IN THE MISSISSIPPI SUPREME COURT

NO. 2006-CA-00519-COA

MERLEAN MARSHALL, ALPHONZO MARSHALL AND ERIC SHEPARD, individually and on behalf of all Wrongful Death Beneficiaries of LUCY SHEPARD, Deceased — APPELLANTS

versus

KANSAS CITY SOUTHERN RAILWAY COMPANY, ERIC W. ROBINSON, THE ESTATE OF ROBERT EVERETT and C.L. DUETT, — APPELLEES

APPEAL FROM THE CIRCUIT COURT
OF SCOTT COUNTY, MISSISSIPPI

APPELLANTS' SUPPLEMENTAL BRIEF

James W. Craig (MSB [redacted])
Phelps Dunbar LLP
111 E. Capitol Street, Suite 600
Jackson, MS 39201
Tel: 601-352-2300
Fax: 601-360-9777

Herbert Lee
Lee & Associates
2311 W. Capitol Street
Jackson, MS 39209
Tel: 601-355-9895
Fax: 601-355-7995

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2006-CA-519

MERLEAN MARSHALL, ALPHONZO MARSHALL AND ERIC SHEPARD, INDIVIDUALLY AND ON BEHALF OF ALL WRONGFUL DEATH BENEFICIARIES OF LUCY SHEPARD, DECEASED — **APPELLANTS**

V.

KANSAS CITY SOUTHERN RAILWAYS COMPANY; ERIC W. ROBINSON; THE ESTATE OF ROBERT EVERETT; and C.L. DUETT — **APPELLEES**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Plaintiffs in the Circuit Court, Appellants in this Court:

   Merlean Marshall
   Alphonzo Marshall
   Eric Shepard
   All known and unknown Wrongful Death Beneficiaries of Lucy Shepard, deceased

2. Counsel for Plaintiffs/Appellants in Circuit Court:

   Herbert Lee, Jr., Lee and Associates of Jackson, Mississippi
   Noble Lee, Lee & Lee of Forest, Mississippi
   Edward Blackmon, Jr., Blackmon & Blackmon of Canton, Mississippi

3. Counsel for Plaintiffs/Appellants in this Court:

Herbert Lee, Jr., Lee and Associates of Jackson, Mississippi
James Craig, Phelps Dunbar LLP, of Jackson Mississippi

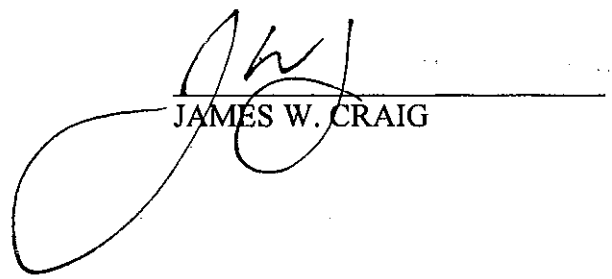
4. Defendants in the Circuit Court, Appellees in this Court:

Kansas City Southern Railway Company
Eric W. Robinson
C.L. Duett
The Estate of Robert E. Everett

5. Counsel for Defendants/Appellees in Circuit Court and this Court:

Charles E. Ross and Charles H. Russell, III
Wise Carter Child & Caraway
Jackson, Mississippi

SO CERTIFIED BY ME, this the 22nd day of December, 2008.



JAMES W. CRAIG

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STATEMENT OF ISSUES

1. Whether the statute of limitations governing the claims of the Wrongful Death Beneficiaries of Lucy Shepard was tolled from July 20, 1998, when the Complaint in *Shepard I* was filed, until September 30, 2003, when *Shepard I* was dismissed?

2. Whether the statute of limitations governing the claims of the Wrongful Death Beneficiaries of Lucy Shepard was tolled by Miss. Code Ann. §15-1-57 and/or by Miss. Code Ann. §15-1-69, from July 20, 1998, when the Complaint in *Shepard I* was filed, until September 30, 2003, when *Shepard I* was dismissed?

