

IN THE SUPREME COURT OF MISSISSIPPI

No. 2007-IA-00909

UNIVERSITY OF MISSISSIPPI  
MEDICAL CENTER

Appellant

VS.

LATISHA MCGEE, INDIVIDUALLY,  
AND ON BEHALF OF THE HEIRS OF  
LAURA WILLIAMS

Appellees

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**BRIEF OF APPELLEES LATISHA MCGEE, ETAL.**

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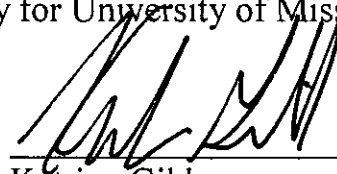
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Certificate of Interested Persons

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

1. Honorable Tomie T. Green, Hinds County Circuit Court Judge
2. Latisha McGee and the heirs of Laura Williams, Appellees
3. University of Mississippi Medical Center
4. J. Leray McNamara, Attorney for University of Mississippi Medical Center
5. Stephanie C. Edgar, Attorney for University of Mississippi Medical Center



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Katrina Gibbs

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## STATEMENT OF ISSUES

- I. Whether the Trial Court erred in denying Defendant's Motion for Summary Judgment.
- II. Whether *Jenkins v. Pensacola Health Trust Inc.*, 933 So. 2d 923 (Miss. 2006) is retroactive and controlling of this case.
- III. Whether summary judgment on Appellee's negligence claims for actions after November 21, 2005 was appropriately denied.

## **PROCEDURAL AND FACTUAL BACKGROUND**

This is a wrongful death case against the Defendant medical professionals employed by University of Mississippi Medical Center (hereinafter referred to as UMC) whose negligence caused or contributed to Laura Williams' demise in December 2004. Her heirs, represented by Latisha McGee, brought suit against UMC for her wrongful death and the Trial Court denied UMC's Motion for Summary Judgment, from which UMC has been granted this interlocutory appeal.

In August, 2004, Laura Williams was diagnosed with both an abdominal mass and a later-found intestinal mass. To remove these cancerous masses, she underwent a total abdominal hysterectomy on or about September 1, 2004. On September 7, 2004, she presented back to UMC with abdominal pain, nausea, vomiting and a diminished appetite. It was then discovered that the doctors from the first surgery had left a laparotomy sponge in Ms. Williams which had become infected. She underwent a second surgery on September 8, 2004 to have it removed.

Thereafter, from October through her death on December 19, 2004, Ms. Williams was for the most part hospitalized.<sup>1</sup> Her health clearly deteriorated after her surgeries in September, leading Dr. Mukund K. Patel, a board certified internist, to

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<sup>1</sup>Records show hospitalizations from October 21- November 12<sup>th</sup> and November 14<sup>th</sup> through December 19<sup>th</sup>.

opine that the retention of the sponge used during the surgery directly resulted in an infection and added to Ms. Williams' morbidity. (R.. Supp. 8-9). Dr. Patel recounted her course of treatment in his written opinion and stated that in her final hospitalization (after November 21, 2004), Ms. Williams had to be transferred to the intensive care unit and placed on mechanical ventilation. Despite this measure, however, neurology felt that Ms. Williams had suffered an "anoxic brain injury", i.e. a brain injury that results from a lack of oxygen. She died on December 19, 2004.

On November 21, 2005, a notice of claim letter was sent to UMC on behalf of Ms. Williams' heirs. (R.25) In that letter, the family lists two instances of medical negligence between September 2004 and the date of death, including the retention of the laparotomy sponge and the failure to provide oxygen just prior to Ms. Williams' death.

On or about February 21, 2006, ninety-three days after sending the notice, Latisha McGee filed suit against UMC (R.3). The Complaint alleges two causes of action: medical negligence and Res Ipsa Loquitur. In the first claim, the Complaint pleads that the UMC medical personnel failed to provide medical care consistent with nationally recognized minimal standards. (Complaint, R. 5-7) In the second claim, the Complaint alleges Res Ipsa Loquitur negligence for the retained laparotomy sponge.

