

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI,
ON APPEAL FROM THE CIRCUIT COURT OF THE SECOND
JUDICIAL DISTRICT OF BOLIVAR COUNTY, MISSISSIPPI

KIMBALL GLASSCO RESIDENTIAL CENTER, INC.
and VERA RICHARDSON

APPELLANTS

VS.

CAUSE NO. 2009-M-01617-SCT

TERRANCE SHANKS AS NEXT OF KIN OF LOIS SHANKS

APPELLEE

**BRIEF OF APPELLANTS, KIMBALL GLASSCO
RESIDENTIAL CENTER, INC. and VERA RICHARDSON**

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record hereby 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. Kimball Glassco Residential Center, Inc., Appellant;
2. Vera Richardson, Appellant;
3. Terrance Shanks, Next of Kin of Lois Shanks, Appellee;
4. Lois Shanks, Appellee;
5. Honorable Albert B. Smith, III, Bolivar County Circuit Court Judge;
6. Wade G. Manor and Jamie L. Heard, both of the law firm of Scott, Sullivan, Streetman & Fox, P.C. (Ridgeland, Mississippi), Counsel for the Appellant; and
7. Ellis Turnage, of the Turnage Law Office (Cleveland, Mississippi), Counsel for Appellee.

By:



Wade G. Manor, attorney of record for the
Appellants

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	I
TABLE OF CONTENTS	II
TABLE OF AUTHORITIES	III
STATEMENT OF THE ISSUES	1
STANDARD OF REVIEW	2
STATEMENT OF THE CASE	3
SUMMARY OF THE ARGUMENT	8
ARGUMENT.....	10
I. Richardson and Kimball Glassco are entitled to the protections and immunities of the MTCA	10
A. <i>DCMHS is a “governmental entity” for the purposes of the MTCA</i>	10
B. <i>As an employee of DCMHS, Richardson is also entitled to the protections of MTCA</i>	11
C. <i>Kimball Glassco is also a “governmental entity” for the purposes of MTCA</i> ..	13
II. The statute of limitations bars Shank’s claims against Richardson and Kimball Glassco.	16
III. Neither Richardson nor Kimball Glassco have waived the affirmative defense of the expiration of the statute of limitations in this case.	17
IV. The correspondences from the Mississippi Tort Claims Board does not equitably estop Richardson or Kimball Glassco from asserting the affirmative defense of the expiration of the statute of limitations	20
CONCLUSION	23
CERTIFICATE OF SERVICE	25

TABLE OF AUTHORITIES

Cases:

<i>Allstadt v. Baptist Memorial Hospital</i> , 893 So.2d 1083 (Miss. App. 2005)	14
<i>Bolivar Leflore Med. Alliance, LLP v. Williams</i> , 938 So.2d 1222 (Miss. 2006)	13
<i>Cain v. Robinson</i> , 523 So.2d 29 (Miss. 1988)	21
<i>City of Hattiesburg v. Region XII Commission on Mental Health and Retardation</i> , 654 So.2d 516 (Miss. 1995)	8, 10
<i>Cotton v. Paschall</i> , 782 So.2d 1215	2, 12
<i>Dubard v. Biloxi H.M.A., Inc.</i> , 778 So.2d 113 (Miss. 2000)	21
<i>Duncan ex rel. Duncan v. Chamblee</i> , 757 So.2d 946 (Miss. 1999)	12
<i>Estate of Fedrick v. Quorum Health Resources</i> , ___ So.3d ___, 2009 WL 7807310, No. 2007-CA-00465-COA (Miss. App.)	2, 13
<i>East Mississippi State Hospital v. Adams</i> , 947 So.2d 887 (Miss. 2007)	19
<i>Grimes v. Warrington</i> , 982 So.2d 365 (Miss. 2008)	12, 14, 19
<i>Gulledge v. Shaw</i> , 880 So.2d 288 (Miss. 2004)	2
<i>Helveston v. Lum Properties Ltd.</i> , 2 So.3d 783 (Miss. App. 2009)	21
<i>Lucas v. Baptist Memorial Hospital - North Mississippi, Inc.</i> , 997 So.2d 226 (Miss. App. 2008)	18
<i>McGlaston v. Cook</i> , 576 So.2d 1268 (Miss. 1991)	23
<i>Mississippi Dept. Of Public Safety v. Stringer</i> , 748 So.2d 662 (Miss. 1999)	21
<i>Mississippi Transp. Comm'n v. Fires</i> , 693 So.2d 917 (Miss. 1997)	2
<i>MS Credit Center, Inc. V. Horton</i> , 926 So.2d 167 (Miss. 2006)	18, 19
<i>Region VII Mental Health v. Isaac</i> , 523 So.2d 1013 (Miss 1988).	8, 10, 11
<i>Rein v. Benchmark Constr. Co.</i> , 865 So.2d 1134 (Miss. 2004)	2

<i>Sarris v. Smith</i> , 782 So.2d 721 (Miss. 2001)	2
<i>Trosclair v. Miss. Dept. of Transportation</i> , 757 So.2d 1778 (Miss. 2000)	21
<i>Turner v. Terry</i> , 799 So.2d 25 (Miss. 2001)	21

Statutes:

MISS. CODE §§ 11-46-1 <i>et seq</i>	1, 4, 10, 13
MISS. CODE ANN. §§ 11-46-7	10, 11
MISS. CODE ANN. § 11-46-11	16
MISS. CODE §§ 41-19-31 <i>et seq</i>	3
MISS. CODE ANN. § 41-19-33	14
MISS. CODE §§ 79-11-101 <i>et seq</i>	3

Rule:

MISS. R. CIV. P. 56	2
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STATEMENT OF THE ISSUES

On appeal, Kimball Glassco Residential Center, Inc. (hereinafter referred to as “Kimball Glassco”) and Vera Richardson (hereinafter referred to as “Richardson”) request that this

Honorable Court consider **whether the trial court erred in denying their *Motion to Dismiss***.

