IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2006-CA-01703
Consolidated with
CASE NO. 2007-CA-00821

NORMAN Q. THOMAS JR., INDIVIDUALLY
AND ON BEHALF OF WILLIAM THOMAS
AND ANNA THOMAS, TWO MINORS — APPELLANTS

VERSUS

CLARK G. WARDEN, M.D.;
MISSISSIPPI BAPTIST MEDICAL CENTER
AND JOHN DOES 1-10 — APPELLEES

AMICUS BRIEF FILED BY MERKEL & COCKE, PA
AND JANICE AND ROBERT CALDWELL

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel for Merkel & Cocke, P.A., and Janice and Robert Caldwell certifies that the following persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court may evaluate possible disqualification or recusal:

1. Appellant Norman Q. Thomas, Jr., and William Thomas, and Anna Thomas, two minors;
2. L. Breland Hilburn, C. Louis Clifford, IV, and Patrick J. Schepens of Eaves Law Firm, attorneys for the appellant;
3. Roger McGehee, Jr. attorney for the appellant;
4. Appellees Clark G. Warden, M.D., and Mississippi Baptist Medical Center;
5. Stuart B. Harmon and Kristopher A. Graham of Page, Druger & Holland, P.A. attorneys for Clark G. Warden;
6. Eugene R. Naylor and Elizabeth A. Ganzerla of Wise, Carter, Child & Caraway, P.A., attorneys for appellee Mississippi Baptist Medical Center;

7. Judge W. Swan Yerger, Hinds County Senior Circuit Court Judge.

8. Walter T. Johnson and J. Collins Wohner, Jr. of Watkins & Eager, PLLC attorneys for *Amici Curiae* Mississippi State Medical Associations, Mississippi Hospital Association, Mississippi Health Care Association, Mississippi Nurses Association, and Mississippi Dental Association.

Respectfully submitted, this the 9 day of June, 2008.

/s/ Cynthia I. Mitchell
Cynthia I. Mitchell
Attorney for Amicus, Merkel & Cocke,
and Janice and Robert Caldwell

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INTRODUCTION

The Amicus Merkel & Cocke, P.A. and Janice and Robert Caldwell file this Amicus Brief in support of the Appellants' contention that the filing of a complaint, without the certificate of expert consultation provided by §11-1-58 of the Mississippi Code, tolls the statute of limitations. The Amicus further file this brief in opposition to the Appellees' contention that the filing of a complaint without the certificate is a "nullity" and "void" and therefore does not toll the statute of limitations.

ARGUMENT

I. FILING OF A COMPLIANT, EVEN WITHOUT THE CERTIFICATE OF EXPERT CONSULTATION, TOLLS THE STATUTE OF LIMITATIONS

The defendants have argued in the appellees' brief filed herein, that the plaintiffs' claims are bared by the statute of limitations. Without citation of authority, they contend that a complaint from which the certificate of expert consultation required by §11-1-58 of Mississippi Code was omitted is a nullity or "void," and that the filing of such a complaint did not toll the statute of limitations. Although the defendants make this argument almost as an afterthought in the space of a few paragraphs, after their lengthy constitutional arguments, this is an important issue which should not be decided without full consideration by this Court.[1]

Time-honored Mississippi law provides quite simply that the filing of a complaint tolls the statute of limitations. *Owens v. Mai,* 891 So.2d 220, 223 (Miss. 2005); *Watters v. Stripling*, 675 So.2d 1242, 1244 (Miss.1996). Rule 3 of the Mississippi Rules of Civil Procedure unequivocally and succinctly provides that "civil actions are commenced by filing a Complaint with the Court." MRCP, Rule 3(a). The *Official Comment* to Rule 3 explains that the purpose of this rule is to "establish a precise date for fixing the commencement of the civil action." MRCP., Rule 3, *Official Comment.* As recognized by the Rule Commentators, Rule 3's fixing of such date for commencement of an action is significant, because it is decisive of whether a claim is "barred by statute of limitations . . . ."MRCP., Rule 3, *Official Comment. See also Schneider v. Schneider*, 585 So.2d 1275 (Miss. 1991). The *Schneider* case overruled pre-MRCP law which had held that the filing of a complaint in itself **did not** toll the statute of limitations.

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This very issue is presented by the interlocutory appeal in *Caldwell v. North Mississippi Medical Center*, Supreme Court No. 2007-M-01512, which is in the process of being briefed at this time.

