

Serial: **214948**

IN THE SUPREME COURT OF MISSISSIPPI

No. 2014-CT-01079-SCT

***UNIVERSITY OF MISSISSIPPI
MEDICAL CENTER***

Appellant

v.

***KIM HAMPTON, INDIVIDUALLY AND
ON BEHALF OF KIMRICK SMITH,
DECEASED, AND THE WRONGFUL
DEATH BENEFICIARIES OF KIMRICK
SMITH***

Appellee

EN BANC ORDER

The instant matter is before the Court en banc on the Court's own motion. The Petition for Writ of Certiorari filed by Kim Hampton was granted by order of the Court signed on May 18, 2017. Upon further consideration, the Court finds that there is no need for further review and that the writ of certiorari should be dismissed, as authorized by Mississippi Rule of Appellate Procedure 17(f).

It is, therefore,

ORDERED:

That the writ of certiorari is hereby dismissed.

SO ORDERED, this the 10th day of October, 2017.

/s/ Josiah Dennis Coleman

JOSIAH DENNIS COLEMAN, JUSTICE
FOR THE COURT

**TO DISMISS: RANDOLPH, P.J., COLEMAN, MAXWELL, BEAM AND
CHAMBERLIN, JJ.**

**KITCHENS, P.J., OBJECTS TO THE ORDER WITH SEPARATE WRITTEN
STATEMENT JOINED BY KING, J.; WALLER, C.J., JOINS IN PART.**

NOT PARTICIPATING: ISHEE, J.

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**KITCHENS, PRESIDING JUSTICE, OBJECTING TO THE ORDER WITH
SEPARATE WRITTEN STATEMENT:**

¶1. After undergoing treatment at the University of Mississippi Medical Center (UMMC) for a stab wound to the chest, Kimrick Smith died from an undetected heart wound. His mother, Kim Hampton, filed suit *pro se* against UMMC on behalf of Smith's wrongful death beneficiaries. The Circuit Court of the First Judicial District of Hinds County, following a bench trial, awarded a \$500,000 judgment to Hampton, finding that UMMC had breached the applicable standard of care and that such breach had been the proximate cause of Smith's death. UMMC appealed and the Mississippi Court of Appeals reversed and rendered, finding that Hampton had filed suit outside the applicable statute of limitations. We granted Hampton's petition for a writ of *certiorari*, and now the Court has decided to dismiss the writ after grant. For the reasons stated below, I object to this Court's dismissal after grant. With

respect, I would reverse the decision of the Mississippi Court of Appeals and reinstate and affirm the judgment of the Circuit Court of the First Judicial District of Hinds County.

FACTS AND PROCEDURAL HISTORY

¶2. On October 30, 2010, Kimrick Smith was airlifted to UMMC after having been stabbed in the chest. He was discharged from UMMC three days later, on November 3, 2010; but, on November 8, 2010, he died suddenly at Marion County General Hospital from an undetected heart wound. The following timeline is significant to the analysis:

- Nov. 11 or 12, 2010 Dr. Adele Shaker, who performed Smith's autopsy, informed Kim Hampton, Smith's mother, of the heart wound. The parties agree that November 12, 2010, is the latest possible discovery date by Hampton of her cause of action and it triggered the one-year statute of limitations. Miss. Code Ann. § 11-46-11(3) (2002).
- November 7, 2011 Hampton hand delivered a pre-suit notice of claim letter to UMMC. Miss. Code Ann. § 11-46-11(1) (Rev. 2012). The parties agree that five days remained on the original, one-year limitations period, but such period was tolled for ninety-five days. Miss. Code Ann. § 11-46-11(3) (2002).
- February 10, 2012 The ninety-five day tolling period, after UMMC received pre-suit notice of Hampton's claim, expired.
- February 28, 2012 UMMC denied Hampton's claim.
- May 29, 2012 Hampton filed a *pro se* complaint in the Circuit Court of the First Judicial District of Hinds County.

- September 21, 2012 UMMC answered Hampton’s *pro se* complaint and raised as an affirmative defense the statute of limitations: “Claims against this defendant are barred by the applicable statute(s) [sic] of limitations.”
- December 12, 2012 The trial court granted UMMC’s motion to compel Hampton, who still was *pro se*, to answer interrogatories from UMMC.
- Jan. and Feb. 2013 Hampton, who still was *pro se*, failed to appear at three depositions noticed by UMMC.
- February 15, 2013 UMMC filed a motion to dismiss “on the basis that the plaintiff continues to delay prosecution of this matter, specifically by her refusal to attend her own deposition after being served with proper notice.” UMMC stated that Hampton’s “blocking of initial basic discovery has prevented the defendant from evaluating certain affirmative defenses to determine if motions should be made.”
- February 21, 2013 The late Precious T. Martin, Sr., and Suzanne Keys filed an entry of appearance as counsel of record for Hampton. Keys responded to UMMC’s motion to dismiss, noting that the delay was due to Hampton’s having “been unable to find counsel to represent her” and her lack of understanding of the process and her desire, due to the complicated nature of wrongful death medical negligence cases, to have “counsel to represent her and be with her at these depositions.”
- April 22, 2013 The trial court denied UMMC’s motion to dismiss.