More specifically, the Appellants request that this Court consider:

- (1) Whether Kimball Glassco and Richardson are entitled to the protections and immunities of the Mississippi Tort Claims Act, codified at MISS. CODE ANN. §§ 11-46-1 *et seq.* (hereinafter referred to as “MTCA,” “the Act,” or “the Tort Claims Act”);
- (2) Whether Kimball Glassco and Richardson waived the affirmative defense of the expiration of the statute of limitations under the Act; and
- (3) Whether Kimball Glassco and Richardson are estopped from asserting the expiration of the statute of limitations as an affirmative defense to the claims of Terrance Shanks on behalf of Lois Shanks (hereinafter referred to as “Shanks”).

STANDARD OF REVIEW

A *Motion to Dismiss* based upon the expiration of the applicable statute of limitations raises an issue of law, and a review of that order is *de novo*. *Estate of Fedrick v. Quorum Health Resources*, ___ So.3d ___, 2009 WL 4807310, No. 2007-CA-00465-COA (§ 7) (Miss. App.) (citing *Sarris v. Smith*, 782 So.2d 721, 723 (§ 6) (Miss. 2001)). Where a trial judge considers matters outside the pleadings, a motion to dismiss is considered a motion for summary judgment under Rule 56 of the MISSISSIPPI RULES OF CIVIL PROCEDURE. *Gulledge v. Shaw*, 880 So.2d 288, 292 (Miss.2004) (citing *Rein v. Benchmark Constr. Co.*, 865 So.2d 1134, 1142 (Miss.2004)). According to Rule 56(c), summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.”

An order denying a motion to dismiss must be reversed where the law, at the trial court level, has been applied or interpreted erroneously. *Cotton v. Paschall*, 782 So.2d 1215, 1217 (§ 10) (citing *Mississippi Transp. Comm’n v. Fires*, 693 So.2d 917, 920 (Miss. 1997)). Here, the law with regard to the waiver of an affirmative defense and also with regard to equitable estoppel has been erroneously interpreted and applied by the trial court. Accordingly, the order of the trial court which is based upon its erroneous interpretation and application of the law regarding waiver and equitable estoppel must be reversed. Further, because no issues of fact remain with regard to whether Shanks’s claims are barred by the applicable statute of limitations, this Court should render an order granting the Defendants’ *Motion to Dismiss*.

STATEMENT OF THE CASE

Delta Community Mental Health Services, referred to formally as the “Commission on Mental Illness and Retardation for the Fifth Region of Mississippi,” is a Community Mental Health/Mental Retardation Service which operates assisted living facilities, clinics and rehabilitative programs for the mentally challenged pursuant to MISSISSIPPI CODE §§ 41-19-31 *et seq.* (See *Affidavit of Dr. Gilbert S. Macvaugh in Support of Defendant’s Motion to Dismiss* and *Certificate of Operation*, enclosed with Appellant’s Record Excerpts as *Exhibits A* and *B*, respectively.) Delta Community Mental Health Services (“DMCHS”) is the primary service provider with whom the Mississippi Department of Mental Health (“DMH”) contracts to provide community-based services in Region V, which consists of Bolivar, Issaquena, Sharkey and Washington Counties. (See Mississippi Department of Mental Health, *Mental Health/Mental Retardation Centers*, enclosed with Appellant’s Record Excerpts as *Exhibit C* and available online at www.dmh.state.ms.us/community_care.htm as of 12 May 2010.) The DMH is responsible for certifying, monitoring and assisting DCMHS in its provision of community-based mental health services, which is funded by Medicare, Medicaid, Federal/State grants, private insurance, private payments and county contributions. *Id.*

The Kimball Glassco Residential Center, Inc. (hereinafter referred to as “Kimball Glassco”) is a non-profit corporation existing pursuant to Mississippi Code §§ 79-11-101 *et seq.* which provides supervised housing for the mentally challenged. (See *Articles of Incorporation of Kimball Glassco Residential Center, Inc.*, enclosed with Appellant’s Record Excerpts as *Exhibit D.*) The Kimball Glassco Residential Center located in Boyle, Mississippi operates for the Region V Commission on Mental Illness and Mental Retardation. DCMHS, the provider of the community-based services in Region V, provides supportive services to the Kimball Glassco

facility and its patients.

This lawsuit arises out of injuries allegedly sustained by Lois Shanks, a resident of Kimball Glassco, in an automobile accident occurring in Cleveland, Bolivar County, Mississippi on April 15, 2005.¹ (R. at 4.) At the time of the accident, Shanks was traveling as a passenger in a van driven by Vera Richardson and owned by DCMHS. (R. at 4. See also *Uniform Crash Report*, enclosed with Appellant's Record Excerpts as *Exhibit E*.) At all times relevant to the accident, Richardson was acting in the course and scope of her employment with DCMHS as apartment manager of the Kimball Glassco facility. (R. at 8. See also *Exhibit A*.)