Once a complaint is filed, the statute of limitations does not begin to run again until or unless the case is dismissed, with one glaring exception which proves the rule. The sole exception to this principle is when service of process is not properly obtained pursuant to Rule 4 of the Mississippi Rules of Civil Procedure. Rule 4(h) allows 120 days for service of process. If service is not effected within the 120 - day period, and if no extension of that period is obtained from the Court, the clock for the statute of limitations then begins to run again on day 121. Where process **is** completed during the 120-day period, the statute remains tolled throughout the pendency of the litigation. *Watters, supra,* 675 So.2d 1244.

This Court has recently reaffirmed the tolling rule in a situation where a previous complaint was dismissed, and the defendants argued that the statute had run prior to the filing of the second complaint. In *Boston v. Hartford Accident & Indemnity Company*, 822 So.2d 239 (Miss. 2002), *overruled on other issues, Capital City Ins. Company v. G.D. "Boots" Smith Corp.*, 889 So.2d 505, 516-517 (Miss. 2004), the plaintiff had first filed suit in federal court. The case was litigated there for over five years before it was dismissed without prejudice. The case was then re-filed in state court, where the trial court dismissed the case based on the statute of limitations. In reversing the trial court's dismissal, the Supreme Court held that "the six(6)-year statute of limitations was tolled while the case was in federal court and. . .the trial court erred in determining that Boston's claims were time-barred." *Boston, supra*, 822 So.2d at 248 ¶31. *See also Norman v. Bucklew*, 684 So.2d 1246 (Miss. 1996).

In the *Norman* case, the plaintiff had filed suit in federal court on various state and federal claims including negligence, malicious prosecution, negligent and intentional infliction of emotional distress, slander and false arrest/imprisonment, and federal civil rights violations. The federal claims were eventually dismissed, and some of the state law claims were dismissed on the merits. Other

state law claims, however, were dismissed without prejudice. The plaintiff re-filed those claims in state court. After the trial court dismissed those claims, this Court reversed and remanded for trial, holding that the filing of the federal complaint had "tolled the statute of limitations . . . . The fact that these claims were subsequently dismissed without prejudice does not prevent the statute of limitations from being tolled." *Norman, supra*, 684 So.2d at 1256.

When the defendant is properly and timely served within the 120 day period, the statute of limitations is tolled from the date of filing of any complaint. A procedural error in failing to attach a certificate of expert consultation does not abrogate Rule 3, or avoid the tolling of the statutory period. The inadvertent omission of a certificate of consultation no more justifies a holding that the statute is not tolled than does any other procedural defect in a complaint. It is not required that a complaint be perfect in order to toll the statute of limitations from the date of filing the complaint.

The defendants' argument that the filing of a complaint without the §11-1-58 certificate does not toll the running of the statute, if taken to its logical conclusion, would mean that no complaint which fails to state a claim under Rule 12(b)(6) based on procedural defects would suffice to toll the statute. Such a conclusion is completely at odds with Rule 3 and with Rule 12(b)(6). Rule 12(b)(6) contemplates dismissal of an action without prejudice and re-filing after the procedural defects are cured.[2] The limitations period is tolled by the filing of the original complaint and does not run again

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Rule 12(b) provides that "if the motion [to dismiss] is granted, leave to amend should be granted in accordance with Rule 15(a)." MRCP, RULE 12(b). Rule 15(a) provides that "[o]n sustaining a motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6), or for judgment on the pleadings, pursuant to Rule 12(c), leave to amend shall be granted when justice so requires upon conditions and within time as determined by the court . . .." Further, Rule 15(c) provides that when the claim asserted in the amended pleading arose out of the same conduct "set forth **or attempted to be set forth in the original pleading,** the amendment relates back to the date of the original pleading." Thus, it is clear from reading Rule 12 and Rule 15 together that a dismissal without prejudice of a defective complaint is not intended to be fatal for a claim whose statute would have otherwise expired but for the filing of the original, defective complaint. As stated above, a complaint does not have to be perfect to prevent the running of the statutory period.

until the complaint is dismissed without prejudice, with the right to re-file.

