

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JONATHAN CRAIG GRAY

APPELLANT

VS.

Cause No. 2006-CA-01601

**UNIVERSITY OF MISSISSIPPI
SCHOOL OF MEDICINE**

APPELLEE

**APPEAL FROM THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT**

BRIEF OF UNIVERSITY OF MISSISSIPPI SCHOOL OF MEDICINE, APPELLEE

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

In order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case:

- a. Jonathan Craig Gray and Earnest Allen Gray, III, Appellants;
- b. James W. Nobles, Jr., Counsel for Appellants;
- c. University of Mississippi School of Medicine, Appellee;
- d. Stephen P. Kruger, Jan F. Gadow, Page, Kruger & Holland, P.A., Counsel for Appellee;
- e. Honorable Swan Yerger, trial judge.

THIS, the 22 day of June, 2007.



Stephen P. Kruger
Jan F. Gadow

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STATEMENT REGARDING ORAL ARGUMENT

Because of the unique combination of legal arguments presented in this appeal and the *de novo* standard of review, Appellee submits that this Court's decisional process will be significantly aided by oral argument. M.R.A.P. 34 (a)(3).

STATEMENT OF THE ISSUES

A. Whether the trial court properly granted summary judgment in favor of UMMC because Gray's complaint is time bared as to all claims of negligence that occurred prior to July 5, 2004;

B. Whether the trial court properly granted summary judgment in favor of UMMC without "splitting" Gray's cause of action.

I. INTRODUCTION

Jonathan Craig Gray sued the University of Mississippi School of Medicine and the University of Mississippi Medical Center Hospitals in an effort to recover damages for the death of Hughlene Gray, his mother, pursuant to the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1, et seq., of the Mississippi Code of 1972 as amended (hereinafter "MTCA"). Gray alleges that Hughlene Gray's death was proximately caused and contributed to by a gastric by-pass surgery performed by Dr. Roger Blake on January 12, 2004 and possibly by subsequent follow-up procedures performed by Dr. Blake. Dr. Blake is a bariatric surgeon who at all times relevant to the complaint was an employee of the University of Mississippi Medical Center.

II. STATEMENT OF THE CASE

On January 6, 2006, Jonathan Craig Gray filed a Complaint against the University of Mississippi School of Medicine and the University of Mississippi Medical Center Hospitals (hereinafter collectively referred to as "UMMC"), seeking damages for the wrongful death of Hughlene Gray, his mother. (C.P. 3-7) On February 6, 2006, UMMC filed a Motion to Dismiss or in the Alternative Motion for Summary Judgment. (C.P. 14-16) The trial court granted UMMC's Motion and entered Final Judgment in favor of UMMC on August 15, 2006. (C.P. 46) Gray subsequently perfected this appeal on August 30, 2006. (C.P. 51)

III. UNDISPUTED FACTS

Dr. Roger Blake, a bariatric surgeon and an employee of UMMC at all times pertinent to this action, performed gastric by-pass surgery on Hughlene Gray on January 12, 2004, at the University of Mississippi Medical Center. (C.P. 4, 9) He also

participated in some of the follow-up treatment and surgical procedures on Hughlene Gray. (C.P. 4)

On January 10, 2005, in an effort to comply with the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-11. Gray served a notice of claim letter upon Dr. Daniel Jones, Vice-Chancellor of the University of Mississippi, as the Chief Operating Officer of the University of Mississippi School of Medicine and University of Mississippi Medical Center Hospitals. (C.P. 8, 11) The letter states that it provides notice of a claim "for injuries sustained by Hughlene Gray, on January 12, 2004, and the follow up attempts to correct the improperly performed bariatric gastric bypass while she was a patient in the University of Mississippi Medical Center Hospital." (C.P. 8, at ¶1)

Hughlene Gray died on January 17, 2005, allegedly as a result of Dr. Blake's failure to adhere to the applicable standard of care for both the initial bariatric gastric bypass surgery and for the subsequent treatment. (C.P. 4-5) Gray filed his Complaint for Hughlene Gray's wrongful death on January 6, 2006, against the University of Mississippi School of Medicine and the University of Mississippi Medical Center Hospitals, divisions of the state of Mississippi pursuant to the MTCA. (C.P. 3)

