IN THE SUPREME COURT OF MISSISSIPPI
NO. 2009-IA-00495-SCT

TALLAHATCHIE GENERAL HOSPITAL,
TALLAHATCHIE GENERAL HOSPITAL
EXTENDED CARE FACILITY
AND BARBARA CRISWELL — APPELLANT

VS.

SUSAN EDWARDS HOWE AND
WAYNE EDWARDS, WRONGFUL
DEATH BENEFICIARIES OF
MYRTICE EDWARDS, DECEASED — APPELLEES

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Glaringly absent from Howe's brief is any acknowledgment of the fact that Howe's prior counsel testified, under oath, that his intent at the time of serving the Notice of Claim to Tallahatchie County was to give notice of an intent to sue Tallahatchie County. Justin Cluck, former counsel for Howe, testified that it was never his intention to serve notice upon TGH of any intent to sue TGH. Howe fails to mention in her brief that it was through no effort or action on her part or that of her counsel that TGH received a copy of the notice of an intent to bring a claim against Tallahatchie County. Instead, she asks this Court to ignore the mandates of the MTCA and to uphold the trial court's misapprehension of this Court's holding in University of Mississippi Medical Center v. Easterling, 928 So. 2d 815 (Miss. 2006). Contrary to Howe's assertions in her brief and this trial court's learned opinion, the law, and justice, does not support a finding that Howe complied with the mandatory requirements of the MTCA sufficient to waive TGH's sovereign immunity. Therefore, Howe's complaint is without legal force and effect, it cannot toll the applicable limitations period, and a dismissal with prejudice in TGH's favor is required under the law.

ARGUMENT

I. No Notice as Required Under the MTCA Was Given to TGH Prior to Suit Being Filed.

"This Court previously has rejected the argument that actual notice of claim and its details obviate the necessity of written notice under the MTCA." Arceo v. Tolliver, 19 So. 3d 67, 72 (¶19) (Miss. 2009) *citing* South Cent. Reg'l Med. Ctr. v. Guffy, 930 So. 2d 1252 (Miss. 2006) and Fairley v. George Co., 871 So. 2d 713 (Miss. 2004). In Guffy, this Court held that although Guffy had a conversation with the risk manager of hospital concerning her medical bills, her attorney requested copies of her medical records, and her attorney informed the hospital's insurance adjuster that Guffy intended to file suit against it, presuit notice must be first served upon the hospital in the manner prescribed by statute before any lawful action could be maintained against it. 930 So. 2d 1252. The

fact that the hospital in Guffy may have known that suit might be forthcoming was of no legal significance. Id. Guffy, nonetheless, was required to follow the mandatory requirements of the statute. Astoundingly, Howe argues in her brief that simply because TGH received a copy of the Notice of Claim served upon the County of an intent to the sue the County, that TGH received proper notice under the statute.

Howe asserts TGH was served "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)." This argument is blatantly false. TGH received a copy of a Notice of Claim directed to Tallahatchie County stating a clear intent to sue Tallahatchie County. Conspicuously, Howe omits any reference in her brief to the following language contained in her Notice of Claim:

> Please be advised that I represent the wrongful death beneficiaries of Myrtice Edwards in **their cause of action against the Tallahatchie County**. . . . I am sending you this notice of claim **in your capacity as Chancery Clerk of Tallahatchie County**. . . . If I do not receive [a response] **from the County . . . I will proceed forward with litigating this claim against Tallahatchie County.**

R. 17. R.E. 2. (emphasis added). Ostensibly, because Howe cannot deny this language, she simply choose to ignore it and to argue that TGH had some duty to act in response to its receipt of this Notice of Claim directed to another. The duty to act was Howe's, not TGH's.

In an attempt to confer some duty on TGH, Howe makes much mention of the fact that at the time the Notice of Claim was served upon Tallahatchie County, one hundred eighty two (182) days remained in the statutory period for serving notice. Thus, Howe argues that TGH had more than sufficient time to act in response to the Notice of Claim, which notice was directed to another and stated an intent to sue another. Curiously, however, Howe's argument regarding time to act conveniently ignores the fact that at any time during this same 182 day period, she could have served

a notice of claim upon TGH of an intent to sue TGH. This she failed to do. Rather than acknowledging her own failure to act, she attempts to place a burden upon TGH, which does not exist under the law, to have taken some affirmative action in response its chance receipt of a notice to bring suit against another entity. TGH was not compelled by law or otherwise to do anything in response to the notice of claim to Tallahatchie County.

