IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

KRISTI BLESSITT, M.D. — APPELLANT

V. — NO. 2007-CA-02020

KING'S DAUGHTERS HOSPITAL OF YAZOO COUNTY, INC., WILLIAM P. THOMPSON, MD., LAWRENCE MADISON SUTTON, JR., M.D., GARY A. CIRILLI, M.D. AND JOHN DOES 1-5 — APPELLEES

ON APPEAL FROM THE CIRCUIT COURT OF THE
YAZOO COUNTY, MISSISSIPPI
CIVIL ACTION NO. 2007-C102

BRIEF OF APPELLEE
GARY A. CIRILLI, M.D.

ATTORNEYS FOR APPELLEE
GARY A. CIRILLI, M.D.
WALTER T. JOHNSON, MSB #[redacted]
ANASTASIA JONES, [redacted]
WATKINS & EAGER, PLLC
The Emporium Building, Suite 300
400 East Capitol Street
Post Office Box 650
Jackson, Mississippi 39205
Telephone: 601-965-1900
Facsimile: 601-965-1901

CERTIFICATE OF INTERESTED PARTIES

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 this Court may evaluate possible disqualification or recusal.

Kristi Blessitt, M.D.	-	Plaintiff/Appellant
Martin A. Kilpatrick	-	Attorney of Record for Plaintiff/Appellant
King's Daughter's Hospital	-	Defendant/Appellee
Dr. Walter Thompson	-	Defendant/Appellee
Dr. Gary A. Cirilli	-	Defendant/Appellee
Walter T. Johnson	-	Attorney of Record for Defendant/Appellee
Anastasia Jones	-	Attorney of Record for Defendant/Appellee
L. Carl Hagwood	-	Attorney of Record for Defendant/Appellee
Michael V. Cory, Jr.	-	Attorney of Record for Defendant/Appellee
Honorable Jannie Lewis	-	Yazoo County Circuit Court Judge

Respectfully submitted, this the 23nd day of April, 2008.

WALTER T. JOHNSON

TABLE OF CONTENTS

STATEMENT OF THE ISSUES

I. **THE SIXTY (60) DAY NOTICE PROVISION OF *MISSISSIPPI CODE ANNOTATED* 15-1-36(15) MERELY EXTENDS THE STATUTE OF LIMITATIONS FOR SIXTY (60) DAYS.**

II. **THE DISCOVERY RULE DOES NOT APPLY TO DR. BLESSITT'S INJURY.**

Dr. Blessitt filed Notice of Appeal on October 29, 2007, thereby perfecting a timely appeal pursuant to Mississippi Rule of Appellate Procedure 3(a). M.R.A.P. 3(a); R. Vol. 1, p. 41.

III. Statement of Uncontested Facts

The allegations in the Complaint are that Dr. Blessitt was in a single car accident on May 10, 1998, and that she was taken to King's Daughters Hospital for treatment associated with the accident where she reported "severe head and neck pain". R. Vol. 1, p. 4, ¶¶ 2, 4. X-ray results were negative and she was discharged the next day. R. Vol. 1, p. 4, ¶¶ 5, 6. The Complaint also alleges that a CT scan was ordered but was not performed prior to Dr. Blessitt's discharge. R. Vol. 1, p. 4, ¶¶ 5, 6.

The Complaint further alleges that Dr. Blessitt suffered neck pain for years and that exactly six and one half (6 ½) years after the accident, on November 11, 2004, an MRI revealed that she had suffered a "burst" fracture during the motor vehicle accident. R. Vol. 1, p. 4, ¶ 7.

Notice of Claim was mailed on September 22, 2006, and the Complaint was filed on January 18, 2007. R. Vol. 1, p. 3; R. Vol. 2, p. 6.

SUMMARY OF THE ARGUMENT

Dr. Blessitt argues two issues: (1) the application of the sixty (60) day notice of claim of *Mississippi Code Annotated* section 15-1-36(15), and (2) the application of the discovery rule.