On or about July 3, 2006, UMC filed its Motion for Summary Judgment (R.15)



which was directed at the Appellee's second cause of action, the Res Ipsa Loquitur claim for the retained sponge. (See ¶¶ 10, 18, 19 of UMC's Motion, R. 17-18) The Motion does not deal with Appellee's general negligence claims which encompass all of Laura Williams' treatment up to the date of her death, December 19, 2004.

Plaintiffs obtained extensions to respond to UMC's Motion because they had repeatedly requested and were not provided Ms. Williams' medical records. These extensions were granted by the trial court (Docket, R. 1.) Plaintiff then responded to the Motion for Summary Judgment on November 30, 2006 (R. Supp. 3) and UMC filed its Reply on January 16, 2007 (R.42). The Trial Court denied the Motion for Summary Judgment on May 25, 2007 (R.50). The Defendant UMC sought an interlocutory appeal of the trial Court's Order which this Court granted (See Order, R.51).

### **Summary of Argument**

When Appellees filed their wrongful death case, based in part on a retained sponge that was negligently left in the deceased, and in part on other instances of negligence prior to death, *Gentry v. Wallace*<sup>2</sup> was the prevailing law, and Appellees relied upon that ruling to calculate the statute of limitations in this case. Under *Gentry* the case was timely filed. After the case was filed, this Court changed the statute of

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<sup>2</sup>606 So.2d 1117(Miss.1992)

limitations in the *Jenkins v. Pensacola Health Trust Inc.*<sup>3</sup> case. Appellant UMC argues that *Jenkins* must be applied retroactively and thus, any negligence from the retained sponge claim is barred. In response, Appellee asserts that the Court has the option of determining whether *Jenkins* should apply retroactively or not. The Court should not apply it retroactively because it strips Appellees of part of their claim which other cases on retroactivity have not. Instead this Court should make an exception under the factors outlined in *Chevron Oil Co. v. Huson*<sup>4</sup> case and apply *Jenkins* only prospectively.

Moreover, Appellees raised other general negligence claims in their Complaint in addition to the res ipsa loquitur claim for the retained sponge. This negligence was raised in their Notice Letter on November 21, 2005 and included not only the retained sponge, but the hypoxic brain injury just prior to Ms. Williams death. According to *Gray v. University Medical Center*<sup>5</sup> Appellees claims for any negligence between November 21, 2004 and the date of death would not be barred.

#### Standard of Review

A party is entitled to summary judgment only if the pleadings, depositions, answers to interrogatories, etc demonstrate that there is no genuine issue of material

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<sup>3</sup> 933 So.2d.923 (Miss. 2006)

<sup>4</sup>404 U.S. 97 (1971)

<sup>5</sup>2008 WL 570430 (Miss. March 4, 2008)

fact and the moving party is entitled to a judgment as a matter of law. M.R.C.P. 56©. This Court reviews the trial court's grant of summary judgment *de novo* and considers all the evidence in the light most favorable to the non-moving party. *Moore v. Parker*, 962 So.2d 558, 567 (¶30) (Miss. 2007). The application of a statute of limitations is a question of law which is subject to de novo review. *Carter v. Citigroup, Inc.*, 938 So.2d 809, 817 (¶36) (Miss. 2006).

### Argument

I. **The Trial Court did not err in denying Appellant's Motion for summary Judgment on Appellee's *Res Ipsa Loquitur* claim for the retained sponge.**

*A. Appellees had timely filed their claim under the prevailing precedent.*

When Appellees filed this wrongful death case, in February 2006, the controlling authority on the appropriate statute of limitations was *Gentry v. Wallace*, 606 So.2d 1117(Miss.1992). Under *Gentry*, the statute of limitations for a wrongful death action began on the date of this death itself, in this case, December 19, 2004. Being a Torts Claims Act entity, and subject to Miss. Stat. 11-49-11, UMC was subject to a one-year statute of limitations. Thus, in December of 2004, under the current precedent, Appellees had until December 19, 2005 to provide notice and file suit accordingly.

When the notice of claim required under §11-49-11 is sent within 90 days of

the one year deadline for filing suit, the limitations period is extended for at least another ninety days. Thus, when Appellees here sent the Notice letter on November 21, 2005, they appropriately waited and filed suit on February 21, 2006. At the time of the filing of the lawsuit, *Gentry* was still precedent and Appellees had properly filed suit, calculating the statute of limitations from the date of death.