IV. SUMMARY OF THE ARGUMENT

This wrongful death action against UMMC is governed by the Mississippi Tort Claims Act, including the Act's one year statute of limitations which begins to run on the date of the allegedly tortious conduct. By the specific terms of the Act, Gray's statutorily required, timely notice of claim letter tolled the statute of limitations for 95 days. Again pursuant to the Act, after this tolling period expired, Gray was afforded an additional 90 days in which to file his wrongful death claim. In other words, Gray had 550 days from the date of the first tortious conduct, to file a Complaint (365 days for the Act's statute of

limitations plus 90 days plus 95 days tolling pursuant to the Act). Gray filed the wrongful death complaint on January 6, 2006; therefore, any claim for actionable conduct that occurred more than 550 days prior to January 6, 2006, *i.e.*, any claim arising out of any medical treatment to Ms. Hughlene Gray at UMMC prior to July 5, 2004, is time barred.

Although Gray did not receive medical records in a timely fashion, the discovery rule does not apply to toll the MTCA's statute of limitations. Hughlene Gray clearly "discovered" her claim and the alleged negligence without access to medical records, as evidenced by the fact that she filed her notice of claim seven days *before* the medical records were ever requested. Gray's late-filed complaint contains the same allegations of negligence as does the timely notice of claim that was prepared without the benefit of medical records. It follows that the discovery rule is inapplicable to these facts because both the injury and alleged negligence were known without access to the medical records.

"Claim splitting" involves splitting a single cause of action into the subject of two different actions against the same defendant(s). Because Gray alleges injury stemming from multiple incidents occurring on independent dates, each of the allegedly actionable surgical procedures constitutes an individual cause of action and each should be considered individually and evaluated separately to ensure that the statute of limitations is properly applied to each allegedly negligent act. The determination that any actionable conduct prior to July 5, 2004 is time barred does not invite or allow two different actions against UMMC based on a single cause of action and, therefore, does not constitute claim-splitting.

V. LEGAL ARGUMENT

A. Standard of Review

When there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law, summary judgment is proper. M.R.C.P. 56. This Court reviews the grant of summary judgment *de novo* and will reverse only if triable issues of fact exist. **Glennon v. State Farm**, 812 So. 2d 927, 929 (¶ 5) (Miss. 2002), overruled on other unrelated grounds by **Meyers v. American States Ins. Co.**, 914 So. 2d 669 (Miss. 2005).

Additionally, the issue of whether the applicable statute of limitations has run is a question of law. **Wayne General Hospital v. Hayes**, 868 So. 2d 997, 1000 (¶ 11) (Miss. 2004); **Sarris v. Smith**, 782 So. 2d 721, 723 (¶ 6) (Miss. 2001). Whether the discovery rule applies is also a question of law. **Johnson v. Blackwood**, 919 So. 2d 1053, *3 (¶ 13) (Miss. App. 2005); **Forrest County General Hospital v. Kelley**, 914 So. 2d 242, 245 (¶¶ 14,15) (Miss. App. 2005) (citing **Wright v. Quesnel**, 876 So. 2d 362, 367 (¶¶ 14, 15) (Miss. 2004)).

B. The Trial Court Properly Granted Summary Judgment in Favor of UMMC Because Gray's Complaint is Time Barred as to All Claims of Negligence that Occurred Prior to July 5, 2004.

1. The Mississippi Tort Claims Act is Exclusive and Controlling

The Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1, et seq., provides the exclusive remedy against a governmental entity or employee for acts or omissions which give rise to a suit. **Southern v. Mississippi State Hosp.**, 853 So.2d 1212, 1215 (¶ 10) (Miss.2003) (citing **Pickens v. Donaldson, M.D.**, 748 So.2d 684, 687

(Miss.1999), **City of Tupelo v. Martin**, 747 So.2d 822, 826 (Miss.1999)). More particularly, the MTCA is:

exclusive of any other civil action or civil proceeding by reason of the same subject matter against the governmental entity or its employee or the estate of the employee for the act or omission which gave rise to the claim or suit; and any claim made or suit filed against a governmental entity or its employee to recover damages for any injury for which immunity has been waived under this chapter shall be brought only under the provisions of this chapter, notwithstanding the provisions of any other law to the contrary.

