

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 28(a)(1), *Mississippi Rules of Appellate Procedure*, the undersigned counsel of record for Plaintiff-Appellant, KRISTI BLESSITT, M.D., does hereby certify that the following persons have an interest in the outcome of this case:

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

L. Carl Hagwood, Esquire  
Post Office Box 4537  
Greenville, MS 38704-4537  
Attorney for Dr. Walter Thompson

Michael V. Cory, Jr., Esquire  
Post Office Box 12269  
Jackson, MS 39223-2269  
Attorney for King's Daughters Hospital

Walter T. Johnson, Esquire  
Post Office Box 650  
Jackson, MS 39205-0650  
Attorney for Dr. Gary Cirilli

Kristi Blessitt, M.D.  
110 East Baker Street  
Indianola, MS 38751

Martin A. Kilpatrick  
Post Office Box 500  
Greenville, MS 38702-0500  
Attorney for Plaintiff-Appellant

Dr. Walter Thompson  
805 East 15<sup>th</sup> Street  
Yazoo City, MS 39194

King's Daughters Hospital of Yazoo County  
Post Office Box 157  
Jackson, MS 39201-0157

Dr. Gary A. Cirilli  
199 Bridgeview Circle  
Ridgeland, MS 39046

THIS, the 20<sup>th</sup> day of March, 2008.

  
MARTIN A. KILPATRICK

**TABLE OF CONTENTS**

	<b><u>PAGE(S)</u></b>
CERTIFICATE OF INTERESTED PERSONS	i-ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF ISSUES	1
STATEMENT REGARDING ORAL ARGUMENT	1
STATEMENT OF THE CASE	1-2
SUMMARY OF THE ARGUMENT	2
ARGUMENT	2-8
CONCLUSION	8-9
CERTIFICATE OF SERVICE	9-10

**TABLE OF AUTHORITIES****STATUTES:****PAGE(S):**

<i>Mississippi Code Annotated</i> , §15-1-7	1
<i>Mississippi Code Annotated</i> , §15-1-36	1, 2
<i>Mississippi Code Annotated</i> , §15-1-36(1)	4
<i>Mississippi Code Annotated</i> , §15-1-36(15)	1, 2, 3, 4, 5, 6, 7, 8
<i>Mississippi Code Annotated</i> , §15-1-49	2
<i>Mississippi Code Annotated</i> , §15-1-57	1, 2, 3, 4, 6, 7

**MISSISSIPPI RULES OF CIVIL PROCEDURE:**

<i>Mississippi Rules of Civil Procedure</i> , Rule 4(c)(5)	3
<i>Mississippi Rules of Civil Procedure</i> , Rule 5	1, 5
<i>Mississippi Rule of Civil Procedure</i> , Rule 5(b)	3

**CASES:**

<i>Brocato vs. Mississippi Publishers Corp.</i> , 503 So. 2D 241 (Miss. 1987)	6
<i>Pope vs. Brock</i> , 912 So. 2D 935 (Miss. 2005)	1, 2, 6, 7
<i>Proli vs. Hathorn</i> , 928 So. 2d 169 (Miss. 2006)	1, 2, 5, 6, 7, 8
<i>Scaggs vs. Garden Park Medical Center</i> , (No. 2005-CA-00917-SCT)	2, 6, 7

## I.

### STATEMENT OF THE ISSUE

This appeal involves a single issue: that issue is whether the Trial Court, in dismissing the Complaint on the ground of statute of limitations, correctly applied the precedent of this Court and the provisions of *Mississippi Code Annotated*, Sections 15-1-36 and 15-1-7 (1972) and Rule 5, *Mississippi Rules of Civil Procedure*.

## II.

### STATEMENT REGARDING ORAL ARGUMENT

The issue to be decided on this appeal presents a critically important matter of public policy. This Court's decision will resolve ambiguities in the subject of the reciprocal rights of injured patients as against those of health-care providers, and establish a single and straight forward statute of limitation standard applicable in all cases.

The Appellant believe that oral argument will assist this Court in resolving the issues raised by divided Court decisions in *Proli vs. Hathorn*, 912 So. 2d 169 (Miss. 2006) and *Pope vs. Brock*, 912 So. 2d 935 (Miss. 2005), as they interpret *Mississippi Code Annotated*, Sections 15-1-36(15) and 15-1-57.

## III.

### STATEMENT OF THE CASE

On January 18, 2007, the Plaintiff-Appellant, KRISTI BLESSITT, M.D. ("Blessitt"), filed a Complaint herein, alleging damages resulting from the combined medical malpractice of the Defendants-Appellees, KING'S DAUGHTERS HOSPITAL OF YAZOO COUNTY, INC. ("KDH"), DR. WILLIAM M. THOMPSON ("Thompson") and DR. GARY A. CIRILLI ("Cirilli") (RE 3-6). KDH, Thompson and Cirilli moved the Trial Court in common for dismissal, alleging that the filing of the Complaint was untimely, citing Code Section 15-1-36(15) (1972) (RE 13-14; 20-21).