Dr. Blessitt does not argue, but merely assumes, without support of authority, that the discovery rule applies. First, she argues that the sixty (60) day notice provision of *Mississippi Code Annotated* § 15-1-36(15) not only extends the statute of limitations for sixty (60) days, but also tolls it for sixty (60) days, thereby extending the date the statute of limitations ends for a total of 120 days. Second, Dr. Blessitt assumes that the two year statute of limitations which applies to

medical malpractice claims, *Mississippi Code Annotated* § 15-1-36(1), does not begin to run until November 11, 2004, the date that the MRI was performed, rather than on May 10 or May 11, 1998, the dates of the accident and discharge from King's Daughters for the treatment in question, respectively.

Dr. Blessitt's claim is timely if and only if she prevails for both of these arguments. Dr. Cirilli argues that case law is clear that the notice provision merely extends the statute of limitations for sixty (60) days. Also, Dr. Cirilli asserts that the discovery rule does not apply.

Dr. Blessitt concedes in the Conclusion of her brief that the law is consistent with the decisions in *Proli v. Hathorn* and *Pope v. Brock*, the cases upon which Dr. Cirilli relies and which define the law in regard to the notice of claim issue. *Proli v. Hathorn*, 928 So.2d 169 (Miss.2006); *Pope v. Brock,* 912 So. 2d 935 (Miss. 2005). However, Dr. Blessitt pleads to the Court to change the law to comply with the dissent in *Pope v. Brock.* Brief on Behalf of Plaintiff-Appellant Kristi Blessitt, M.D., pp. 8-9.

STANDARD OF REVIEW

"When considering a motion to dismiss, this Court's standard of review is de novo." *Scaggs v. GPCH-GP, Inc.*, 931 So.2d 1274, 1275 (Miss.2006). A *de novo* standard of review is applied when considering issues of law including statute of limitations issues. *Carter v. Citigroup, Inc.*, 938 So.2d 809, 817(¶ 36) (Miss.2006).

ARGUMENT

I. THE SIXTY (60) DAY NOTICE PROVISION OF *MISSISSIPPI CODE ANNOTATED* 15-1-36(15) MERELY EXTENDS THE STATUTE OF LIMITATIONS FOR SIXTY (60) DAYS.

It is undisputed that the applicable statute of limitations for this claim is the medical malpractice statute, section 15-1-36(1), which provides that claims for medical negligence must be filed within two years of the date of the alleged negligent act. [1] MISS CODE ANN. § 15-1-36(1) (Rev. 2003).

It has been established in Mississippi by statute, in section15-1-36(15), [2] and affirmed by the Supreme Court, that a plaintiff may not begin an action against a healthcare provider based on professional negligence until the plaintiff gives the provider sixty (60) days written notice of his intent to bring suit. *Proli v. Hathorn*, 928 So.2d 169, 175 (¶ 20) (Miss.2006); MISS. CODE ANN. § 15-1-36(15). Service of this notice will extend the time to commence an action by sixty (60) days if the notice is served within sixty (60) days of the expiration of the statute of limitations. *Id.* Because

---

[1] Miss. Code Annotated § 15-1-36(1) provides: (1) For any claim accruing on or before June 30, 1998, and except as otherwise provided in this section, no claim in tort may be brought against a licensed physician, osteopath, dentist, hospital, institution for the aged or infirm, nurse, pharmacist, podiatrist, optometrist or chiropractor for injuries or wrongful death arising out of the course of medical, surgical or other professional services unless it is filed within two (2) years from the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered. MISS CODE ANN. § 15-1-36(1) (Rev. 2003).

[2] Section 15-1-36(15) states, "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. This subsection shall not be applicable with respect to any defendant whose name is unknown to the plaintiff at the time of filing the complaint and who is identified therein by a fictitious name. MISS. CODE ANN. § 15-1-36(15)(Rev. 2003).

the statute of limitations to initiate a lawsuit against a medical provider is two years from the alleged negligent act, this additional sixty (60) days essentially allows for a statute of limitations of two years and sixty (60) days. MISS. CODE ANN.§15-1-36(1); *Proli v. Hathorn,* 928 So.2d 169, 174 (¶ 18).

In this case Appellee will assume for the sake of argument only that the discovery rule applies and that the date the statute of limitations began to run is November 11, 2004, when an MRI allegedly revealed that Dr. Blessitt had suffered a "burst" fracture during the motor vehicle accident which had occurred six and one half (6 ½) earlier. R. Vol. 1, p. 4, ¶ 7. Because the applicable statute of limitations is two years, pursuant to section 15-1-36(1), the statute would have expired on November 11, 2006. MISS CODE ANN. § 15-1-36(1).