*B. Appellee is not bound by Jenkins v. Pensacola Health Trust, Inc. because Appellee's case was filed before Jenkins was decided and Jenkins should not be applied retroactively.*

After Appellee filed her suit in February 2006, this Court then rendered its decision in *Jenkins v. Pensacola Health Trust, Inc.*, 933 So.2d.923 (Miss. 2006) overruling *Gentry*. The decision was rendered on April 27, 2006, but did not become final until rehearing was denied on August 3, 2006. *Jenkins* changed the statute of limitations in a wrongful death case, so that the statute now began running on the date of the negligence that caused or contributed to the death, not the date of the death itself.

Appellant argues that the holding in *Jenkins* must be applied retroactively and thus, is applicable to this case, requiring its dismissal. However, this Court is not bound to apply *Jenkins* retroactively and such an application to Appellees case offends basic notions of fairness and justice since Appellees had a right to rely on prevailing

case law at the time.

Appellee appreciates this Court's holdings in *Cleveland v. Mann*, 942 So.2d 108 (Miss. 2006) and *Mississippi Transportation Commission v. Ronald Adams Contractor, Inc.* 753 So.2d 1077 (Miss. 2000) cited by the Appellants as precedents for holding *Jenkins* to be retroactive. However, the facts of the case at hand differ significantly from the facts of these cases and warrant a different result. *Cleveland v. Mann* dealt with the application of prior precedent holding that patient/doctor agreements affected interstate commerce, so an arbitration agreement between the parties would be enforced. In *Cleveland v. Mann*, plaintiffs did not completely lose their cause of action against the surgeon they were suing for the death of their relative; plaintiffs simply had to go to another forum to pursue their claim. Moreover, the plaintiff in *Mississippi Transportation Commission v. Ronald Adams Contractor* did not lose its claim because of a retroactive application of a court decision; in fact, he benefitted from the doctrine. There the Court found that a contractor could sustain his cause of action against the Transportation commission for breach of a public highway contract and because of the retroactive effect of another court decision, he could also collect post judgment interest and statutory penalties.

Unlike these two cases, the retroactive effect of *Jenkins* strips Appellees of a cause of action they had prior to the *Jenkins* ruling, with no other recourse. In cases

such as these, the Court should instead enter in an analysis of the fairness factors discussed in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).<sup>6</sup> In *Chevron*, the Supreme Court stated that in determining whether a decision should be applied retroactively, a Court should consider whether a decision displaces a principle of law on which reliance may reasonably have been placed and whether prospectivity is on balance warranted by its effect on the operation of the new rule and by the inequities that might result from retroactive application. *Chevron*, 404 U.S. at 106-107. Given the facts of this case, the fact that *Jenkins* did change the statute of limitations on which Appellees reasonably relied. Moreover, unlike the other retroactivity cases discussed above, Appellees would be totally stripped of a cause of action they had when they filed the case. The inequitable result is clear. Given these facts, the Court

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<sup>6</sup>Appellant may argue that the *Mississippi Transportation Commission* case rejected the application of *Chevron*. There the Court looked at a subsequent Supreme Court decision in *James B. Beam Distilling Co. V. Georgia*, 501 U.S. 529 (1991). The Court felt that *James Beam* required that it could not return to the old rule with respect to cases relying on facts predating the pronouncement of the new law. However, with all due respect, the Court misapplied the *James Beam* analysis to these facts. In *James Beam* a distillery had sought to recover back excise taxes that the State of Georgia had collected from it. The trial Court agreed that the statute that would tax out of state products higher than in-state products was unconstitutional. But the trial Court would not apply its ruling retroactively so the distillery could collect nothing. James Beam appealed and the Supreme Court said that had already determined that a similar Hawaii statute was unconstitutional and declared that its holding in that case was retroactive, *Bacchus Imports Ltd. V. Dias*, 468 U.S. 263 (1984). Thus, in *James Beam*, the Supreme Court was simply applying a ruling it had made in a case that was decided *prior to the filing* of the *James Beam* case. This is not the case here.

should find that a *Chevron* exception should be made, and *Jenkins* applied only prospectively.

