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

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

VS.

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

BRIEF OF APPELLANTS

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VS.

SUSAN EDWARDS HOWE AND WAYNE EDWARDS, WRONGFUL DEATH BENEFICIARIES OF MYRTICE EDWARDS, DECEASED — 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. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Susan Edwards Howe - Plaintiff/Appellee
2. William Liston - Counsel for Plaintiff/Appellant;
3. Tallahatchie General Hospital - Defendant/Appellant
4. Bobby J. Brunson, Jr., Administrator of Tallahatchie General Hospital
5. Gaye Nell Currie, Wise Carter Child & Caraway, P.C. - Counsel for Defendant/Appellant;
6. Barbara Criswell, R.N., Defendant-Appellant

7. Honorable Robert P. Chamberlin, Circuit Court Judge

SO CERTIFIED this the 18th day of December, 2009.

Respectfully submitted,

Tallahatchie General Hospital and
Barbara Criswell

BY: _____
GAYE NELL CURRIE

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STATEMENT OF THE ISSUES

1. Whether the sovereign immunity of a political subdivision is waived where a party fails to give notice under M. C. A. §11-46-11(1) of an intent to sue that particular entity.

2. Whether substantial compliance is the standard with regard to the notice provision of M.C.A. §11-46-11(1), particularly that notice must be served upon the proper entity, and if so, if the fact that the chief executive officer of a public hospital by happenstance receives a copy of a notice of an intent to sue another party constitutes substantial compliance with the pre-suit notice provisions of M.C.A. §11-46-11(1).

3. When sovereign immunity has not been waived, whether the simple filing of a complaint can toll the statute of limitations.

STATEMENT OF THE CASE

A. Nature and Course of Proceedings

The issue before the Court is a matter of straightforward non-compliance with the provisions of the Mississippi Torts Claim Act; and therefore, a failure to obtain waiver of a state entity's sovereign immunity. Tallahatchie General Hospital is a public hospital which operates both an acute care facility and a nursing home facility on its premises, and is owned by the County of Tallahatchie, State of Mississippi. R. 35-36; R. 115-116. As such it is a body politic of the State of Mississippi. The law of the State of Mississippi is that the "State" and it's "political subdivisions" "have never been and shall never be liable, and have always been and will always be immune from suit at law or in equity on account of any wrongful or tortious act or omission." §11-46-3, Miss. Code Ann. (Rev. 2009). Under the law, no right of action can lawfully be instituted against the State or its political subdivisions unless and until certain enumerated prerequisites are met. Those requirements are set out in the body of law commonly known as the Mississippi Torts Claim Act. §11-46-1, *et seq.*, Miss. Code Ann. (Rev. 2009) ("MTCA"). Specifically, the MTCA requires that before a suit can be lawfully instituted, the potential plaintiff must file a notice of claim the chief executive officer ("CEO") of the State entity. § 11-46-11(1), MTCA. No suit may be brought until at least ninety (90) days after the notice of claim is served. Id. But, in any event, no right of action exists at law against the State entity unless such notice of claim is properly served. Id. Otherwise, the immunity of the State entity remains in tact. § 11-46-3, MTCA. In this case, no such notice was or has ever been served upon TGH and therefore, its statutory immunity remains vested and no lawful action can be maintained against it. R. 16-19, 36, 105-106, 313, 316, 317.

Susan Howe, daughter of Myrtice Edwards, on June 2, 2008, filed the complaint in this matter attempting to assert a wrongful death action on behalf of herself and the wrongful death

beneficiaries of Ms. Myrtice Edwards. R. 3-15. Named as defendants in the unlawful complaint were Tallahatchie General Hospital, Tallahatchie Extended Care Facility, and Barbara Criswell, FNP, an employee of Tallahatchie General Hospital. Id. (hereinafter referred to cumulatively as "TGH"). However, it is undisputed that prior to suit being filed, no notice of claim was served upon the chief administrative officer ("CEO") of TGH of an intent to sue TGH, as is required by §11-46-11(1), MTCA. R. 16-19, 36, 105-106, 313, 316, 317. Therefore, on July 30, 2008, TGH filed its Motion to Dismiss based upon the its sovereign immunity and Howe's failure to obtain waiver of such immunity. R. 35-36; 58-68. 11-46-11(1), MTCA.[1] In addition, TGH asserted that a dismissal with prejudice was in order as the limitations period contained in the MTCA had then passed. Id.

After filing the Motion to Dismiss, counsel for Howe made an informal request which was agreed to by TGH to be allowed to conduct limited discovery prior to the motion being heard.[2] Counsel for Howe noticed, and subsequently deposed, Ms. Anita Fountain Green, Chancery Clerk of Tallahatchie County, Mississippi; Mr. Tommy Reynolds, Attorney for the Board of Supervisors of Tallahatchie County, and Mr. Bobby J. Brunson, CEO of Tallahatchie General Hospital. In addition, prior to the hearing on the pending motion to dismiss, TGH entered into the record a Stipulation of Fact acknowledging that Bobby J. Brunson, CEO of TGH, had received a copy of a notice of claim served upon Ms. Green and Mr. Reynolds, indicating an intent to sue Tallahatchie **County**, Mississippi. R. 105-106.

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[1]The Motion to Dismiss was converted to a Motion for Summary Judgment since matters outside the pleading were submitted for consideration.

[2]Rather than requiring counsel for Howe to file a formal motion under Rule 56(f), Miss. R. Civ. P., the parties agreed to allow limited discovery to be conducted solely for the purposes of responding to the pending motion to dismiss.

On January 30, 2009, a hearing was held on TGH's Motion to Dismiss. T. 1-43. The trial court having considered the evidence and arguments of counsel entered its ruling on March 5, 2009. R. 459-462, R. E. 60-61. The trial court made the following findings of fact: (1) Plaintiffs' served a notice of claim of an intent to sue Tallahatchie **County** upon the Chancery Clerk of Tallahatchie County on October 17, 2007; (2) Plaintiffs never served a notice of claim of an intent to sue TGH upon its CEO, Bobby J. Brunson, prior to filing their lawsuit naming TGH as a defendant; (3) Bobby J. Brunson inadvertently received a copy of the notice of intent to sue Tallahatchie **County** on or about November 27 via a third party; and (4) TGH is a separate governmental entity from Tallahatchie County, Mississippi. R. 459-462, R. E.60-61. In addition, the court found that "because [TGH] timely received a copy of the notice that was sent to the County and [because] they have presented no evidence that they will be in any manner prejudiced, that this constitutes substantial compliance under the statute." Id. Therefore, the trial court erroneously denied the Motion to Dismiss. R. 462. Based upon its sovereign immunity and the law of the State, TGH appeals the trial court's ruling and seeks to have this Court overturn the erroneous ruling and render a dismissal with prejudice in favor of TGH as to all claims against it in this matter.

B. Statement of the Facts

Howe failed to comply with the presuit notice requirements of the MTCA, and therefore, failed to obtain waiver of TGH's sovereign immunity. Without waiver of its sovereign immunity, TGH cannot be sued. § 11-46-1, *et seq*. MTCA. No legal basis exists for such an action. Id. The only manner in which sovereign immunity can be waived, is through the requirements contained in the MTCA. Id. Significantly, a complete and total failure on the part of a plaintiff to abide by the presuit notification requirements of the MTCA is not the same as an attempt at compliance resulting in what this Court has historically referred to as "substantial compliance." As no waiver of the

immunity was obtained, the complaint filed herein is without legal effect and is null and void. Therefore, there is no lawful action before this Court.

