

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

**UNIVERSITY OF MISSISSIPPI
MEDICAL CENTER**

APPELLANT

vs.

NO.2007-IA-00909-SCT

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

APPELLEE

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

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT NOT REQUESTED BY APPELLANT

PREPARED AND SUBMITTED BY:

J. Leray McNamara
Stephanie C. Edgar
Copeland, Cook, Taylor & Bush, P.A.
1076 Highland Colony Parkway
600 Concourse, Suite 100
Post Office Box 6020
Ridgeland, Mississippi 39158
Telephone: (601) 856-7200
Facsimile: (601) 856-7626

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
REPLY	1
I. Mississippi Case Law Applies Retroactively and Appellee is Bound by This Application	1
II. Appellee Did Not Plead a Negligence Claim for Conduct Occurring Between November and December of 2004	3
III. Appellee's Expert Opinion Does Not Support a Negligence Claim for Conduct Occurring Between November and December of 2004	4
CONCLUSION	5
CERTIFICATE OF SERVICE	7

TABLE OF AUTHORITIES

CASES	<u>Page</u>
<i>Ales v. Ales</i> , 650 So.2d 482 (Miss. 1995)	2
<i>Anderson v. Anderson</i> , 692 So.2d 65 (Miss. 1997)	2
<i>Bowie v. Montfort Jones Memorial Hosp., et al.</i> 861 So.2d 1037(Miss. 2003)	5
<i>Cleveland v. Mann</i> , 942 So.2d 108 (Miss. 2006)	1
<i>Erby v. North Mississippi Medical Center</i> , 654 So.2d 495 (Miss. 1995)	5
<i>Galloway v. Travelers Insurance Co.</i> , 515 So.2d 678 (Miss. 1987)	5
<i>Gentry v. Wallace</i> , 606 So.2d 1117 (Miss. 1992)	1
<i>Hall v. Hilbun</i> , 466 So.2d 856 (Miss. 1985)	2
<i>Harold's Auto Parts, et al v. Flower Mangialardi</i> , 889 So.2d 493 (Miss. 2005)	3, 4
<i>Jenkins v. Pensacola Health Trust, Inc.</i> , 933 So.2d 923 (Miss. 2006)	<i>passim</i>
<i>Ladner v. Campbell</i> , 515 So.2d 882 (Miss. 1987)	5
<i>May v. Pulmosan Safety Equip. Corp.</i> , 948 So.2d 483 (Miss. Ct. App. 2007)	1
<i>Miss. Transp. Comm'n v. Ronald Adams Contractor, Inc.</i> , 753 So.2d 1077 (Miss. 2000)	1, 2-3
<i>Mohundro v. Alcorn County</i> , 675 So.2d 848 (Miss. 1996)	2
<i>Morgan v. State</i> , 703 So.2d 832 (Miss. 1997).	1
<i>Sheffield v. Goodwin</i> , 740 So.2d 854 (Miss.1999)	5
<i>Thompson v. City of Vicksburg</i> , 813 So.2d 717 (Miss. 2002)	2

CASES (continued)

Page

Tucker v. Hinds County, 558 So.2d 869 (Miss. 1990) 2

STATUTES AND RULES

Miss. R. Civ. Pro. 11 4

REPLY

I. Mississippi Case Law Applies Retroactively and Appellee is Bound by This Application.

Jenkins v. Pensacola Health Trust, Inc. expressly overruled *Gentry v. Wallace*, 606 So. 2d 1117 (Miss. 1992), which stood for the proposition that “a new statute of limitations for wrongful death begins 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 923, ¶ 8 (Miss. 2006). Consequently, the current rule of law in Mississippi with regard to this issue is 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.”** *Id.* at ¶ 12, (emphasis added). See also *May v. Pulmosan Safety Equip. Corp.*, 948 So. 2d 483, ¶ 8 (Miss. Ct. App. 2007) (quoting *Jenkins*, 933 So. 2d at ¶ 12). Further, the Court stated that *Jenkins* was barred from relying on any act of negligence, “which allegedly occurred three years before the Complaint was filed. . . .” *Jenkins*, 933 So. 2d at ¶ 13.

In her Response, Appellee argues that *Jenkins* is inapplicable to this lawsuit because the *Jenkins* opinion was decided after the death of Laura Williams. It is well settled that “all judicial decisions apply retroactively unless the Court has specifically stated the ruling is prospective.” *Cleveland v. Mann*, 942 So. 2d 108, ¶ 11 (Miss. 2006) (citing *Miss. Transp. Comm’n v. Ronald Adams Contractor, Inc.*, 753 So. 2d 1077, 1093 (Miss. 2000); *Morgan v. State*, 703 So. 2d 832, 839 (Miss. 1997)). There is absolutely no indication within the *Jenkins* opinion that it was only intended to apply prospectively, and therefore, Appellee’s argument on this point lacks merit. Moreover, this

Court was abundantly clear in its instruction of *Thompson v. City of Vicksburg* regarding the retroactive application of case law, which stated as follows:

The law is quite clear regarding retroactive application of judicially articulated rulings. Retroactive application is not limited to pending appeals, as stated by City, but also applies to cases awaiting trial. We have held consistently that “judicially enunciated rules are applied retroactively.”