- May 1, 2013 Hampton was deposed and stated that she learned on November 11 or 12, 2010, from Dr. Shaker that Smith had succumbed to a stab wound to the heart, that UMMC “should have seen this,” “that they should have done a CT . . .” and that “he [Dr. Shaker] didn’t understand why they didn’t find it.”
- May 28, 2013 UMMC filed a motion for summary judgment asserting that Hampton’s complaint was filed outside the limitations period of Mississippi Code Section 11-46-11(3) (2002).
- November 4, 2013 The trial court denied UMMC’s motion for summary judgment, and the case proceeded to trial.
- November 4-6, 2013 A bench trial took place before the Circuit Court of the First Judicial District of Hinds County.
- July 15, 2014 The trial court entered a \$500,000 judgment in favor of Hampton, finding that UMMC breached the applicable standard of care and that such breach proximately caused or contributed to Smith’s death.

Aggrieved, UMMC appealed.

¶3. The case was assigned to the Mississippi Court of Appeals, which reversed and rendered the judgment of the Circuit Court of the First Judicial District of Hinds County.

Univ. of Miss. Med. Ctr. v. Hampton, 2016 WL 5914215, *1 (Miss. Ct. App. Oct. 11, 2016).

The Court of Appeals determined that Hampton’s complaint had been filed outside the applicable statute of limitations and that UMMC had not waived its statute of limitations

defense. *Id.* at *5. This Court granted Hampton’s petition for writ of *certiorari* to address the statute of limitations issue. I would address that issue as follows:

Whether UMMC waived its statute of limitations affirmative defense.

¶4. Hampton argues that UMMC waived any statute of limitations affirmative defense by waiting from May 29, 2012, when Hampton filed her *pro se* complaint, until May 28, 2013, to file its motion for summary judgment, in which it claimed that the complaint had been filed outside the statutory period. UMMC justifies that nearly year-long delay by claiming that it did not have the information it needed until Hampton disclosed in her May 1, 2013, deposition that Hampton had discovered her claim, at the latest, on November 12, 2010.

¶5. In *MS Credit Center, Inc. v. Horton*, 926 So. 2d 167, 181 (Miss. 2006), this Court held that “absent extreme and unusual circumstances—an eight month unjustified delay in the assertion and pursuit of any affirmative defense or other right which, if timely pursued, could serve to terminate the litigation, coupled with active participation in the litigation process, constitutes waiver as a matter of law.” In that case, while the defendants “asserted their right to compel arbitration in their respective answers,” instead of “proceeding within a reasonable time to file a motion to compel arbitration and request a hearing on the motion, defendants proceeded to substantially engage in the litigation process by consenting to a scheduling order, engaging in written discovery, and conducting Horton’s deposition.” *Id.* at 180. This Court held that, because the defendants had “delayed pursuing their right to compel arbitration for eight months (over 240 days),” defendants had “waived their right to compel arbitration.” *Id.* at 181.

¶6. Likewise, this Court considered a case in which the defendant asserted tort claims immunity pursuant to the Mississippi Tort Claims Act in his answer to the plaintiff's complaint. *Grimes v. Warrington*, 982 So. 2d 365, 370 (Miss. 2008). The defendant did not assert tort claims immunity again until more than five years later, when he moved for summary judgment on that basis. *Id.* The defendant offered "no evidence that any information needed to assert this affirmative defense was not available to him from the inception of the litigation" and "the case was set and twice reset for trial, experts were designated and deposed on the merits of the negligence claim, and [the defendant] filed a motion in limine to exclude part of [the plaintiff's] expert testimony." *Id.* This Court held that the defendant's "failure actively and specifically to pursue his MTCA affirmative defense while participating in the litigation served as a waiver of the defense." *Id.*

¶7. In the present case, the Court of Appeals held that UMMC had "lacked exact knowledge of when the plaintiff discovered the claim necessary to present its statute-of-limitations defense," since "Hampton's complaint did not plead the date the claim was discovered or include facts that would indicate the discovery date of her claim." *Hampton*, 2016 WL 5914215, *5. According to the Court of Appeals:

UMC pleaded the defense and then timely pursued discovery of the information needed to successfully bring the defense to the court's attention. Frustrated in its pursuit of discovery, UMC first moved to compel discovery and later moved that the complaint be dismissed for Hampton's refusal to engage in discovery. Once UMC gained the necessary information via Hampton's deposition, it promptly filed a motion for summary judgment on the basis of its defense and pursued the court's adjudication of its defense. Had UMC filed for summary judgment prior to receiving information indicating a discovery date of the plaintiff's claim, it would not have been able to support

its motion with evidence of when the statute of limitations began to run and therefore of when it expired.

