IN THE SUPREME COURT OF MISSISSIPPI

NO. 2020-IA-00199-SCT

METHODIST HEALTHCARE-OLIVE BRANCH HOSPITAL

v.

BETTYE B. McNUTT, INDIVIDUALLY, AS MOTHER AND NEXT KIN OF, AND ON BEHALF OF ALL WRONGFUL DEATH BENEFICIARIES OF RONALD BRANDON McNUTT, DECEASED

DATE OF JUDGMENT:	02/04/2020
TRIAL JUDGE:	HON. CELESTE EMBREY WILSON
TRIAL COURT ATTORNEYS:	THOMAS J. LONG CHERYL LONG CRAIG C. CONLEY BRADLEY W. SMITH KATHERINE MARQUIS ANDERSON KEVIN O'NEAL BASKETTE ALEXANDER PARK TOMMIE GREGORY WILLIAMS, JR
COURT FROM WHICH APPEALED:	DESOTO COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	BRADLEY W. SMITH CRAIG C. CONLEY
ATTORNEYS FOR APPELLEES:	CHERYL LONG THOMAS J. LONG
NATURE OF THE CASE:	CIVIL - MEDICAL MALPRACTICE
DISPOSITION:	AFFIRMED AND REMANDED - 08/06/2021
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

KITCHENS, PRESIDING JUSTICE, FOR THE COURT:

¶1. Bettye B. McNutt filed a complaint against Dr. Vivian Sze Ting Lo, Methodist-Olive Branch Hospital (Methodist), and others asserting the wrongful death of her son due to

medical malpractice. Because Dr. Lo had not been served with a presuit notice of claim, the Circuit Court of DeSoto County dismissed the claims against Dr. Lo and, because the statute of limitations had expired, the dismissal was with prejudice. After Dr. Lo's dismissal, Methodist filed a motion for partial summary judgment, arguing that McNutt's vicarious liability claims based on Dr. Lo's conduct were extinguished when Dr. Lo was dismissed with prejudice. The circuit court denied the motion for partial summary judgment, and Methodist appeals.

¶2. We hold that the circuit court properly denied partial summary judgment. Although Dr. Lo was dismissed with prejudice, the dismissal was not an adjudication on the merits, and McNutt did not enter into a settlement release and indemnity agreement with Dr. Lo. Methodist asserts that ***Lowery v. Statewide Healthcare Services, Inc.***, 585 So. 2d 778 (Miss. 1991), mandates that it be dismissed because McNutt's lawsuit against Dr. Lo was untimely. We find that ***Lowery*** does not mandate Methodist's dismissal in this case because Dr. Lo was not an indispensable party to McNutt's lawsuit against Methodist, and McNutt had attempted to serve Dr. Lo with presuit notice within the applicable limitations period. We affirm and remand for further proceedings.

FACTS

¶3. According to the complaint, Brandon McNutt visited the emergency room at Methodist on May 12, 2016, complaining of chest pain and bilateral shoulder pain. Dr. Lo examined Brandon McNutt, told him he was having a panic attack, diagnosed him with bilateral arm pain and shoulder pain and swelling, referred him to a psychiatrist, and ordered

his discharge the same day. Two days later, on May 14, 2016, Brandon McNutt died of a heart attack.

¶4. Bettye McNutt, Brandon McNutt's mother, filed the wrongful death action on July 10, 2018. In addition to Dr. Lo and Methodist, McNutt sued UT Methodist Physicians, LLC, and T.M. Carr, M.D., P.C. The complaint averred that McNutt had given the defendants written presuit notice of claim on May 9, 2018, by serving each defendant via certified mail. A stipulation of dismissal of UT Methodist Physicians, LLC, was entered on October 9, 2018. The parties stipulated to the dismissal of T.M. Carr, M.D., P.C., on December 4, 2019.

¶5. On October 1, 2018, Dr. Lo filed a motion to dismiss, arguing that, because McNutt had not served her with presuit notice as required by Mississippi Code Section 15-1-36(15) (Rev. 2019),[1] the claims against her must be dismissed. Dr. Lo argued also that, notice having failed, the dismissal should be with prejudice because the two-year limitations period had expired on May 14, 2018, before McNutt had filed the complaint. In response, McNutt averred that on May 9, 2018, she had mailed a notice of claim to Dr. Lo's last known address

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[1] Mississippi Code Section 15-1-36(15) provides, in pertinent part, that

> No action based upon the health care provider's professional negligence may be begun unless the defendant has been given at least sixty (60) days' prior written notice of the intention to begin the action. No particular form of notice is required, but it shall notify the defendant of the legal basis of the claim and the type of loss sustained, including with specificity the nature of the injuries suffered. If the notice is served within sixty (60) days prior to the expiration of the applicable statute of limitations, the time for the commencement of the action shall be extended sixty (60) days from the service of the notice for said health care providers and others.

Miss. Code Ann. § 15-1-36(15).

at Methodist, where Dr. Lo had treated Brandon McNutt. Post office tracking information showed that the notice was received in the mail room of the hospital on May 18, 2018. McNutt argued that, because the service of notice had extended the two-year statute of limitations for sixty days, the complaint was timely. At her deposition, Dr. Lo said that she never received presuit notice and that she had worked only two shifts at Methodist in 2018, none of which had been in May 2018. Dr. Lo's physician's profile with the Mississippi State Board of Medical Licensure showed a different address than Methodist's.

¶6. After a hearing, the circuit court granted Dr. Lo's motion to dismiss, finding that McNutt had not accomplished service of the statutorily required presuit notice of claim on Dr. Lo. The circuit court found that, although McNutt had mailed the notice of claim within the limitations period, Dr. Lo had rebutted the presumption of delivery. Further, the circuit court found that the dismissal should be with prejudice because, without the benefit of the sixty-day extension of time, the statute of limitations had expired before McNutt had filed the complaint. At Dr. Lo's request, the circuit court entered a final judgment pursuant to Mississippi Rule of Civil Procedure 54(b). No appeal was taken from the final judgment dismissing Dr. Lo with prejudice.

¶7. Methodist filed a motion for partial summary judgment on McNutt's claims for vicarious liability based on the negligence of Dr. Lo. Methodist contended that, under ***J&J Timber Co. v. Broome***, 932 So. 2d 1 (Miss. 2006), no claim for vicarious liability against an employer can survive if no action can be brought against the employee. In response, McNutt argued that ***J&J Timber*** did not apply because, unlike in ***J&J Timber***, McNutt (the plaintiff)

had not entered into a settlement and release agreement with the employee. McNutt relied on ***Sykes v. Home Health Care Affiliates, Inc.***, 125 So. 3d 107 (Miss. Ct. App. 2013), which held that the plaintiff could maintain a vicarious liability action against the employer although the employee had been dismissed and although the statute of limitations had run against the employee. Methodist filed a reply arguing that the dismissal of Dr. Lo with prejudice was a dismissal on the merits and that, because no action could be brought against Dr. Lo, the vicarious liability claim against Methodist was extinguished.

¶8. After a hearing and supplemental briefing, the circuit court denied Methodist's motion for partial summary judgment, reasoning as follows:

> The cases cited by Methodist are distinguishable. The ***J & J Timber*** case and ***Thompson***[***v. A&Z, Inc.***, 150 So. 3d 744 (Miss. Ct. App. 2014)], cases involved a release of a party. No release is present in this case. Dr. Lo was dismissed based on a procedural issue. The Court finds this case to be more like the ***Sykes*** case or and ***Fulgham***[***v. AAA Cooper Transp. Co.***, 134 So. 3d 807 (Miss. Ct. App. 2014)]. The Court disagrees with Methodist that ***Sykes*** does not apply. A federal court noted in 2015 that it does not appear that a Mississippi court has ever applied ***J & J Timber*** in the absence of a release. *See* ***McDaniel v. O'Reilly Auto. Stores, Inc.***, No. 3:14CV610 DPJ-FKB, 2015 WL 5021810, at *2 (S.D. Miss. Aug. 24, 2015). Another federal court judge citing the ***McDaniel*** case said the expiration of the deadline for filing a proof of claim in the bankruptcy proceeding does not have the same effect as a settlement and release. *See* ***King v. Cole's Poultry, LLC***, No.114CV00088MPMDAS, 2016 WL 6993763, at *6 (N.D. Miss. Nov. 29, 2016).
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> Methodist's argument hinges on the fact that the Court's order dismissing Dr. Lo was with prejudice. The Court admits that the Supreme Court in ***Jackson v. Bell*** said a dismissal with prejudice indicates a dismissal on the merits. ***Jackson v. Bell***, 123 So. 3d 436, 439 (Miss. 2013).The Court in the ***Jackson*** case also said a dismissal for lack of jurisdiction is not a dismissal on the merits, and thus may not be with prejudice. The Supreme Court has said that a motion to dismiss for failure to comply with Miss. Code Ann. § 15-1-36(15) does not reach the merits of a cause of action. ***Brewer v.***

> ***Wiltcher***, 22 So. 3d 1188, 1190 (Miss. 2009). This Court earlier dismissed the claims against Dr. Lo for failure to comply with Miss. Code Ann. §15-1-36(15), and the Court ordered the dismissal to be with prejudice because the statute of limitations had run at the time the lawsuit was filed. McNutt did not appeal this ruling, and the determination of whether the dismissal with prejudice was proper is not before the Court.
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> The Court finds that solely because this Court dismissed Dr. Lo from this case with prejudice does not mean this court made an adjudication on the merits of the claims of McNutt against Dr. Lo. The Court therefore finds that the ***J & J*** case does not apply. This was not a case of settlement. This was also not a case where the employer was added after the statute of limitation had run on the employee. Therefore, the motion must be denied.