On October 22, 2007, the Trial Court heard oral argument on the motions to dismiss (RE 28), and, at the conclusion of arguments, ruled that the Complaint would be dismissed. The Trial Court entered a Final Judgment of Dismissal with prejudice on October 29, 2007 (RE 28-27), and Blessitt filed a timely Notice of Appeal on the same date (RE 27).

#### IV.

#### SUMMARY OF THE ARGUMENT

Blessitt asserts on this appeal that a medical malpractice Plaintiff who has given proper advance written notice of claim, has a period of sixty (60) days from the date she or he could have first filed suit within which to do so. Blessitt bases her argument upon the decisions of this Court in *Proli vs. Hathorn* 912 So. 2d 169 (Miss. 2006), *Pope vs. Brock*, 912 So. 2d 935 (Miss. 2005), and *Scaggs vs. Garden Park Medical Center*, (No. 2005-CA-00917-SCT), as they interpret *Mississippi Code Annotated*, 15-1-36(15) and 15-1-57 (1972).

#### V.

#### ARGUMENT

Prior to the 1976 Legislative Session, the limitation period for filing medical malpractice actions was six (6) years, based upon the "general limitation statute", Section 15-1-49. In 1976, however, the period of limitation for medical malpractice actions was reduced to two (2) years by the enactment of Section 15-1-36. In 1989, the Legislature reduced the "general limitation statute" of Section 15-1-49 from six (6) years, to a period of three (3) years; at the same Session, Section 15-1-36 was amended to provide for a staggered-applicability limitation for various types of health-care providers, and codified the "Discovery Rule" by which the two (2)-year limitation period would not begin to run until "...the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered." By virtue of the 2003 Extraordinary Session, and as a part of a "Tort Reform" measure, Subsection (15) of Section 15-1-36, required that "No action based

upon the healthcare 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." The new Subsection (15) also provided that, "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..." As it has developed, this portion of the amendment was inconsistent with Section 15-1-57, which provides that:

"When any person shall be prohibited by law...from commencing...any action...the time during which such person shall be so prohibited...shall not be computed as any part of the period of time limited by this chapter for the commencement of such action."

Also relevant is Rule 5(b), *Mississippi Rules of Civil Procedure*, which provides that "Service by mail is complete upon *mailing*". This is in contrast with Rule 4(c)(5), *Mississippi Rules of Civil Procedure*, which provides that "Service of process by certified mail is complete upon the *date of delivery*."

On May 10, 1998, Blessitt was involved in a motor vehicle accident on Highway 49 between Jackson and Yazoo City (RE 4). As a consequence of her condition following the accident, she was taken by ambulance to KDH, where she received emergency room treatment, and remained overnight for observation (RE 4). While Blessitt was a patient at KDH, the emergency room physician, Thompson, ordered that a computerized tomography or "CT Scan" be performed on her cervical spine (RE 4). For reasons yet unknown to Blessitt, she was released from KDH with a diagnosis of "concussion and cervical strain", *but without the CT Scan ever having been performed* (RE 4).

Blessitt alleges that, because of persistent neck pain, she spent much of the next 6 ½ years in seeking medical assistance to learn the cause of her problems (RE 3-6). She asserts that, on November 11, 2004, she underwent magnetic resonance imaging, or "MRI", by which it was revealed, for the first time, that she had suffered a "burst" fracture, as a result of the May 10, 1998, accident (RE 5).

Blessitt contends that, had the CT Scan been promptly and properly performed, as ordered, at KDH, this serious condition would have been promptly and properly diagnosed and treated accordingly (RE 6).

*Mississippi Code Annotated*, Section 15-1-36(1) (1972) sets a two-year period for claims accruing prior to June 30, 1998. This case falls within that time frame, because the KDH visit occurred about 2 ½ months earlier, on May 10, 1998. The "Discovery Rule" is integrated into Section 15-1-36(1), because the two-year limitation period begins from the date the alleged act of malpractice is, or with reasonable diligence might have been first known or discovered.

Section 15-1-36(15) provides that no medical malpractice case may be filed without the Plaintiff having first given the Defendant 60 days' notice before filing suit. It is also provided there (albeit in conflict with 15-1-57) that, if the notice is served within 60 days prior to the expiration of the statute of limitations, the time for filing the action is extended 60 days from the notice. Judicial interpretation has found the running of the period from date of notice to be in conflict with Section 15-1-57 and thus erroneous.