813 So.2d 717, ¶15 (Miss. 2002)(quoting *Anderson v. Anderson*, 692 So.2d 65, 70 (Miss. 1997)) (citing *Ales v. Ales*, 650 So.2d 482, 484 (Miss. 1995); *Hall v. Hilbun*, 466 So.2d 856, 875 (Miss. 1985)).

Appellee also urges the Court to ignore the well established precedent that case law is to be applied retroactively. Instead, Latisha McGee urges the Court to engage in an analysis which would, in Appellee’s estimation, restore her right of action against the University of Mississippi Medical Center. Appellee’s logic for such a measure is that if *Jenkins* is applied retroactively, she will be stripped of her cause of action with no other recourse. Essentially, Latisha McGee claims that a retroactive application of *Jenkins* deprives her of due process. The University of Mississippi Medical Center submits that, “[A] due process violation requires that the party be deprived of a protected property interest.” *Mohundro v. Alcorn County*, 675 So.2d 848, 852 (Miss. 1996)(citing *Tucker v. Hinds County*, 558 So.2d 869, 873 (Miss. 1990)). Also, “[T]he legislature has continued to withhold such a right, therefore there is no property right to sue the State. Without such a property interest there can be no due process violation.” *Id.*

Moreover, despite Latisha McGee’s wishes to the contrary, in *Jenkins*, this Court applied its holding in what to Mary Jenkins likely amounted to an arguably equal procedural harshness as the *Jenkins* holding forces this Court to make in the case at bar. However, this Court “may not now selectively apply that holding.” *Miss. Transp. Comm’n v. Ronald Adams Contractor, Inc.*, 753 So.

2d 1077, ¶ 57 (Miss. 2000). For these reasons, Latisha McGee should be held to no less than the same standard applied to Mary Jenkins, and the trial court's decision denying the University of Mississippi Medical Center's Motion for Summary Judgment should be reversed.

II. Appellee Did Not Plead a Negligence Claim for Conduct Occurring Between November and December of 2004.

Latisha McGee further claims that the trial court was correct in denying the University of Mississippi Medical Center's Motion for Summary Judgment because she made two negligence claims against the University of Mississippi Medical Center which occurred at different times. Specifically, Appellee argues that her Notice of Claim "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* page 11 of Appellee's Brief. This statement is not entirely correct. Appellee's Notice of Claim correspondence, transmitted after the expiration of the one-year statute of limitation, does list two instances of alleged medical negligence which occurred between September 2004 and the date of Laura Williams' death. (R. at 25-26). These alleged acts are the retention of the laparotomy sponge and the alleged failure to provide oxygen to Ms. Williams prior to her death. *Id.* However, despite the content of the Notice of Claim letter, Appellee's Complaint is curiously devoid of any mention of the University of Mississippi Medical Center's alleged failure to provide oxygen. (R. at 3-9).

Appellee's Complaint makes absolutely no reference to the "anoxic brain injury" allegedly caused by the University of Mississippi Medical Center. *Id.* In *Harold's Auto Parts, et al v. Flower Mangialardi, et al*, this Court held that a plaintiff must specifically plead facts which support his or

her claim against the defendant from whom that plaintiff seeks to recover damages. 889 So. 2d 493, 495 (Miss. 2005).¹ The *Mangialardi* Court made it abundantly clear that this information must be contained within the Complaint. To emphasize the stringency of this requirement, the Court stated “to do otherwise, is an abuse of the system and is sanctionable.” *Id.* at 494 (citing Miss. R. Civ. Pro. 11).

III. Appellee’s Expert Opinion Does Not Support a Negligence Claim for Conduct Occurring Between November and December of 2004.