¶9. Following the denial of its motion for partial summary judgment, Methodist filed a petition for interlocutory appeal, which this Court granted.

STANDARD OF REVIEW

¶10. This Court applies *de novo* review to the grant or denial of summary judgment. ***Venture, Inc. v. Harris***, 307 So. 3d 427, 431 (Miss. 2020) (quoting ***Double Quick, Inc. v. Moore***, 73 So. 3d 1162, 1165 (Miss. 2011)). "Summary judgment is appropriate when '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 a judgment as a matter of law.'" ***Id.*** (quoting Miss. R. Civ. P. 56(c)). "All evidence will be viewed in the light most favorable to the nonmoving party." ***Miss. Baptist Med. Ctr., Inc. v. Phelps***, 254 So. 3d 843, 845 (Miss. 2018) (citing ***Estate of Northrop v. Hutto***, 9 So. 3d 381, 384 (Miss. 2009)).

DISCUSSION

¶11. The facts in this case are not in dispute. The circuit court dismissed McNutt's claims against Dr. Lo because she had not succeeded in serving Dr. Lo with the mandatory presuit notice. Methodist argues that, because Dr. Lo's dismissal was with prejudice due to the expiration of the limitations period, McNutt's claims against Methodist based on vicarious liability no longer are viable as a matter of law. McNutt urges this Court to affirm the circuit court's denial of partial summary judgment. The parties agree that this case presents an issue of first impression about whether vicarious liability claims against an employer are extinguished when the employee is dismissed due to a failure to serve presuit notice and when the dismissal is with prejudice because the statute of limitations has expired.

A. **Respondeat Superior** ***and the Effect of a Settlement and Release Agreement***

¶12. Under the doctrine of *respondeat superior*, the master's liability is derivative of the servant's tort. ***Granquist v. Crystal Springs Lumber Co.***, 190 Miss. 572, 1 So. 2d 216, 219 (1941). An employer and employee are jointly and severally liable for injuries caused by the negligence of the employee.[2] ***Cap. Transp. Co. v. McDuff***, 319 So. 2d 658, 661 (Miss. 1975).

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[2] Mississippi Code Section 85-5-7(2) preserves joint and several liability under the common law doctrine of *respondeat superior*, providing that

> in any civil action based on fault, the liability for damages caused by two (2) or more persons shall be several only, and not joint and several and a joint tortfeasor shall be liable only for the amount of damages allocated to him in direct proportion to his percentage of fault. In assessing percentages of fault an employer and the employer's employee or a principal and the principal's agent shall be considered as one (1) defendant when the liability of such employer or principal has been caused by the wrongful or negligent act or omission of the employee or agent.

Miss. Code Ann. § 85-5-7(2) (Rev. 2011).

Therefore, a plaintiff alleging injury attributable to an employee's negligence has the option to sue the employee, the employer, or both. ***Lowery***, 585 So. 2d at 780.

¶13. This Court held in ***J&J Timber Co.***, 932 So. 2d at 9, that "the release of a tortfeasor operates to bar claims predicated on vicarious liability against the tortfeasor's employer." In ***J&J Timber***, the wrongful death beneficiaries of persons killed in a collision between a school bus and a log truck entered into a settlement release and indemnity agreement with the log truck's driver. ***Id.*** at 2. In the agreement, the beneficiaries released the truck driver and agreed to indemnify him against all claims and damages, including third party claims, arising out of the accident. ***Id.*** Then, the wrongful death beneficiaries sued the truck driver's employer, J&J Timber, asserting that J&J Timber was vicariously liable for the negligence of its driver. ***Id.*** at 3. Noting that vicarious liability is a derivative claim, the Court found that "the vicarious liability claim itself is extinguished when the solely negligent employee is released." ***Id.*** at 6. The Court determined that the settlement agreement would cause a "circle of indemnity" to result if the beneficiaries recovered from the employer. ***Id.*** at 7 (internal quotation marks omitted). Because an employer has a common law right of indemnity from a negligent employee, if the beneficiaries recovered from the employer, then the employer could seek reimbursement from the employee, who then would be indemnified by the beneficiaries under the settlement agreement. ***Id.***

¶14. Methodist argues that this Court should apply ***J&J Timber*** and find that, because McNutt's vicarious liability claim against Methodist is derivative of Dr. Lo's negligence and Dr. Lo has been dismissed, the action cannot continue against Methodist. But as recognized

by the circuit court, ***J&J Timber*** has not been applied in the absence of a release. ***McDaniel***, 2015 WL 5021810, at *2. This case does not involve a settlement release and indemnity agreement as in ***J&J Timber***. Because McNutt has not released and has not agreed to indemnify Dr. Lo, there is no prospect of the development of a circle of indemnity as in ***J&J Timber***. Due to the absence of a settlement release and indemnity agreement, ***J&J Timber*** does not apply.

B. **Sykes *and* Fulgham**

¶15. This case is analogous to ***Sykes***, 125 So. 3d 107, and ***Fulgham***, 134 So. 3d 807. ***Sykes*** arose from a car accident in which a vehicle driven by an employee of Home Health Affiliates, Inc., collided with Sykes's vehicle. ***Sykes***, 125 So. 3d at 108. Sykes sued the driver and Home Health but did not accomplish service of process on the driver. ***Id.*** The county court granted summary judgment to Home Health on the ground that the statute of limitations had run as to the driver. ***Id.*** Home Health argued that it could not be sued unless the driver were made a party. ***Id.*** at 109. The Court of Appeals reversed and allowed suit to continue against Home Health. ***Id.*** at 110. The Court of Appeals relied on the well-established rule that a plaintiff asserting vicarious liability can sue the employer, the employee, or both. ***Id.*** at 109 (citing ***Cap. Transp. Co.***, 319 So. 2d at 661). Then, the Court of Appeals reviewed several exceptions to the rule developed by this Court and found that no exception applied. ***Id.*** at 109-10. The Court of Appeals found that, because Sykes had not released the driver, ***J&J Timber*** did not apply. ***Id.*** The Court of Appeals found also that *res judicata* and *collateral estoppel*, which would preclude a lawsuit against the employer if a jury already had

found the employee not negligent, did not apply. ***Id.*** at 110 (citing ***McCoy v. Colonial Baking Co., Inc.***, 572 So. 2d 850, 852 (Miss. 1990)). And the Court of Appeals found that Sykes had sued Home Health within the limitations period applicable to the driver. ***Id.*** (citing ***Lowery***, 585 So. 2d 779-80).

¶16. The Court of Appeals followed ***Sykes*** in ***Fulgham***, in which Fulgham sued a trucking company, AAA Cooper, after her vehicle was struck by an eighteen-wheeler truck. ***Fulgham***, 134 So. 3d at 808. AAA Cooper moved for summary judgment arguing that, because Fulgham had not sued the driver and the statute of limitations had expired as to the driver, the vicarious liability claim was extinguished. ***Id.*** The trial court granted summary judgment, but the Court of Appeals reversed because an employee is not a necessary party to an action against an employer based on vicarious liability. ***Id.*** at 809. Citing ***Sykes***, the Court of Appeals reviewed the exceptions to the general rule allowing a vicarious liability claim to proceed against the employer alone and found that no exception applied. ***Id.*** at 810. Fulgham had not executed a settlement release. ***Id.*** Fulgham's claims were not barred by *res judicata* or *collateral estoppel*. ***Id.*** And "[a]lthough the statute of limitations has expired regarding any claim that Fulgham could raise against [the driver] individually, there is no legal preclusion from litigating [the driver's] alleged negligence as it applies to AAA Cooper's liability under the doctrine of respondeat superior." ***Id.*** at 809-10.