For this particular case, the following is an undisputed chronology of the relevant events:

- (1) The operative event of alleged negligence occurred on May 10-11, 1998 (RE 3-6);
- (2) By operation of the "Discovery Rule", the limitation period began to run on November 11, 2004, when the nature of her injury became known to Blessitt (RE 4);
- (3) Under the "Discovery Rule", the two-year statute would have ordinarily run on November 11, 2006, but for the notice requirement;
- (4) Belssitt's notice of claim was sent September 22, 2006-50 days, and thus within 60 days-before the expiration of the November 11, 2006, deadline (RE 3);
- (5) Suit could not have been filed for a period of 60 days from the date of the September 22, 2006, notice letter, or before November 22, 2006;



(6) No part of the 60-day period is counted for the calculation of the statute of limitation, so the counting could not begin until November 22, 2006;

(7) Sixty days from November 22, 2006, is January 22, 2007; and

(8) Suit was filed January 18, 2007, four (4) days prior to January 22, 2007.

KDH, Thompson and Cirilli say that the statute of limitations ran January 10, 2007. They arrive at this date by adding 60 days to the date of November 11, 2006, the date on which the statute would ordinarily have expired. They cite for this calculation the 2006 case of *Proli vs. Hathorn*, 928 So. 2d 169 (Miss. 2006).

Contrary to their argument, however, *Proli* is not controlling as to the specific issue now before this Court. It appears impossible to appreciate fully why *Proli* does not control the instant issue, without a clear and thorough exposition of the facts of that case, which follow.

In *Proli*, Tressie Bedwell died on May 18, 2002, a little over two weeks after Dr. Joseph Proli performed an electrocardiogram procedure on her. Mrs. Bedwell's daughters, one of whom was Melinda Hathorn, sent a certified-letter notice of claim to Dr. Proli, on April 22, 2004, approximately one month before the statute was to expire on the second anniversary of her mother's death. Suit was filed against Dr. Proli on June 24, 2004, 37 days after the original limitation period would have expired. Dr. Proli's Answer raised Section 15-1-36(15) as an affirmative defense.

The central issue in *Proli* was whether the notice period began with the date it was *sent*-April 22, 2004-or the date Dr. Proli received the letter, which was April 30, 2004. The Trial Court denied Proli's motion to dismiss, and the Order was certified for interlocutory appeal to this Court, where the Order denying Proli's motion to dismiss was affirmed.

The only issue on the *Proli* appeal was whether the 60-day notice requirement of Section 15-1-36(15) was governed by Rule 5, *Mississippi Rules of Civil Procedure*, thereby making service of the notice complete upon mailing. The Court's observations otherwise were not necessary to the

decision and were thus *dictum*.

The Trial Court had found that the 60-day notice period began on April 30, 2004, the date that Proli *received* the letter, thus extending the period to June 30, 2004, which was 6 days after June 24, 2004, the date suit was filed. This Court, however, concluded that the required notice period began on the date the letter was mailed, based upon Code Section 15-1-57 and *Brocato vs. Mississippi Publishers Corp.*, 503 So. 2d 241 (Miss. 1987), which held that the 10-day notice period prior to filing a libel suit begins when the notice is mailed. Dr. Proli had argued that the suit had to be filed by two years from death, or by May 18, 2004; and, because the notice was sent April 22, 2004, the Complaint had to be filed by 60 days thereafter, or June 21, 2004. Hathorn argued that the operative date was June 30, 2004, 60 days after Dr. Proli received the notice. This Court held that both Hathorn and Proli were incorrect.

*Proli* drew for its holding upon the September 8, 2005, decision in *Pope vs. Brock*, 912 So. 2d 935 (Miss. 2005). *Pope* held that no part of the 60-day notice period could be used in computing the running of the statute of limitations, because that period of time set out in Section 15-1-36(15) is *extended*, not *tolled* for the 60-day period. Accordingly, when Hathorn mailed her claim notice on April 22, 2004, she was prohibited from filing suit until 60 days had passed, or until June 21, 2007. 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. All other comments in the *Proli* decision are *dictum*.

Less than two months after it had decided *Proli*, this Court decided *Scaggs vs. Garden Park Medical Center* (No. 2005-CA-00917-SCT). The special concurring Opinion in *Scaggs* by Justice Graves, joined by Justices Diaz and Carlton, is critically important, for it attempts to cut through the interstices of *Proli* and *Pope* with these incisive observations:

“The majority in this case, like the majority in *Pope vs. Brock*...offers a protracted and ambiguous analysis of the issue before this Court, without adding little, if any, clarification as to how...Section 15-1-57 interacts with...Section 15-1-36(15). As I stated in my specially concurring opinion in *Pope*, Section 15-1-57 mandates that the statute of limitations be tolled during the notice period found in Section 15-1-36(15), regardless of the facts of a particular case...[U]ntil this Court authors a majority opinion which clearly and succinctly admits as much, *the trial judges, and attorneys of this State will continually struggle to make sense of these statutes, and this Court will be compelled to continue its confusing and piecemeal approach to the resolution of this important issue.*”  
(Emphasis Added)

While the Court in *Prol*i predicated its decision largely upon *Pope*, there is nothing in either decision which clarifies the ambiguity pointed out by Justice Graves in *Scaggs*. In fact, according even to the *Pope* Court itself, “Section 15-1-36(15) is ambiguous.” Worse, it conflicted with Section 15-1-57.