The facts which lead to the filing of the unlawful complaint center around Myrtice Edwards, age 88, who was admitted to the nursing home facility at TGH on May 16, 2007. R. 8. Ms. Edwards had a past medical history significant for a previous stroke, gastreoesophageal reflux, hypertension, rheumatoid arthritis, osteoarthritis, coronary artery disease, congestive heart failure and gait instability. R. 9. According to Plaintiffs, during the time period of May 18, 2007 through June 2, 2007, while Ms. Edwards as a patient in the nursing home facility, she received two medications which were not prescribed for her, being Digoxin and Lisonopril, both of which are medications of first choice for patients suffering from congestive heart failure, as was Ms. Edwards. R. 10. Nonetheless, as these medications were not prescribed upon her admittance, they were discontinued and not given to Ms. Edwards after June 2, 2007. Ms. Edwards was admitted to the TGH from the nursing home to adjust her potassium levels, a common side effect of the drug Digoxin. R. 10. These conditions resolved and Ms. Edwards returned to her baseline condition. Unfortunately, however, Ms. Edwards developed an infection which was believed to be the result of a bowel obstruction and possible perforation, unrelated to the medications previously given. Ms. Edwards' physician recommended that Ms. Edwards be transferred to a facility which could provide a higher level of care to treat this possible perforation. However, Ms. Edwards' family refused to agree to such a transfer. Ms. Edwards thereafter died on June 9, 2007. R. 11. Plaintiff claims the administration of medications used to treat congestive heart failure caused or contributed to Ms. Edwards death. R. 3-15.

On October 17, 2007, a notice of claim addressed to Anita Mullen Fountain (sic) Greenwood, Chancery Clerk of Tallahatchie County, and to Mr. Thomas Reynolds, Tallahatchie County Attorney,

was sent by Justin Cluck, then attorney for the heirs of Ms. Edwards, giving notice of intent to file an action against the **County** of Tallahatchie, Mississippi.[3] R. 16-19. Specifically, the letter stated the following:

> 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.

Ms. Greenwood, upon receipt of the notice of claim to sue Tallahatchie County, faxed a copy of the notice of claim to Mr. Reynolds, attorney for the County Board of Supervisors, and to Mr. Tim Tackett, the local insurance agent who handled the County's insurance needs. R. 183. Ms. Fountain did not send the letter to TGH. Id. On October 23, 2007, Zurich North America, the insurer of Tallahatchie County, sent notice to the Tallahatchie County Board of Supervisors that the claim as stated in the October 17 notice of claim letter was being denied under its policy. R. 365-366. Copied on that letter were Mr. Reynolds and Mr. Tackett. Id.

On or about November 27, 2007, Tim Tackett faxed a copy of the notice of claim served upon Tallahatchie County to Mr. Joey Brunson, CEO of TGH. R. 105-106. R. E. 21-22. The facsimile transaction did not have any accompanying letter or communication by way of explanation for why the notice of claim was being faxed to Mr. Brunson. Facially, the notice of claim, however, states a clear intention on the part of Howe to sue the **County** of Tallahatchie, not TGH. R. 17, R.

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[3]The fact that the MTCA does not allow service of a notice of claim to be effected by serving the attorney for a County Board of Supervisors is not at issue in this appeal. Howe did not sue the County, although her notice of intent to sue was directed to the County and clearly stated upon its face her intent to sue the County.

E. 2.

It is undisputed that to this date, no notice of claim was ever served upon the CEO of TGH, Bobby J. Brunson, of any intent to sue TGH. Justin Cluck, the attorney who formerly represented Ms. Howe and under whose signature the notice of claim letter was served, stated emphatically under oath that it was his intent to sue the **County** of Tallahatchie and not TGH. R. 316-317. R.E. 31-32. Mr. Cluck testified it was never his intent to serve notice upon Mr. Brunson as CEO of TGH. Id. However, on June 2, 2008, a complaint was filed naming TGH. R. 3-15.

Contrary to the trial court's interpretation and ruling, this is not matter of either strict or substantial compliance, but is a matter of non-compliance. Because no notice of claim was ever served upon TGH prior to suit being filed, and therefore, its sovereign immunity had never been waived, TGH promptly moved to dismiss Howe's suit as being unlawful and time barred. § 11-46-11(1), MTCA. A hearing was held on TGH's Motion to Dismiss on January 30, 2009. T. 1-43. The trial court, after having heard oral arguments of counsel and having considered the evidence in this matter, erroneously held that while no notice of claim was served, nor was it ever intended to be served, on TGH, since TGH nonetheless received a copy of the notice of claim evidencing an intent to sue the County, and because TGH had not demonstrated any prejudice by its not being properly served with a notice of claim, dismissal of the suit was not warranted. R. 459-462. R. E. 60-61. Unfortunately, the trial court's ruling is contrary to the law, as a complete failure to comply cannot be the same as substantial compliance, and it overlooks the principle of sovereign immunity. Furthermore, the trial court erroneously applied a standard of prejudice which is not an element of sovereign immunity. As the sovereign immunity of TGH was never waived, no lawful action can be maintained against it. § 11-46-11(1), MTCA. Thus, the trial court should have dismissed the unlawful complaint. Furthermore, because the limitations period contained in § 11-46-11(3), had

passed, the dismissal should have been with prejudice. Thus, this Court should reverse the ruling of the trial court and render a dismissal with prejudice in favor of TGH.

STANDARD OF REVIEW

The standard of review applicable to a motion to dismiss is well established. Because a motion to dismiss involves matters of law, the Court's review is *de novo*. Black v. City of Tupelo, 852 So. 2d 1221 (Miss. 2003). If a trial judge is confronted with a motion to dismiss and considers matters outside the pleadings en route to a ruling on that motion, the motion shall be treated as a Rule 56 motion. This Court employs a *de novo* standard of review under Rule 56, and such motion should be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Brown v. Credit Ctr., Inc., 444 So.2d 358, 362-65 (Miss. 1983).

SUMMARY OF ARGUMENT

This is not a case of whether Howe substantially complied with the notice requirements of the MTCA, but is a straight-forward, admitted case of non-compliance with the statutory notice requirements. Howe, to date, has never served a notice of claim on the CEO of TGH of an intent to sue TGH. This Court should not allow Howe, or any plaintiff, to blatantly ignore the law of this state and take advantage of a fortuitous event to prosecute an unlawful claim simply because a complaint was filed. Howe served her notice of intent to sue Tallahatchie **County** upon Tallahatchie **County**. The fact that through no effort or action of Howe this notice inadvertently made its way into the hands of the CEO of TGH cannot, and does not, meet the requirements under the law to waive TGH's sovereign immunity. Thus, the unlawful complaint did not, and could not, "duly commence" an action against TGH, and the limitations period applicable to a claim against TGH was not, and

could not, be tolled.

The sovereign immunity of the State and its political subdivisions has a long and extensive history. The Legislature in adopting the MTCA codified the doctrine of sovereign immunity as part of the substantive law of this state. Under, the sovereign immunity of the State and its political subdivisions remains intact, unless and until, waiver is accomplished by the means set forth in MTCA. Specifically, before waiver of immunity can be accomplished, a plaintiff must, at least 90-days before bringing such action, serve a notice of claim upon the chief executive officer of the governmental entity. §11-46-11(1), MTCA. Otherwise, no action may be maintained against that governmental entity, the entity's immunity from suit remains vested, and there is no lawful right of action before the court.