Wayne General Hospital v. Hayes, 868 So.2d 997, 1004 (¶ 29) (Miss.2004)(citing Miss. Code Ann. § 11-46-7(1)).

It is undisputed that the defendants in the instant action, the University of Mississippi School of Medicine and the University of Mississippi Medical Center Hospitals, are governmental entities, as admitted in the style of Gray's complaint. (C.P. 3) "[T]he University of Mississippi Medical Center is an agency of the State of Mississippi." **Board of Trustees of State Institutions of Higher Learning v. Peoples Bank of Mississippi**, 538 So. 2d 361, 366 (Miss. 1989). Therefore, Gray's sole remedy for the injuries alleged in his complaint is provided by Miss. Code Ann. §§ 11-46-1, et seq.

The MCTA also provides the statute of limitations for all actions governed by the Act:

The limitations period provided herein shall control and shall be exclusive in all actions subject to and brought under the provisions of this chapter, notwithstanding the nature of the claim, the label or other characterization the claimant may use to describe it, or the provisions of any other statute of limitations which would otherwise govern the type of claim or legal theory if it were not subject to or brought under the provisions of this chapter.

Henderson v. Un-Named Emergency Room, Madison County Medical Center, 758 So.2d 422, 426 (¶ 13) (Miss.2000)(citing Miss. Code Ann. § 11-46-11(3) (Rev. 2002)). The MTCA provides a one year statute of limitations for all actions brought under its provisions. Miss. Code Ann. § 11-46-11(3). Service of a notice of claim letter upon a state agency tolls the statute of limitations for 95 days. After this tolling period expires, the MTCA grants a Plaintiff an additional 90 days to file a claim against a properly served governmental entity.

[T]he filing of a notice of claim as required by subsection (1) of this section shall serve to toll the statute of limitations for a period of ninety-five (95) days from the date the chief executive officer of the state agency receives the notice of claim.... After the tolling period has expired, the claimant shall then have an additional ninety (90) days to file any action against the governmental entity served with proper claim notice."

Henderson, 878 So.2d at 426 (¶ 13) (citing Miss. Code Ann. § 11-46-11(3) (Rev. 2002)). "This 90 days is in addition to the balance of the 365 days not used as of the date when notice was given. **Page v. University of Southern Miss.**, 878 So.2d 1003, 1005 (¶8) (Miss. 2004).

The MTCA's one year statute of limitation for filing a claim *commences upon the occurrence of actionable conduct by a government entity*.

All actions brought under the provisions of this chapter shall be commenced within one (1) year next after the date of the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based, and not after....

Southern v. Mississippi State Hosp., 853 So.2d 1212, 1216 (¶ 12) (Miss.2003)(citing Miss. Code Ann. § 11-46-11(3)). The MTCA gives Plaintiffs one year from the date of

an allegedly negligent incident to file a complaint. **Page**, 878 So.2d at 1005 (¶ 6) (citing Miss. Code Ann. § 11-46-11(3) (Rev. 2002)).

In **Lee v. Thompson**, 859 So. 2d 981, 992 (¶ 26) (Miss. 2003), this Court reiterated the language found in **Cole v. State**, 608 So. 2d 1313 (Miss. 1992), *cert. denied* 508 U.S. 962 (1993), as to the clear purpose of statutes of limitations:

The primary purpose of statutory time limitations is to compel the exercise of a right of action within a reasonable time. These statutes are founded upon the general experience of society that valid claims will be promptly pursued and not allowed to remain neglected. They are designed to suppress assertion of false and stale claims, when evidence has been lost, memories have faded, witnesses are unavailable, or facts are incapable of production because of the lapse of time.