On April 4, 2006, former counsel for Shanks, Eric Hamer, provided notice of her claim to both DCMHS and DMH pursuant to the requirements of the Mississippi Tort Claims Act, specifically, MISSISSIPPI CODE §§ 11-46-1 *et seq.* (See *Correspondence from Hamer*, dated 4 April 2006 and enclosed with Appellant's Record Excerpts as *Exhibit F*.) It is important to note that in the correspondence, there was no mention by Hamer of an intent to file a claim against Richardson, personally, or against Kimball Glassco.

On July 28, 2006, Bruce Donaldson, on behalf of the Mississippi Tort Claims Board (hereinafter referred to as MTCB or "the Board"), forwarded a letter to Hamer acknowledging receipt of notice of the Plaintiff's claim "directed to the Mississippi Department of Mental Health." (R. at 27.) In the letter, Donaldson informed Hamer that DMH has advised the Board that DCMHS "is not a state agency nor is it a department or division of" DMH and that accordingly, the Mississippi Tort Claims Board would "be unable to assist [Hamer or Shanks] any further in this respect." (R. at 7.) No further action was taken by the Plaintiff until the April

¹ The accident did not occur on or near the Kimball Glassco Residential Center property.

3, 2008 filing of the instant *Complaint* - which occurred just under three years after the April 15, 2005 collision. (R. at 3.) The only named Defendants in the action were Richardson and Kimball Glassco, who, again, received no prior notice of Shanks's claims against them. (R. at 4.)

On May 12, 2008, Kimball Glassco filed its *Answer and Defenses*, specifically denying that Richardson was employed by Kimball Glassco and asserting as an affirmative defense the protections and immunities afforded to it as a governmental entity under the Tort Claims Act (R. at 11-16.) The same day, Richardson filed a *Motion to Dismiss*, asserting that (1) Richardson was, at all relevant times, an employee of DCMHS and is therefore entitled to the protections and immunities of Mississippi's Tort Claims Act and (2) the Plaintiff's cause of action against her is barred by the Act's statute of limitations. (R. at 8-10.)

The timeline that follows is crucial in understanding the issues presented on appeal:

June 27, 2008	Correspondence from counsel for Kimball Glassco and Richardson - Wade G. Manor - to counsel for Shanks - Ellis Turnage - (1) confirming prior telephone conversations regarding the basis for the <i>Motion to Dismiss</i> occurring between the filing of the motion and June 27 th and (2) reasserting the appellants' position regarding their entitlement to the immunities and protections of the Tort Claims Act.
September 24, 2008	Correspondence from Turnage's office to Manor (1) enclosing documents requested by Manor in the June 27, 2008 correspondence and (2) referencing numerous telephone conversations between Manor and Turnage regarding the request which occurred between June 27 th and September 24 th .
January 13, 2009	Correspondence from Manor to Turnage (1) reasserting the appellants' position regarding their entitlement to the immunities and

protections of the Tort Claims Act and (2) indicating an intent to move forward with the scheduling of the hearing on the *Motion to Dismiss*.

April 2, 2009	Plaintiff's First Set of Interrogatories, Requests for Production of Documents and Requests for Admissions propounded to the Defendant requesting information regarding the status of Kimball Glassco as a governmental entity. (R. at 17. See also <i>Kimball Glassco Residential Center, Inc.'s Responses to Plaintiff's First Set of Interrogatories, Kimball Glassco Residential Center, Inc.'s Responses to Plaintiff's First Requests for Production of Documents, and Defendant, Kimball Glassco Residential Center, Inc.'s Responses to Plaintiff's First Requests for Admission</i> , enclosed with Appellant's Record Excerpts collectively as <i>Exhibit G</i> .)
April 8, 2009	Correspondence from Manor to Turnage proposing dates to set the <i>Motion to Dismiss</i> for hearing.
May 12, 2009	Correspondence from Manor to Turnage advising that he had not yet heard from Turnage with regard to the proposed hearing dates.
May 14, 2009	Kimball Glassco filed its responses to the Plaintiff's written discovery. (R. at 40-44. See also <i>Exhibit E</i> .)
May 21, 2009	Correspondence from Turnage to Manor indicating that he is unavailable for a hearing on the dates proposed in the April 8, 2009 correspondence and requesting additional dates for the month of June.
June 4, 2009	Correspondence from Turnage's office to the Court Administrator for the Bolivar County Circuit Court, reserving the date of August 19 th for the hearing on the <i>Motion to</i>

Dismiss, along with two motions of the Plaintiff.

June 5, 2009

Notice of Hearing on Richardson's *Motion to Dismiss* forwarded to the Court for filing. (R. at 45-46.)

(R. at 56 (¶ 6); Hrg. Tr. at 28:1-22. All correspondence referenced above is enclosed with Appellant's Record Excerpts collectively as *Exhibit H.*) There were no other pleadings filed by either party.

At the hearing on Richardson's *Motion to Dismiss*, which took place on August 19, 2009, Kimball Glassco joined in the motion on all grounds and Shanks conceded Kimball Glassco's status as a governmental entity. (Hrg. Tr. at 21:11-13.) However, after hearing arguments of counsel, the Court denied the motion, stating that even if Kimball Glassco and Richardson are entitled to governmental immunity, (1) Kimball Glassco and Richardson waived the affirmative defense of governmental immunity by failing to pursue the *Motion to Dismiss* in a timely manner and (2) Kimball Glassco and Richardson are equitably estopped from asserting the affirmative defense of governmental immunity based on the correspondence from the Mississippi Tort Claims Board. (Hrg. Tr. at 29:13-28; R. at 57.) An order to that effect was entered on or about September 15, 2009 and the case was stayed pending this appeal. (R. at 55-57.)