With regard to the notice provisions of the MTCA, as recognized by this Court, there is a stark difference between non-compliance with the provisions of the MTCA and what has come to be referred to as "substantial compliance."[4] "Substantial compliance is not the same as, nor a substitute for, non-compliance." Carr v. Town of Shubuta, 733 So.2d 261, 265 (Miss. 1999) (overruled on other grounds by Stuart v. University of Mississippi Medical Center, __ So.3d ___, 2009 WL 2563466 (Miss. 2009)). Nonetheless, the pre-suit notification requirements of §11-46-11(1) are mandatory and strict compliance therewith is required. University of Mississippi Medical Center v. Easterling, 928 So.2d 815 (Miss. 2006). Dismissal is the appropriate remedy for a failure to comply with the notice requirement in §11-46-11(1) . Price v. Clark, ___ So.3d ___, 2009 WL

[4]TGH agrees with this Court's opinion in South Cent. Reg'l Med Ctr. v. Guffy, that "substantial compliance" is a misnomer - either there is compliance or there is not. 930 So.2d 1252 (Miss. 2006). However, it is recognized that substantial compliance is the standard which is applied to Section (2) of § 11-46-11, but not, to Section (1) of the statute. Easterling, *supra*; Lee v. Memorial Hosp. at Gulfport, 999 So.2d 1263 (Miss. 2008).

2183271 ¶18 (Miss. 2009). If no notice is given, the sovereign immunity of the state entity remains intact. See, Parker v. Harrison Co. Bd of Supervisors, 987 So.2d 435, 441 (Miss. 2008); Long v. Mem'l Hospital at Gulfport, 969 So.2d. 35, 41 (Miss. 2007); South Cent. Reg'l Med. Ctr. v. Gulfport, 930 So.2d 1252, 1259 (Miss. 2006). However, after notice is served pursuant to § 11-46-11(1), the court may determine if a potential plaintiff has substantially complied with the provisions of § 11-46-11(2), Guffy, 930 So.2d at 1258 (¶20).

Ostensibly because waiver has already been accomplished by the service of the notice to the correct party, this Court created the judicial standard of "substantial compliance." This Court in Guffy, explained the concept of "substantial compliance" as follows:

> In order to comply with this requirement, the notice need not disclose every single fact, figure and detail, but rather the substantial details, in order to comply with the requirements of Miss. Code Ann. §11-46-11(**2**). However, where some information in each of the seven required categories is provided, this Court must determine whether the information is "substantial" enough to be in compliance with the statute. If it is, the result is "compliance," not "substantial compliance" with the requirements under Miss. Code Ann. §11-46-11(**2**).

930 So.2d at 1258 (¶20)(emphasis added). Thus, compliance is required, but the Court has the latitude to determine whether the information contained in the notice is of such a substantial nature to meet the requirements of the statute, despite the fact that every detail about the claim may not have been divulged. Id. This interpretation is reasonable and is fact-determinative. However, it is not the law, nor has it ever been, that a party can fail to give notice and nonetheless, sovereign immunity is waived.[5]

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[5]The recent holdings of this Court that the defense of sovereign immunity may be waived should the party entitled to such defense not raise it in a timely manner but proceeds with litigation are not applicable to this appeal. The motion to dismiss was timely filed after the complaint and was promptly pursued. As there is no issue herein of waiver for failure to raise and pursue this defense, this line of case law will not

In this case, the trial court incorrectly relied upon the holding of Powell v. City of Pascagoula, 752 So.2d 999 (Miss. 1999), in ruling (1) that substantial compliance is the standard for pre-suit notification under § 11-46-11(1), other than with regard to the 90 day waiting period; and (2) that Howe, by serving a notice of claim to Tallahatchie **County** of her intent to sue the **County**, but which by random chance found its way to the CEO of TGH, constituted substantial compliance with the requirements of §11-46-11(1), MTCA. While it is denied that substantial compliance is the appropriate standard to be applied, Howe failed even to meet that liberal standard. No notice of service of any intent to sue TGH was ever served on any party. Likewise, the notice of service which was served on Tallahatchie County was a notice of an intent to bring an action against an entirely different entity from TGH, the **County**. R. 16-19; R. E. 1-4. Furthermore, while the CEO of TGH did receive a copy of the notice of claim served upon Tallahatchie County, this fortuitous receipt of the notice of intent to sue the County occurred as the result of no action, effort or intent, whatsoever of Howe. In fact, Howe's counsel testified it was never his intent to serve a notice of claim upon TGH. R. 316-317, R. E. 31-32. Therefore, Howe did not substantially comply with the requirements of §11-46-11(1), MCTA. In any event, as this Court has previously held, "substantial compliance is not the same as, nor a substitute for, non-compliance." Carr, 733 So.2d at 265.

Because Howe did not comply with the presuit requirements of the statute, the immunity status of TGH remained vested and suit against it was prohibited by law. Thus, Howe's complaint was, and is, a nullity, without any legal force or effect. Where no right of action exists under the law, the simple filing of a complaint cannot create one. Furthermore, an unlawful complaint cannot, and did not, toll the applicable limitations periods therefore a dismissal with prejudice is appropriate

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be discussed.

herein. Therefore, the trial court's order should be overturned and a dismissal with prejudice in favor of TGH should be rendered.

ARGUMENT

I. THE SOVEREIGN IMMUNITY OF TALLAHATCHIE GENERAL HOSPITAL WAS NEVER WAIVED AS NO NOTICE WAS SERVED ON IT PRIOR TO SUIT BEING FILED.

It is an undisputed fact that TGH never received notice from anyone of an intent to bring an action against it before Howe filed her complaint. It is likewise undisputed that the only notice of claim served was a notice to the County of Tallahatchie of an intent to sue the County. Therefore, this is a straight-forward matter of non-compliance with the presuit notice requirements of the MTCA. Despite this fact, Howe filed her complaint with no basis in law compelling TGH to file its motion to dismiss. Applying the wrong standard applicable under the law, the trial court denied the motion on the basis there had been no demonstration of prejudice, a standard which is not contained in the MTCA. Because TGH's sovereign immunity was never waived, because Howe did not comply with the requirements of the MTCA, because no action against TGH could be "duly commenced" and because the statute of limitations cannot be tolled by an unlawful complaint, the motion to dismiss should have been granted and a dismissal with prejudice in favor of TGH should have been entered.

A. Unless Notice of Claim is Given, the Immunity of the Sovereign Remains in Tact.

"There is no fundamental right to bring suit against the state of Mississippi or a political subdivision of Mississippi." Vortice v. Fordice, 711 So.2d 894, 895, (Miss. 1998), *citing* Wells v. Panola County Bd. of Educ., 645 So.2d 883, 893 (Miss. 1994). There is no property interest in the

right to sue a governmental entity. See, Brown v. Southwest Mississippi Reg'l Med. Ctr., 989 So.2d 933, 937 (Miss. 2008) r'hrg denied, cert. denied, 993 So.2d 832. The Mississippi Legislature has proclaimed:

> [A]s a matter of public policy . . .[it] does hereby declare, provide, enact, reenact that the "state" and its "political subdivisions," as such terms are defined in Section 11-46-11, **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 on account of any wrongful or tortious act or omission or breach of implied term or condition of any warranty or contract. . . .

§ 11-46-3(1), MTCA (emphasis added). The Legislature in stating its intent went further to say, "[t]he immunity of the state and its political subdivisions recognized and reenacted herein **is and always has been the law in this state**." § 11-46-3(2), MTCA (emphasis added.). As stated by this Court:

> The basic principle of sovereign immunity is that the "king can do no wrong." Consequently, the state is free from any liabilities unless it creates an exception. These exceptions come in the form of tort claims acts.