The United States District Court for the Northern District of Mississippi, Honorable Allen Pepper, has recently considered this issue on an *Erie* determination, and came to the precise conclusion argued herein: the filing of a complaint, even without the section 11-1-58 certificate, nevertheless tolls the statute of limitations. *See Gray v. Mariner*, 3:05cv127(N.D. Miss. 9/12/06), 2006 USDist Lexis 65725. Addendum at p.1. In the *Mariner* case, Judge Pepper applied settled Mississippi law, citing *Owens v. Mai, supra,* to conclude that the filing of the complaint, even without the certificate of consultation, tolled the limitations period. Judge Pepper held that the filing of the complaint, which had omitted the certificate of merit, tolled the statute of limitations until such time as the complaint was dismissed. Then, the clock begin ticking once again on the date of the dismissal. Judge Pepper rejected the defendant's argument that the filing of the complaint without the certificate did not operate to toll the statute. For these reasons, the federal court denied the defendant's motion for summary judgment. *Gray v. Mariner, supra.*

The purpose of the certificate of expert consultation is to prevent the filing of non-meritorious actions; its purpose is ***not*** to condemn meritorious actions, nor to prevent persons injured by medical malpractice from recovering for their damages, due solely to a procedural error. The purpose of the rule is amply served by a dismissal without prejudice and refiling of the complaint within the statutory period. *See Caldwell v. North Mississippi Medical Center*, 956 So.2d 888 (Miss. 2000 [hereinafter *Caldwell I*]. In *Caldwell I*, the plaintiffs' counsel John Cocke inadvertently failed to attach a certificate of expert consultation to the complaint when filed. Although plaintiffs' counsel had in fact conferred with an expert prior to filing suit, through oversight, the section 11-1-58 certificate of consultation was not attached to the original complaint in *Caldwell I.* Subsequently, however, the plaintiffs did file a designation of expert in lieu of the certificate of counsel. Moreover, plaintiffs' counsel provided an affidavit that he had in fact

conferred with an expert as required by section 11-1-58 prior to filing suit. The trial court dismissed the original Caldwell complaint without prejudice. On appeal, this Honorable Court affirmed, concluding that a dismissal without prejudice was appropriate.[3]

Where, as in *Caldwell I*, the substance of section 11-1-58 has been complied with, i.e., the attorney has consulted with an expert who provides support for the medical malpractice action, the purpose of the statute is satisfied; and a procedural error in failing to attach the certificate of consultation should not be fatal.

Mississippi law has long provided that the filing of a complaint in itself is sufficient to toll the statute of limitations; there is no authority for the defendants' position that there is a special rule for medical malpractice cases in the event of a procedural defect in the complaint. Nothing in either Rule 3 or in section 11-1-58 supports such an argument. A complaint whose 11-1-58 certificate is inadvertently omitted is simply subject to dismissal without prejudice, and the normal tolling rules apply. Judge Pepper had it right in the *Gray v. Mariner*, and this Honorable Court should reject the defendants' argument that the failure to attach a certificate of consultation renders the filing void and fails to toll the statute.

CONCLUSION

For the foregoing reasons, Merkel & Cocke and Janet and Robert Caldwell, Amicus Curiae, respectfully submit that the statute of limitations is tolled by the filing of a complaint, even if the complaint inadvertently omits the section 11-1-58 certificate of consultation. The defendants' argument to the contrary should be rejected.

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The Caldwell plaintiffs re-filed their action within days of the trial court's order of dismissal without prejudice, and the defendant has argued, as in this case, that the original filing did not toll the statute. That issue is the issue presently on appeal in *Caldwell II,* Supreme Court No. 2006-TS-00630.

This the 9th day of June, 2008.

Respectfully submitted,

By: Cynthia Mitchell

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be delivered via first class United States Mail, postage prepaid, a true and correct copy of the above and foregoing document to:

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THIS, the 9th day of June, 2008.

CYNTHIA I. MITCHELL [redacted]

ADDENDUM

1 of 1 DOCUMENT

MAE GRAY, INDIVIDUALLY AND ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES OF ANNIE PICKENS, PLAINTIFFS, vs. MARINER HEALTH CENTRAL, INC., ET AL., DEFENDANTS.

CIVIL ACTION NO. 3:05CV127-P-A

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI, WESTERN DIVISION

2006 U.S. Dist. LEXIS 65725

September 12, 2006, Decided

CORE TERMS: statute of limitations, statute of limitations period, summary judgment, voluntary dismissal, two-year, clock, discovery rule, continuance, toll, medical malpractice, limitations period, briefing, ticking, matter of form, wrongful death action, question of fact, savings clause, begin to run, discovery, commence, tolled, reply, save, genuine issue of material fact, wrongful death, nursing home, predicated, lawsuit, died

COUNSEL: [*1] For Mae Gray, Individually and For and On Behalf of the Wrongful Death Beneficiaries of Annie Pickens, Plaintiff: John F. Hawkins, BARIA, HAWKINS & STRACENER, PLLC, Jackson, MS; Wayne Eric Stracener, BARIA LAW FIRM, Jackson, MS.