SUMMARY OF THE ARGUMENT²

Pursuant to the prior rulings of this Honorable Court in *City of Hattiesburg v. Region XII Commission on Mental Health and Retardation*, 654 So.2d 516 (Miss. 1995) and *Region VII Mental Health v. Isaac*, 523 So.2d 1013 (Miss. 1988), DCMHS does, in fact, qualify as a “governmental entity” for the purposes of the Mississippi Tort Claims Act. As a DCMHS employee acting in the course and scope of her employment at the time of the accident, Vera Richardson is also entitled to the immunities and protections of the Act. Additionally, however, in light of DCMHS’s ultimate control of Kimball Glassco, Kimball Glassco is considered an “instrumentality” of DCHMS and is entitled to the same protections.

Accordingly, any suit against Richardson and Kimball Glassco must, therefore, be pursued in accordance with the provisions of the Tort Claims Act. Under the Act, Shanks was required to (a) provide both Richardson and Kimball Glassco with sufficient notice of her intent to file suit and (b) file suit against them within one year on the date of their allegedly negligent acts. Because Shanks failed to file her *Complaint* within the time allowed by law, her claims against Richardson and Kimball Glassco are barred.

Contrary to the findings of the trial court, neither Richardson nor Kimball Glassco waived their right to assert the defense of expiration of the statute of limitations under the Act. First, neither Richardson nor Kimball Glassco failed to timely or reasonably raise and pursue the enforcement of the defense, as the defense was actively pursued by the parties from the date of

² In the filing of their appeal and of this brief, Kimball Glassco and Richardson have not and do not waive any other arguments that they may have with regard to their entitlement to governmental immunity and the application of that immunity to this case, the procedural propriety or impropriety of Shanks’s claim under the Tort Claims Act, or any other arguments as to the merits of Shanks’s claim against them. Kimball Glassco and Richardson specifically reserve their right to assert any other defenses they may have to the claim filed herein against them at the trial court level following the disposition of this appeal, if necessary.

the filing of their first responsive pleading through the date of the filing of the Notice of Hearing on the *Motion to Dismiss*. Second, regardless of any delay in the assertion of the defense and the scheduling of the hearing on their motion, neither party actively participated in the instant litigation. Because a delay in the pursuit of the defense *and* an active participation in the litigation process are not *both* present in this case, as is required by caselaw, neither Richardson nor Kimball Glassco can be said to have waived the defense.

Finally, because neither Richardson nor Kimball Glassco acted in a way which would induce Shanks's reliance in the form of non-action (i.e. failing to file a *Complaint* within the time allowed by law), and because the actions of the Tort Claims Board cannot be imputed to Richardson or Kimball Glassco, the appellants are not estopped from asserting the expiration of the statute of limitations as a defense to Shanks's claims against them. The trial court's finding of the contrary was, therefore, reached in error.

ARGUMENT

I. Richardson and Kimball Glassco are entitled to the protections and immunities of the MTCA.

A. DCMHS is a “governmental entity” for the purposes of the MTCA.

The Mississippi Torts Claims Act provides the exclusive civil remedy against a governmental entity and its employees for acts or omissions which give rise to a claim against them. MISS. CODE ANN. § 11-46-7. Accordingly, any action against a governmental entity or its employee, not otherwise barred, must be brought under the provisions of the Act. *Id.* Under the Act, a governmental entity is defined as (a) the State of Mississippi, including “any office, department, agency, division, . . . commission, board, . . . or other instrumentality thereof, and (b) any political subdivision other than the State which is responsible for governmental activities in geographic areas smaller than that of the State, including also instrumentalities of the subdivision. MISS. CODE ANN. § 11-46-1.

According to this Honorable Court’s ruling in *City of Hattiesburg v. Region XII Commission on Mental Health and Retardation*, as the Region V Commission on Mental Health and Mental Retardation, DCMHS is considered a “state agency” and “subdivision of the State of Mississippi.” 654 So.2d 516, 517 (Miss. 1995) (citing *Region VII Mental Health v. Isaac*, 523 So.2d 1013 (Miss. 1988)). In *Hattiesburg v. Region XII*, the Court was faced with the issues of “whether a regional mental health commission is a state agency” and if so, whether a city zoning ordinance could be enforced against the Commission. *Id.* at 516. While the Court did find that the Commission was subject to the city ordinance, the Court unequivocally confirmed that the Commission does qualify as a “governmental entity.” *Id.* at 517-518.

In the unanimous decision, Justice Randolph stated for the Court:

It is clear that the Commission is a subdivision of the state. We have said as much in *Region VII Mental Health v. Isaac*, 523 So.2d 1013 (Miss. 1988) where we held that *as a subdivision of the state of Mississippi*, the mental health center had sovereign immunity and could not, therefore be sued simply because it had liability insurance. The fact that the Commission is a state agency, however, does not ipso facto preclude it from adhering to the municipal ordinances regarding land use and permits concerning safety.

654 So.2d at 517 (en banc) (emphasis in original) (internal citation omitted). In light of this holding, it cannot be disputed by Shanks that DCHMS is a governmental entity and therefore entitled to the immunities and protections of the Act.