¶17. We find that the Court of Appeals' reasoning in ***Sykes***, which was followed by ***Fulgham***, is sound. ***Sykes*** recognized that the general rule under the doctrine of *respondeat superior* is that a plaintiff may assert a vicarious liability claim against the employer, the

employee, or both. ***Sykes***, 125 So. 3d at 109 (citing ***Cap. Transp. Co.***, 319 So. 2d at 661). And ***Sykes*** found that, although this Court has set forth certain exceptions that can extinguish a claim against an employer, none of those applies when the plaintiff has sued both the employee and employer but failed to effect service of process on the employee. ***Id.*** at 110. In that situation, the timely asserted vicarious liability claims against the employer will persist even after the time has passed in which the plaintiff could have sued the employee. ***Id.*** ***Sykes*** and ***Fulgham*** have been applied by the federal district courts of Mississippi. ***King***, 2016 WL 6993763, at *6; ***McDaniel***, 2015 WL 5021810, at *1-2.

C. The Effect of Dr. Lo's Dismissal with Prejudice

¶18. Methodist argues that this case is distinguishable from ***Sykes*** and ***Fulgham*** for two reasons. First, Methodist contends that this case is distinguishable because McNutt's claims against Dr. Lo were dismissed with prejudice, unlike in ***Sykes*** and ***Fulgham***, which did not involve dismissals of the employee with prejudice. Methodist argues that Dr. Lo's dismissal with prejudice in this case functioned as an adjudication on the merits. Methodist's theory is that, because the issue of Dr. Lo's negligence was fully resolved on the merits adversely to McNutt, Methodist cannot be found vicariously liable for Dr. Lo's actions.

¶19. This argument requires exploration of the effect of the circuit court's order dismissing Dr. Lo. The reason Dr. Lo was dismissed was that McNutt had not served her with the presuit notice required by Mississippi Code Section 15-1-36(15). This Court has held that, when dismissal is due to the failure to serve a defendant with presuit notice under Section 15-15-36(15), the dismissal should be without prejudice. ***Brewer***, 22 So. 3d at 1190 (holding that

"[a] motion to dismiss for failure to comply with Section 15-1-36(15) does not reach the merits of a cause of action . . . ." (footnote omitted)). But "in all civil suits, where a suit is dismissed for any reason and the statute of limitation has expired, dismissal with prejudice is warranted." ***Arceo v. Tolliver***, 19 So. 3d 67, 75 (Miss. 2009) (citing ***Tolliver v. Mladineo***, 987 So. 2d 989, 996-97 (Miss. Ct. App. 2007); ***Watters v. Stripling***, 675 So. 2d 1242, 1243, 1244 (Miss. 1996)). When the circuit court dismissed Dr. Lo, the statute of limitations had expired on McNutt's claims against her. Therefore, rather than a without prejudice dismissal under ***Brewer***, the circuit court properly dismissed the claims against Dr. Lo with prejudice due to the expiration of the limitations period.

¶20. Methodist argues that a dismissal with prejudice always is an adjudication on the merits and fully resolves the claim. It cites a statute generally applicable to limitations periods providing that "[t]he completion of the period of limitation prescribed to bar any action, shall defeat and extinguish the right as well as the remedy." Miss. Code Ann. § 15-1-3(1) (Rev. 2019). Methodist relies also on ***Rayner v. Raytheon Co.***, 858 So. 2d 132, 134 (Miss. 2003), which held that "[g]enerally, a dismissal with prejudice connotes an adjudication on the merits." Additionally, Methodist cites federal law that "[d]ismissal of an action with prejudice is a complete adjudication of the issues presented by the pleadings and is a bar to a further action between the parties." ***Schwarz v. Folloder***, 767 F.2d 125, 129 (5th Cir. 1985) (internal quotation mark omitted) (quoting ***Smoot v. Fox***, 340 F.2d 301, 303 (6th Cir. 1964)).

¶21. Certainly, the general rule is that a dismissal with prejudice functions as a dismissal on the merits. ***Rayner***, 858 So. 2d at 134. After a defendant is dismissed with prejudice, the plaintiff's case against that defendant has ended. Therefore, the dismissal of Dr. Lo with prejudice terminated the litigation between McNutt and Dr. Lo in this case. What Methodist seeks is for the judgment dismissing Dr. Lo to have claim preclusive effect that bars McNutt's vicarious liability claims against Methodist. And for a judgment to have claim preclusive effect, it must have been based on an adjudication on the merits. "At its core, the rule of collateral estoppel 'precludes parties from relitigating issues authoritatively decided on their merits in prior litigation to which they were parties or in privity.'" ***Hogan v. Buckingham ex rel. Buckingham***, 730 So. 2d 15, 18 (Miss. 1998) (quoting ***State ex rel. Moore v. Molpus***, 578 So. 2d 624, 640 (Miss. 1991)). A dismissal on statute of limitations grounds does not reach the merits of the case. Accordingly, this Court without equivocation has held that a dismissal on statute of limitations grounds is not a dismissal on the merits for the purposes of claim preclusion. ***Patton v. Mack Trucks, Inc.***, 556 So. 2d 679, 680 (Miss. 1989). Although Chief Justice Randolph's separate opinion takes issue with our holding, we do nothing more than apply ***Patton***, a case that settled the question before us thirty-two years ago. In accord with ***Patton*** is ***Lee v. Swain Building Materials of New Orleans, Inc.***, 529 So. 2d 188 (1988). ***Lee*** explained that a dismissal on statute of limitations grounds "'operates as' an adjudication upon the merits as to refiling the same cause of action in other trial courts" but "[s]uch a dismissal is not in fact an adjudication upon the merits" because a dismissal due to the expiration of the statute of limitations is "not based on the merits of the

case." ***Id.*** at 190-91. We said that "[t]he mere fact that the judgment recited 'with prejudice' does not control." ***Id.*** at 191. "A final judgment on the merits is 'a judgment based on the evidence rather than on the technical or procedural grounds.'" ***Strickland v. Estate of Broome***, 179 So. 3d 1088, 1094 (Miss. 2015) (quoting ***White v. White (In re Estate of White)***, 152 So. 3d 314, 317 (Miss. 2014)). Because the dismissal of Dr. Lo on statute of limitations grounds was not an adjudication on the merits, the judgment did not preclude McNutt's vicarious liability claims against Methodist.

D. The Effect on Dr. Lo of the Expiration of the Limitations Period

¶22. The second way in which Methodist seeks to distinguish this case from ***Sykes*** and ***Fulgham*** is by emphasizing that, on the date that McNutt filed the complaint, the limitations period had expired as to Dr. Lo because McNutt was without the benefit of the sixty-day extension of time. McNutt mailed notices of claim to Dr. Lo, Methodist, and the other defendants on May 9, 2018, within the two-year limitations period. As the circuit court found, Dr. Lo never received the notice of claim. Methodist points out that, because Dr. Lo did not receive the notice of claim, the statute of limitations was not extended by sixty days. Therefore, when McNutt filed her complaint on July 10, 2018, the limitations period had expired as to Dr. Lo. Methodist does not dispute that it received McNutt's notice of claim and that the limitations period applicable to the claims against Methodist was extended by sixty days. Therefore, the complaint was timely filed against Methodist. In other words, if McNutt had sued Methodist only and not Dr. Lo, Methodist would agree that the complaint was timely. What Methodist argues is that, because McNutt sued Methodist after the statute

of limitations had expired on her claims against Dr. Lo, her vicarious liability claims against Methodist likewise were time barred, notwithstanding Methodist's timely receipt of McNutt's notice of claim.

¶23. For this theory, Methodist relies on ***Lowery***, 585 So. 2d 778. In ***Lowery***, wrongful death beneficiaries (Lowery) filed a medical malpractice suit against several defendants. ***Id.*** at 778. Later, they sought to amend their complaint to add a nurse, Fannie Rue Russell, and her employment agency, Statewide Healthcare Service, Inc. ***Id.*** at 779. The circuit court dismissed the suit because the new defendants had been added after the two-year limitations period in Section 15-1-36 had expired. ***Id.*** On appeal, Lowery argued that the then six-year general statute of limitations applied to their claims, not the two-year statute of limitations of Section 15-1-36. ***Id.*** This Court rejected Lowery's argument, finding that Section 15-1-36 applied and, because Lowery had not sued Russell and Statewide until after the expiration of the two-year limitations period, the claims were untimely. ***Id.*** at 780.