For Mariner Health Central, Inc., Mariner Healthcare Management Company, National Heritage Realty, Inc., doing business as Holly Springs Health & Rehab Center and/or Trinity Mission Health and Rehab of Holly Springs, LLC, Defendant: David Mark Eaton, Kelly Wyche McMullan, WILKINS, STEPHENS & TIPTON, Jackson, MS.

JUDGES: W. ALLEN PEPPER, JR., UNITED STATES DISTRICT JUDGE.

OPINION BY: W. ALLEN PEPPER, JR.

OPINION:

ORDER

This matter comes before the court upon Defendants' Motion for Summary Judgment [9-1]. After due consideration of the motion and the responses filed thereto, the court finds as follows, to-wit:

Annie Pickens resided at the defendants' nursing home from October 8, 2002 to April 19, 2003. She died on April 20, 2003. Mae Gray, individually and on behalf of the wrongful death beneficiaries of Annie Pickens, filed her first wrongful death suit predicated on medical malpractice against the nursing home defendants in the Circuit Court of Marshall [*2] County, Mississippi on August 30, 2004. On January 10, 2005, the defendants removed the first case to federal court. On January 19, 2005 one of the defendants filed a motion to dismiss. On February 7, 2005 the plaintiffs responded to the motion and agreed to dismiss the action without prejudice to allow the plaintiffs to comply with the requirements for medical malpractice actions by giving 60 days notice of intent to sue and by certifying that a medical expert was consulted before filing a lawsuit. The defendants replied that the case should be dismissed with prejudice. On August 5, 2005 the court dismissed the first case without prejudice.

On October 17, 2005, some two months later, the plaintiffs filed the instant suit in federal court.

The defendants moved for summary judgment, arguing that *Miss. Code Ann. § 15-1-36*'s two-year statute of limitations period for medical malpractice actions bars the plaintiffs' second case. The plaintiffs filed their response and the *defendant* filed a reply. Shortly thereafter, the plaintiffs filed a Consolidated Motion for Leave to Supplement, Supplemental Response to Defendants' Motion for Summary Judgment, Motion for [*3] Continuance Under *Rule 56(f)*, and Brief in Support Thereof. This began an entirely new round of briefing, including the defendants' response, the plaintiffs' reply, and the defendants' surreply. Essentially, the plaintiffs' consolidated motion does nothing more than reargue their original arguments in addition to two new, alternative arguments that the discovery rule saves the plaintiffs' case and/or the plaintiffs need a continuance under *Fed. R. Civ. P. 56(f)* to allow for discovery to take place on the statute of limitations question. The court admonishes plaintiffs' counsel to utilize the traditional methods of briefing in the future, including filing a motion for permission to supplement before doing so, as well as not consolidating several motions into one. Nevertheless, since the court had to go through the extra round of briefing to apprise itself of the relief requested therein, the court will address all four of the plaintiff's arguments.

First, the plaintiff argues that the discovery rule tolled the statute of limitations in this case until she received the medical records. The discovery rule for medical malpractice actions states [*4] that "[t]he two-year statute of limitations does not commence running until the patient discovers or should have discov-

ered that he has a cause of action...." *Sanders, 485 So. 2d 1051, 1052.* The plaintiff cites *Sarris v. Smith, 782 So.2d 721 (Miss. 2001)* as an example of a case in which the limitations period did not begin to run at the plaintiff's death but rather when the medical records evidencing medical negligence were obtained. However, this case is readily distinguishable from that in *Sarris* simply because, unlike the situation in *Sarris*, the plaintiff in this case actually filed a lawsuit based on her current claims before she obtained the medical records. Furthermore, the plaintiff in *Sarris* was never present during her husband's treatment nor did she even know the treating physician's name until she obtained the medical records. Thus, the court concludes that the discovery rule is inapplicable to the facts of this case.

Second, the plaintiff argues that the savings clause found in *Miss. Code Ann. § 15-1-69* gave her an extra year to file her suit. This statute provides in pertinent part that:

> If in any action, duly **[*5]** commenced within the time allowed, the writ shall be abated, or the action otherwise avoided or defeated ...for any matter of form ... plaintiff may commence a new action for the same cause, at any time within one year after the abatement or other determination of the original suit ...