B. *As an employee of DCMHS, Richardson is also entitled to the protections of MTCA.*

In Mississippi, any claim against an employee of a governmental entity for acts or omissions arising out of his or her employment must be brought under the provisions of the Tort Claims Act. MISS. CODE ANN. §11-46-7. According to the Act, while an “employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, [] **no employee shall be held personally liable for acts or omissions occurring within the course and scope of the employee’s duties.**” *Id.* Further, there is a “rebuttable presumption that any act or omission of an employee within the time and at the place of his employment is within the course and scope of his employment” for the purposes of a claim brought under the Act. *Id.* Stated differently, even though a governmental employee may be the party allegedly responsible for a person’s injuries or damages and may be named in a lawsuit as a defendant along with her employer, that employee is still immune from personal liability for the damages caused so long as he or she was acting within the course and scope of his or her employment at the time of the

injurious act or omission. *Id.* See also *Cotton v. Paschall*, 782 So.2d 1215, 1217 (¶ 11) (Miss. 2001) (confirming that “an employee acting within the course and scope of her employment is immune from personal liability”).

In this case, it is undisputed that Richardson was acting in the course and scope of her employment with DCMHS at the time of the subject accident. As such, it is admitted that had Shanks filed a lawsuit *against DCMHS* within the time allowed by law, Richardson would be a proper party to that lawsuit pursuant to the statute, notwithstanding that Richardson could not be held personally liable for any damages awarded therein. In the instant case, however, DCMHS was not named as a party to the lawsuit. In fact, there was no mention of DCMHS at all in Shanks’s *Complaint*.

In dealing with the issue of whether a governmental employee named as a party to a lawsuit must be dismissed *upon the dismissal of his or her employer as a party to the same suit*, this Court has consistently held that the dismissal of the governmental entity necessitates dismissal of the employee, where the employee cannot be otherwise held personally liable for the claimant’s injury or damages. *Cotton*, 782 So.2d at 1218 (holding that where the school district was dismissed from a lawsuit arising out of a school bus collision, the school bus driver was properly dismissed as well); *Duncan ex rel. Duncan v. Chamblee*, 757 So.2d 946, 951 (Miss.1999) (holding that where a school district was dismissed from a lawsuit arising out of a teacher’s administration of allegedly excessive corporal punishment, it was proper to dismiss the teacher from the suit where her actions were admittedly within the course and scope of her employment with the school district); *Grimes v. Warrington*, 982 So.2d 365, 367 (¶ 10) (Miss. 2008) (stating that to be in compliance with the MTCA, the claimant must sue the governmental employer and join the employee in his representative capacity only). In a case such as the one

before this Court, where the governmental entity was never named as a party in the first place, the end result should be the same - dismissal of the employee.

Here, because (1) any action against Richardson for her acts or omissions which occurred during the course and scope of her employment with DCMHS must be brought under the Act and because (2) Shanks cannot properly maintain an action under the Act against Richardson alone, Richardson should be dismissed from the suit. Moreover, notwithstanding that Richardson is immune from personal liability in this case and that an action against Richardson alone cannot be maintained, as an employee of DCMHS, Richardson is entitled to the same protections and immunities under the Act as to which DCMHS would have been entitled had DCMHS been named as a party. In particular, Richardson would be entitled to assert against Shanks the affirmative defense of the expiration of the statute of limitations as set forth in the Act.

C. *Kimball Glassco is also a “governmental entity” for the purposes of the MTCA*

Note: While Shanks admitted Kimball Glassco’s status as a governmental entity at the hearing on the Motion to Dismiss, the following argument as to Kimball Glassco’s entitlement to the protections and immunities of the MTCA is made out of an abundance of caution.

As stated *supra*, the Act defines a governmental entity as the State, its political subdivisions and the *instrumentalities* of either. MISS. CODE ANN. § 11-46-1 (emphasis added). An instrumentality is defined as “something that serves as an intermediary or agent through which one or more functions of a controlling force are carried out: a part, organ, or subsidiary branch esp[ecially] of a governing body.” *Estate of Fedrick v. Quorum Health Resources*, ___ So.3d ___, 2009 WL 4807310, No. 2007-CA-00465-COA (¶ 24) (Miss. App.) (citing *Bolivar Leflore Med. Alliance, LLP v. Williams*, 938 So.2d 1222, 1228 (¶ 16) (Miss. 2006)). According to this Honorable Court, whether a private business organization qualifies as an “instrumentality” of a governmental entity depends largely on whether the governmental entity retains “ultimate

control” of the private organization. *Grimes*, 982 So.2d at 367-368 (citing *Bolivar Leflore*, 938 So.2d at 1223-1225 and *Allstadt v. Baptist Memorial Hospital*, 893 So.2d 1083, 1084-1086 (Miss. App. 2005) (stating where a private partnership is “ultimately controlled” by a governmental entity, the partnership is considered an “instrumentality” of the governmental entity and is entitled to the protections, limitations and immunities of the MTCA). Accordingly, a breakdown of the relationship between DCMHS and Kimball Glassco is necessary in evaluating Kimball Glassco’s status as an “instrumentality” of DCMHS.