However, notice of intent was mailed on September 22, 2006, which was 50 days from November 11, 2006, the date of the expiration of the statute of limitations, and thus within the sixty (60) days provided in section 15-1-36(15). MISS. CODE ANN. § 15-1-36(15). Because notice of intent was sent within sixty (60) days of the expiration of the statute, the two year statute of limitations is extended sixty (60) days. *Proli v. Hathorn*, 928 So.2d at 175 (¶ 20). Thus, the statute expires on January 10, 2007, which is sixty (60) days beyond November 11, 2006, the original date of expiration. Because Dr. Blessitt did not file her Complaint until January 18, 2007, the Complaint was not timely filed and the trial court was correct in dismissing it as barred by the statute of limitations.

Dr. Blessitt Incorrectly Represents *Pope, Proli* and MISS. CODE ANN. § 15-1-36

Dr. Blessitt's interpretation of the application of section 15-1-36(15) is summarized in the Conclusion of her brief, which states:

> In this case, the statute of limitation would ordinarily have run on November 11, 2006. However, the statute compelled Blessitt to give a 60-day notice before filing suit. Blessitt did send the required notice, on September 22, 2006, within 60 days prior to November 11, 2006. She was not allowed to file suit until 60 days had expired, or until November 22, 2006. No portion of this 60-day period could be counted against her in calculating the running of the statute of limitation, so adding 60 days to November 22, 2006, yields January 22, 2007. Blessitt filed her suit on January 18, 2007, well within the allowed period of time.

Brief on Behalf of Plaintiff-Appellant Kristi Blessitt, M.D., p. 8. What Dr. Blessitt is actually saying is that the statute of limitations is not only tolled for sixty (60) days if the notice of intent is filed within sixty (60) days of its expiration, but also that the statute of limitations is extended for an additional sixty (60) days at the end of the tolling period as well. The result of such an application would be that the expiration date of the statute of limitations is extended for 120 days. This is the argument Dr. Blessitt made at the hearing and which the trial court rejected. R. Vol. 2, pp. 22, 27.

However, it is not supported by case law and no case has even contemplated this application of section 15-1-36(15), including *Proli v. Hathorn* or *Pope v. Brock*, cases upon which Dr. Blessitt relies. *Proli v. Hathorn*, 928 So.2d 169; *Pope v. Brock,* 912 So. 2d 935 (Miss. 2005).

Neither the result in *Pope* nor *Proli* considers that the statute of limitations would be tolled for sixty (60) days and extended for sixty (60) days if the complaint were filed within sixty (60) days of the expiration of the statute of limitations, as Dr. Blessitt has calculated in the Conclusion of her Brief. Brief on Behalf of Plaintiff-Appellant Kristi Blessitt, M.D., p. 8. *Proli* actually clarified *Pope,* and stated that the time period pursuant to section 15-1-36(15) was extended, not tolled. *Proli v. Hathorn*, 928 So.2d at 174 (¶ 18). In regard to the application of section 15-1-36(15), *Proli* states:

> Here, the statute of limitations began to run on May 18, 2002. Normally, the statute of limitations would end on May 18, 2004. However, Miss. Code Ann. § 15-1-36(15) required a 60 day notice period, but this 60 day period could not be computed as part of the two year statute of limitations. . . . When Hathorn mailed her service of notice on April 22, 2004, she had to wait until June 21, 2004, and no later than July 17, 2004, to file her case.

Proli, 928 So. 2d at 175 (¶ 20). *Proli's* manner of calculating the expiration date is simple and is based strictly on an extension of sixty (60) days to the expiration date of the statute. Contrary to Dr. Blessitt's misrepresentation in the Conclusion of her Brief, *Proli* does not in any way consider any additional days beyond the sixty (60) which are "credited" or added to the expiration date and *Proli* does not toll the statute. The result in *Pope* is consistent with that of *Proli* because *Pope* merely adds sixty (60) days to the expiration date of the statute, and no more. Even though *Pope* called this extra sixty (60) days a result of tolling of the statute, *Proli* clarified *Pope* and stated that the statute was not tolled but extended. *Proli v. Hathorn*, 928 So. 2d at 174 (¶ 18). Nevertheless, both *Proli* and *Pope* only added sixty (60) to the expiration date of the statute of limitations.