Accordingly, the fact that a barred claim is a just one or has the sanction of a moral obligation does not exempt it from the limitation period. These statutes of repose apply with full force to all claims and courts cannot refuse to give the statute effect merely because it seems to operate harshly in a given case. The establishment of these time boundaries is a legislative prerogative. That body has the right to fix reasonable periods within which an action shall be brought and, within its sound discretion, determine the limitation period.

Lee, 859 So. 2d at 992 (¶ 26) (quoting **Cole**, 608 So. 2d at 1317-18).

As the United States Supreme Court said in a case involving a federal cause of action:

[Statute of limitations] periods are established to cut off rights, justifiable or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary. Remedies for resulting inequities are to be provided by Congress, not the courts.

Kavanagh v. Noble, 332 U.S. 535, 539, 68 S.Ct. 235, 237, 92 L.Ed. 150 (1947)(citations omitted). “[C]ourts should apply the statute of limitations strictly, even though barring actions often seems arbitrary and inequitable.” **Carter v. Washington**

Metropolitan Area Transit Authority, 764 F. 2d 854, 858 (U.S.App.D.C. 1985).

Mississippi jurisprudence has long recognized that once a defendant raises the statute of limitations as an affirmative defense, which UMMC did in their Motion to Dismiss or in the Alternative for Summary Judgment (C.P. 14-15), the plaintiff bears the burden of proving that the statute has not run. See **Gulf National Bank v. King**, 362 So.2d 1253 (Miss. 1978); **Hall v. Dillard**, 739 So.2d 383, 387-88 (¶ 19) (Miss. App. 1999). Gray has not and cannot meet this burden.

Jenkins v. Pensacola Health Trust, Inc., 933 So. 2d 923 (Miss. 2006), makes clear that the statute of limitations for wrongful death lawsuits is subject to the statute of limitations for the underlying tort¹. **Jenkins**, 933 So. 2d at 926 (¶ 12). In **Jenkins**, Ms. Woodson lived in a nursing home from December 20, 1997, until her death on October 4, 2001. Jenkins, administratrix of Woodson's estate, filed suit on December 31, 2002, claiming that, as a result of the nursing home's negligence, Ms. Woodson had sustained severe personal injuries which led to her death. The nursing home filed a motion for partial summary judgment seeking to have the trial court dismiss all of the claims of tortious conduct which allegedly occurred or accrued before December 31, 1999 (more than three years prior to filing suit, which is the length of the applicable statute of limitations in the case). In doing so, it argued that the statute of limitations did not begin running on the date of death, but from the date of the alleged underlying tortious conduct. In other words, "the statute of limitations on bringing a wrongful death suit did not revive an otherwise expired statute of limitations on specific allegations of tortious conduct." **Jenkins**, 933 So. 2d at 924 (¶¶ 2-4). The trial court agreed and granted the motion. *Id.*

On appeal, this Court summarized the issue as follows:

Simply stated, the question presented is whether the statute of limitations for wrongful death lawsuits is subject to the statute of limitations for the underlying tort. Wrongful death claims must be based on a claim of some wrongful conduct which led to the death. Each act of alleged wrongful conduct, whether an intentional or negligent act, has its own statute of limitations. For instance, a careless driver who causes an accident and injuries may be sued for negligence, subject to a three year statute of limitations on negligence. However, if the injured party dies as a result of the accident, the negligence suit is transformed into a suit for wrongful death. Nevertheless, the gravamen of the claim is the negligent act which led to the death.

Jenkins, 933 So. 2d at 925 (¶ 6). The *Jenkins* Court first revisited *Gentry v. Wallace*, 606 So.2d 1117 (Miss. 1992), which held that a new statute of limitations for wrongful death began to run on the date of death, regardless of when the statute of limitations began to run for the underlying tort which led to the death. *Jenkins*, 933 So. 2d at 925-26 (¶¶ 7-8). It then discussed the more recent opinions of *Thiroux v. Austin*, 749 So.2d 1040 (Miss. 1999), and *Lee v. Thompson*, 859 So.2d 981 (Miss. 2003), which held that a wrongful death action is limited by the statute of limitations applicable to the underlying tort resulting in the wrongful death. *Jenkins*, 933 So. 2d at 926 (¶¶ 9-10).