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versus

KANSAS CITY SOUTHERN RAILWAY COMPANY, ERIC W. ROBINSON, THE ESTATE OF ROBERT EVERETT and C.L. DUETT, — APPELLEES

APPELLANTS' SUPPLEMENTAL BRIEF

On December 11, 2008, this Court granted the Petition for Writ of Certiorari filed by Appellants Merlean Marshall, Alphonzo Marshall, Eric Shepard, and all known and unknown Wrongful Death Beneficiaries of Lucy Shepard, deceased ("the Beneficiaries") with respect to the Opinion of the Mississippi Court of Appeals, handed down on November 6, 2007.

In addition to the authorities cited in their prior pleadings, the Beneficiaries submit that this Court's opinion in *Crawford v. Morris Transp., Inc.*, 990 So. 2d 162 (Miss. 2008), supports their argument that the statute of limitations had not expired, and that the dismissal of this civil action by the Circuit Court was error.

STATEMENT OF PROCEEDINGS

This lawsuit was brought to establish the liability of Kansas City Southern Railway Company ("the Railroad") and several of its employees for the death of Lucy Shepard, the driver of a van struck by a Kansas City Southern train at an intersection in Scott County that the

Railroad had previously agreed to upgrade. CP 3, 21, 50, 271, 308. There is no dispute that the Shepard Beneficiaries filed their first lawsuit within days of the death of Ms. Shepard. Likewise, there is no dispute that the second lawsuit – this case – was filed even before the Fifth Circuit affirmed the without-prejudice dismissal of the first case. Further, there is no doubt that the United States District Court, to which the Railroad removed this case and that of Ms. Shepard's passenger, Phyllis Body McKee, had no subject matter jurisdiction because the complaints in both cases sufficiently stated claims against the Railroad's Mississippi resident employees. *McKee v. Kansas City Southern Railway Co.*, 358 F.3d 329 (5th Cir. 2004); *Marshall v. Kansas City S. Railway*, 372 F. Supp.2d 916, 921-22 (S.D. Miss. 2005) (Barbour, J. remanding after second removal); CP 413-23.[1] The question before the Circuit Court, the Court of Appeals, and now this Court, was simply this: was the statute of limitations tolled during the pendency of the first lawsuit filed by the Shepard Beneficiaries?

REASONS FOR REVERSAL OF THE CIRCUIT COURT AND COURT OF APPEALS

I. The Limitations Period Was Tolled By The Filing Of The First Shepard Complaint

In its discussion of the two savings statutes involved in this case, the Court of Appeals misapprehended a major principle of law: the cases relied upon by the Railroad, and cited by the Court in its November 6, 2007 Opinion, govern whether the Shepard Beneficiaries would be allowed **additional** time (up to one year) after the dismissal of the first ("*Shepard I*") case. But those cases do not change the general principle that **the limitations period does not run at all from the filing of a complaint until the time that complaint is dismissed**. This latter point is controlled by this Court's precedent interpreting the statutes of limitations themselves. As a

[1] With respect to this case, District Judge Barbour also specifically held that the Railroad could not simultaneously claim the federal dismissal was without prejudice and then turn around and say it precluded any further state court claim, *Marshall*, 372 F.Supp.2d at 921-22.

different panel of the Court of Appeals recently held, "[t]he filing of a complaint, even without service of process tolls the three-year statute of limitations . . ." *Parmley v. Pringle*, 976 So. 2d 422, 424 (Miss.App. 2008) at ¶8.

Parmley followed *Owens v. Mai*, 891 So. 2d 220, 223 (Miss. 2005) at ¶14 ("the filing of a complaint tolls the statute of limitations"); *Triple "C" Transp., Inc. v. Dickens*, 870 So. 2d 1195, 1199 (Miss. 2004) at ¶32 ("In the event the action is commenced within the period of limitation, the statute of limitations **stops running**, for a time"), and *Fortenberry v. Memorial Hosp. at Gulfport, Inc.*, 676 So. 2d 252 (Miss. 1996). See also *Watters v. Stripling*, 675 So.2d 1242, 1244 (Miss.1996) ("The filing of an action tolls the statute of limitations until the expiration of the 120-day service period.").