Howe argues that by not responding to the Notice of Claim served upon the County, TGH acted in contravention to the intent of the statute and operated to defeat the purpose of the Act itself. This is simply untrue. TGH acknowledges that the purpose of the strict notice requirement is to eliminate confusion and uncertainty in order that these entities can act in a fiscally responsible manner with the public funds entrusted to them. Notice must be given to the CEO of the public hospital and to no other. The plaining reading of the Notice of Claim served herein was that suit would be brought against Tallahatchie County. While there may have been some chance an action would be maintained against TGH, this is exactly the type of uncertainty and confusion the strict notice requirement was designed to prevent — TGH should not be required to unnecessarily expend time and resources on the mere chance something may or may not happen in the future.

The burden to adhere to the requirements of the MTCA, specifically the notice provisions, was on Howe. In order to waive TGH's sovereign immunity and to have a right of action to proceed against TGH, Howe was compelled to first give notice to TGH's CEO of an intent to bring a claim against TGH, not some other party. §11-46-11(1), MTCA; Easterling, 928 So. 2d 815 (Miss. 2006); Brown v. Southwest Mississippi Reg'l Med Ctr., 989 So. 2d 933, 937 (Miss. 2008); Watts v. Lafayette Co. School Dst., 737 So. 2d 1019, 1021 (¶ 6) (Miss. 1998); Reaves ex rel Rouse v. Randall, 729 So. 2d 1237, 1240 (¶ 9) (Miss. 1998). It is disingenuous to assert that notice was properly given to TGH when the notice, on its face, and supported by the sworn testimony of its

author, was a notice of intent to sue another. R. 316-17; R.E. 31-32.

The sworn testimony of Howe's former counsel, Justin Cluck, contradicts Howe's contention that "[e]veryone who touched the Notice of Claim, including the CEO, knew that the targets of the claim were TGH and the other Defendants." Appellees Brief, p. 21. Mr. Cluck, the author of the Notice of Claim, testified under oath that it was never his intent to serve TGH of any notice of intent to sue TGH. R. 316-17; R.E. 31-32. Furthermore, the plain reading of the notice indicates the intent to sue Tallahatchie County. Had suit been filed against Tallahatchie County, TGH would certainly not be required to take any action, as Tallahatchie County is a separate and distinct entity.

Should this Court, as suggested by Howe, disregard the fact that the Notice of Claim clearly evidenced an intent to sue Tallahatchie County and the fact that the author of the Notice of Claim confirmed that intent, TGH's happenstance receipt of the Notice of Claim does not alleviate Howe from complying with the mandatory requirements of the statute. Arceo, 19 So. 3d at 72. No greater burden would be on TGH to act under such circumstances than if a complaint had been filed against it but summons was never issued and the complaint was never served. "[A]ctual knowledge by a defendant of the pendency of a suit against him is immaterial 'unless there has been a legal summons or a legal appearance.'" Brown v. Riley, 580 So. 2d 1234, 1237 (Miss. 1991) (*quoting* McCoy v. Watson, 154 Miss. 307, 315, 122 So. 368, 370 (1929)). "Jurisdiction is not obtained by a defendant's informally becoming aware that a suit has been filed against him." Sanghi v. Sanghi, 759 So. 2d 1250, 1257 (¶33) (Miss. App. 2000) (*citing* Mansour v. Charmax Indus., Inc., 680 So. 2d 852, 855 (Miss. 1996). Likewise, an MTCA defendant has no duty to act simply because it suspects that suit may be filed against it in the future. In addition, jurisdiction cannot be obtained over the MTCA defendant unless and until the mandatory requirements of the notice provisions of the MTCA are met. Without notice being served in the manner as prescribed by statute and

containing the information required therein, the sovereign immunity of the MTCA defendant remains in tact and there is no duty upon it to act.

II. The Holding of Easterling is not Limited to Premature Filings of Complaints.

The holding of Easterling applies equally to cases in which no notice is given, such as in this case, as well as to cases where notice is served after the complaint is filed or wherein a complaint is filed prior to the elapse of the 90-day waiting period. Easterling, 982 So. 2d 815, Brown, 989 So. 2d at 937. The requirement to serve notice to the proper entity is part and parcel of the 90-day notice requirement. It would be illogical to require strict compliance with the 90-day waiting period, but to allow the notice to be served upon an entirely different party. Without notice, the 90-day waiting period is not triggered. Thus, should a party a fail to receive notice, the fact that plaintiff did not wait 90-days prior to filing suit would be of no consequence, as notice, not the filing of suit is the mechanism through which sovereign immunity is waived.