This Court concluded its analysis in *Jenkins* as follows:

Recognizing that, in *Thiroux*, we should have specifically overruled *Gentry*, we do so now, and hold that the statute of limitations on bringing a wrongful death claim is subject to, and limited by, the statute of limitations associated with the claims of specific wrongful acts which allegedly led to the wrongful death.

Jenkins, 933 So. 2d at 926 (¶ 12). This Court held that *Jenkins* could not rely on any act of negligence "which allegedly occurred three years before the complaint was filed

¹ In the subject appeal, the statute of limitations for the underlying tort is the MTCA's one year statute.

on December 31, 2002. Claims - whether for negligence or wrongful death - that were not brought within the applicable [three year] statute of limitations (15-1-49) are barred by that statute." **Jenkins**, 933 So. 2d at 926 (¶ 13). See also **Pounds v. Miss. State Dept. of Health**, 946 So.2d 413, 416 (¶ 14) (Miss. 2007) ("In medical malpractice and wrongful death actions filed under the Mississippi Tort Claims Act, the statute of limitations begins to run from the date of the 'tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based.'")

Application of the MTCA statute of limitations to the facts at hand is simple. The initial actionable conduct giving rise to this suit, as claimed by Gray, occurred on January 12, 2004, during gastric bypass surgery. (C.P. 4-5, 8) Hughlene Gray submitted a Notice of Claim letter on January 10, 2005, as required by the MTCA, alleging injuries she sustained on January 12, 2004, and through follow up treatment over the next eleven months. (C.P. 8) The MTCA's one year statute of limitations began to run on January 12, 2004, the date of the first tortious or otherwise actionable conduct. **Pounds**, 946 So.2d 416 (¶ 14).

Under Section 11-46-11(3), Gray had 550 days from January 12, 2004, to file a Complaint (365 days plus 90 days plus 95 days). Gray filed the wrongful death complaint on January 6, 2006; therefore, using the **Jenkins** rationale as it applies to the MTCA, any claim for actionable conduct that occurred more than 550 days prior to January 6, 2006, is time barred. **Jenkins**, 933 So. 2d at 926 (¶ 13). The net result is that any claim arising out of any medical treatment to Ms. Hughlene Gray at UMMC prior to July 5, 2004, is time barred and was properly dismissed by the trial court.

Despite the clear and consistent case law and statutory language and the ease of application of the law to the facts, Gray asserts that because his wrongful death suit

was filed within one year after Hughlene Gray's death, it was filed in a timely fashion. However, this Court's analysis and holdings in **Jenkins** and **Pounds** effectively preclude any claim by Gray that the statute of limitations should begin running on the date of Ms. Gray's death in this case. Just as this Court in **Jenkins** barred all claims which occurred or accrued more than three (3) years prior to filing suit, this Court must now affirm the trial court's bar of all claims which occurred or accrued more than five hundred and fifty (550) days prior to when Gray filed this wrongful death suit. Consequently, any claim for injury resulting from any alleged act that occurred prior to July 5, 2004, is time barred by the statute of limitations found in Miss. Code Ann. § 11-46-11(3). **Jenkins**, 933 So. 2d at 926 (¶ 13).

2. Gray's Claim that the Statute of Limitations was Tolled has no Support in Mississippi Law

Gray claims that the statute of limitations did not run because he could not have reasonably discovered that a cause of action existed without the medical records, which UMMC did not produce in a timely fashion². Gray asserts that he did not receive the medical records until October, 2005. What is controlling is the fact that Hughlene Gray filed the statutorily required notice of claim on January 10, 2005, making specific allegations of negligence against UMMC based on the January 12, 2004 surgery and the follow up treatment. (C.P. 8) This notice was filed seven days *before* the first request for medical records was allegedly made. (C.P. 28) What this Court must not lose sight of is the fact that Hughlene Gray, as of January 10, 2005, absolutely knew that she had a cause of action because she filed a notice of claim. In other words, she

² In the trial court, the principal thrust of Gray's argument was that the one year statute of limitations began to run on the date of death. (C.P. 17-A – 21; 23-A - 25) Now, feeling the full impact of this Court's

had already "discovered" her claim and the alleged negligence such that Gray's argument that the discovery rule affords him some relief is misguided.