Pope contemplated tolling the statute in evaluating its language, but concluded that the statute was to extend the expiration of the statute of limitations for sixty (60) days only. *Proli v. Hathorn*, 928 So. 2d at 175 (¶ 21). Had the result in *Pope* been that 15-1-36(15) was to be tolled, the days remaining in the statute of limitations when the notice of claim was filed would have been added to the sixty (60) day extension of the expiration date. However, this is not the conclusion reached by the court in *Pope*. MISS. CODE ANN. § 15-1-36(15); *Pope v. Brock*, 912 So. 2d at 938 (¶ 12).

Furthermore, Blessit misrepresents what the court in *Proli* did. Dr. Blessitt states in regard to Hathorn, the defendant/appellee in *Proli*:

> Accordingly, when Hathorn mailed her notice on April 22, 2004, she was prohibited from filing suit until 60 days had passed, or until June 21, 200[4]. The first 37 days were deducted, leaving 23 days, or until July 17, 2007, to file suit. Thus the filing of suit on June 24, 2004, was within the period of limitation.

Brief on Behalf of Plaintiff-Appellant Kristi Blessitt, M.D., p. 6. There is nothing in *Proli* which indicates that this is the manner in which the expiration period of the statute of limitations was calculated. Neither the result in *Pope* nor *Proli* considers at what point in time notice of intent was filed within the sixty (60) day period prior to the expiration of the statute of limitations so as to "credit" the calculation of the new expiration date with the additional days remaining until the expiration date of the statue beyond the sixty (60) day extension provided in section 15-1-36(15). *Proli*, 928 So. 2d at 175 (¶ 20); *Pope v. Brock,* 912 So. 2d at 939 (¶ 19); MISS. CODE ANN. § 15-1-36(15).

Dr. Blessitt has incorrectly interpreted and applied *Pope* and *Proli* to section 15-1-36(15) since those cases do nothing more than add sixty (60) days to the expiration date of the statute of limitations if notice of claim is filed within sixty (60) days of the expiration date of the statute of limitations.

II. THE DISCOVERY RULE DOES NOT APPLY TO DR. BLESSITT'S INJURY.

Medical malpractice claims begin to run two years "from the date of the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered." MISS. CODE ANN. § 15-1-36(1). This is commonly referred to as the discovery rule, and is applied to begin the running of the statute of limitations when "the patient can reasonable be held to have knowledge of the injury itself, the cause of the injury, and the causative relationship between the

injury and the medical practitioner." *Joiner v. Phillips*, 953 So. 2d 1123, 1126 (Miss. App. 2006). Dr. Blessitt merely assumes that the discovery rule applies to her injury, without citation of authority.

The allegations in the Complaint are that Dr. Blessitt was in a single car accident on May 10, 1998, and that she was taken to King's Daughters Hospital for treatment associated with the accident where she reported "severe head and neck pain". R. Vol. 1, p. 4, ¶¶ 2, 4. Even though the x-ray results were negative and she was discharged the next day, the Complaint alleges that Dr. Blessitt suffered neck pain for years and that six and one half (6 ½) years after the accident, on November 11, 2004, an MRI revealed that she had suffered a "burst" fracture during the motor vehicle accident. R. Vol. 1, p. 4, ¶¶ 5, 6; R. Vol. 1, p. 4, ¶ 7. Thus, she argues, that November 11, 2004, is the date the statute of limitations began to run.

However, the application of the discovery rule does not require a plaintiff to be formally advised by a physician or receive a medical diagnosis as to the cause of an injury in order for the cause of action to accrue, as the action accrues when the injury first manifests itself to the plaintiff. *Illinois Cent. R. Co. v. McDaniel,* 951 So.2d 523, 534 (Miss. 2006). In addition, the discovery rule imposes an affirmative duty on the plaintiff to investigate the potential cause of his or her injury. *Id.* The rule is not to be abused by plaintiffs who are aware that an injury exists but who choose to ignore it and fail to investigate its cause. *Id.*

In *Robinson v. Singing River Hosp. Sys*, a physical therapy patient was burned during physical therapy treatments, however, even though the patient was aware of the burns, he did not realize that they were the result of the treatments because the feeling in his lower extremities was

impaired. The court held that the discovery rule did not apply because the patient knew that he was injured while undergoing treatment by the hospital. Therefore, the statute of limitations began running on the day that he was aware that he had an injury. *Robinson v. Singing River Hosp. System*, 732 So.2d 204, 208 (Miss. 1999).

