

INTRODUCTION

This matter is presently pending before the Court on Motions to Reconsider submitted by all parties. The Governor submits this *amicus curiae* brief in support of the Appellee's Motion to Reconsider. A more detailed description of the Governor's interests in this matter is set forth in the separate Motion for Leave to File *Amicus Curiae* Brief.

To the extent applicable, the Governor respectfully joins in the arguments of law submitted by the Appellee medical providers in their Motion to Reconsider, and adopts them as his own, and urges this Court, upon reconsideration, to dismiss all claims in this action with prejudice as being barred by the applicable statute of limitations. To the extent applicable and in the interest of brevity, the arguments advanced in the proposed *amici curiae* brief of the Mississippi State Medical Association, the Mississippi Hospital Association, the Mississippi Health Care Association, the Mississippi Nurses Association, and the Mississippi Tort Claims Board ("MTCB *amicus* brief"), are incorporated herein by reference.

The Governor fears that this Decision, coupled with two more recent decisions of this court, will erode part of the progress Mississippi has made regarding tort reform. This slow erosion risks returning our state to an era when health care professionals stopped practicing because of sky-high insurance premiums (or no available insurance at all), and when job-creating business avoided Mississippi for fear of liability. Our state has made too much progress to return down that path.

ARGUMENT

The Governor is concerned the Court's decision in this matter, if it stands, will undermine Mississippi's progress on tort reform, by effectively eliminating the pre-suit notice requirements of Miss. Code Ann. §§ 11-46-11 and 15-1-36(15). This result contradicts the Legislature's clear intention in adopting the relevant statutes, and risks resurrecting problems from the pre-tort reform era. Whether or not the decision will return us to an era when health-care providers left the state because of unaffordable insurance premiums—and outside observers labeled Mississippi a “Judicial Hellhole”—it will unquestionably invite considerable procedural gamesmanship. That gamesmanship will increase litigation and insurance costs and decrease the predictability of our tort system, while doing nothing to expand the public's access to justice. The sole group to benefit from this decision will not be plaintiffs, but plaintiffs' lawyers.

This Court is well aware of the medical liability crisis that led to tort reform efforts in the early 2000s. As noted at length in the MTCB *amicus* brief, earlier this decade Mississippi faced a medical liability crisis, in which health care providers were ceasing operations in the state, and insurance companies providing coverage to health care providers were leaving the state or worse. As a result, parts of Mississippi lacked doctors in certain specialties because malpractice insurance coverage was too expensive or simply unavailable. Mississippi's deserved reputation as a “Judicial Hellhole” scared away businesses that otherwise would have generated much-needed jobs. Thankfully, politics was put aside to solve the crisis, and Mississippi adopted meaningful tort reform, including the notice provision of Miss. Code Ann. 15-1-36(15).

Tort reform has been an unmitigated success in Mississippi. Insurance premiums have been lowered. Competition is returning to the market. Physicians are beginning to return, and

recruiting efforts are now more successful. Companies that might otherwise have been scared off by our civil justice system have decided to come to the post-tort reform Mississippi, generating thousands of jobs. Our reputation as a haven for jackpot justice and runaway juries has abated.

Of equal importance, these reforms have succeeded without preventing plaintiffs with legitimate claims from accessing the courts. The pre-suit notice requirements of the MTCA and of Miss. Code Ann. § 15-1-36(15), are valuable conditions precedent to filing suit, allowing potential defendants to investigate and resolve claims so that suit might be avoided. If a would-be defendant is unable to resolve the claim during the pre-suit notice period, however, the claimant may proceed to the courts for resolution. Needless to say, encouraging the prompt resolution of claims with merit benefits plaintiffs as well as defendants. These notice provisions provide predictability and the potential for resolution of claims without litigation, but do not deprive potential plaintiffs of a cause of action.

This Court's decision undermines the legislative intent for, and the general efficacy of, these statutes. Under the Court's decision in its present form, a suit filed without the requisite pre-suit notice is a nullity, but nevertheless tolls the statute. As discussed at length in the MTCB *amicus* brief, this tolling, coupled with more recent decisions of this court (specifically *Arceo v. Tolliver*, ("Arceo II") No. 2008-CA-00224-SCT (Miss. 2009) and *Stuart v. UMMC*, No. 2007-CT-00864-SCT (Miss. 2009)), permits a plaintiff to effectively extend the statute of limitations far beyond the period the Legislature intended. This effectively renders meaningless both the conditions precedent to access to court (the pre-suit notice requirement) and the time frames set by the Legislature of this state for bringing these claims (the statutes of limitations). The

Legislature cannot have intended to establish a pre-suit notice requirement but virtually no penalty for non-compliance.

It should also be noted that this Court's decision will cost the state unknown additional sums to defend suits brought under the MTCA outside of the original brief limitations period set by the Legislature. These additional costs will come in the midst of a major economic crisis, when state and local budgets are already approaching the breaking point. When the state already faces the threat of deep cuts to, *inter alia*, education, public safety, and public health, she can ill afford additional costs incurred when plaintiffs fail to comply with the Legislature's clear pre-suit notice requirements.

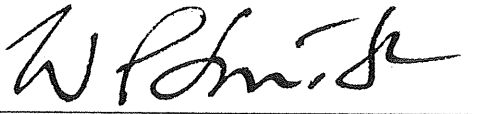
CONCLUSION

The Governor is gravely concerned this Court's prior decision in this matter, along with its recent decisions in *Arceo II* and *Stuart*, represent the beginnings of a return to the pre-tort reform approach, with the concomitant pre-tort reform problems of unaffordable insurance premiums, unavailable insurance coverage, and employers fearful of our state's civil justice system. Although that was undoubtedly not this Court's intention, the decision previously announced may invite costly procedural manipulation. Mississippi cannot afford a return to her old ways, and we respectfully urge this Court to reconsider its prior decision in this matter, rejecting tolling when a plaintiff files suit without giving the pre-suit notice mandated by the Legislature.

THIS the 27th day of August, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed by United States mail, postage prepaid,
a true and correct copy of the foregoing instrument to the following:

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