In support of his "discovery rule" argument, Gray first erroneously relies on **Forrest County General Hosp. v. Kelley**, 914 So. 2d 242 (Miss. App. 2005). In **Kelley**, which holds that the discovery rule applied to the facts presented to toll the MTCA's one year statute of limitations, the plaintiff was reasonably diligent in investigating the cause of her husband's death. Nonetheless, without access to the requested medical records, the plaintiff could not have discovered that a cause of action existed. **Kelley**, 914 So. 2d at 245 (¶¶ 13-15). The facts in the case *sub judice* are inapposite. Given Gray's timely, pre-records notice of claim, it follows that she had sufficient knowledge and understanding of a claim even *before* receipt of the medical records³. Nothing changed after receipt of the medical records, in terms of allegations; the late-filed complaint contains the same allegations of negligence as does the timely notice of claim⁴. (C.P. 3-4, 8) So, Gray's argument that the statute was tolled because he didn't have the medical records and was, therefore, ignorant of the facts and issues so as to inhibit pursuit of a claim, is disingenuous. Unlike in **Kelley**, here the timing of the receipt of medical records had no impact on the assertion of a claim. See *also Sutherland*, 2007 WL 1151833, at *3 (¶ 12)(discovery rule not applicable where neither injury nor negligence is unknown). There is no issue concerning the impact of production of medical records on the timely notice of claim or filing of suit and, it follows,

Jenkins decision, he has shifted his strategy to emphasize that the statute was tolled because he didn't receive the medical records in a timely fashion. (Appellant's brief, p. 8-11)

³ The timely notice of claim was filed on behalf of Hughlene Gray by her attorney. (C.P. 37-38) It is presumed that he performed the appropriate amount of due diligence in concluding that there was a reasonable basis for this notice of claim as a precedent to litigation. Such a claim would not have been made based on nothing.

Kelley has no application to this appeal. Instead, as in **Wright v. Quesnel**, 876 So. 2d 362, 367 (¶ 14) (Miss. 2004), Gray “had enough information at the time of the death such that [he] knew or reasonably should have known that negligence had occurred.”

Gray next relies on **Sarris v. Smith**, 782 So. 2d 721 (Miss. 2001), in support of his proposition that his failure to receive medical records affords him relief under the discovery rule. **Sarris**, however, involves a situation in which the plaintiff couldn’t have reasonably known the nature of the defendant’s acts and their causal connection with the death without access to the medical records. **Sarris**, 782 So. 2d at 725 (¶¶ 13-15). Again, in the case at bar, Gray, unlike the plaintiff in **Sarris**, reasonably knew of the alleged negligence as evidenced by the notice of claim, without the necessity of access to medical records. Gray cannot now be heard to argue that he needed medical records to make a claim because Hughlene Gray made a claim before she ever received any medical records. Consequently, **Sarris** has no application and Gray can find no relief under the discovery rule.

Moreover, even with the benefit of the discovery rule, a cause of action accrues “when the patient can *reasonably be held* to have knowledge of the injury itself, the cause of the injury, and the causative relationship between the injury and the conduct of the medical practitioner.” **Jackson Medical Clinic for Women v. Moore**, 836 So. 2d 767, 770 (¶ 10) (Miss. 2003) (quoting **Sarris**, 782 So. 2d at 723 (¶ 9) (quoting **Smith v. Sanders**, 485 So. 2d 1051, 1052 (Miss. 1986))). As of January 10, 2005, the date Gray filed her notice of claim, she had had actual knowledge of the injury and can reasonably be held to have had knowledge of the cause of injury as well as the causative