In each of these cases, this Court, in calculating the time elapsed under the statute of limitations, excluded the time from the filing of the complaint until the end of the 120 day period within which service of process should have been effected. After that 120 day period, because process had not been served, the limitations "clock" began to run again. But the statute of limitations remained tolled from the filing of the Complaint until the 120 day service period had elapsed. **This is because, under the precedent of this Court, the filing of a civil action automatically tolls the limitations period – and even upon dismissal, the time that the case was properly filed is not charged against the plaintiff's limitations deadline.**

In this case, service of process **was** effected within 120 days in both *Shepard I* and *Shepard II*. Thus, as a matter of law, the limitations period was tolled from July 20, 1998, when the Complaint in *Shepard I* was filed, until September 30, 2003, when *Shepard I* was dismissed. This action, the second Complaint filed by the Shepard Beneficiaries (*Shepard II*) was filed in the Circuit Court of Scott County on August 13, 2004.

So then, even without the **additional** year granted by either Mississippi Code Ann. §§15-1-69 and 15-1-57, the Beneficiaries timely filed the *Shepard II* Complaint:

EVENT	DATE	LIMITATIONS TIME
Death of Lucy Shepard	July 10, 1998	0 days (limitations running)
Filing of *Shepard I*	July 20, 1998	10 days (limitations stayed)
Dismissal of *Shepard I*	September 30, 2003	10 days (limitations running)
Filing of *Shepard II*	August 13, 2004	327 days (limitations stayed)

The Court of Appeals misapprehended this point. Even without reaching the savings statute issues below, this Court can reverse the Court of Appeals and Circuit Court on this independent grounds.

II. The Beneficiaries Are Entitled to the Benefit of the Savings Statutes: Miss. Code Ann. §§ 15-1-69 and 15-1-57

But even if the Beneficiaries had to rely solely on the two savings statutes at issue here, their Complaint should not have been dismissed, because either or both of those enactments apply to toll the limitations period. The first is Miss. Code Ann. §15-1-69: "If in any action duly commenced within the time allowed, the writ shall be abated, or the action otherwise avoided or defeated, for any matter of form . . . the plaintiff may commence a new action for the same cause, at any time within one year after the abatement of the original suit." This Court has long held that Section 15-1-69 is a "highly remedial statute" that "ought to be liberally construed" . . . "to save one who has brought his suit within the time limited by law from loss of his action by reason of accident or inadvertence." *Ryan v Wardlaw*, 382 So. 2d 1078 (Miss. 1980).

Of the four elements required for the application of Section 15-1-69, three are uncontested: (1) *Shepard I* was filed ten days after Lucy Shepard's death; (3) *Shepard II* is a

second lawsuit for the same cause; and (4) *Shepard II* was filed within one year of the dismissal, without prejudice, of Shepard I.

The only dispute here is over the second element. A dismissal without prejudice is considered a dismissal "as a matter of form" because it does not decide the merits. *Smith Enterprise Company, Inc. v. Lucas*, 204 Miss. 43, 36 So. 2d 812 (1948). Even more to the point: this Court has dictated that **where a case was filed erroneously in federal court, and later dismissed without prejudice, that is a "dismissal as a matter of form."** *Boston v. Hartford Acc. & Indemn. Co.*, 822 So. 2d 239, 248 (Miss. 2002); *Norman v. Bucklew*, 684 So.2d 1246 (Miss. 1996).

That is exactly the situation here. *Shepard I* was not dismissed on the merits. Furthermore, it is clear that the federal courts never had subject matter jurisdiction of this case. *McKee v. Kansas City Southern Railway Co.*, 358 F.3d 329 (5th Cir. 2004); *Marshall v. Kansas City S. Railway*, 372 F. Supp.2d 916, 921-22 (S.D. Miss. 2005).

While, as a narrow exception, this Court has refused to apply the tolling statute where a plaintiff files in the wrong court and then takes a voluntary non-suit, *W.T. Raleigh Co. v. Barnes*, 143 Miss. 597, 109 So. 8 (Miss. 1926), that did not happen in this case. Here the Beneficiaries were wrongfully dragged to a court that did not have jurisdiction.[2] The Shepard Beneficiaries' motion to remand was denied; the District Court reached the merits of the case against the Railroad employees. It did the same thing in the *McKee* case, in a ruling later reversed by the Fifth Circuit.