The factual context of *Pope* is important, so it will be explained here. Nancy Springer died June 2, 2001, and her administratrix, Ginger Pope, sent notice of claim to her physician, Dr. Brock, on May 30, 2003. She waited the required 60-day period, and filed suit on July 30, 2003. The Trial Court granted Brock's motion for dismissal on the ground that the suit was barred by the statute of limitations. The Trial Court held that the statute expired 60 days from the day of notice. This Court said, “Our duty is to carefully review statutory language and apply its most reasonable interpretation to the facts of a particular case. Whether the Legislature intended that interpretation, we can only hope but we will never know.”

The *Pope* Court found Section 15-1-57 to be compelling. That statute provides that, when a person is prohibited by law from prosecuting an action, the time during which the person is so prohibited, shall not be computed as *any part* of the period of time limitation for the commencement of the action. Thus, *Pope* specifically held that the Trial Court had erred in holding that the statute of

limitations ran 60 days from the date of the notice.

## VI.

### CONCLUSION

By virtue of *Prolí* and *Pope*, one knows several points of law to be unassailable: (1) The 60-day notice period begins with the date of the mailing of the notice; (2) No part of the 60-day notice period may be used to calculate the statute of limitations; (3) The statute does *not* run 60 days from the date of service of the notice; and (4) The statute intends that a medical malpractice Plaintiff have a 60-day grace period to file suit, if the notice requirement has been met.

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.

The uncertain state of the law noted by Justice Graves is the fact that no unambiguous test, which is applicable to *all cases*, has been prescribed by the statute or by the Court. Thus, new law must be made for each case which comes before the Court. The conclusion asserted by KDH, Cirilli and Thompson, that the statute ran on January 10, 2007, is based upon *dictum* in *Prolí* which was not *necessary to the decision in that case, and which is inconsistent with Section 15-1-36(15)*. So the notice period is not merely 60 days from notice, or 60 days from other original statute of limitation, but it is rather as calculated by Blessitt: the statute runs 60 days from that date on which she could have filed suit, November 22, 2006.

One simple example highlights the illogical position of KDH, Cirilli and Thompson: if

Blessitt had waited 49 days longer to send her notice letter, all the way from September 22, 2006, up to November 10, 2006-the day before the statute ran-her statute of limitation would expire, according to KDH, on January 10, 2007, which is the same date they argue it would have run from the September 22, 2006, notice letter.

As argued by Justice Graves, there may be only one standard, applicable to all cases, for reconciling the statutes and the case law, otherwise the decisions create not only unpredictability, but chaos. Only one standard makes sense and provides clear-cut predictability, and that standard is the one argued for by Blessitt. The notice period should begin on the date the letter is sent, so that there will be no confusion over whether it was promptly delivered or "signed for", or whether the Defendant delayed accepting it. The Defendant should have his full 60-day period, without having to worry about being served with process during that period of time, and the Plaintiff should have the benefit of the full 60-day grace period intended, and be able to file suit up until the 60<sup>th</sup> day from the date he was ordinarily allowed to file suit, that is, 60 days from the date the 60-day notice period expired. There can be no question but that the Legislature intended the matter to be a compromise measure by which both sides were to receive reciprocal and equal benefits and responsibilities.

By virtue of the foregoing, Blessitt respectfully asserts that the said motions for dismissal predicated upon the statute of limitations should have been denied. Accordingly, this Court should revise and render judgment for Blessitt on the issue of the statute of limitations.

## VI.

### CERTIFICATE OF SERVICE

I, Martin A. Kilpatrick, do hereby certify that I have this day, served via-U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing documents upon:

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

L. Carl Hagwood, Esquire  
Post Office Box 4537  
Greenville, MS 38704-4537  
Attorney for Dr. Walter Thompson

Michael V. Cory, Jr., Esquire  
Post Office Box 12269  
Jackson, MS 39223-2269  
Attorney for King's Daughters Hospital

Walter T. Johnson, Esquire  
Post Office Box 650  
Jackson, MS 39205-0650  
Attorney for Dr. Gary Cirilli

THIS, the 20<sup>th</sup> day of March, 2008

  
MARTIN A. KILPATRICK