Muhundro v. Alcorn County, 675 So.2d 848, 851-52 (Miss. 1996).

Thus, by enactment of the MTCA, the Mississippi Legislature elected to waive sovereign immunity **if, and only if** certain limited requirements are met. Within its provisions, the legislation includes a very narrow and limited set of circumstances under which the State waives its immunity and may be sued. Unless those procedural requirements are first met, no lawful action may be maintained.[6] Watts v. Lafayette Co. School Dst., 737 So.2d 1019, 1021 (¶6)(Miss. 1998)(holding

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[6]Specifically, the Legislature set out certain conditions, which only after they had been met, could the state or its political subdivisions be sued. First, at least 90 days before filing any action, notice must be given to the chief executive officer of the governmental entity. § 11-46-11(1). Second, the statute requires that such notice be delivered in a certain manner and must contain specific information. § 11-46-11(2). Furthermore, immunity shall only be waived if the foregoing requirements are completed within the specified

before a lawsuit **may be properly filed**, the claimant must first serve the governmental entity with a notice of claim).

The Legislature was clear to provide that:

> The remedy provided by this chapter against a governmental entity or its employee **is exclusive of** any other civil action or civil proceeding by reason of the same subject matter against the governmental entity or its employee or the estate of the employee for the act or omission which gave rise to the claim or suit; and any claim made or suit filed against a governmental entity or its employee to recover damages for any injury for which immunity has been waived under this chapter **shall be brought only under the provisions of this chapter, notwithstanding the provisions of any other law to the contrary.**

§ 11-46-7 (emphasis added). Thus, "[a] letter of notice to the chief executive officer of a governmental entity is the only means the legislature prescribed through which sovereign immunity may be reached." Reaves ex rel Rouse v. Randall, 729 So. 2d 1237, 1240 (¶9) (Miss. 1998).[7]

It is undisputed in this matter that Howe utterly failed to comply with the requirements of the MTCA in that she did not, and has not to this date, ever served a notice of claim of an intent to sue TGH on the CEO of TGH. The only notice of claim which was served on Howe's behalf was to the County of Tallahatchie of an intent to sue the **County** of Tallahatchie. R. 16-19 ; R.E. 1-4. On October 17, 2007, a notice of claim addressed to Anita Mullen Fountain (sic) Greenwood, Chancery Clerk of Tallahatchie County, and to Mr. Thomas Reynolds, Tallahatchie County Attorney, was sent by Justin Cluck, then attorney for the heirs of Ms. Edwards, giving notice of intent to file an action

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time period, one year next after the date of the tortious wrongful, or otherwise actionable conduct. §§ 11-46-11(2) & (3). In addition, the MTCA (1) specifies where such suits must be maintained, (2) limits the recovery in suits to specified amounts, (3) declares that cases would only be heard by the bench, not a jury; (4) prohibits recovery of punitive damages; and (5) specifies that there can be but one recovery against the state no matter how many state entities are deemed to be liable. § 11-46-1, *et seq.*

[7]It is important to note that while Reaves re-instituted the substantial compliance standard it nonetheless continued what has always been the law, that without notice there is no right of action under the law against a state entity.

against the **County** of Tallahatchie, Mississippi.[8] Id. Specifically, the letter stated the following:

> 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.

A putative plaintiff seeking redress under the MTCA must first comply with the requirements of the MTCA, specifically the presuit notice provisions, or otherwise, no right of action exists to pursue a claim against a state entity. *See* Parker, 987 So.2d at 441; Long, 969 So.2d at 41 ('[t]he [MTCA] gives a governmental entity defendant ninety days from the filing of a notice of claim to consider the claim *before a lawsuit can be maintained.*") (emphasis added); Guffy, 930 So. 2d at 1259 ("[t]he MTCA specifically requires the plaintiff to wait ninety days after providing notice *before maintaining an action* against a governmental entity. . . .) (emphasis added). Thus, if no notice of claim is served, immunity remains vested and there is no right of action under the law. Therefore, no lawsuit can be "duly commenced" under the law against a state entity whose immunity remains intact.

Because no notice of claim was served upon TGH, its immunity has not been waived and no action may be maintained against it. Because Howe did not comply with the statutory requirements, a dismissal of her complaint is required.

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[8]The fact that the MTCA does not allow service of a notice of claim to be effected by serving the attorney for a County Board of Supervisors is not at issue in this appeal. Howe did not sue the County, although her notice of intent to sue was directed to the County and clearly stated upon its face her intent to sue the County.

B. Strict Compliance is Required Under § 11-46-1(1).

Howe does not disputed the fact that she never served a notice of claim upon the CEO of TGH of any intent to pursue legal action against it.[9] Rather, it is her contention that because she served notice upon a separate state entity of an intent to sue that particular entity, but which notice inadvertently fell into the hands of the CEO of TGH, that she substantially complied with the requirements of the MTCA. The trial court applying the wrong standard, the standard of substantial compliance, unfortunately held Howe had indeed meet the requirements of the MTCA However, strict compliance, not substantial compliance, is the appropriate standard under the law with regard to Subsection (1) of §11-46-11. University of Mississippi Medical Center v. Easterling, 928 So.2d 815 (Miss. 2006); Brown, 989 So.2d 933.

The presuit notification requirements of §11-46-11(1) are mandatory and strict compliance therewith is required. Easterling, 928 So.2d 815. In Easterling, this Court made clear that the notice requirement under § 11-46-11(1) is a "hard-edged, mandatory rule which the Court [will] strictly enforce." 928 So.2d at 820 (citations omitted.). In making its determination, the Easterling court examined the clear language of the statute which reads:

> 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 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.** Service of notice of claim may be made in the following manner: If the governmental entity is a county, then upon the chancery clerk of the

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[9]Howe argued at the hearing on the motion to dismiss that the statute allows for service upon the Chancery Clerk **or** the CEO of TGH. This argument was rejected by the trial court who entered a ruling acknowledging that the CEO of TGH was the only person upon whom effective notice could be made. R. 461 R. E. 60.

> county sued; if the governmental entity is a municipality, the upon the city clerk. If the governmental entity to be sued is a state entity as defined in Section 11-46-1(j), service of notice of claim shall be had only upon that entity's chief executive officer. . . .

§ 11-46-11(1), MTCA. (emphasis added.). Thus, provided that a notice of claim is served upon the CEO of the government entity 90 days in advance of any filing, a potential plaintiff may then, and only then, proceed in an action at law against the state entity. Id. Reaves, 729 So.2d at 1240. Not only must the notice of claim be served 90 days prior to filing suit but it must also be served upon the proper governmental official, in this case the chief executive officer of the governmental entity. Id.

In misconstruing the appropriate standard to be applied, the trial court relied upon its

> assum[ption] that if the Supreme Court in **Easterling** had meant to overrule **Powell** as to the requirement of substantial compliance in regard to whom the notice is sent, that the Supreme Court would have specifically overruled **Powell** or alternatively, noted in the **Easterling** decision that strict compliance was the law as to M.C.A. 11-46-11(1) rather than specifically noting it applied to the 90 day requirement contained in M.C.A. 11-46-11(1).

R. 461; R. E. 60. (emphasis in original). Such assumption is misplaced.[10] Easterling's holding applies equally to cases such as here, in which no notice is served, notice is served after the complaint is filed, or the complaint is filed sooner than 90 days after notice is served. Brown, 989 So.2d at 937. Powell not only does not stand for the position that substantial compliance is the standard applicable to § 11-46-11(1) of the MTCA, but also its facts are clearly distinguishable from those in the case at bar.