¶24. The Court reasoned that, because Russell was a nurse, she was among the statutorily listed medical professionals to whom the two-year statute applied. ***Id.*** at 779. But Statewide, as an employment agency, was not a medical professional listed in Section 15-1-36. ***Id.*** Because Lowery's claims against Statewide were based on vicarious liability for the acts of Russell and derivative of the claims against Russell, this Court held that Statewide should be given the benefit of the statute of limitations applicable to Russell. ***Id.*** at 780. In our analysis, we recognized that because, under *respondeat superior*, the liability of an employer and employee is joint and several, Lowery could have sued Russell, Statewide, or both, and

there was no requirement for Lowery to have joined Russell in her suit against Statewide. ***Id.*** at 779-80. But the Court said that "[t]his does not mean, however, that the plaintiffs could wait until the action was time barred as to Russell, the agent, and then file an action against Statewide, whose sole liability was based upon the conduct of its servant and agent." ***Id.*** at 780. The Court further said that, under Section 15-1-36, which "bars both the right of action of the plaintiffs[] against Russell and Statewide and also bars any remedy against both parties," the action against Statewide was time barred because the action against Russell was time barred. ***Id.*** The Court found that the general rule is that a lawsuit that is time barred "against an agent will likewise bar the same claim against the principal whose liability is based solely upon the principal and agency relationship, and not some act or conduct of the principal separate and apart from the act or conduct of the agent."[3] ***Id.*** The holding was that Statewide, although not one of the listed individuals or entities in Section 15-1-36, nonetheless had the benefit of the two-year statute of limitations applicable to its employee, Russell. ***Id.***

¶25. Methodist seizes on ***Lowery*** to argue that, because McNutt's complaint against Methodist and Dr. Lo was time barred as to Dr. Lo due to the lack of presuit notice on Dr. Lo, the suit likewise was untimely as to Methodist, despite Methodist's having received presuit notice. ***Lowery*** did hold that the principal/employer has the benefit of the same limitations period applicable to the agent/employee. ***Id.*** at 780. No dispute exists that Section 15-1-36(15) made the same limitations period applicable to Dr. Lo and to Methodist.

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[3] The Court indicated that equitable circumstances might furnish an exception to the general rule. ***Lowery***, 585 So. 2d at 780.

Methodist attempts to extend ***Lowery*** to the presuit notice context by arguing that a plaintiff's timely but unsuccessful attempt to accomplish service of a notice of claim on an employee, resulting in a time bar, should be imputed to a claim against the employer, despite the plaintiff's successful service of a notice of claim on the employer.[4]

¶26. This case involves presuit notice. ***Lowery*** does not. The question created by Methodist is whether we should stretch ***Lowery*** in a manner that would mandate that the plaintiff's timely filed vicarious liability claim against an employer must be dismissed when the plaintiff attempted, but failed, to accomplish presuit notice on the employee within the applicable limitations period. Considering the principles underlying *respondeat superior*, we decline to extend ***Lowery*** to apply to circumstances it neither contemplated nor addressed. Clearly, under the doctrine of *respondeat superior*, McNutt could have sued Dr. Lo, Methodist, or both. Under ***Sykes***, the fact that the statute of limitations has expired as to the employee because of the failure to serve the employee with process does not extinguish the claim against the employer. ***Sykes***, 125 So. 3d at 110. The same reasoning applies in this case. McNutt mailed notices of claim to Dr. Lo and to Methodist within the limitations period. She successfully served Methodist with a notice of claim but did not accomplish

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[4] Methodist cites a favorable sentence from ***Mosely v. Baptist Memorial Hospital-Golden Triangle, Inc.***, 232 So. 3d 162, 166 (Miss. Ct. App. 2017). But ***Mosely***'s pronouncement was a *dictum* because it was not necessary to the court's decision and instead addressed a hypothetical scenario posed by the court. Decisions of the Court of Appeals are merely persuasive authority, and its *dictum* has no precedential value whatsoever. ***Hampton v. State***, 309 So. 3d 1055, 1061 (Miss. 2021); ***Collins ex rel. Smith v. McMurry***, 539 So. 2d 127, 131 (Miss. 1989).

service on Dr. Lo. If McNutt had succeeded in serving Dr. Lo, her suit against Dr. Lo, the employee, would have been timely.

¶27. Vitally, this is not a case in which the plaintiff waited until after her claims were time barred to attempt service of presuit notice on the employee. McNutt attempted, within the limitations period, to serve Dr. Lo with presuit notice, then filed the complaint within the sixty-day extension of time that would have applied if notice had been accomplished. As in ***Sykes***, a failure of service rendered the claim against the employee time barred. As in ***Sykes***, the failure to serve the employee did not extinguish the vicarious liability claim against the employer who was properly served. Although McNutt's claim against Dr. Lo is time barred because her attempt at serving Dr. Lo with presuit notice was unsuccessful, causing the limitations period to expire as to Dr. Lo, "[t]here is no legal preclusion from litigating [Dr. Lo's] negligence" in McNutt's suit against Methodist. ***Sykes***, 125 So. 3d at 110.

¶28. We observe that several practical considerations caution against applying ***Lowery*** in the broad manner advocated by Methodist and the dissent. McNutt did not have to sue Dr. Lo at all because the physician/employee was not an indispensable party to the lawsuit. She was free to have sued Methodist, and Methodist alone, for the vicarious liability of Dr. Lo. Under Methodist's argument, McNutt's decision to sue the employer without having made sure her presuit notice on Dr. Lo was successful doomed her entire case. But McNutt had no way of knowing whether her presuit notice had succeeded until the circuit court had ruled on Dr. Lo's motion to dismiss. Therefore, this Court's application of ***Lowery*** in the manner urged by Methodist and the dissent would force the plaintiffs into the untenable position of

having to decide whether to risk suing a negligent employee because, if a court decided later that presuit notice on that employee had failed, not only would the employee be dismissed, but the employer would be dismissed as well.[5] Because that result is inconsistent with the joint and several nature of vicarious liability, we decline to adopt it.

¶29. Methodist's argument also is inconsistent with ***Sykes***. ***Sykes*** distinguished ***Lowery*** because in ***Sykes***, the plaintiff sued the employer and the employee within the limitations period. ***Id.*** But neither ***Sykes*** nor ***Lowery*** involved presuit notice. In a medical malpractice case, the initial litigation step is not the filing of a complaint but presuit notice. Miss. Code Ann. § 15-1-36(15). McNutt *acted within the limitations period* by mailing notice of claim to Dr. Lo's last known address. And McNutt sued Dr. Lo within sixty days of that attempted notice. As it turned out, Dr. Lo successfully rebutted the presumption of delivery, resulting in the dismissal of McNutt's suit against the doctor due to a failure of presuit notice. Because the limitations period had run, the dismissal was with prejudice. But the same principles are at work in this case as were at work in ***Sykes***: the plaintiff's service of necessary documents on the employee failed. Therefore, the employee was dismissed from the litigation. The employer argued that the expiration of the limitations period on the employee should be imputed to the employer. We see no good reason to distinguish ***Sykes*** by holding that a failure of presuit notice extinguishes the plaintiff's case against the employer but that a

[5] The impact of the plaintiff's ability voluntarily to dismiss the employee also must be considered. A lawsuit against the employer is not destroyed if the plaintiff voluntarily dismisses the employee without prejudice after the limitations period has expired. ***McDaniel***, 2015 WL 5021810, at *2. Adopting Methodist's reading of ***Lowery*** would encourage plaintiffs who suspect that the employee did not receive timely presuit notice voluntarily to dismiss the employee in an effort to avoid dismissal of the employer.

failure of service of process does not. That result would be absurd. That is especially so because the employee is not an indispensable party to a claim of vicarious liability based on the employee's negligence, and applying ***Lowery*** in a manner that ignores that precept, as advocated by the dissent, would be arbitrary and oppressive to litigants. Although the statute of limitations had run on Dr. Lo when McNutt filed the complaint, the reason was a failure of the presuit notice that McNutt had attempted, although unsuccessfully, to accomplish within the limitations period. That fact distinguishes this case from ***Lowery***.

CONCLUSION

¶30. We hold that the circuit court's dismissal of Dr. Lo with prejudice did not extinguish McNutt's vicarious liability claims against Methodist. Therefore, we affirm the decision of the circuit court's denying Methodist's motion for partial summary judgment, and we remand the case for further proceedings.

¶31. **AFFIRMED AND REMANDED.**

KING, P.J., BEAM, CHAMBERLIN AND GRIFFIS, JJ., CONCUR. MAXWELL, J., SPECIALLY CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY KITCHENS, P.J., BEAM, CHAMBERLIN AND GRIFFIS, JJ. RANDOLPH, C.J., CONCURS IN RESULT ONLY WITH SEPARATE WRITTEN OPINION JOINED BY ISHEE, J.; COLEMAN AND GRIFFIS, JJ., JOIN IN PART. COLEMAN, J., DISSENTS WITH SEPARATE WRITTEN OPINION.

MAXWELL, JUSTICE, SPECIALLY CONCURRING:

¶32. I write separately to explain why I am joining the majority.

