days to file any action against the governmental entity served with proper claim Notice". *See, University of Mississippi Medical Center v. MaGee,* 999 So. 2d. 837, 841, ¶ 14.

TGH"s only argument presented to the Court against the *Price* opinion is that the Court was wrong and its decision should be set aside on the principle of *stare decisis*.[6] In the end, TGH has presented no viable law or argument in its attack on *Price,* but the proverbial "chicken little" chant. *Price v. Clark* is the law of this State and in the event this Court decides to dismiss the Complaint for failure to personally serve the CEO, such ruling is required to be without prejudice and the Statute of Limitations is tolled.

D.

MISSISSIPPI HOSPITAL ASSOCIATION LACKED STANDING TO FILE A MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF.

On December 28, 2009, Mississippi Hospital Association ("MHA") filed a Motion for Leave to file Brief of Amicus Curiae, accompanied with its Brief. The Motion for Leave to File the Brief did not comply with the mandatory provisions of *Mississippi Rules of Appellate Procedure*, 29 in two respects, namely:

1. It failed to file its Motion for Leave to File Amicus Curiae Brief within seven (7) days after the initial Brief of TGH pursuant to *Mississippi Rules of Appellate Procedure*, 29(b); and

2. It failed to demonstrate pursuant to Rule 29(a) the following requirements:

    (i) that it had an interest in some other case involving a similar question; or

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[6] It seems odd in deed that TGH has no argument when this Court turned a dissent into law requiring strict compliance and screams to high heaven when this Court handed down *Price v. Clark*. After all the *Price* Court, after rendering the majority opinion on July 23, 2009, revisited the opinion in order to make sure it was right before releasing it. Rehearing Denied on December 3, 2009.

(ii) counsel for the Appellant is inadequate or the initial Brief is insufficient; or

(iii) there are matters of fact or law that may otherwise escape the Court's attention; or

(iv) Amicus has substantial legitimate interest that will likely be affected by the outcome of the case and which interest will not be adequately protected by those already parties to the case.

MHA not only failed to demonstrate compliance with Rules 29(a) and (b), its attorney admitted such in his Motion filed with this Court after the Edwards timely responded to MHA's initial Motion. However, MHA totally failed to offer any excuse for its violation, except that its attorney "missed counted the days." Such an excuse does not rise to the defense of excusable neglect by any stretch of the imagination.

Consequently, the Brief of Amicus Curiae should be stricken from this case and not considered by this Court.[7]

[7] MHA in its Brief relies on the doctrine of strict compliance under *Miss. Code Ann.* § 11-46-11(1), but at the same time, prays to be relieved from the mandatory "shall" requirement of the timely filing of its Motion for Leave to File Brief of Amicus Curiae. *See, Weirner v. Meredith*, 943 So 2d. 692, 694 (holding that the term "shall" is mandatory)..

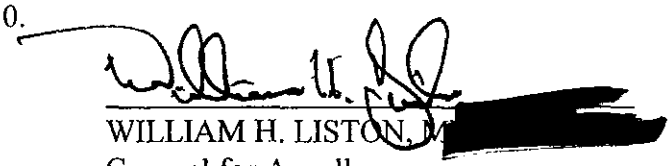
CONCLUSION

TGH starts with its Conclusion by saying that this matter involves a failure to communicate. The Edwards' strongly contend that this case involves a great deal more than a failure to communicate, namely, justice and what is right. Judge Chamberlin had it exactly right when he denied TGH's Motion for Summary Judgment because under the factual circumstances, TGH was not prejudiced in that it had one hundred eighty seven (187) days after its CEO received the Notice of Claim, which clearly advised him that TGH was the offending entity, all before the Complaint was filed on June 2, 2007.

There is an abundance of evidence establishing a valid inference that TGH and its liability insurance company intentionally "hid in the woods" in the vain hope that the Edwards' would let the Statute of Limitations run. Their ploy did not work and should not have worked.

Under these circumstances, the trial court's ruling was not in error and therefore, this Court should deny TGH's claim. Alternatively, in the event that this Court rules that the Notice of Claim served on TGH's Chief Executive Officer did not constitute sufficient notice under Miss. Code Ann. § 11-46-11(1), the filing of the Complaint tolled the one (1) year Statute of Limitations pursuant to Miss.Code Ann. 11-46-11(3), and the Court should dismiss the Edwards' case without prejudice and remand this action to the Circuit Court of the First Judicial District of Tallahatchie County Mississippi, for further action.

This the 30th day of March, A.D. 2010.



WILLIAM H. LISTON, M[redacted]
Counsel for Appellees

CERTIFICATE OF SERVICE

I, William H. Liston, certify that I have this day mailed via U.S. Postal Service a true and copy of the above and foregoing Brief of Appellees to:

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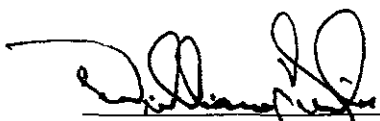
This the 30th day of March, 2010.



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