As set forth in MISS. CODE ANN. § 41-19-33, DCMHS has the explicit authority, *inter alia*:

- To establish, own, lease, acquire, construct, build, operate and maintain mental illness, mental health, mental retardation, alcoholism and general rehabilitative facilities and services . . .
- To provide facilities and services for the prevention of mental illness, mental disorders, developmental and learning disabilities, . . . and other related handicaps or problems (including problems of the aging) . . . and for the rehabilitation of persons suffering from such illnesses, disorders, handicaps or problems . . .
- To enter into contracts and make such other arrangements as may be necessary with any and all private businesses, corporations, partnerships, proprietorships or other private agencies, whether organized for profit or otherwise, as may be approved by and acceptable to the regional commission for the purpose of establishing, funding, constructing, operating and maintaining facilities and services for the care, treatment and rehabilitation of persons suffering from mental illness, mental retardation, . . . developmental and learning disabilities, . . . and other illnesses, disorders, handicaps and problems (including the problems of aging) . . .
- To provide and finance within their own facilities, or through agreements or contracts with other local, state or federal agencies or institutions, nonprofit corporations, or political subdivisions or representatives thereof, programs and services for the mentally ill . . . and mentally retarded.
- To provide alternative living arrangements for persons with serious mental illness, including, but not limited to, group homes for the chronically mentally ill.
- In general, to take any action which will promote, either directly or indirectly, any and all

of the foregoing purposes.

In other words, DCHMS has the statutory authority to contract or otherwise enter into agreements with any private corporation in furtherance of the purposes of DCMHS. DCMHS exercised that power in its affiliation with Kimball Glassco.

Kimball Glassco was incorporated in 1995 for the purpose of “providing elderly persons and handicapped persons with housing facilities and services specially designed to meet their physical, social, and psychological needs.” See *Exhibit D*. According to its Articles of Incorporation, Kimball Glassco is empowered “[t]o buy, own, sell, assign, mortgage, or lease any interest in real estate and personal property and to construct, maintain, and operate improvements thereon necessary or incident to the accomplishment of the purposes set forth in [the previous Article], but **solely in connection with the project known as HUD Project No. 065-HD009.**” *Id.* (emphasis added). For reference, HUD Project No. 065-HD009 is referred to informally as the Kimball Glassco Residential Center Project. The project’s construction and application for financing through HUD was sponsored by the Commission on Mental Illness and Mental Retardation for the Fifth Region of Mississippi, d/b/a DCMHS. (See partial *Application for Multifamily Housing Project* and supplements and attachments thereto, enclosed with Appellant’s Record Excerpts as *Exhibit I*.)

The property referred to as the Kimball Glassco Residential Center is owned by Kimball Glassco Residential Center, Inc. but exists solely for and is completely operated by DCMHS. The day-to-day management of the Center and the activities and services provided therein is controlled by DCMHS. Further evidence of DCMHS’s control of Kimball Glassco and of its owner corporation is found in the Seventh Article of Kimball Glassco’s incorporating document, which provides that the “**Directors of the Corporation shall, at all times, be limited to**

individuals who have the approval of the Commission on Mental Illness and Retardation [for] the Fifth Region of Mississippi[,] the Sponsoring Corporation. The Sponsoring Corporation shall determine the term of the Directors so assigned.” *Id.* (emphasis added).

Stated differently, DCMHS even has unfettered control of who serves on Kimball Glassco’s Board of Directors. Such control can only be described as “ultimate” and clearly sufficient to establish Kimball Glassco’s status as an “instrumentality” of DCMHS. Therefore, Kimball Glassco is also entitled to the protections and immunities of the MTCA.

II. The statute of limitations bars Shanks’s claims against Richardson and Kimball Glassco.

As discussed above, since both parties are entitled to the immunities and protections of the Tort Claims Act, Shanks’s claims against both Richardson and Kimball Glassco must be brought in accordance with the provisions of the Act. Section 11-46-11 of the MISS. CODE ANN. provides, in pertinent part:

All actions brought under the provisions of this chapter shall be commenced within (1) year next after the date of the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based, and not after; provided, however, that the filing of the notice of claim as required by subsection (1) of this section shall serve to toll the statute of limitations for ninety-five (95) days from the date the chief executive officer of the state agency receives the notice of claim, or for one hundred twenty (120) days from the date the chief executive officer or other statutorily designated office of a municipality, county or other political subdivision receives the notice of claim during which time no action may be maintained by the claimant unless the claimant has received a notice of denial of claim. After the tolling period has expired, the claimant shall then have an additional ninety (90) days to file any action against the governmental entity served with proper claim notice.

In other words, the one-year statute of limitations under the MTCA will begin to run on a claim against a governmental entity on the date of accrual of the action. However, the one year period

is tolled, i.e. temporarily suspended, by the filing of the requisite notice of the claim. After the tolling period (90 or 120 days) has expired, the claimant is afforded an additional 90 days within which to file his or her *Complaint* in addition to the amount of time left remaining on the original one year period.

In the instant case, while notice of Shanks's potential claims against DCMHS was provided by Shanks to DCMHS and DMH, notice of Shanks's potential claims against Richardson and Kimball Glassco in particular was never provided to *any party*, nor were the claims against them mentioned at all in the notice that was provided. Nonetheless, notwithstanding that proper notice of Shanks's claims against Richardson and Kimball Glassco was not provided, it is clear that even under the longest potentially applicable statute of limitations of one year plus either 185 or 210 days, Shanks's *Complaint* in the instant case was not filed within the appropriate time period. Because Shanks's *Complaint*, filed on April 3, 2008, was filed over 1,000 days after the date of the accrual of her claim, her claims are barred by the Act's statute of limitations.

III. Neither Richardson nor Kimball Glassco have waived the affirmative defense of the expiration of the statute of limitations.