¶33. Both parties agree this Court has never addressed the precise procedural quandary before us. But the Court of Appeals has addressed similar cases and the controlling legal principle is clear and well settled. In Mississippi, under the doctrine of respondeat superior,

a plaintiff need not join an employee as a defendant to bring a vicarious-liability claim against the employer. I did not write this law, nor did any other justice on this Court create this doctrine. It came from our common law and remains precedent today.[6]

¶34. Turning to the case before us, we are confronted with the viability of a respondeat-superior-based claim against an employer. While there are plenty of cases addressing this theory of liability, a concise discussion about the general longstanding view that injured parties have a primary right to sue an employer is found in the Court of Appeals' decision in ***Sykes v. Home Health Care Affiliates, Inc.***, 125 So. 3d 107, 109 (Miss. Ct. App. 2013). In ***Sykes***, the appellate court correctly described the distinct and separate nature of claims against employees and employers, pointing out employees are not necessary parties for respondeat superior liability:

> American Jurisprudence states the general rule as to necessary parties: "[T]he right of an injured party to sue the employer is a direct or primary right because the claim is distinct and separate from the claim against the employee; therefore, the employee is not a necessary party to an action against an employer." Am. Jur. 2d *Employment Relationship* § 400 (2004). In fact, there have been suits based upon respondeat superior in which the negligent employee was never made a party. *See, e.g.*, ***Children's Med. Group v. Phillips***, 940 So. 2d 931 (Miss. 2006); ***AAA Cooper Transp. Co. v. Parks***, 18 So. 3d 909 (Miss. Ct. App. 2009).

Sykes, 125 So. 3d at 109.

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[6] "Under the doctrine of respondeat superior, the employer and employee are jointly and severally liable for injury caused by the employee's negligence." ***Sykes v. Home Health Care Affiliates, Inc.***, 125 So. 3d 107, 109 (Miss. Ct. App. 2013) (citing ***Capital Transp. Co. v. McDuff***, 319 So. 2d 658, 661 (Miss. 1975)). "The practical implication of joint and several liability is that a plaintiff in a respondeat superior action may sue either the employer or the employee or both." ***Id.*** (citing ***Capital Transp. Co.***, 319 So. 2d at 661; ***Thomas v. Rounds***, 161 Miss. 713, 718-19, 137 So. 894 (1931)); *see also* 1 Jeffrey Jackson, Mary Miller & Donald Campbell, *Encyclopedia of Mississippi Law* § 4:18 (2d ed. 2015).

¶35. Furthermore, this Court has previously applied this doctrine in the physician/hospital context.[7] So in short, it is well settled that McNutt *did not* have to sue Dr. Lo to bring a vicarious-liability claim against Methodist Healthcare.

McNutt's Case

¶36. Here, there is no question that McNutt timely sued the hospital. Yet the dissent insists that because McNutt also initially sued Dr. Lo—whom our law does not even require that she sue—but did not properly serve Dr. Lo notice,[8] McNutt now has no vicarious-liability claim against the hospital. The dissent reaches this result even though Dr. Lo was not a necessary party and McNutt's claim against the hospital *was* deemed timely.

¶37. I do not join in that view. It just seems illogical to suggest everything would have been okay and that her claim against the hospital could have proceeded had McNutt never tried to sue Dr. Lo and instead just brought a vicarious-liability claim against Methodist Healthcare only.[9] But because McNutt tried to sue—but failed to give presuit notice to an

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[7] In ***Hardy v. Brantley***, 471 So. 2d 358, 371 (Miss. 1985), this Court held:

> Where a hospital holds itself out to the public as providing a given service, in this instance, emergency services, and where the hospital enters into a contractual arrangement with one or more physicians to direct and provide the service, and where the patient engages the services of the hospital without regard to the identity of a particular physician and where as a matter of fact the patient is relying upon the hospital to deliver the desired health care and treatment, the doctrine of respondeat superior applies and the hospital is vicariously liable for damages proximately resulting from the neglect, if any, of such physicians.

[8] The judge found the claim against Dr. Lo untimely based on the defective presuit notice's failure to toll the statute of limitations as to this individual doctor.

[9] Justice Coleman will neither confirm nor deny he agrees with this.

unnecessary party who she was not required to pursue—her timely claim against the hospital must also be thrown out.

¶38. With respect, I suggest that adherence to this rationale would lead to an absurd result—one that was certainly not contemplated by ***Lowery v. Statewide Healthcare Service, Inc.***, 585 So. 2d 778 (Miss. 1991), and one that is contrary to our existing res judicata jurisprudence.

¶39. As the majority in ***Lowery*** made clear, "*the only issue* on th[at] appeal" was the applicable statute of limitations—namely, *which* statute of limitations applied. ***Id.*** at 779 (emphasis added) ("The only issue on this appeal is whether § 15-1-36 the two-year statute of limitation, or Miss. Code Ann. § 15-1-49 [the six-year statute of limitations] applied as to [the agent] Russell and [her employer] Statewide."). In that case, the wrongful-death beneficiaries sued a nurse and her employer, a non-hospital staffing agency, outside the two-year statute of limitations of Section 15-1-36. The beneficiaries had argued that the shorter statute of limitations in Section 15-1-36 did not apply to the non-medical employer. ***Id.*** But the ***Lowery*** Court rejected this argument. The ***Lowery*** Court reasoned that the beneficiaries could not "wait until the action was time barred as to Russell, the agent, *and then* file an action against Statewide, whose sole liability was based upon the conduct of its servant and agent." ***Id.*** at 780 (emphasis added). In ***Sykes***, the Court of Appeals noted what the ***Lowery*** exception is—pointing out that it precludes the filing of a respondeat superior suit against an employer *after* the limitation period of the employee had already expired. ***Sykes***, 125 So. 3d at 110 (citing ***Lowery***, 585 So. 2d at 779-80) (An "exception to the general rule that an

employer may be sued without joinder of the negligent employee occurs when the statute of limitations expired as to the employee *before suit* was brought against the employer." (emphasis added)).

¶40. But in this case, we certainly face a different procedural scenario than ***Lowery***—one that both parties agree raises an issue of first impression in this Court. Here, unlike the plaintiff in ***Lowery***, McNutt did not wait until after two years had passed to file her action. Instead, within the two-year limitations period, she issued her required presuit notice to all would-be defendants. And because this notice was sent within sixty days of the running of the two-year period, Mississippi Code Section 15-1-36(15) (Rev. 2019) statutorily extended that period for another sixty days. It was within this extended period that McNutt filed her complaint. Only *after* McNutt had already filed suit was the presuit notice to Dr. Lo deemed improper and incapable of extending the two-year limitations period *as to Dr. Lo*. This is what made the claims against Dr. Lo, *in retrospect*, untimely. But no one disputes that presuit notice was proper as to Methodist and the claims against it *were* timely filed.

¶41. So, in contrast to ***Lowery***, what we must decide here is not which statute of limitations applies—Section 15-1-36 clearly does. Instead, we must decide *what effect* does the dismissal of Dr. Lo for failure to comply with Section 15-1-36's presuit notice requirements have on the viability of the timely vicarious-liability claim against Methodist—a claim that *was* filed in compliance with Section 15-1-36. Thus, the issue before us is one of res judicata or claim preclusion.

¶42. The problem is that ***Lowery*** did not consider whether, under the doctrine of respondeat superior, one may sue an employer only based on its employee's actions. Nor did it consider res judicata concerns. So ***Lowery*** should not be taken out of the specific context of "the only issue" in that case—a plaintiff arguing a longer statute of limitations applied to a vicarious-liability claim against a non-medical employer, even though the claim was based on the employee's alleged medical negligence. ***Lowery***, 585 So. 2d at 779. And absent this Court's stepping up and having an open and honest discussion about continued adherence to our respondeat superior precedent, it certainly should not be applied in a way that would eviscerate that doctrine.

¶43. The bottom line is that applying ***Lowery*** beyond its specific facts, as the dissent would do here, as a blanket, bright line, one-size-fits-all bar,[10] creates three obvious problems. First, it would lead to an absurd result—saying that if McNutt had never even attempted to notice and sue Dr. Lo, her claim against Methodist would not be barred, but holding here that her timely claim against the hospital must be thrown out because she failed to give presuit notice to a party she was not even required to pursue. Second, it would undermine the sixty-day statutory extension under Section 15-1-36(15), by requiring plaintiffs to file presuit notice more than sixty days out, out of fear that a glitch in their presuit notice against the unnecessary employee would automatically bar their claim against

[10] *But cf.* ***McCoy v. Colonial Baking Co.***, 572 So. 2d 850, 854 (Miss. 1990) (holding that, when it comes to derivative claims, estoppel "must be applied cautiously on a ad hoc basis in order to preserve the critical component of due process—i.e., the requirement that every party have an opportunity to fully and fairly litigate an issue").

the employer. And third and most important, it creates a direct and irreconcilable conflict with our res judicata jurisprudence.