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[10]The trial court reasoned that since this Court did not specifically overrule Powell after its decision in Easterling that Powell must still be the law. However, it should be noted that although this Court may not reference a case by name, if the principle of law upon which a prior case stands is overturned, that case is overturned as well.

Powell served notice on the city clerk of an intent to bring an action against the City, after making inquiring of the City Attorney as to the identity of the proper party upon whom service should be made. Powell, 752 So.2d at. 1002. The City Attorney advised counsel for Powell that service upon the clerk was acceptable. Id. Furthermore, the City Attorney testified that he was "always somewhat in doubt as to whether either the mayor or the city manager was the chief executive officer of the city." Id. In any event, the notice which was served upon the city clerk **was notice of an intent to bring an action against the City, not notice to sue another party.** While notice had been served upon the city clerk, the notice did not contain all the required information.[11] Significantly, after events in Powell, but before the Powell decision was handed down, the Mississippi Legislature amended the MTCA to allow notice of claim to be served upon city clerks of municipalities. Therefore, the law at the time the Powell decision was handed down the law was that a city clerk was the proper party to receive notice of claim against a municipality.[12] Acknowledging that the notice of intent to sue the city had been received by the clerk, this Court held that plaintiffs substantially complied with § 2 of the statute because while the notice did not contain the plaintiff's address, it did contain the plaintiff's counsel's address. Id.

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[11]Powell served notice upon the city clerk but her notice did not contain her home address as required by Subsection (2) of the statute. This Court held that the City of Pascagoula was not prejudiced by the fact that Powell's address was not contained in the notice, as the City was aware of her counsel's address, and that substantial compliance with Subsection (2) was sufficient. Powell, 752 So. 2d at. 1005.

[12]Apparently recognizing that confusion existed in identifying the chief executive officers of municipalities and counties, the Legislature acted to clear up the confusion and carve out a special exception for municipalities and counties, entities which do not always clearly have one chief executive officer. This legislative change was entirely understandable as municipalities across the state have different forms of government and may not have one specific "chief executive officer." Some municipalities have mayor/city council forms of government, while others have city commissioner forms of government. Likewise, there is no one chief executive officer for counties.

In the case at bar, it is undisputed that Howe never served any notice of claim upon the CEO of TGH prior to filing suit against it, or even to this day. Likewise, Howe never served notice upon anyone of an intent to bring an action against the hospital. The only notice of claim served on behalf of Howe was served upon the Chancery Clerk of Tallahatchie County of an intent to bring any action against Tallahatchie County.[13] Even if substantial compliance was the appropriate standard, which is denied, the fact that by shear happenstance the CEO of TGH received a copy of a notice of intent to sue the County cannot, and does not, constitute substantial compliance with § 11-46-11(1).[14] Howe should not be allowed to take advantage of the fortuitous act of a third party to claim that she substantially complied with the requirements of the law.[15] Howe did not comply, either substantially or otherwise, with the requirements of the statute as the intent when the notice was served upon the County was never to serve notice upon the hospital or even to sue the hospital.

In any event, the requirement to serve the proper entity is part and parcel of the 90 day notice requirement, not a separate and distinct element. It is illogical to think that the mandatory language of Subsection (1) should only apply to the first seven words of the sentence – i.e. "provided, however, that ninety (90) days prior" – and not to the remaining words of the same sentence – **"shall file a notice of claim with the chief executive officer of the governmental entity."** §11-46-

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[13]The Chancery Clerk of Tallahatchie County testified that she was not authorized to receive a notice of claim on behalf of Tallahatchie Hospital. R. 347; R. E. 54. Counsel for Howe testified he served notice on the County because he intended to sue the County and that he never intended to put Mr. Brunson, CEO of TGH on notice. R. 316-317; R.E. 31-32..

[14]TGH take issue that "actual" notice was received by the CEO of TGH as the notice of claim which was served upon the Chancery Clerk of Tallahatchie County clearly stated upon its face that Howe's **"cause of action [is] against Tallahatchie County. . .[and Howe will] proceed with litigating this claim against Tallahatchie County**." (emphasis added). R. 17, R. E. 2.

[15]By mere chance, and without any letter of explanation as to why, the insurance agent for the County faxed a copy of the notice to claim evidencing an intent to sue the County to TGH's CEO.

11(1), MTCA. The "constitutional mandate to faithfully apply the provisions of constitutionally enacted legislation" applies to all of the Subsection (1), not to just the first seven words of the sentence. Easterling, 928 So.2d at 820.[16] In this Courts' recent decision in Price v. Clark, it reiterated that with regard to § 11-46-11(1), "[s]trict compliance with the statutory notice is required, regardless of why the plaintiff failed to provide notice." ___ So.3d ____, 2009 WL 2183271 (¶16) (Miss. 2009) (citations omitted). Likewise, the Court stated that "dismissal [is] the proper remedy for failure to comply with the notice requirements." Id. at ¶18. This Court did not limit its decision to the first clause of Section (1). To the contrary, the statute's use the mandatory language of "**shall** " when referring to whom notice must be served, indicates that strict compliance is required. § 11-46-11(1), MTCA; *See generally*, Weirner v. Meredith, 943 So.2d 692, 694 (the statutory term "may" is permissive while the term "shall" is mandatory.)

Frankly, it is illogical and unreasonable to assume that the Legislature only meant what it said when it required a party to wait 90 days after notice before a lawful action may be maintained against the state or its political subdivisions, but did not mean what it said when it specified upon whom notice must be served. If a party is not given notice of an intent to pursue an action against it, then how can there be any compliance with the 90 day requirement? There cannot - the two elements are part and parcel of the same requirement. By giving notice, the state entity is allowed time to investigate the claim, determine if it would be best to seek to compromise the matter prior to suit, or be a better use of public resources to defend the case on the merits. If no notice is served of such an intent, no investigation will, or can, follow. Thus, if notice is not given to the proper entity, the

[16]When the language of a statue is unambiguous this Court is required to apply the statute according to its plain meaning. Barbour v. State ex rel. Hood, 974 So. 2d 232, 240 (Miss. 2008).

entire purpose of the 90-day period is thwarted.[17]

As was recognized by this Court in Easterling, applying the standard of strict compliance to § 11-46-11(1) provides consistency with other statutes. 968 So.2d at 820. Furthermore, in Easterling this Court echoed the sentiments of former Chief Justice Prather dissenting opinion in Reaves, 729 So.2d 1237, when it held that "a considerable amount of time has passed for the legal profession to become aware of the . . .requirements of 11-46-11(1)" and to follow them.[18] As Justice Prather wrote:

> The Legislature mandated that the required notice "shall" be provided, and the trial judge correctly concluded that the statute should be strictly enforced. It would set a dangerous precedent if this Court were to ignore specific statutory requirements for notice. This Court must enforce the statute as written, and the members of the bar will comply with the requirements herein, which are not overly burdensome or complicated.

729 So. 2d at 1241. Justice Prather's reasoned dissent was a harbinger of the changes to be implemental both by the Mississippi Legislature and this Court. Mississippi Legislature amended the Act in 1999 to clarify the intent of the statute and its provisions. Likewise, this Court in Easterling aptly recognized its responsibility to faithfully apply all provisions of the legislation, not just cherry picked portions of the same sentence. The fact that harsh results may ensue does not alleviate a plaintiff of the responsibility of following the constitutional mandates of the Legislature. *See*, Easterling, 928 So.2d 815. The Legislature, in drafting the MTCA, made it clear that **if, and**

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[17]It is anticipated that Howe will argue TGH received "actual" or at least "constructive" notice was made on TGH. However, such notion is a farce. What TGH received was a copy of a notice of claim served upon the County of an intent to sue the County, not of any intent to institute an action against TGH.