Id. At her deposition on May 1, 2013, Hampton stated that Dr. Adele Shaker, the forensic pathologist who performed the autopsy, informed her personally that Smith “had a stab wound to the heart.” According to Hampton, Dr. Shaker, on other occasions, spoke to Angela Tucker, who “relayed to [Hampton] their conversations.” Hampton further stated that “the way [Tucker] told me was Dr. Shaker said that the hospital should have seen this, that they should have done a CT with contrast, and he didn’t understand why they didn’t find it.” Hampton was asked “[s]o when you filed this lawsuit, on your own, you had information from a doctor that UMC, at least in his opinion, had missed this—the discovery of this stab wound?” Hampton responded, “[y]es, ma’am.”

¶8. UMMC had ample information at the time it answered Hampton’s *pro se* complaint to raise, as its thirteenth affirmative defense, that “[c]laims against this defendant are barred by the applicable statute(s) [sic] of limitations.” Moreover, the autopsy report completed on November 12, 2010, identifies the cause of death as a “[s]tab wound to the heart.” More specifically, the autopsy report states that the stab wound “penetrates significantly into the upper left chest wall with multiple subcutaneous hemorrhages surrounding its tract, and it penetrated the pericardium and the upper anterior right ventricle.” It continues, “[t]he upper anterior right ventricle displays 1/4 of an inch stab wound that is covered with dry scab. There is approximately 300 mL of clotted and liquid blood in the pericardium.” The notice of claim letter, which was hand delivered to James E. Keeton, M.D., Chief Executive Officer of UMMC, on November 7, 2011, stated that “[i]t is Ms. Hampton’s belief and allegation,

based on information obtained from both the Marion General Hospital and the Marion Coroner that Mr. Smith's death was occasioned by injured [sic] from the stab wound he suffered on October 31, 2010." The letter continues: "It is also Ms. Hampton's belief and allegation that UMMC failed to properly diagnose and treat Mr. Smith and, further, improperly discharged Mr. Smith, all contributing to and resulting in Mr. Smith's death."

¶9. Under this Court's precedent, Hampton's cause of action accrued at the time she discovered the *injury*; in other words, Hampton is charged with knowledge of the injury from the date the autopsy report revealed to her that her son had died from a stab wound to the heart, irrespective of the point at which the forensic pathologist informed her that UMMC's failure to discover and treat the heart wound caused or contributed to the ultimate consequence of the injury: Kimrick Smith's death. *See Angle v. Koppers*, 42 So. 3d 1, 5 (Miss. 2010) ("cause of action accrued upon the discovery of the injury, *not discovery of the injury and its cause.*") (emphasis in original). As such, UMMC's argument that "it was necessary that [it] participate in the normal discovery process to learn the facts underlying the plaintiff's discovery of her cause of action" falls flat. UMMC may have learned through the deposition that someone had informed Hampton that UMMC was responsible and that she should sue; but under this Court's precedent, the operative point for discovery of a cause of action is discovery of the injury.

¶10. UMMC waived its statute of limitations affirmative defense. It answered the complaint on September 28, 2012. It participated in the litigation by propounding written discovery, by filing a motion to compel discovery responses, which the trial court granted,

by filing a motion to dismiss accusing Hampton of failure to engage in the discovery process, by taking multiple depositions, and by agreeing to a scheduling order setting the trial for November 4, 2013. UMMC waited 241 days (i.e., eight months and seven days) to file its motion for summary judgment, in which it asserted the affirmative defense of statute of limitations. I would hold that its delay in so doing was not justified.

Whether Hampton's complaint was filed timely under the applicable statute of limitations.

¶11. The parties agree that the one-year statute of limitations of Mississippi Code Section 11-46-11(3) commenced, at the latest, on November 12, 2010, when Hampton received notice that Smith had died from a stab wound to the heart which had not been discovered during the course of his treatment at UMMC. The issue in dispute is whether the additional ninety-day period to file suit provided by Mississippi Code Section 11-46-11(3) began to run from February 10, 2012, the date on which the ninety-five day tolling period after pre-suit notice pursuant to Section 11-46-11(3) ended, or on February 28, 2012, the date UMMC denied Hampton's claim. Hampton filed her complaint *pro se* on May 29, 2012.