Res Judicata - There is No Legal Preclusion

¶44. To prove her vicarious-liability claim against Methodist, McNutt has to show Dr. Lo was medically negligent. And here, though Dr. Lo was dismissed on statute-of-limitations grounds, the question whether she was medically negligent was not resolved on the merits for purposes of res judicata. ***Smith v. Malouf***, 826 So. 2d 1256, 1260 (Miss. 2002) (holding that an "action . . . dismissed due to the running of the applicable statute of limitations . . . was not 'actually litigated' and cannot act as a bar to [the] current suit under the doctrine of res judicata or collateral estoppel"); ***Patton v. Mack Trucks, Inc.***, 556 So. 2d 679, 680 (Miss. 1989) ("Because the dismissal in Pennsylvania was by reason of the statute of limitations and not an adjudication on the merits, the Pennsylvania final judgment has no claim preclusive effect in Mississippi."). As to this specific topic, the Court of Appeals has on two occasions unanimously agreed there is no legal preclusion from litigating a respondeat superior claim against an employer when the statute of limitations had expired against the allegedly negligent employee.[11] So unless we want to overrule two unanimous Court of Appeals cases

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[11] ***Fulgham v. AAA Cooper Transp. Co.***, 134 So. 3d 807, 809-10 (Miss. Ct. App. 2014) ("Although the statute of limitations has expired regarding any claim that Fulgham could raise against Harrison individually, there is *no legal preclusion* from litigating Harrison's alleged negligence as it applies to AAA Cooper's liability under the doctrine of respondeat superior." (emphasis added.)); ***Sykes***, 125 So. 3d at 110 ("There is no doubt Sykes's suit was timely, and Home Health was properly served with a summons. [But t]here is no legal preclusion from litigating Gambleton's alleged negligence.").

Citing this Court's role as the "ultimate expositor of law," the dissent suggests little weight should be given to Court of Appeals' authority. I assure the dissent that I recognize,

and throw out our own longstanding respondeat superior and res judicata precedent, Dr. Lo's alleged negligence can still form the basis of Methodist's vicarious liability. This is true even though McNutt can no longer hold Dr. Lo individually liable.

Conclusion

¶45. I have no idea what the weight or the worth of McNutt's evidence will be. But I do agree the trial court did not err by holding its dismissal of the claim against Dr. Lo did not bar McNutt from at least pursing the vicarious-liability claim against Methodist.

¶46. In other words, if our respondeat superior law permits McNutt to sue Dr. Lo, Methodist, or both, then the procedural defect that led to the dismissal of the claim against Dr. Lo should not be imputed to the claim against Methodist, which was otherwise timely and properly filed. Therefore, I concur with the majority.

KITCHENS, P.J., BEAM, CHAMBERLIN AND GRIFFIS, JJ., JOIN THIS OPINION.

RANDOLPH, CHIEF JUSTICE, CONCURRING IN RESULT ONLY:

¶47. Today's case involves a case of first impression, a unique circumstance in which one defendant, Methodist Hospital, was timely given notice and served with a complaint, while the other defendant, Dr. Lo, was not. The circuit court appropriately dismissed the defendant doctor, holding that, since the complaint against the doctor was filed after the statute of limitations ran, "the dismissal should be with prejudice." That judicial ruling was not contested further in the trial court and is not before this Court.

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as does every member of this Court, that we have the last say on matters of Mississippi law. But I did serve on the Court of Appeals for almost seven years and do not dismiss that court's ability and precedent, particularly when it is sound and relevant.

¶48. It is not necessary to discuss the nuances of the cases cited, since none replicate the facts presented in today's case. Methodist appeals a denial of its motion for partial summary judgment, urging that a once viable suit against it cannot be maintained, since its agent subsequently was dismissed with prejudice.[12] The sole issue before this Court is whether a principal, who was timely noticed and served *before* the applicable statute of limitations expired, can be held liable for the acts and/or omissions of its agent who subsequently was dismissed with prejudice.

¶49. Resolution of this issue of first impression requires no upheaval or even a modest change in our precedent. The answer lies in ***Lowery v. Statewide Healthcare Service, Inc.***, 585 So. 2d 778, 779 (Miss. 1991), cited by all of today's opinions. The general principle under the respondeat superior doctrine is that the employer, the employee, or both can be sued, as they are jointly and severally liable. ***Id.*** Subsequently, Justice Griffis, then sitting as a judge on the Court of Appeals, wrote a well-reasoned opinion, identifying exceptions to the general rule, also cited by all of today's opinions. ***Sykes v. Home Health Care Affiliates, Inc.***, 125 So. 3d 107, 109-10 (Miss. Ct. App. 2013).

¶50. The ***Lowery*** Court analyzed whether a trial court properly applied the two-year statute of limitation as to the medical provider, Nurse Russell, and her employer, Statewide. ***Lowery***, 585 So. 2d at 779. Neither the nurse nor her employer were sued within the two year statute of limitations, unlike today's case, in which where Methodist was timely sued. ***Id.*** That Court

[12] This Court reviews summary judgment challenges de novo. ***Smith v. Miss. Transp. Comm'n***, 292 So. 3d 231, 233 (Miss. 2020) (citing ***Miss. Transp. Comm'n v. Montgomery***, 80 So. 3d 789, 794 (Miss. 2012)).

affirmed the trial court's dismissal of both the nurse and her employer. ***Id.*** That Court held that it is generally accepted that

> a suit barred by a statute of limitation against an agent will likewise bar the same claim against the principal whose liability is based solely upon the principal and agency relationship, and not some act or conduct of the principal separate and apart from the act or conduct of the agent.

Lowery, 585 So. 2d at 780. The ***Lowery*** Court also adopted the following language in its holding:

> According to 54 C.J.S. Limitations of Actions § 15:
>
> > An agent may be protected by the statute of limitation in respect of personal liability and a statute of limitation that bars a claim against an agent equally protects those on whose behalf he acted as agent.
>
> 3 Am. Jur. 2d Agency § 348 (1962) also reads:
>
> > However, a statute that bars a claim against an agent equally protects those in whose behalf he acted as agent, where there are no circumstance of equity to prevent the operation of the statute in their favor; and the concealment of the fact of agency where there is no fraud on the part of the principals does not constitute such a circumstance.

Lowery, 585 So. 2d at 780. This rule applies *unless* "there are circumstance[s] of equity [which should] prevent the operation of the statute in their favor. . . ." ***Id.*** (quoting 3 Am. Jur. 2d *Agency* § 348 (1962)). That exception controls the disposition of today's case.

¶51. "Equity" is defined by Black's Law Dictionary as "[f]airness; impartiality; evenhanded dealing . . . [t]he body of principles constituting what is fair and right; natural law." *Equity*, Black's Law Dictionary (11th ed. 2019). Should this Court apply only the general principles of the respondeat superior doctrine in today's case, it would lead us to an

absurd result. *See* Maj. Op. ¶ 29, Sp. Con. Op. ¶ 37. Methodist, a properly served defendant that never argued the applicable statute of limitations had expired as to the claims against it, is asking this Court to ignore the language of ***Lowery*** and to grant refuge it would not otherwise be entitled to.

¶52. All parties and members of this Court accept that Methodist was given presuit notice and was timely served with a complaint, a point not contested by Methodist at any stage of these proceedings. Separately, Methodist has never argued that the statute of limitations expired on the claims alleged against it. Rather, Methodist seeks unearned relief based on the trial court's ruling on the merits of Dr. Lo's affirmative defense. Our law does not provide that such an advantage or benefit be accorded to Methodist. McNutt's claim against it met all statutory and rule requirements when it was timely served with the complaint. McNutt's failure to confirm proper notice and service on Dr. Lo and Dr. Lo's subsequent dismissal with prejudice does not extend to a defendant that was properly served before the statute of limitations expired. Holding otherwise would lead to an absurd result, neither just nor fair. *See* Maj. Op. ¶ 29, Sp. Con. Op. ¶ 37.

¶53. Statutes of limitation are substantive rights granted by the Legislature, setting forth a time frame in which suit must be served. The stated purpose of the statute of limitation, timely filing suit against Methodist, was unequivocally met in today's case. The Court's own rules on timeliness of service were met.