[18]Yet, the courts and the legal profession continue to make a convoluted mess out of what should be a straight forward mandate.

only if, the requirements of the statute are met, will the sovereign immunity of the state be waived. §11-46-1, *et seq.*, MTCA.

The responsibility to comply with the requirements of the statute lies with plaintiffs. Easterling, 928 So.2d at 820. Howe did not fulfill her responsibility — she never served a notice of claim of an intent to sue TGH upon the CEO of TGH. Because she failed to comply with the mandates of the statute, TGH's sovereign immunity remains vested. The fact that TGH received Howe's notice of intent to sue the County does not, and cannot, rise even to the level of substantial compliance with the requirements of the MTCA. Howe must give notice to the entity to be sued, not to another. See, Harris v. Mississippi Valley State Univ., 873 So. 2d 970 (Miss. App. 2006) (Service of notice upon the Institution for Higher Learning did not constitute substantial compliance with the requirement to serve the CEO of the University, which would be its President.)

"Substantial compliance is not the same as, nor a substitute for noncompliance." Carr supra. While the notice of claim itself may substantially comply with the requirements for its content, if no notice is served, there can be no compliance. Miss. Dept. of Public Safety v. Stringer, 748 So.2d 662 (Miss. 1999) r'hrg. denied. The liberal standard of substantial compliance cannot be met where no presuit notice was served prior to filing a complaint. Whiting v. Tunica County, 222 F. Supp.2d 809 (N.D. Miss. 2002).

C. A Complete Lack of Notice is Not the Same as Substantial Compliance

Borrowing from the words of a famous movie, "[w]hat we got here — is failure to communicate." Cool Hand Luke (1967). Howe did not communicate any notice of an intent to sue TGH to anyone: not to the County, and certainly not to TGH. Specifically, what was communicated was the following:

> 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.**

(emphasis added). R. 17. R.E. 2.

A failure to give notice is fatal under the MTCA. See, Jackson v. Lumpkin, 697 So. 2d 1179 (Miss. 1997) (where Lumpkin failed to submit any notice of claim suit was subject to dismissal); Holmes v. Defer, 722 So.2d 624 (Miss. 19990)[19] (total failure to submit notice results in dismissal); Carpenter v. Dawson, 701 So.2d 806 (Miss. 1997)[20] (two sentence letter sent to city's insurance adjuster is not notice under statute);) Little v. Mississippi Dept. of Human Resources, 835 So.2d 9 (Miss. 2002) (no notice is fatal to claim); Southern v. Mississippi State Hospital , 853 So.2d 1212 (Miss. 2003) (failure to comply with notice of claim requirements barred plaintiff from pursuing claim against state hospital); Black v. City of Tupelo, 853 So.2d 1221 (Miss 2003) (*pro se* plaintiff failed to send any notice of claim letter and was thus barred from pursing claim against city). *See also,* Montgomery v. Mississippi, 498 F. Sup.2d 892 (S.D. Miss. 2007) (firemen who failed to give notice before filing suit were barred from prosecuting action.)

In Little, this Court recognized that "we can hardly afford relief under the applicable statutes when there is no effort to comply with the procedure mandates." 835 So.2d at 12-13. Here, it is undisputed that Howe did not send, nor did she ever intend to send, a notice of claim to TGH. Justin Cluck, former counsel for Howe, admitted, under oath, that it at the time the notice of claim was served under his signature, it was his intent to give notice to and to sue the **County,** not TGH. R.

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[19]Overruled on other grounds by Carr, supra; and ___ So. 3d ____, 2009 WL 2563466 (Miss.)

[20]Overruled on other grounds by Carr, supra.

316-317; R. E.31-32. The trial court acknowledged this fact and issued its finding TGH never received from anyone a notice of an intent to bring an action against it. R. 461, R. E. 60. Furthermore, the trial court made a finding that TGH and Tallahatchie County are indeed separate political entities. Id. Nonetheless, because in the trial court's opinion, TGH would not be prejudice by Howe's blatant and absolute failure to follow the law, it wrongfully denied TGH's motion to dismiss, finding substantial compliance was accomplished by TGH's inadvertent receipt of a copy of the notice of claim served upon Tallahatchie County. R. 461-462; R. E. 60-61. To the contrary, however, a failure to give notice to the proper party prior to filing suit cannot, and does not, constitute substantial compliance. Clanton v. DeSoto County Sheriff's Department, 946 So.2d 560 (Miss. App. 2007). Furthermore, there is no provision in the statute requiring a showing of a lack of prejudice in order for a torts claim act defendant to be entitled to its lawful immunity from suit. See, § 11-46-1 *et. seq.* MTCA.

D. Prejudice is Not a Standard Contained in the MTCA.

In direct contravention to the trial court's findings that TGH did not receive notice of an intent to institute a claim against it, and that such notice could only be served upon its CEO, the trial court nonetheless incorrectly surmised that, because no evidence of prejudice was presented, and because the CEO happened, by no action or effort of Howe, to receive a copy of the notice of claim against the County, a dismissal was not warranted.[21] R. 461-462; R.E. 61. However, the MTCA does not contain a "no harm, no foul" provision to alleviate plaintiffs of the responsibility of

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[18]TGH's counsel did not address any issue of prejudice at the hearing on the Motion to Dismiss, because the basis of the motion was a question of law, i.e., whether Howe complied with the statutory requirements necessary to waive sovereign immunity, and there is no provision in the statute with regard to prejudice. It is undisputed herein that no notice of claim stating an intent to sue TGh was served, or ever has been served, on TGH.

following the law.

A lack of prejudice is not a defense to a failure to follow the law. Howe failed to adhere to the requirements of the statute – end of discussion. Prejudice is not an issue. Without notice of claim, the sovereign immunity of TGH remains vested. Reaves, 729 So. 2d at 1240 ("[a] letter of notice to the chief executive officer of a governmental entity is the only means the legislature prescribed through which sovereign immunity may be reached.") No letter was served on the CEO of TGH of any intent to sue TGH, thus its immunity has not been reached or waived. No right of action exists under the law for Howe to pursue a claim against TGH. However, it is abundantly clear, should this Court uphold the trial court's erroneous ruling, that prejudice would in fact ensue not only as to TGH but to all potential tort claims act defendants.

To uphold the trial court's ruling in this matter would be to effectively judicially abrogate the requirements of § 11-46-11(1), MCTA. Plaintiffs could, and no doubt would, ignore the provisions of the statute: why bother with performing any due diligence inquiry regarding their claims or serving notice upon the proper party defendant? Serve notice to anyone you choose – or not – just file a complaint and your claim will be preserved. The foregoing statements not only sound ridiculous, but also are offensive to the notions of justice and fair play. However, if Howe is allowed to take advantage of the fortuitous act of another to keep her time-barred action alive in contravention to the unambiguous language of the statute, as well as the spirit of the law, ridiculous or not, it will be reality. Should the Court uphold the trial court's ruling, it would effectively be issuing a mandate to future litigants that they can simply ignore the law – it would be as if the provisioning Mississippi Code Section 11-46-11 was erased leaving only a blank page. With all due respect, to do so would contravene the laws upon which this country was founded and would fly in the face of our entire system of government.