Thus, even though Dr. Blessitt may not have known that she had suffered a "burst" fracture during her accident, as she alleges, because she suffered neck pain for years, the cause of action accrued when the injury first manifested itself, which was when she reported severe head and neck pain shortly after the accident. *Illinois Cent. R. Co. v. McDaniel,* 951 So.2d at 534 ; *Robinson v. Singing River Hosp. Sys.*, 732 So 2d at 208. Because Dr. Blessitt had head and neck pain, she had a duty to investigate the potential cause of her injury because the discovery rule does not allow a plaintiff to ignore that an injury exists and to fail to investigate its cause. *Illinois Cent. R. Co. v. McDaniel,* 951 So.2d at 534.

Furthermore, there is case law to support that Dr. Blessitt should be held to a higher standard in regard to her duty to investigate the nature of her injury as a physician who has filed a medical malpractice claim. The Mississippi Supreme Court in *Earwood v. Reeves* considered that the appellants in that case were a lawyer and a law firm who should have known the rules of civil procedure in ruling that responses to requests for admissions which were not timely filed were deemed admitted even under circumstances where the result was an entry of summary judgment against the defendants. *Earwood v. Reeves*, 798 So.2d 508, 517 (Miss. 2001). Likewise, the appellant in this case, Dr. Blessitt, is a physician, who should be held to a somewhat higher standard in regard to her duty to investigate the source of her neck pain.

The discovery rule in this case does not apply because Dr. Blessitt had severe head and neck pain from the time of the accident and the statute of limitations began to run on May 10, 1998, the date of the accident.

CONCLUSION

The discovery rule in this case does not apply because Dr. Blessitt had severe head and neck pain from the time of the accident and the statute of limitations began to run on May 10, 1998, the date of the accident, and expired on May 10, 2000.

Even if the discovery rule did apply and the statute began to run on the date of the MRI, November 11, 2004, Dr. Blessitt's claim was still not timely filed. The two year statute of limitations would expire on November 11, 2006, but because the notice of claim was mailed on September 22, 2006, which is within sixty (60) days of November 11, 2006, an additional sixty (60) days is added to the expiration date and the last day for filing her Complaint was on January 10, 2007. Her Complaint was filed on January 18, 2007, and was not timely. MISS CODE ANN. §§ 15-1-36(1)(15).

The order of the Circuit Court of Yazoo County dismissing Dr. Cirilli should be affirmed.

Respectfully submitted,

GARY A. CIRILLI, M.D.

BY: _____
WALTER T. JOHNSON, MSB#[redacted]

OF COUNSEL:

WALTER T. JOHNSON, MSB #[redacted]
ANASTASIA G. JONES[redacted]
WATKINS & EAGER PLLC
The Emporium Building, Suite 300
400 East Capitol Street
Post Office Box 650
Jackson, Mississippi 39205
Telephone: 601-965-1900
Facsimile: 601-965-1901

CERTIFICATE OF SERVICE

I, Walter T. Johnson, attorney of record for the Appellee, do hereby certify that I have this day mailed, via United States first class mail, postage prepaid, a true and correct copy of the foregoing Appellee's Brief to the following:

Honorable Jannie M. Lewis
Post Office Box 149
Lexington, MS 39095-0149

Martin Kilpatrick
Post Office Box 500
Greenville, MS 38702-0500

Michael V. Cory, Jr., J.D.
Danks, Miller, Hamer & Cory
Post Office Box 12269
Jackson, MS 39236

Leon Carl Hagwood
Christopher W. Winter
Wilkins, Stephens & Tipton
Post Office Box 4537
Greenville, MS 38704-4537

SO CERTIFIED, this 23 day of April, 2008.

WALTER T. JOHNSON