Appellant may raise the Court of Appeals' recent decision in *Marvin Brown v. Southwest Mississippi Regional Medical Center*, 2008 MSCA 2006-CA-01947 - 012908 decided on January 29, 2008 in support of its position. However, that decision should not be cited since it is not final and currently subject to a motion for rehearing. *Mississippi Transportation Commission v. Allday*, 726 So.2d 566 (Miss. 1998) Appellant may also raise *University of Mississippi Medical Center v. Easterling*, 928 So.2d 815 (Miss. 2006) in support of its position that Torts Claims Act rulings are retroactive. However, the case at hand is factually distinguishable from *Easterling*. There the Plaintiff had totally failed to comply with the Notice provisions of the Torts Claims Act prior to filing suit, despite the language of the statute and rulings of this Court that prior Notice be given. The Appellees here did comply with the statute and with the prevailing precedent of this Court when they filed their suit.

The bottom line is that this Court has the authority to determine whether or not and when to make its rulings retroactive or prospective. In cases like this one, where Appellants lose a valuable claim they rightfully and lawfully had at the time of filing, the Court should chose the propsective route.

**II. The Trial Court's denial of Summary Judgment for any negligence between November 15, 2004 and December 2004 was correct.**

UMC's Motion for Summary Judgment is based solely on the retained sponge claim. However, in Appellant's Notice letter, Latisha McGee raises other negligence in addition to the retention of the laparotomy sponge. The Notice letter states:

\*Ms. Williams consistently found herself in and out of the hospital.

\*she was told her cancer was in remission and would disappear but it did not

\*there is question of whether she was provided adequate oxygen just prior to hear death on December 19, 2004. (R. 25-26)

In her Complaint, Latisha McGee specifically plead two separate causes of action: The Res Ipsa Loquitur action for the retained sponge, and for medical negligence for the failure of UMC personnel to provide health care services consistent with nationally minimal standards.

Ms. Williams died on December 19, 2004 and when the Notice of Claim was sent on November 21, 2005, the Notice clearly covered any negligence from November 21, 2004 through December 19, 2004 as well as the September sponge retention and Appellees could properly pursue a claim for that later negligence, even if the negligence with respect to the retained sponge was precluded. (See *Gray v. University Medical Center* 2008 WL 570430 (Miss. March 4, 2008) where the Court



tallied up and limited the time period for claims of negligence in a wrongful death case). Therefore, even if *Jenkins* is to be applied retroactively, it does not apply to Appellees' claims for negligence between November 15 and December 19, 2004.

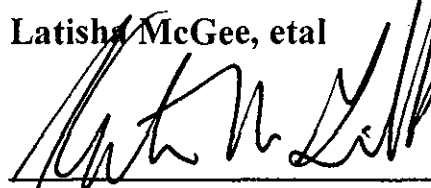
### Conclusion

This Court has the option of applying its rulings prospectively or retroactively. It is not required to do either, but has the authority to choose the fairest and most equitable approach. Appellee urges the Court to recognize the severity of the retroactive application of the *Jenkins* decision in this case and the inequitable, almost punitive results it obtains. Retroactive decisions in the past have not harmed Plaintiffs, nor stripped them of their claims as would be the case here.

Moreover, the Motion for Summary Judgment was limited to Appellee's Res Ipsa Loquitur claim. Even if its barred, claims for any negligence after the Notice Letter, or negligence between November 21, 2004 and Ms. Williams' death are not. Appellee respectfully requests this Court to affirm the Trial Court decision below.

**RESPECTFULLY SUBMITTED, this the 20th of March 2008**

Latisha McGee, etal



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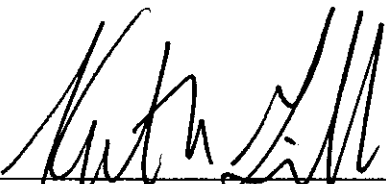
**CERTIFICATE OF SERVICE**

I, **Katrina Gibbs**, certify that I have this day filed this **Brief of Appellees** with the Clerk of this Court and have served a copy by United States mail with postage prepaid on the following persons at these addresses:

The Honorable Tomie T. Green  
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This 20th day of March 2008.

  
\_\_\_\_\_  
**KATRINA M. GIBBS**