II. Since the Prerequisites of the Statute Were Not Met, Howes' Complaint Has No Legal Force or Effect and Summary Judgment Should Have Been Granted.

As stated above, the MTCA provides the only mechanism under the law by which the state or its political subdivisions may be sued. § 11-46-1, et seq., MTCA. "There is no fundamental right to bring suit against the state of Mississippi or a political subdivision of Mississippi." Vortice v. Fordice, 711 So.2d 894, 895, (Miss. 1998), *citing* Wells v. Panola County Bd. of Educ., 645 So.2d 883, 893 (Miss. 1994). There exists no property interest in giving the state or one of its potential subdivisions Brown v. Southwest Miss. Reg'l Med. Cent., 989 So.2d 933, 937 (¶10) (Miss. 2008). If, and only if, the requirements of the MTCA are met, can a cause of action be maintained against the State and its political subdivisions. Whether these requirements are termed "jurisdictional"[22] or "conditions precedent"[23] does not change the simple fact that no right of action exists under the law if sovereign immunity is not waived. A lawsuit cannot be properly filed unless and until the claimant first serves the governmental entity with a notice of claim. Reaves, supra. Watts v. Lafayette Co. School Dist., 737 So.2d at 1259; Long, 969 So.2d at 41; Parker, 987 so.2d at 441. "It is certainly an undisputable and invariable rule of law that a right of action must be complete when an action therefore is commenced...." Crawford Commercial Constructors, Inc., v. Marine Indus. Residential Insulation, Inc., 437 So.2d 15, 16 (Miss. 1983) (quoting Georgia Pac. Ry. Co. v. Baird, 76 Miss. 521,

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[22]"'Jurisdiction' is a broad term, and has been defined in countless ways by courts. Generally speaking, it means the power or authority of a court to hear and decide a case." Fitch v. Valentine, 946 So.2d 780, 783 (Miss.2007) (*quoting* Penrod Drilling Co. v. Bounds, 433 So.2d 916, 922 (Miss.1983)). (emphasis added). *See also* Bullock v. Roadway Express, Inc., 548 So.2d 1306, 1308 (Miss.1989) (subject matter jurisdiction relates to the power and authority of a court to entertain and proceed with a case.) Furthermore, the parties cannot, by consent or otherwise, give a court jurisdiction of subject matter which it would not otherwise have under the law. Duvall v. Duvall, 224 Miss. 546, 80 So.2d 752, 754 (1955). If no right of action exists under the law, certainly the Court has no authority to entertain such an action.

[23]The notice of claim requirements "imposes a conducive precedent to the right to maintain an action." Miss. Dep't of Pub. Safety v. Stringer, 748 So.2d 662, 665, (Miss. 1999) (citations omitted).

24 So.195, 196 (1898). If the statutory notice requirement is not met, and no right of action exists under the law, the simple act of filing a complaint cannot itself duly commence an action! Whatever name is chosen to describe these requirements, be it jurisdictional or condition precedent, unless and until the are followed, whether it be said they were strictly or substantially follow, there can be no right of action against the state entity, here, there was no compliance whatsoever.

A. Caves II Requires that Notice Requirements of the Statute Must First Be Met Before Any Right of Action Can Be Maintained.

There is a long history of judicial precedent which holds that the notice requirements of the MTCA are jurisdictional, and if they are not met, subject matter jurisdiction of the court will not attach.[24] In addition, this Court has held the notice of claim requirement of the MTCA "imposes a condition precedent to the right to maintain an action." Clanton v. DeSoto County Sheriff's Dept., 963 So.2d 560, 563 (Miss. App. 2007). Jurisdiction does not attach over a governmental entity unless proper notice is given with the statutory period prior to filing suit. Id. (citations omitted). Furthermore, prior case law holds that the subject matter jurisdiction of the Court is not invoked if the statutory prerequisites to filing suit have not been fulfilled. See generally, Newall v. Jones County, 731 So.2d 580, 582 (Miss. 1999) (ten day time limit to file notice of appeal under Miss. Code Ann. Section 11-51-75 is both mandatory and jurisdictional). These holdings are not only reasonable but are logically correct as "subject matter jurisdiction" is defined as a court's ability to hear a claim. If sovereign immunity is not waived, the Court cannot have any authority to hear a

[24]This law of case law was summarily overruled by this Court in its recent holding in Stuart, *infra.* However, TGH submits that the Stuart decision overlooks this Court's obligations under *stare decises* and its holding in Caves II. Nonetheless, whatever term is assigned to these requirements, the law remains that without waiver of sovereign immunity, there can be no lawful action against the State or its political subdivisions.

claim against the state or its political subdivision, as no such right of action exists under the law.[25] Nonetheless, this Court, in Stuart v. University of Mississippi Medical Center, summarily overruled years of legal precedent without any explanation or authority.

Therein, this Court stated "we now take the opportunity to overrule Lumpkin and Carr and their progeny, to the extent these cases characterize the notice requirements set out in Section 11-46-11 as jurisdictional requirements." * 4 at. ¶11. However, no explanation or rationale was given for such a proclamation, and no precedent was cited therefor. Respectfully, the Court's edict, with no supporting authority, is contrary to law. The Legislature with its codification of the MTCA the law of sovereign immunity is alive and well in Mississippi. The unambiguous law of this State is that no right of action exists against the state and its political subdivisions unless and until the notice requirements have been met. § 11-46-11, MTCA.

Not only is the Stuart opinion contrary to the principle of sovereign immunity, it is contrary to the position recently taken by this Court in Caves v. Yarborough, 991 So.2d 142 (Miss. 2008) ("Caves II"). In Caves II, this Court held that under the principle of *stare decises*, it was required to follow those prior decisions holding that the discovery rule was applicable to the MTCA, whether or not the Court now agrees with them. Significantly, this Court acknowledged that "it is this Court's duty to apply the law as written, not as we think it should have been written." 991 So. 2d at 150 (¶ 32). Furthermore, the Court held that "in cases where this Court concludes a statute was

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[25]Many times attorneys are asked if they "Can I sue for "X?" The response, often times may be, "Yes, you can sue for anything; however, your complaint will be dismissed if no right of action exists under the law for "X"." For example, can an employee sue his employer because the employer will not allow him to come to work naked? Sure, the employee can file a complaint but by doing so he does not create a right of action against the employer where none previously existed under the law. The law of the land does not give the employee a right to go to work in the nude and the employees filing of a complaint alleging he has such a right will not create it under the law. Likewise, where no right of action exist against the state, a Plaintiff cannot create one by simply filing a complaint.

incorrectly interpreted in a previous case, we will nevertheless continue to apply the previous interpretation, pursuant to the doctrine of *stare decises*, upon finding the Legislature amended or reenacted the statute without correcting the prior interpretation." Id. at 153 (¶ 43).

Indeed, the Legislature amended or reenacted the MTCA without correcting this Court's previous holdings that the presuit requirements contain therein were mandatory and jurisdictional. Significantly, however, in Stuart, the Court ignores its recent proclamation in Caves II, even though its holding therein was based upon the same statute, the same amendments, and the same principle of *stare decises*. In Caves II, handed down only a year before Stuart, this Court held that, whether it agreed with the past holdings or not, it was nonetheless bound to enforce them. Id. at 150. What has changed since Caves II? We submit, nothing.