¶54. The only error I discern of the trial court, and why I reject the other opinions, is the reliance on ***Brewer v. Wiltcher***, 22 So. 3d 1188 (Miss. 2009). Wiltcher failed to file presuit

notice against a medical clinic. The trial court dismissed his suit with prejudice. ***Id.*** at 1190. This Court reversed the trial court, determining that the dismissal should have been without prejudice (for failing to abide by the notice requirement). ***Id.*** There was no discussion of an expiration of the applicable statute of limitations before the trial court ruled. That opinion did not bar the plaintiff from curing the defect and refiling suit against that same defendant. That sets ***Wiltcher*** apart from today's case. The trial court's judgment dismissing the claims against Dr. Lo with prejudice was final and never appealed, thus barring refiling.

¶55. Our precedent that a dismissal with prejudice is an adjudication on the merits turned on its head today. It also flies in the face of our rules. *See* Miss. R. Civ. P. 41(b).[13] The only issue before the trial court at that stage of the proceedings was the affirmative defense of statute of limitations raised by Dr. Lo. Finding the statute of limitations had expired as to Dr. Lo, the trial court entered a dismissal *with prejudice* as to the claims against Dr. Lo.

¶56. It is universally accepted that "with prejudice" is the "loss of all rights; in a way that finally disposes of a party's claim and bars any future action on that claim." *With Prejudice*, Black's Law Dictionary (11th ed. 2019). Moreover, Black's defines a "dismissal with prejudice" as

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[13] Rule 41(b) of the Mississippi Rules of Civil Procedure reads in pertinent part:

> Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any other dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

> [a] dismissal, [usually] after an adjudication on the merits, barring the plaintiff from prosecuting any later lawsuit on the same claim. If, after a dismissal with prejudice, the plaintiff files a later suit on the same claim, the defendant in the later suit can assert the defense of res judicata (claim preclusion).

Dismissal With Prejudice, Black's Law Dictionary (11th ed. 2019). McNutt's suit against Dr. Lo was a final disposition and barred any future action by McNutt against Dr. Lo.

¶57. Contrastingly, it is also universally accepted that "without prejudice" is defined as "[w]ithout loss of any rights; in a way that does not harm or cancel the legal rights or privileges of a party." *Without Prejudice*, Black's Law Dictionary (11th ed. 2019). "Dismissal without prejudice" is defined as "[a] dismissal that does not bar the plaintiff from refiling the lawsuit within the limitations period." *Dismissal Without Prejudice*, Black's Law Dictionary (11th ed. 2019). Surely the Majority is not suggesting that ruling was not a final adjudication, barring McNutt from making claims anew against Dr. Lo in Mississippi courts.

¶58. Initially, the trial court was faced with a claim of the expiration of a statute of limitations. That was the only claim advanced by Dr. Lo before the judge. The judge, after considering the merits of the statute-of-limitations defense, ruled on that issue.

¶59. Our case law repeatedly has agreed with this principle. "A dismissal with prejudice indicates a dismissal on the merits." ***Jackson v. Bell***, 123 So. 3d 436, 439 (Miss. 2013) (citing ***B.A.D. v. Finnegan (In re Guardianship of B.A.D.)***, 82 So. 3d 608, 614 (Miss. 2012)).[14]

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[14] *See also* ***Expro Americas, LLC v. Walters***, 179 So. 3d 1010, 1024 (Miss. 2015) (King, J., dissenting):

> A Rule 41(b) dismissal "operates as an adjudication upon the merits." Miss. R. Civ. P. 41(b). It is appropriate for failure to prosecute or to comply with the

> Generally, a dismissal with prejudice connotes an adjudication on the merits. See generally ***Foundry Sys. & Supply, Inc. v. Indus. Dev. Corp.***, 124 Ga.App. 589, 185 S.E.2d 94, 95 (1971) (The phrase "with prejudice" in [the context of when an action is dismissed with prejudice] means an "adjudication on the merits and final disposition, barring the right to bring or maintain an action on the same claim or cause. ***Pulley v. Chicago, R.I. & P.R.***, 122 Kan. 269, 251 P. 1100 (1927). Black's Law Dictionary, 4th ed., p. 555"). Thus, lacking jurisdiction, the circuit court was without authority to address the merits. The circuit court should have simply dismissed this case for lack of jurisdiction.

Rayner v. Raytheon Co., 858 So. 2d 132, 134 (Miss. 2003) (alteration in original). *See also* ***In re Guardianship of B.A.D.***, 82 So. 3d at 615 (holding that a chancellor could not dismiss a petition "based on the question of subject-matter jurisdiction and then rule on the merits of the case"). The trial court's ruling on the affirmative defense of statute of limitations, in this case, was a final decision on whether the defendant prevailed as a matter of law on a substantive right granted by the Mississippi Legislature. *See* Miss. Code Ann. 15-1-3 (Rev. 2019). The Majority's reliance on ***Patton v. Mack Trucks, Inc.***, 556 So. 2d 679 (Miss. 1989) and ***Lee v. Swain Building Materials Co. of New Orleans***, 529 So. 2d 188, 190-91 (Miss. 1988), is misplaced. The very limited and narrow issue in both was whether a foreign tort action, filed prior to the amendment of Mississippi Code Section 15-1-65 (Supp. 1989) and barred by the foreign state's statute of limitations, was likewise barred in Mississippi. Both

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> rules of civil procedure or any order of court, or after the plaintiff has completed the presentation of his evidence "in an action tried by the court without a jury" when the plaintiff has shown no right to relief upon the facts and the law. Id. The chancellor did hear the preliminary injunction case in full, and the evidence makes it abundantly clear that Expro had no chance whatsoever of success on its only claims in the complaint . . . .

courts reversed the trial courts and held that the actions were subject only to Mississippi's statutes of limitation. ***Patton***, 556 So. 2d at 680; ***Lee***, 529 So. 2d at 190.

¶60. ***Patton*** has never been cited for the issues presented in today's case, for good reason, because it is an anomaly. ***Patton*** is not even authority for the proposition it answered by virtue of the Legislature's amendment to Mississippi Code Section 15-1-65 (Supp. 1989). Justice Maxwell, writing for this Court, acknowledged the change in the law in a recent case, finding that a cause of action time barred in Louisiana could not be maintained in Mississippi "under the plain language of Section 15-1-65." ***N. Am. Midway Ent., LLC v. Murray***, 200 So. 3d 437, 439 (Miss. 2016). Justice Maxwell noted that the codification of Section 15-1-65 "effectively end[ed] this state's days as a home for unpled foreign torts." ***Id.*** at 439 n.4 (internal quotation mark omitted) (quoting ***Patton***, 556 So. 2d at 680 n.1). In today's case, the Mississippi courts were not faced with an out-of-state statute-of-limitation issue, as in ***Patton***.

¶61. ***Lee*** held that

> Mississippi Rule of Civil Procedure 41(b) . . . states that dismissals for expiration of a statute of limitations operate as adjudications upon the merits. Indeed, such a dismissal "operates as" an adjudication upon the merits as to refiling the same cause of action in other trial courts in the same state and the only recourse in that state is to appeal. Such a dismissal is not in fact an adjudication upon the merits. *See* ***Titus v. Wells Fargo Bank & Union Trust Co.***, 134 F.2d 223, 224 (5th Cir.1943); ***Western Coal Mining Co.*** [***v. Jones***, 27 Cal. 2d 819, 167 P.2d 719, 724 (1946)]; ***Cummings v. Cowan***, 390 F.Supp. 1251, 1255 (N.D. Miss.1975); 1B Moore's Federal Practice, ¶ 0.409 [6] (2nd ed. 1984). And, though it *operates* the same *as an adjudication* upon the merits in other courts *within the same state*, it is not a judgment deserving full faith and credit from sister states. ***Cummings***, 390 F. Supp. at 1255; ***Los Angeles Airways, Inc. v. Lummis***, 603 S.W.2d 246 (Tex. Civ. App.1980). Rule 41(b) describes the effect of such a dismissal within the state where it was entered;

> Rule 41(b) does not entitle such a dismissal to full faith and credit in sister states.

Lee, 529 So. 2d at 190-91. Although ***Lee*** properly cites Rule 41(b), its facts are not replicated in today's case, no matter the Majority's attempt to make them fit.

¶62. The decision today serves only to cloud the once-clear waters of these long-standing principles.

ISHEE, J., JOINS THIS OPINION. COLEMAN AND GRIFFIS, JJ., JOIN THIS OPINION IN PART.

COLEMAN, JUSTICE, DISSENTING:

¶63. In ***Lowery v. Statewide Healthcare Service, Inc.***, 585 So. 2d 778, 780 (Miss. 1991), the Mississippi Supreme Court held that if the statute of limitations expires as to a tortfeasor, then no action for the tortfeasor's negligence may be pursued against the tortfeasor's employer under the principle of vicarious liability. The ***Lowery*** Court quoted,

> However, a statute that bars a claim against an agent equally protects those in whose behalf he acted as agent, where there are no circumstance of equity to prevent the operation of the statute in their favor; and the concealment of the fact of agency where there is no fraud on the part of the principals does not constitute such a circumstance.