Although it is clear that Richardson and Kimball Glassco are entitled to the immunities and protections of the MTCA and that under the Act, Shanks's claims are barred by the statute of limitations, the trial court found that Richardson and Kimball Glassco waived their right to assert the defense of the expiration of the statute of limitations under the Act in light of their delay in noticing the motion for hearing. (R. at 57). While it is true that in Mississippi, a defendant's failure to timely pursue an affirmative defense, along with the defendant's active participation in litigation, will ordinarily serve as a waiver of the defense, "**neither delay in pursuing [an**

affirmative defense] nor participation in the judicial process, standing alone, will constitute a waiver.” *MS Credit Center, Inc. v. Horton*, 926 So.2d 167, 180 (¶¶ 41, 44) (Miss. 2006). In other words “a party who invokes [an affirmative defense] and pursues [it] will not ordinarily waive the right simply because of involvement in the litigation process.” *Id.* Conversely, **“a party who seeks to [assert an affirmative defense] after a long delay will not ordinarily be found to have waived the right [to assert the defense] where there has been no participation in, or advancement of, the litigation process.”** *Id.* (emphasis added). According to the Mississippi Court of Appeals, under some circumstances, even *minimal* participation in a lawsuit coupled with a delay in the pursuit of an affirmative defense will not constitute waiver of a defense. *Lucas v. Baptist Memorial Hospital - North Mississippi, Inc.*, 997 So.2d 226 (Miss. App. 2008) (holding that the hospital’s minimal participation in medical negligence action did not constitute a waiver of an affirmative defense of insufficiency of process even in light of a nine-month delay in between the hospital’s responsive pleadings and its Motion to Dismiss).

Here, both Kimball Glassco and Richardson first asserted their entitlement to the protections and immunities of the Tort Claims Act in their initial pleadings filed on May 12, 2008. (R. at 8-16.) As is clearly evidenced by the numerous telephone calls and correspondence exchanged between counsel for Shanks and counsel for the appellants during the time period between the filing of the initial pleadings and the filing of the notice of hearing, Richardson and Kimball Glassco consistently reaffirmed to Shanks their position that Shanks’s claims against them were barred by the Act’s statute of limitations. (See R. at 56 (¶ 6) and *Exhibit H.*) During that period, neither Kimball Glassco nor Richardson *actively* participated in the instant litigation. While Kimball Glassco did respond to discovery propounded upon it by Shanks, that discovery was related solely to Kimball Glassco’s status as a governmental entity. (See *Exhibit G.*) No

other pleadings were subsequently filed by either Kimball Glassco or Richardson.

In support of their position that the defense has been waived, it is anticipated that Shanks will cite to the following cases:

- *MS Credit Center, Inc. v. Horton*, 926 So.2d 167 (Miss. 2006).

In *Horton*, this Honorable Court found that even though the defendants asserted their right to compel arbitration in their respective answers, where the defendants participated fully in the litigation of the merits of the case for over two years by consenting to a scheduling order, engaging in written discovery, and conducting the deposition of the plaintiff, the defendants waived their right to compel arbitration.

- *East Mississippi State Hospital v. Adams*, 947 So.2d 887 (Miss. 2007).

In *Adams*, this Court held that, even though the hospital and the Department of Mental Health asserted the defenses of insufficiency of process and of service of process in their answer, because the defendants actively participated in litigation by conducting discovery, filing motions to compel, participating in status conferences and filing and responding to various motions before filing a motion specifically asserting the grounds for the defense, the defense was waived.

- *Grimes v. Warrington*, 982 So.2d 365 (Miss. 2008).

In *Grimes*, the affirmative defense of immunity under the Tort Claims Act was found to have been waived when the defendant physician asserting the defense engaged in discovery, conducted depositions, designated experts and filed a motion in limine in preparation for the trial of the matter, notwithstanding that he asserted the defense of immunity in his answer, where he failed to file a motion specifically asserting the grounds for the defense until 5 years after the initiation of litigation.

Each of these cases, however, are easily distinguishable from the case at hand. In the cases cited above, each of the defendants *actively* participated in litigation. They exchanged discovery, conducted depositions and engaged in the litigation of the merits of each case. Such participation cannot, under any circumstances, be described as minimal.

In contrast with these cases, Richardson's *only* participation in the instant litigation included the filing of her *Motion to Dismiss*. Additionally, Kimball Glassco's participation in this case - which included the filing of an *Answer* asserting the affirmative defense of immunity and responding to discovery related solely to its status as a governmental entity - can only be described as minimal *at best*. Regardless, however, Kimball Glassco's participation in the case was clearly not in furtherance of the litigation of the merits thereof. Most importantly, Shanks was never once led to believe Richardson or Kimball Glassco would not be pursuing the defense and, therefore, suffered absolutely no prejudice in the short delay between the initial pleadings and the filing of the notice of hearing on the matter. Because there has been no delay in the pursuit of the affirmative defense of the expiration of the statute of limitations in this case coupled with active participation in the litigation of the merits of the case, neither party has waived the affirmative defense and the trial court's contrary holding was made in error.

IV. The correspondence from the Mississippi Tort Claims Board does not equitably estop Richardson or Kimball Glassco from asserting the affirmative defense of the expiration of the statute of limitations.

At the hearing on the Motion to Dismiss, Shanks also argued, and the trial court also agreed, that Richardson and Kimball Glassco are equitably estopped from asserting the defense of the expiration of the statute of limitations under the Act in light of the April 4, 2006 correspondence from the Tort Claims Board to Shanks's prior counsel. (R. at 27, 57.) Specifically, the subject correspondence provides:

This will acknowledge receipt of your notice of claim **directed to the Mississippi Department of Mental Health** concerning the above-referenced matter.