Just as in Caves II and with regard to the discovery rule, this Court is bound by its prior decisions holding that the presuit notification requirements of the MTCA are mandatory and jurisdictional, and without proper notice being served upon the proper party, no right of action exists under the law. The filing of a complaint cannot, and does not, change the law. Moreover, as stated above, it matters not what term is used to characterize the presuit requirements – either jurisdictional or conditions precedent, the effect remains the same – if the requirements are not met, whether strictly or substantially, there is no basis under the law to sue the state. Therefore, any complaint filed without notice being first served is without any legal force or effect.

B. The Statute of Limitations Was Not Tolled As No Service of Notice as Required By the MTCA Was Made, Therefore Howes' Claim Is Now Time Barred.

The MTCA contains a one-year statute of repose which mandates that "all actions 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." §11-46-11(3), MTCA.[26] Therefore, based upon Howe's allegations as contained in their Complaint, the statute of limitations on this matter ran on June 2, 2008, or the last date of the alleged tortious activity on which this action is based. Myrtice Edwards was admitted to the nursing home facility at TGH on May 16, 2007. Howe alleges that beginning on May 18 and continuing through June 2, 2008, Ms. Edwards was administered two medications in error. According to Howe's Complaint, these medications were discontinued on June 2, 2008. Therefore, the alleged tortious activity upon which Plaintiff's Complaint is based ended on June 2, 2007.

Because the presuit notice requirements of the MTCA were not met, Howe's complaint is unlawful and cannot be considered to have "duly commenced" an action against a state entity. Watts, 737 So.2d at 1019; Guffy, 930 So.2d at 1259; Long, 969 so.2d at 41; Parker, 987 So.2d at 441. The filing of a complaint coupled with failure to invoke waiver of immunity is startlingly analogous to a party without standing filing a complaint. Standing, similar to the notice requirements, is determined at the time suit is filed. Lujan v. Defenders of Wildlife, 504 U.S. 555, 571 n. 5, 112 S. Ct. 2130, 2142, 119 L. Ed.2d 351, 371. This Court recognized that it is without authority to empower a person with no standing a legal right to commence suit. Delta Health Group, Inc. v. Estate of Pope ex rel. Payne, 995 So.2d 123 (Miss. 2008). Likewise, simply filing a complaint cannot empower a Plaintiff to toll the limitations period of the MTCA.

The only manner in which the limitations period in the MTCA may be tolled is by first providing notice under §11-46-11(1). See, §11-46-11(3). Without notice, the substantive law does not provide for any tolling. Since this is a matter of substantive law, it does not encroach upon this Court's authority to define what constitutes the proper filing of a complaint. For example, if a right

[26]In wrongful death actions, the limitations periods are governed by the limitations period applicable to the tortious acts that resulted in the harm. May v. Pulmosan Safety Equip. Corp. 948 So.2d 483.

of action exists at law but a complaint is filed containing some procedural deficiency, the Court 's Rules determine whether or not the complaint is valid but the while pending and until that determination is made, the limitations period of the action will be tolled. However, there is no provision in the substantive law to allow for tolling of the limitations period contained in the MTCA unless notice is given. Thus, if the question is whether the notice given complies with §11-46-11(2), waiver has already been accomplished by the giving of notice and the filing of the complaint does toll the limitations period. But, if no notice is given, pursuant to Section 3 of the state, no tolling is provided under the substantive law.

It is anticipated that Howe will rely upon this Court's recent holding in Price v. Clark for the position that the filing of her complaint, although filed without presuit notice, tolled the limitations period applicable to her claim. However, it cannot go without mentioning that the Price Court entertained that issue without any precedent being cited by any party. Likewise, the Price ruling is in direct contravention to this Court's previous holding in Caves II, *supra*, and it overlooks the Court's obligations under the principles of *stare decises*. As this Court acknowledged in Caves II, "the doctrine of *stare decises* requires us to follow those prior decisions, whether or not this Court now agrees with them."

Simply filing a complaint cannot confer legal authority where it never existed before. As was argued by this writer in Pope, "[w]ere the Court to allow such a scenario, any person could commence an action, toll the statute of limitations, [and] . . . keep the courthouse door open. . ." Id. So too would be the outcome if this Court allows the act of filing a complaint to toll the limitations period of the MTCA when no notice of claim is given as required by § 11-46-11(1). Just as a person who files a complaint without standing cannot toll the limitations period applicable to that action, neither can a complaint filed by a plaintiff who has failed to take the steps necessary to invoke

waiver of the political subdivision's sovereign immunity toll the limitations period under the MTCA.

In addition, the Price court overlooked the substantive purpose and effect of the condition precedents – no lawful complaint can be filed unless waiver is first obtained. "A letter of notice to the chief executive officer of a governmental entity is the only means the Legislature prescribed through sovereign immunity may be reached." Reaves, 729 So.2d at 1240. The Mississippi Rules of Civil Procedure cannot, and do not, create a right of action under law where one never previously existed. To dismiss a complaint on the grounds that no lawful right of action exists for such a claim is not a matter of form to which the Rules of Civil Procedure would apply. Without notice, there can be no tolling. § 11-46-11(3). As the immunity remains in tact, the complaint is and can be nothing more than a piece of paper evidencing a desire for relief which is prohibited by law, but just as with a complaint filed by a person with no standing, the complaint filed without waiver likewise cannot toll the limitations period. For these reasons the holding in Price should be reconsidered as to this issue, or limited to its facts alone. Because the sovereign immunity of TGH was never waived, Howe has no legal right of action against TGH. Howe's complaint was not properly filed as it has no legal basis.

Although the Complaint was filed on June 2, 2008, the last date remaining in the limitations period, because the mandatory prerequisites of notice were not adhered to, there can be no tolling of the limitations period. The complaint is unlawful and, thus, no action was "duly commenced," as no right of action existed under the law. The complaint is, therefore, a nullity without any legal force or effect. The statute of limitations period has now passed and the ruling of the trial court should be overturned and summary judgment in favor of the TGH should be granted.

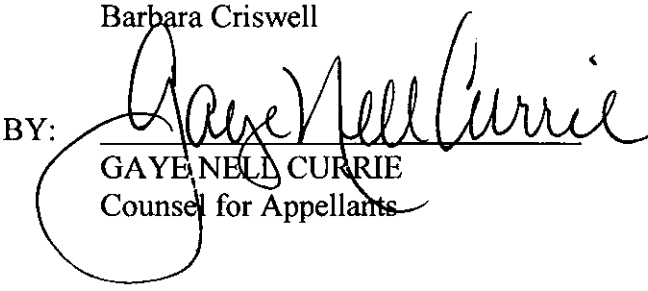
CONCLUSION

As stated above, this matter involves a failure to communicate – the failure of Howe to serve a notice of claim on TGH of an intent to sue TGH. Without a letter to TGH's CEO advising of her intent to sue TGH, the sovereign immunity of TGH remains vested. Therefore, under the law, no right of action exists TGH as unless, and until, its sovereign immunity is waived, the law prohibits suit against the state entity. The fact that Howe sent a letter of intent to another state entity advising it of her intention to sue it, but which letter by happenstance, and through no effort, act, or intent of Howe, came into the possession of TGH's CEO, does not magically alleviate Howe of her lawful responsibility to serve notice on TGH before filing suit. Therefore, the complaint filed by Howe has no legal force, as there is no right of action under the law; and thus, it cannot, and did not, toll the limitations period contained in the MTCA. Therefore, the trial court's ruling was in error and the only remedy herein is to render a dismissal of all claims against TGH with prejudice. Otherwise, this Court will be sanctioning an abrogation of the presuit provisions of the MTCA and the statute will finally be rendered meaningless, along with all notions of justice and fair play.

Dated this the 18th day of December, 2009.

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 18th day of December, 2009.

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