Howe asserts that her failure to give notice to the proper party is merely a matter of semantics, not substance. The converse is true. As stated above, the Notice of Claim was a notice of intent to sue the County and was served upon the County. As the trial court properly recognized, the County and TGH are two separate and distinct entities. They are not interchangeable nor are they a substitute one for the other. As aptly pointed out in the Amicus Curiae Brief filed on behalf of the Mississippi Hospital Association and its public hospital members, to allow notice to be given to one entity but suit to be filed against another, would create a universe of ambiguity and uncertainty. It involves no stretch of the imagination that by allowing such constructive notice to be deemed proper under the statute that hours upon hours and untold funds would be expended litigating when and under what circumstances constructive notice will be deemed sufficient. Conversely, applying the statute as it has been written allows for continuity of rulings among the trial courts and gives direct

guidance to members of the bar of the specific requirements necessary to file suit against a public entity. Furthermore, applying the statute as written, provides consistency with other statutes.

As argued in Appellants' Brief, it is not only illogical but strains credulity to think that the strict mandates of subsection (1) should apply only to the first seven words of the sentence and not to the remaining fifteen words of the same sentence. No manner or method of statutory construction would allow for such an interpretation. Strict compliance with all of subsection (1) is required, regardless of why the plaintiff may have failed to provide notice. The trial court erred in overlooking the unambiguous language of the Notice of Claim and Howe's counsel's testimony that the Notice of Claim was purposely directed to Tallahatchie County as the intent was to file suit against Tallahatchie County, not TGH.

III. The MTCA Does Not Require a Showing of Prejudice in Order for a Public Hospital to Maintain Its Sovereign Immunity.

Conspicuously absent from the entire body of law which constitutes the MTCA is the word "prejudice." There is no requirement under the law that a Torts Claim Act entity must establish a showing of prejudice in order to avail itself of its lawful right of sovereign immunity. The trial court mistakenly applied such a requirement and held that TGH would not be prejudiced by allowing Howe to proceed under her unlawful complaint. The prejudice, not only to TGH, but to all public hospitals in the state is succinctly demonstrated in a reading of the Amicus Curiae Brief filed herein. Furthermore, as mentioned above, to allow the trial court's holding to stand, would effectively eviscerate the MTCA itself and would cause great uncertainty and ambiguity for litigants as well as the trial courts of this state. Certainly, such ominous repercussions of such an erroneous ruling are more than sufficient to constitute prejudice, although it is specifically denied that such a demonstration is required.

Contrary to the assertions in Howe's brief, TGH never "hid in the woods" and did not act in any "devious" or nefarious manner. TGH voluntarily entered a stipulation into the record of this case that its CEO had receive a copy of the notice of intent to sue Tallahatchie County, although the receipt thereof was by no effort or intent of Howe. TGH did not engage in any attempt to conceal such a fact but readily admitted the chance event which led to its receiving a copy of the Notice of Claim served upon Tallahatchie County. Thus, TGH finds incredulous Howe's assertions TGH was playing a game of "gotcha." Appellees Brief, p. 17. The clear, unambiguous, language of the Notice of Claim stated an intent to pursue an action against Tallahatchie County. TGH had no knowledge, information, or assurance, that any action would be taken against it. Furthermore, as stated above, TGH had no duty to act in response to a notice of claim served upon another entity.

IV. Because Howe Failed to Abide by the Requirements of §11-46-11(1), Her Claims Are Time Barred Under §11-46-11(3).

Because the sovereign immunity of TGH was not waived by the giving of notice prior to filing suit, Howe's complaint could not toll the limitations period contained in the Act and her complaint is time-barred. TGH agrees with the Amicus Curiae that the issue of tolling under the MTCA is one of substantive law, provided exclusively in § 11-46-11(3). Huss v. Gayden, 991 So. 2d 162 (Miss. 2008). The filing of a complaint in total noncompliance with §11-46-11(1) cannot toll the limitations period provided in subsection (3) of the statute. TGH also urges this Court to revisit and clarify its ruling in Price v. Clark, 21 So. 3d 509 (Miss. 2009), which allowed the simple filing of a complaint to be sufficient to toll the limitations period under the MTCA. As stated by the Amicus Curiae, the determination of when a civil action is commenced does fall squarely within the province of this Court. However, the issue of tolling is substantive, not procedural, and is therefore solely within the purview of the Legislature. Huss, 991 So. 2d at 165 (Miss. 2008) (issues of

limitations and tolling are substantive and "should not be confused with the separate procedural issue of whether the defense is raised, preserved or should be barred . . . "). Furthermore, the substantive provisions of subsection (3) would not conflict with prior rulings of this Court.