The plaintiff argues that her voluntary dismissal in the first case was a "matter of form." Mississippi case law does not support this argument. In *W.T. Raleigh Co. v. Barnes, 143 Miss. 597, 109 So. 8, 9 (Miss. 1926)* the Court held that a voluntary dismissal where counsel agreed to the dismissal and referred to it as a nonsuit was not a matter of form for the purposes of the savings clause. *See also Smith v. Copiah County, Mississippi, 232 Miss. 838, 100 So.2d 614, 616 (Miss. 1958)* (quoting *Raleigh*). More recently, the Court in *Lee v. Thompson, 859 So.2d 981, 990 n. 8 (Miss. 2003)* concluded that a dismissal without prejudice with leave to refile within thirty days was a motion on the merits and not one "as to form" with regard to *§ 15-1-69*. In any event, the Court in *Owens v. Mai, 891 So.2d 220, 223-24 (Miss.2005)* held that "[t]he savings statute **[*6]** cannot save a complaint from the expiration of the applicable statute(s) of limitations. To allow otherwise would circumvent the effect and purpose of the statutes of limitation."

Third, the plaintiffs' motion for a *Rule 56(f)* continuance should be denied because the plaintiff has not demonstrated exactly what she intends to learn from discovery that would speak to the statute of limitations issue. Furthermore, this court does not agree that the question of whether a cause is barred by the statute of limitations is necessarily a question of fact. In *Smith v. Sanders, 485 So.2d 1051,*

1053 (Miss. 1986), the Mississippi Supreme Court wrote:

> Occasionally the question of whether the suit is barred by the statute of limitations is a question of fact for the jury; however, as with other putative fact questions, the question may be taken away from the jury if reasonable minds could not differ as to the conclusion. ... [T]he question of the running of the statute of limitations to bar an action may also be the subject of a summary judgment if there exists no genuine issue of material fact concerning the question.

In the circumstances of this case, the court [*7] concludes that there is no genuine issue of material fact with regard to the question of whether the statute of limitations bars the instant action. Moreover, the court finds the argument regarding *Rule 56(f)* continuance moot since, as will be explained below, the court finds that the statute of limitations has not run in this case.

Finally, the court concludes that the plaintiffs' primary argument that the statute of limitations has not run because the first complaint tolled the limitations period is sustained. It is undisputed that the Court in *Owens v. Mai* observed that "the filing of a complaint tolls the statute of limitations...." *891 So.2d at 223*. Ms. *Pickens* died on April 20, 2003. The two-year clock began ticking. The plaintiff filed her first action on August 30, 2004, leaving approximately 233 days remaining on the two-year clock. With *the filing* of the first complaint, the clock stopped. It resumed ticking when the court dismissed the first action without prejudice on August 5, 2005. Mississippi law is clear that a voluntary dismissal *does not* toll the statute of limitations period. *Raleigh, 109 So. at 9*; *Smith v. Copiah County, 100 So.2d at 616.* [*8] Thus, the clock began ticking once again on that date. At that time, there were still 233 days remaining on the clock. The plaintiff then filed her second suit on October 17, 2005, approximately 160 days within the two-year statute of limitations period. Accordingly, the defendant's motion for summary judgment should be denied. n1

> n1 The defendants cite *Taylor v. Bunge Corp., 775 F.2d 617 (5th Cir. 1985)* for the proposition that a voluntary dismissal renders a case as having never been filed for the purposes of the statute of limitations, thereby not allowing the filing of the complaint to toll the limitations period. However, *Taylor* is inapposite since it was decided upon Louisiana law and not Mississippi law. The defendants also cite *Gentry v. Wallace, 606 So.2d 1117, 1123 (Miss. 1992)* for the

proposition that the statute of limitations period in wrongful death actions begins to run upon the death of the plaintiff. The decision in *Gentry*, however, was overruled in *Jenkins v. Pensacola Health Trust, Inc., 933 So.2d 923, 926 (Miss. April 27, 2006)* (holding that the statute of limitations period for a wrongful death action does not begin to run upon the death of the plaintiff but rather upon the same time-frame as the tort upon which the wrongful death action is predicated). In any event, the defendants have cited no binding authority vitiating the rule that the filing of a complaint tolls the statute of limitations period even though a voluntary dismissal does not.

[*9]

IT IS THEREFORE ORDERED AND ADJUDGED that Defendants' Motion for Summary Judgment [9-1] is **DENIED.**

SO ORDERED this the 12th day of September, A.D., 2006.

/s/ W. ALLEN PEPPER, JR.

UNITED STATES DISTRICT JUDGE