⁴ The wrongful death complaint was filed on Gray’s behalf by the same attorney who previously filed the notice of claim. (C.P. 3-6)

relationship between the injury and UMMC's and its employees' allegedly negligent conduct. **Moore**, 836 So. 2d at 770 (¶ 10). Given that the wrongful death suit alleges that the same negligent acts of UMMC and its employees that were at issue in the notice of claim (C.P. 8) were also the asserted proximate cause of Hughlene Gray's death (C.P. 3-4), it cannot be said that Gray could not have reasonably known of the nature of UMMC's acts or their alleged causal connection with Hughlene Gray's death without having access to her medical records. Where neither the injury nor the negligence which allegedly caused the injury is unknown, the discovery rule does not come into play. **Sutherland v. Ritter**, 2007 WL 1151833, at *3 (¶ 12) (Miss. 2007). This is indisputably not a case for application of the discovery rule.

Even **May v. Pulmosan Safety Equipment Co.**, 948 So. 2d 483 (Miss. App. 2007), also cited by Gray, cannot save the untimeliness of his claims based on actions that occurred more than 550 days before the complaint was filed. As succinctly stated in Justice Chandler's special concurrence:

As **Jenkins** clarifies, if on the date the wrongful death suit was filed, a claim by the decedent, had he lived, would have been barred by the statute of limitations applicable to that claim, then the wrongful death claim is likewise time-barred. **Jenkins**, 933 So. 2d at 926 (¶12). This is consistent with the fact that, under the [wrongful death] statute, a wrongful death claim is "derivative in nature, arising from and dependant upon the wrong done the (fatally) injured person." **Gentry**, 606 So. 2d at 1123 (Robertson, J., dissenting).

May, 948 So. 2d at 487 (¶ 15). On January 6, 2006, a claim by Hughlene Gray, had she lived, based on actionable negligence that occurred prior to July 5, 2004, would have been barred by the MTCA statute of limitations. It follows that the wrongful death suit filed on January 6, 2006 is also time barred as to any claims based on negligent

acts that occurred prior to July 5, 2004. *May*, 948 So. 2d at 487 (¶ 15). *Jenkins*, 933 So. 2d at 926 (¶ 12).

Gray also claims that without the medical records, he couldn't file a certificate of consultation pursuant to Miss. Code Ann. § 11-1-58(1), which should somehow excuse the untimely filing of the complaint. This argument fails to recognize the specific provision of § 11-1-58(4), which excuses filing such a certificate with the complaint when the plaintiff has requested medical records and they have not yet been produced. In such a situation, the plaintiff is not required to file the certificate of consultation until ninety (90) days after the records have been produced. § 11-1-58(4).

Although not actually argued in his brief and not clearly articulated, in his Statement of the Case, Gray hints that because the University of Mississippi Medical Center never denied the claim after receiving the notice of claim, the period of limitations should be extended. (Appellant's Brief, p. 2) In fact, UMMC is not obligated to deny a claim after receiving a notice of claim. The MTCA presupposes that there will be no denial in providing that suit may be filed ninety (90) days after the notice of claim. Miss. Code Ann. § 11-46-11 (3). The only effect of denial of the claim would be to shorten the limitation period, not enlarge it. Miss. Code Ann. § 11-46-11 (3).

In summary, the running of the MTCA statute of limitations is clear and exclusive and operates to bar any claim based on any actionable conduct which occurred prior to July 5, 2004. Gray's arguments regarding the discovery rule, Miss. Code Ann. Sections 11-7-13 and 11-1-58(1), the absence of medical records, and the absence of any official denial of claim have no impact on the running of the statute of limitations. Sections 11-46-7(1) and 11-46-11(3) clearly and unequivocally bar this wrongful death action to the extent it is based on claims of negligent acts that occurred prior to July 5, 2004. See

also *Jenkins*, 933 So. 2d at 926 (§ 12); *Pounds*, 946 So. 2d 416 (§ 14). There is no genuine issue of material fact; the applicable statute of limitations has expired as to all claims based on acts prior to July 5, 2004 and UMMC is entitled to judgment as a matter of law. *Glennon*, 812 So. 2d at 929 (§ 5). This Court must affirm.