At the time Hampton filed suit, Section 11-46-11(3) provided the following: 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. However, should the governmental entity deny any such claim, then the additional ninety (90) days during which the claimant may file an action *shall begin to run upon the claimant's receipt of notice of denial of claim* from the governmental entity.

Miss. Code Ann. § 11-46-11(3) (2002) (emphasis added).

¶12. In *Page v. University of Southern Mississippi*, 878 So. 2d 1003, 1008 (Miss. 2004), this Court considered a hypothetical situation in which a claim was denied after the expiration of the tolling period:

If the cause of action occurs on January 1, 2003, and notice is received on February 1, 2003 (31 days later), the 120-day tolling period would end on June 1, 2003. If the claim were denied later on October 1, 2003, the remaining 334 days in the original one-year statute, *would be calculated from June 1, 2003, the date on which the tolling period ended*. Therefore, the one-year statute would expire on April 30, 2004. Adding the additional 90 days to file suit, the action would have to be filed by July 29, 2004.

Id. at 1008 (emphasis added). The legislature revised the statute and, effective July 1, 2012, the statutory language now appears as follows: “No action whatsoever may be maintained by the claimant until the claimant receives a notice of denial of claim or the tolling period expires, whichever comes first, after which the claimant has an additional ninety (90) days to file suit.” Miss. Code Ann. § 11-46-11(3)(b) (Rev. 2012).

¶13. In the present case, the Court of Appeals ruled that “the Legislature incorporated the legal rule of the *Page* hypothetical directly into the statute.” *Hampton*, 2016 WL 5914215, at *3. Applying the *Page* hypothetical and the subsequent statutory amendment, the Court of Appeals held that the additional ninety-day period, and the five-day period remaining on Hampton’s original limitations period, began to run from February 10, 2012, the date the ninety-five day tolling period expired. *Id.* at *3. “The five days remaining in the original limitations period, combined with the final ninety days, expired on May 15, 2012.” *Id.* Accordingly, the Court of Appeals held that Hampton’s complaint, which had been filed on May 29, 2012, was “fourteen days outside of the limitations period.” *Id.*

¶14. Hampton maintains in her petition for writ of *certiorari* that the *Page* hypothetical was *dictum*. She also observes that the hypothetical in *Page* is not the same factual scenario now before the Court. In that hypothetical, the Court considered the effect of denial of the claim after the tolling period but before the end of the one-year statute of limitations. *Page*, 878 So. 2d at 1008. According to Hampton, “[h]ere the denial of the claim came after both the tolling period and the one year period had ended (November 12, 2010, to November 12, 2011) and during the final 90 days for filing suit.” Hampton argues that her complaint was filed timely because, according to the statute in effect at the time, the ninety-day period did not begin to run until she received notice that UMMC had denied her claim.

¶15. Hampton is correct for two reasons. First, this Court’s observation in *Page* was based on a hypothetical situation that was not before the Court. We have held that “[t]he purpose of our appellate review is not to settle questions in the abstract or to issue advisory opinions.” *Scroggins v. Baptist Mem’l Hosp.*, 967 So. 2d 646, 649 n.1 (Miss. 2007). Second, according to the plain language of the statute in effect at the time Hampton filed her complaint, the ninety-day period began to run when Hampton received notice that UMMC had denied her claim. Hampton’s *pro se* complaint therefore was timely on May 29, 2012. In addition to the ninety-day period, Hampton had five days remaining on her statute of limitations. Accordingly, Hampton had until June 2, 2012, to file her complaint.

¶16. Hampton’s complaint was timely. I would therefore reverse the decision of the Court of Appeals which holds otherwise.

CONCLUSION

¶17. I would reverse the decision of the Mississippi Court of Appeals and would hold, first, that UMMC waived the affirmative defense of statute of limitations by unjustifiedly waiting 241 days (i.e., eight months and seven days) to file its motion for summary judgment on that ground and, second, that Hampton's complaint was filed timely under Mississippi Code Section 11-46-11(3) (2002), which was applicable at the time she filed the complaint. Accordingly, I respectfully object to the order dismissing Hampton's petition for writ of *certiorari* after grant.

KING, J., JOINS THIS SEPARATE WRITTEN STATEMENT. WALLER, C.J., JOINS THIS SEPARATE WRITTEN STATEMENT IN PART.