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[2] *See also Wertz v. Ingalls Shipbuilding Inc.*, 790 So.2d 841 (Miss. 2000); *Lowry v. Int'l Broth. of Boilermakers, Iron Ship Builders and Helpers of America*, 220 F.2d 546 (5th Cir. 1955). In these cases, the time spent in federal court did not count against the statute of limitations because the dismissal for lack of jurisdiction was for a "matter of form."

In the face of the ruling to keep the case in federal court, which the Beneficiaries were convinced was wrong, and in the face of rulings by the district court that cut off the merits of their case against the Railroad's employees and against the Railroad itself, the Beneficiaries moved for the district court to enter final judgment against them, so they could appeal those rulings. They did **not** ask for the federal court version of a "non-suit," which is a voluntary dismissal under Rule 41. Beneficiaries' Record Excerpts at Tab G.

In response, the Railroad acknowledged that the Beneficiaries wanted to appeal the federal court's ruling about jurisdiction. Record Excerpts Tab H. The Railroad said it did not object to such an appeal. But the Railroad said the district court should use Rule 41, not Rule 54, to dismiss the case. The district court did what the Railroad suggested – **not** what the Plaintiffs asked for. This was misapprehended by the Court of Appeals in its November 7 Opinion.

Indeed, if the Railroad had told the Fifth Circuit that it believed the statute of limitations would bar further proceedings in the case, the Fifth Circuit would never have held that the dismissal was without prejudice. If limitations bar further proceedings, the Fifth Circuit rule is that the trial court dismissal, even if it says "without prejudice," is in fact a dismissal "with" prejudice that can be appealed. A case the railroad cites confirms this:

> Because the statute of limitations would, under [the defendant's] reading, bar most of the [plaintiff's] claim, this court would have to construe the dismissal as a dismissal with prejudice.. [If the dismissal had been with prejudice the plaintiff] could have secured a reversal had he appealed.

Sharp v. Ford, 758 F.2d 1018, 1024 (5th Cir. 1985).

Thus, the dismissal without prejudice was a "matter of form" because it was done to get out of a federal court to which the case had been wrongfully removed and in the face of a threat to dismiss the matter with prejudice. CP 524-529; CP 608-609. The purpose of Miss Code Ann. §15-1-69 is to come to the aid of a plaintiff who mistakenly files suit in the wrong jurisdiction.

Hawkins v. Scottish Union & Nat'l Ins. Co., 69 So. 710 (Miss. 1915). If the statute comes to the aid of a plaintiff who makes a mistake, it certainly should come to the aid of plaintiff beneficiaries who made no mistake and have, at all times, sought to go forward in state court, the only court with jurisdiction over this case.

This Court's recent opinion in *Crawford v. Morris Transp., Inc.*, 990 So. 2d 162 (Miss. 2008), makes clear that the *Shepard II* Complaint should not have been dismissed. *Crawford* interpreted Section 15-1-69. This Court acknowledged the limited exception that "voluntary dismissals are not dismissals as a 'matter of form', and therefore are not afforded the protections of the savings statute." Id. at 170, ¶30. But this Court pointed out that "we look to the content or substance of a pleading rather than form." Id. at 171, ¶35. The Court explained:

> At no point did Crawford evince an intent to abandon his claim. It appears that Crawford even tried to frame his motion as being involuntary and based upon one of the defenses enumerated under Rule 12(b) of the Federal Rules of Civil Procedure. He moved for dismissal pursuant to Rule 12(b) and 41(b) of the Federal Rules of Civil Procedure. . . . While his invocation of Rule 12(b) and 41(b) was of no effect, it sheds some light upon Crawford's intent.

Id. at 172, ¶37 (citations omitted).

The Court then explained why it was important to determine the intent behind Crawford's motion to dismiss his federal action:

> This Court has framed the 'true meaning' of the savings statute as follows: 'where the plaintiff has been defeated by some matter not affecting the merits, some defect or informality, which he can remedy or avoid by a new process, the statute shall not prevent him from doing so, provided he follows it promptly, by suit within a year.' The statute is highly remedial and should be liberally construed to accomplish its purpose. Good faith in the institution of the dismissed action is one consideration for invoking the statute.

Id. at 174, ¶43. The Court concluded that **"Crawford inadvertently found himself in a procedural quagmire and made a good-faith effort to preserve his claim."** *Id.* at 174, ¶44 (emphasis added).