C. The Trial Court Properly Granted Summary Judgment in Favor of UMMC Without "Splitting" Gray's Cause of Action.

In the instant action, Hughlene Gray's notice of claim and the subsequent wrongful death complaint both state a claim for injuries allegedly resulting from multiple surgical procedures. The initial bariatric gastric bypass surgery occurred on January 12, 2004 and the follow-up procedures occurred over the ensuing eleven months. Because Gray alleges injuries stemming from multiple incidents occurring on independent dates, each of the surgical procedures that Gray alleges to be actionable constitutes an individual cause of action. Therefore, each surgery Dr. Blake performed should be considered individually and evaluated as an isolated event under the MTCA. Contrary to Gray's claim, this does not constitute "splitting" a cause of action but, instead, merely ensures that the statute of limitations is properly applied to each allegedly negligent act.

In support of this "splitting" a cause of action argument, Gray first cites to *Estate of England*, 846 So. 2d 1060 (Miss. App. 2003), then immediately concedes that this opinion does not affect the issue at bar. (Appellant's Brief, p. 12) Next, Gray asserts that *Harrison v. Chandler-Sampson Ins., Inc.*, 891 So. 2d 224 (Miss. 2005), prevents dissecting Gray's claim for wrongful death by dated components, *i.e.*, before and after July 5, 2004. (Appellant's Brief, p. 12-13) First, and again, this case has absolutely no

relevance to the appeal at bar or to the point Gray is attempting to make⁵. According to Gray, the wrongful death either resulted from the entire hospitalization and all surgeries performed over the twelve month period, or not. (Appellant's Brief, p. 12) This claim is disingenuous, at best. As alleged, any one or more of the subject surgeries could have been performed in a negligent manner, wholly independent of any of the other surgeries Ms. Gray underwent between January 2004 and December 2004. If Gray had retained an expert whose opinion was that Dr. Blake failed to meet the applicable standard of care on the fourth surgery, but not the first, would he still argue this "all or nothing" approach?

Regardless, "claim splitting" involves splitting a single cause of action into the subject of two different actions against the same defendant(s). **Channel v. Loyacano**, 954 So. 2d 415, 424 (¶ 32) (Miss. 2007). Prevention of claim splitting is one of the goals of *res judicata* and is the reason a plaintiff must bring, in the first forum, every point which properly belongs to the subject litigation which he could bring at the time by exercising reasonable diligence. **Channel**, 954 So. 2d at 424 (¶ 32). *Res judicata* prevents claim splitting by preventing a plaintiff from obtaining a final judgment then bringing additional claims that were or could have been raised in the first action. **Robinson v. Hosemann**, 918 So. 2d 668, 671 (¶ 12) (Miss. 2005).

Declaring that certain of Gray's claims are barred by the statute of limitations in no way invites claim-splitting. Instead, not only can the time-barred claims *not* be brought in a future action, but they cannot be pursued in the initial action either. As a matter of law, there is nothing resembling claim-splitting here. The trial court properly

⁵ Instead, the quoted passage from **Harrison** involves a discussion of identity of cause of action as one of the four identities necessary for the bar of *res judicata* to apply. **Harrison**, 891 So. 2d at 232-33.

granted summary judgment in favor of UMMC and this Court must affirm. **Glennon**,
812 So. 2d at 929 (¶ 5).

VI. CONCLUSION

For all of the above and foregoing reasons, this Court should affirm the August
15, 2006 Judgment of the Hinds County Circuit Court, First Judicial District.

Respectfully submitted, this the 22 day of June, 2007.

UNIVERSITY OF MISSISSIPPI SCHOOL OF
MEDICINE, APPELLANT

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CERTIFICATE OF SERVICE

I, STEPHEN P. KRUGER/JAN F. GADOW, do hereby certify that I have this day forwarded, via U.S. mail, postage prepaid, a true and correct copy of the foregoing to:

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Honorable W. Swan Yerger
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Barbara Dunn
Hinds County Circuit Clerk
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THIS, the 22 day of June, 2007.



STEPHEN P. KRUGER
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