Latisha McGee has provided no expert testimony to support the notion that the University of Mississippi Medical Center breached the standard of care in allegedly failing to provide oxygen to Laura Williams. In responding to the University of Mississippi Medical Center’s Motion for Summary Judgment, Latisha McGee came forward and presented the trial court with an expert opinion authored by Dr. Mukund Patel, which tracks Laura Williams’ medical treatment and discusses how the University of Mississippi Medical Center allegedly breached the standard of care. (R. at 47-49 and Supp. R. at 7-9). The pertinent portion of this opinion is entitled “Expert Medical Opinion” and provides as follows:

Based upon my review of the available medical records pertaining to Ms. Laura O’Neal Williams, I conclude with reasonable medical certainty that medical negligence and breech (sic) from appropriate standard of medical care was exercised by Dr. Christine Carter Toers (Attending General Surgeon), Dr. Kenneth D. Vick (Resident General Surgeon) and Patricia Smith (R.N.) Who participated in Ms. Williams’ small bowel resection with an end-to-end anastomosis. Specifically, the retention of the sponge used during surgery directly resulted in an infection and added to Ms. Williams’ morbidity. Nurse Patricia Smith falsely documented in her intra-operative notes that the sponge count was correct at the conclusion of this operation. In addition, Dr. Toers and Dr. Vick ought to have been aware that this sponge was being retained. This directly constitutes medical malpractice and

¹ While *Mangialardi* was a mass-tort action, the rationale of specificity in pleading applies equally to all types of lawsuits.

deviation from the appropriate standard of medical care. Had the sponge been appropriately removed from the pelvic cavity, Ms. Williams would not have suffered from subsequent abdominal pains, nausea, vomiting and a diminished appetite. She would have been spared of having to undergo an unnecessary exploratory (sic) laparotomy on September 08th, 2004 with removal of this infected sponge.

(R. at 49 and Supp. R. at 9).

Thus, Dr. Patel's sole criticism of the University of Mississippi Medical Center, according to his own report, arises out of the retained laparotomy sponge, which occurred on September 1, 2004 and was removed on September 8, 2004. *Id.* It is elementary that a plaintiff in a medical malpractice case must present expert testimony necessary to support the elements of her *prima facie* case. See *Bowie v. Montfort Jones Memorial Hosp., et al.*, 861 So.2d 1037, ¶¶ 14-17 (Miss. 2003); *Sheffield v. Goodwin*, 740 So.2d 854, ¶ 16-17 (Miss.1999); *Erby v. North Mississippi Medical Center*, 654 So.2d 495, 500 (Miss. 1995); *Galloway v. Travelers Insurance Co.*, 515 So.2d 678, 683 (Miss. 1987); and *Ladner v. Campbell*, 515 So.2d 882, 887-88 (Miss. 1987). In the case at bar, Latisha McGee has come forward with an expert opinion which supports her *res ipsa loquitur* claim; however, this opinion makes absolutely no criticism of the University of Mississippi Medical Center and its alleged failure to provide Laura Williams with oxygen. As such, Appellee's spurious claim for the alleged hypoxic brain injury must fail.


CONCLUSION

The statute of limitation for wrongful death actions, such as this lawsuit, begins to run on the date of the tortious injury, which leads to the death. While this rule of law was announced after Appellee filed her lawsuit, it should nevertheless be applied to this case as case law applies retroactively, and Appellee has no protected property interest in suing a state entity such as the University of Mississippi Medical Center. Additionally, Appellee never pled a cause of action

against the University of Mississippi Medical Center for anything other than the retained laparotomy sponge, and her expert's opinion contains no reference to any other acts of negligence of the University of Mississippi Medical Center.

For the foregoing reasons, the University of Mississippi Medical Center respectfully requests that this Court reverse the decision of the trial court and dismiss this action with prejudice. The University of Mississippi Medical Center further requests any additional relief this Court deems appropriate.

RESPECTFULLY SUBMITTED, this the 3RD day of April, 2008.


JOSEPH LERAY MCNAMARA, MSB [REDACTED]
STEPHANIE C. EDGAR, MSB [REDACTED]
*Attorneys for Appellant, University of Mississippi
Medical Center*

OF COUNSEL:

COPELAND, COOK, TAYLOR & BUSH
Post Office Box 6020
Ridgeland, Mississippi 39158-6020
Telephone: (601) 856-7200
Facsimile: (601) 856-7626

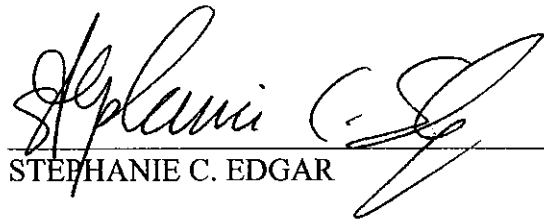
CERTIFICATE OF SERVICE

I, Stephanie C. Edgar, do hereby certify that I have this day caused to be mailed by United States Mail, postage prepaid, a true and correct copy of the above and foregoing document to:

Honorable Tomie T. Green
Hinds County Circuit Court Judge
P.O. Box 327
Jackson, MS 39205-0327

Katrina M. Gibbs, Esquire
GIBBS & MARTIN, PLLC
Post Office Box 373
Jackson, MS 39205
Counsel for Appellee

This the 3RD day of April, 2008.


STEPHANIE C. EDGAR