That is exactly what happened in this case. The wrongful removal of *Shepard I* created an adverse circumstance from which the Beneficiaries could only free themselves by seeking dismissal in the federal court and review of the jurisdictional issues.[3]

The Beneficiaries respectfully suggest that this Court apply its reasoning in *Crawford* to this case; if it does so, then the Circuit Court's dismissal must be reversed.

CONCLUSION

As a matter of law, whether or not the additional year mandated by Section 15-1-69 and/or Section 15-1-57 is granted to Beneficiaries, the filing of the *Shepard I* Complaint stopped the limitations "clock" until the district court dismissed that case. Given that, *Shepard II* was filed within the time allowed by the applicable limitations statute.

Moreover, as *Crawford* underscores, the purpose of the savings statutes is to protect a diligent Plaintiff who has filed a lawsuit in the wrong jurisdiction or is forbidden to file a lawsuit. Here, the Railroad – not the Beneficiaries -- moved the case to the wrong jurisdiction. They convinced the district judge to change the Beneficiaries' motion for a Rule 54 judgment to a motion for a Rule 41 judgment. That is not the kind of non-suit maneuver that prevents the tolling statute from applying. As in *Crawford*, the Beneficiaries have been diligent the entire time, fighting a series of procedural machinations in an effort to get a court with proper jurisdiction to hear the merits of this case. Given these facts, the Beneficiaries request this Court

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[3] The jurisprudence of other States, applying similar savings statutes, recognizes just this type of "escape from quagmire" as a dismissal for matter of form that requires application of their savings statutes. *Bockweg v. Anderson*, 402 S.E. 2d 627, 629 (N.C. 1991); *see also Cero Realty Corp. v. American Manufacturers Mut. Ins. Co.*, 171 Ohio St. 82, 167 N.E.2d 774 (Ohio 1960) (where the plaintiff moves for an order of dismissal as a result of adverse rulings by the trial court, the dismissal implicates the savings statute and plaintiff is allowed additional time to re-file); *Gutierrez v. Vergari*, 499 F.Supp. 1040, 1049-50 (S.D.N.Y. 1980); *Roberts v. General Motors Corp.*, 673 A.2d 779 (N.H. 1996); *Frazier v. East Tennessee Baptist Hospital*, 55 S.W. 3d 925, 930 (Tenn. 2001).

to vacate the Court of Appeals' November 6, 2007 Opinion, reverse the Circuit Court of Scott County's summary judgment dismissal, and remand the case to that Court.

Respectfully submitted,

By: _____

James W. Craig (MSB [redacted])
Phelps Dunbar LLP
111 E. Capitol Street, Suite 600
Jackson, MS 39201
Tel: 601-352-2300
Fax: 601-360-9777

Herbert Lee
Lee & Associates
2311 W. Capitol Street
Jackson, MS 39209
Tel: 601-355-9895
Fax: 601-355-7995

CERTIFICATE OF SERVICE

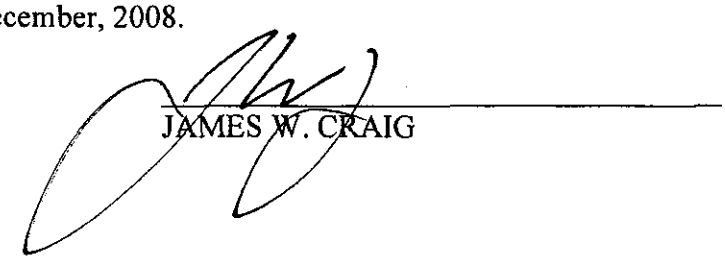
I, James W. Craig, attorney for the appellants, hereby certify that I have this day caused to be mailed by United States Mail, postage prepaid, a true and correct copy of the above and foregoing Supplemental Brief to:

Charles Ozier
Charles Russell
Wise Carter Childs & Carraway
P.O. Box 651
Jackson, MS 39205

Hez L. Hollingsworth
Thompson & Hollingsworth
222 E. Main Street, Ste. 5
P.O. Drawer 119
Forest, MS 39074

Honorable Marcus D. Gordon
Circuit Judge
P.O. Box 220
Decatur, MS 39327

THIS the 22nd day of December, 2008.



JAMES W. CRAIG