The MTCA provides, in pertinent part, that "[t]he limitations period provided herein shall control and shall be exclusive in all actions subject to and brought under the provisions of this chapter." §11-46-11(3). Under subsection (3), an action filed under the MTCA must be commenced within one year of the date of the actionable conduct, not after. Absent the filing of a notice of claim as required by subsection (1), the one year limitations period is not tolled. Because no notice was ever given to TGH pursuant to the requirements of subsection (1), there can be no tolling of the applicable limitations period. "This is the substantive law of this State." Amicus Brief, p. 10. As argued by the Amicus Curiae:

> [O]nce the issue of tolling is properly case as a substantive rule of law, then the holding in Price must be limited to dismissals for failure to comply with subsection (2) matters of form. Dismissals under subsection (1) are not dismissals for matters of form, but are dismissals for failure to comply with the substantive prerequisites to pursuing a claim under the MTCA. Therefore, the tolling rules provided in subsection (3) are controlling and exclusive.

Amicus Brief, p. 11.

Because Howe failed to give proper notice of claim, her complaint is without legal force or effect, and her claims are barred by the applicable limitations period.[1] No notice was ever received

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[1]A typographically error was contained in TGH's initial brief wherein it stated that the medications received by Mrs. Edwards was discontinued on June 2, 2007, rather than June 4, 2007. Nonetheless, no notice was received by TGH of any intent to file suit against it prior to June 4, 2008, therefore, the one year statutory period elapsed and thus, any survival claims, if any of Myrtice Howe are time-barred. Furthermore, as no notice was given prior to June 9, 2007, the wrongful death claims are likewise time barred. *See*, Saul v. South Central Reg'l Med. Ctr., 25 So. 3d 1037 (Miss. 2010).

prior to the expiration of the one year period contained in § 11-46-11(3). Thus, sovereign immunity was never waived, and no right of action existed under law for Howe to file suit against TGH. The limitations period has long passed. A dismissal with prejudice in favor of TGH is required under the law.

CONCLUSION

Howe cannot deny that at the time the notice of claim was served, the intent of the notice was to give notice to Tallahatchie County of an intent to sue Tallahatchie County. She blatantly fails to address the sworn testimony of her prior counsel attesting to this fact. Likewise, she gives no explanation for why no notice of service was ever served upon the CEO of TGH of any intent to sue TGH, although she readily admits that more than sufficient time was available to her do so had she chosen so to act. Instead, she asks this Court to ignore the law and to allow her to circumvent the provisions of the statute simply because TGH happened to receive a copy of the notice served upon Tallahatchie County.

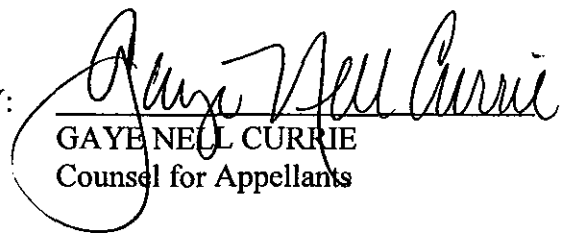
The trial court's erroneous decision effectively abrogates the notice requirements contained in the MTCA. The total noncompliance with subsection (1) of §11-46-11 should not be sanctioned. If allowed to stand, the trial court's decision would create uncertainty and ambiguity in the trial courts and for litigants across the state. The plain, unambiguous language of the statute was designed to avoid such events. Furthermore, the tolling provisions contained in subsection (3) of the statute are substantive, not procedural, and proper for legislative enactment. As the Price decision directly conflicts with this Court's decision in Huss v. Gayden, 991 So. 2d 162 (Miss. 2008), this Court should revisit Price, and in light of Huss, clarify that the tolling provisions under subsection (3) are controlling and exclusive, and that the filing of a complaint without first giving notice as required under subsection (1) cannot, and does not, toll the limitations period of the statute.

The trial court's ruling should be overturned and a dismissal with prejudice in favor of TGH should be entered herein.

Dated this the 15th day of April, 2010.

Respectfully submitted,

Tallahatchie General Hospital and
Barbara Criswell

BY: 
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CERTIFICATE OF SERVICE

I, GAYE NELL CURRIE, one of the attorneys, do hereby certify that I have this day caused to be mailed, by United States Mail, first-class, postage pre-paid, a true and correct copy of the foregoing pleading to all counsel of record as follows:

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Dated this the 15th day of April, 2010.

GAYE NELL CURRIE