We have been in contact with the Mississippi Department of Mental Health concerning this matter and **[have been] advised** that Delta Community Mental Health Service is not a state agency nor is it a department or division of the Mississippi Department of Mental Health.

For these reasons, we will unfortunately be unable to consider this claim. We regret we will be unable to assist you or your client any further in this respect.

(R. at 27.)

This Honorable Court has generally defined equitable estoppel “as the principle by which a party is precluded from denying any material fact, induced by **his** words or conduct upon which a person relied, whereby the person changed his position in such a way that injury would be suffered if such denial or contrary assertion was allowed.” *Helveston v. Lum Properties Ltd.*, 2 So.3d 783, 786-787 (¶ 14) (Miss. App. 2009) (citing *Dubard v. Biloxi H.M.A., Inc.*, 778 So.2d 113, 114 (¶ 5) (Miss.2000)). The essential elements of equitable estoppel are (1) conduct and acts, language or silence, (2) amounting to a misrepresentation or concealment of material facts (3) **with knowledge or imputed knowledge of such facts**, (4) **with the intent that the representation or silence or concealment be relied upon**, with the other party's ignorance of the true facts, and reliance to his damage upon the representation or silence. *Turner v. Terry*, 799 So.2d 25, 37 (¶ 42) (Miss. 2001) (*Cain v. Robinson*, 523 So.2d 29, 34 (Miss.1988)).

It is undisputed by the appellants that equitable estoppel can be asserted in opposition to a statute of limitations defense in order to avoid a serious injustice *if there is inequitable conduct*. *Trosclair v. Miss. Dept. of Transportation*, 757 So.2d 178, 181 (Miss. 2000) (citing *Mississippi Dept. Of Public Safety v. Stringer*, 748 So.2d 662 (Miss. 1999)). In this case, however, there has

been no such inequitable conduct on behalf of Richardson or Kimball Glassco, as the subject letter was not drafted from or on behalf of DCMHS, Kimball Glassco or Vera Richardson.

Moreover, nowhere in the letter does Donaldson reference, either directly or indirectly, Kimball Glassco itself or Kimball Glassco's status *vel non* as a governmental entity. Absent some representation therein as to the status of Kimball Glassco, the letter cannot, under any circumstances, be relied upon by Shanks as a representation that Kimball Glassco is not entitled to the protections and immunities of the MTCA. Since no representations as to Kimball Glassco were made therein, Shanks's argument that Kimball Glassco is estopped from asserting the defense of the expiration of the statute of limitations based on the representations contained in the letter is clearly misplaced.

Finally, the letter does not serve to grant or deny governmental immunity to DCMHS. Nowhere in the letter does Donaldson state that DCMHS *is not* a governmental entity as defined by the Tort Claims Act. Rather, the letter only served to inform Shanks of *DMH's* representations to the Board and that the Board would not be handling the claim. More precisely, by way of this correspondence, Donaldson was simply passing along information which was provided to him by **DMH - not DCMHS**. Despite being clearly aware of the identity of DCMHS as a separate and distinct entity from DMH (as is evidenced by Shanks's specific naming of the DCMHS Executive Director in her notice of the claim) Shanks took no action to address her inquiries as to DCMHS's status as a governmental entity to DCMHS itself. In fact, until the production of Donaldson's letter by counsel in the instant litigation, DCMHS had no knowledge of the contents of Donaldson's letter.

Because the information contained therein was neither a representation of DCMHS, Richardson or Kimball Glassco nor was it *based on* a representation of DCMHS, Richardson or

Kimball Glassco, the correspondence cannot serve as a basis for estoppel *against DCMHS, Richardson or Kimball Glassco*. See, generally, *McGlaston v. Cook*, 576 So.2d 1268 (Miss. 1991) (holding that a mother's actions in a paternity suit could not be imputed to her child to invoke the doctrine of estoppel against the child in the child's paternity action). Here, there has been no action on behalf of Richardson, DCMHS or Kimball Glassco which could have been reasonably expected to induce the Plaintiff to believe that her claims did not fall within the province of the Tort Claims Act. As such, the doctrine of equitable estoppel does not apply in this case to preclude Richardson and Kimball Glassco from asserting the expiration of the Act's statute of limitations as an affirmative defense to Shanks's claims and the trial court was in error in holding otherwise.

CONCLUSION

First, both Richardson and Kimball Glassco are entitled to the immunities and protections of the MTCA and any claims against them must be brought in accordance with the provisions of the Act. Because Shanks failed to file her claim against Richardson and Kimball Glassco within the time allowed by the Act, her claims against them are barred. Most importantly, however, neither Richardson or Kimball Glassco have waived the defense of the expiration of the statute of limitations in this case, nor are they equitably estopped from asserting the defense, as (1) neither party actively participated in litigation and (2) neither party acted in a way which would induce inaction on behalf of Shanks, i.e. to cause her to believe that claims against them would not be governed by the Tort Claims Act. Accordingly, the trial court's holdings to the contrary were clearly made in error.

Because Richardson and Kimball Glassco are not equitably estopped from asserting their entitlement to the protections of the Mississippi Tort Claims Act and because they did not otherwise waive the affirmative defense of the expiration of the statute of limitations under the Act in this case,