Id. (quoting 3 Am. Jur. 2d *Agency* § 348 (1962)). In the case *sub judice*, a statute, namely Mississippi Code Section 15-1-36(15) (Rev. 2019), mandated the dismissal of the plaintiff's claims against Methodist's employee. Because the statute of limitations has run as to the plaintiff's claims against the employee, the trial court dismissed the claims against her with prejudice. While the failure to give notice necessitated the dismissal of the plaintiff's claims as to the employee, it is the running of the statute of limitations—just as in ***Lowery***—that

prevents the plaintiff from refiling and pursuing claims against her. ***Lowery***, then, is directly on point, and, pursuant to its holding, the plaintiff's claims against Methodist are barred. In its attempt to distinguish ***Lowery***, the majority makes a straw man out of the notice requirement.

¶64. The special concurrence concludes that, because the plaintiff was not required to sue Dr. Lo, the undisputed fact that McNutt may no longer proceed against her due to the running of the statute of limitations does not cut off the claim against Dr. Lo's employer. The argument of the Special Concurrence was considered and rejected by the ***Lowery*** Court. ***Lowery***, 585 So. 2d at 780. Indeed, it was necessary to the ***Lowery*** Court's holding to reject it. It is, as the Special Concurrence recites, true that a plaintiff may proceed only against the employer when pursuing a claim based solely on an employee's negligence. However, if that remains true even after a judgment in favor of the employee is entered due to the running of the statute of limitations against the employee, then the ***Lowery*** holding must be wrong and must be overruled. Instead, the well-settled principles of agency law relied on by the ***Lowery*** Court operate to cut off liability of the employer/principal when recovery may not be had against the employee/agent. ***Lowery***, 585 So. 2d at 780.

¶65. The Special Concurrence relies on the Court of Appeals case of ***Sykes v. Home Health Care Affiliates, Inc.***, 125 So. 3d 107, 109 (Miss. Ct. App. 2013), but there the Court of Appeals only addressed ***Lowery*** in a single sentence in which it failed to examine the principle behind the holding.. Both the ***Sykes*** Court and the Special Concurrence ignore the well-settled law, quoted above and below, that forms the basis of the ***Lowery*** Court's holding

that the running of the statute of limitations against the employee cuts off the liability of the employer. Moreover, decisions of the Court of Appeals are not "controlling" here. (Sp. Con. ¶ 33). It is the other way around. ***Pascagoula Sch. Dist. v. Tucker***, 91 So. 3d 598, 604 (¶ 12) (Miss. 2012) (Supreme Court "as a matter of institutional necessity and constitutional imperative, is the ultimate expositor of the law of this state . . . .") (quoting ***UHS-Qualicare, Inc. v. Gulf Coast Cmty. Hosp., Inc.***, 525 So. 2d 746, 754 (Miss. 1987)); ***Competition Marine of MS, Inc. v. Whitney Bank***, 220 So. 3d 1019, 1024 (¶ 15) (Miss. Ct. App. 2017); ***WC Baker Co., LLC v. Stockton***, 274 So. 3d 948, 951 (¶ 13) (Miss. Ct. App. 2018) (quoting ***Bevis v. Linkous Constr. Co.***, 856 So. 2d 535, 541 (¶ 18) (Miss. Ct. App. 2003)).

¶66. The Chief Justice's separate opinion has me at something of a loss. In the first five paragraphs of his opinion, he acknowledges that ***Lowery*** controls and cites the longstanding law of agency that should guide the Court to the correct result. However, he then seems to conclude that some equitable principle saves the plaintiff's claim against the hospital, (CIRO Op. ¶ 51), which, if true, would be in line with the above-quoted rule from ***Lowery***. However, the Chief Justice identifies no existing equitable maxim, *e.g.*, equitable tolling, *see* ***Brown v. McKee***, 242 So. 3d 121, 130 (¶ 33) (Miss. 2018), which, although it does not apply here is at least an established equitable doctrine. As more fully set forth below, the Chief Justice's remaining argument for an equity-based exception would also have been true in ***Lowery***.

¶67. The Chief Justice continues, writing as follows:

> Separately, Methodist has never argued that the statute of limitations expired on the claims alleged against it. Rather, Methodist seeks unearned relief based

> on the trial court's ruling on the merits of Dr. Lo's affirmative defense. Our law does not provide for such an advantage or benefit be accorded to Methodist. McNutt's claim against it met all statutory and rule requirements when it was timely served with the complaint. McNutt's failure to confirm proper notice and service on Dr. Lo and Lo's subsequent dismissal with prejudice does not extend to a defendant that was properly served before the statute of limitations expired. Holding otherwise would lead to an absurd result, neither just nor fair.

(CIRO Op. ¶ 52). As an initial matter, no claims alleged against Methodist are at issue here—only claims of negligence alleged against Dr. Lo and Methodists's liability for them as her employer are at issue. The ***Lowery*** opinion directly refutes every other part of the above-quoted paragraph. In ***Lowery***, the claim against the employer was timely pursuant to the six-year statute of limitations applicable to the employer, ***Lowery***, 585 So. 2d at 779, just as the claim against Methodist is timely in the case *sub judice*. Nevertheless, the ***Lowery*** Court extended the protections of the two-year statute of limitations applicable to the employee to the employer. ***Id.*** at 780. In other words, the ***Lowery*** Court reached the very result decried by the Chief Justice as "absurd, neither just nor fair." (CIRO ¶ 6). The Chief Justice continues as follows:

> Statutes of limitation are substantive rights granted by the Legislature, setting forth a time frame in which suit must be served. The stated purpose of the statute of limitation, timely filing suit against Methodist, was unequivocally met in today's case. The Court's own rules on timeliness of service were met.

(CIRO Op. ¶ 53). Every single word of the above-quoted paragraph was equally true in ***Lowery***, just as it is equally true both here and in ***Lowery*** that the lawsuit against the employer was timely, (CIRO Op. ¶ 50), yet the Chief Justice would reach the opposite holding today.

¶68. I agree with much of the remainder of the Chief Justice's opinion, which is why I join him in part. I agree with his assertion that a dismissal with prejudice has the effect of a dismissal on the merits. However, as I write above in response to the majority, today's case is not about the failure to give notice. Today's case is about whether the plaintiffs may proceed on wholly derivative vicarious liability claims against an employer when—as all agree—the statute of limitations bars all of the plaintiffs' direct claims against the employee and tortfeasor.

¶69. On final note, I take no position as to whether "everything would have been okay" if McNutt had sued only Methodist. (Sp. Con. ¶ 37). "We have held that the review procedure should not be allowed for the purpose of settling abstract or academic questions, and that we have no power to issue advisory opinions." ***Fails v. Jefferson Davis Cnty. Pub. Sch. Bd.***, 95 So. 3d 1223, 1225 (Miss. 2012) (internal quotation mark omitted) (quoting ***Allred v. Webb***, 641 So. 2d 1218, 1220 (Miss. 1994)). We are not faced with a case in which McNutt sued only Methodist, and we should confine ourselves to discussing the case before us. We are, instead, faced with a case in which judgment was entered in favor of the employee on the grounds that the statute of limitations has run, and in ***Lowery*** we held that, when the statute of limitations runs against the employee, the plaintiff may not recover against the employer. Again, the ***Lowery*** Court wrote as follows:

> 3 Am. Jur. 2d Agency § 348 (1962) also reads:
>
> > However, a statute that bars a claim against an agent *equally protects those in whose behalf he acted as agent*, where there are no circumstance of equity to prevent the operation of the statute in their favor; and the concealment of the fact of agency

> where there is no fraud on the part of the principals does not constitute such a circumstance.
>
> *See also,* ***Ware v. Galveston City Co.***, 111 U.S. 170, 174, 4 S. Ct. 337, 339, 28 L. Ed. 393 (1883); ***Wilhelm v. Traynor***, 434 So. 2d 1011, 1013 (Fla. App. 5 Dist. 1983); ***Hewett v. Kennebec Valley Mental Health Association***, 557 A.2d 622, 624 (Me. 1989). *This case is time barred as Statewide and Russell were first made party defendants on May 2, 1986, well over two years after the cause of action accrued.*
>
> We accordingly affirm dismissal of the suit against Russell and Statewide as time barred.

Lowery, 585 So. 2d at 780 (emphasis added). It is crystal clear from the above-quoted language that the ***Lowery*** Court held that the running of the statute of limitations against the employee/agent cut off the plaintiff's *respondeat superior* claims against the employer. Had McNutt attempted to sue Methodist without giving notice to Dr. Lo, we would have a wholly different case before us.