

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**

BRIEF OF APPELLANT

ORAL ARGUMENT NOT REQUESTED BY APPELLANT

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

**UNIVERSITY OF MISSISSIPPI
MEDICAL CENTER**

APPELLANT

vs.

NO.2006-M-00872-SCT


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

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Appellant certify that the following listed persons and public entity 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. Latisha McGee
2. Katrina Gibbs
3. University of Mississippi Medical Center
4. J. Leray McNamara
5. Stephanie C. Edgar
6. The Honorable Tomie T. Green



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MEDICAL CENTER

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I. STATEMENT OF ISSUES

Whether the statute of limitation for a wrongful death lawsuit is subject to the statute of limitation for the underlying tort? If so, whether the holding of *Jenkins v. Pensacola Health Trust, Inc.*, 933 So. 2d 923 (Miss. 2006), is applicable to this case in light of its determination occurring after the death of the decedent, Laura Williams?

II. STATEMENT OF THE CASE

The decedent, Laura Williams, underwent a total abdominal hysterectomy at the University of Mississippi Medical Center (“UMMC”) on September 1, 2004. R. at 21. During this surgery, UMMC physicians also removed a cancerous mass from Ms. Williams, who had been previously diagnosed with small bowel cancer. R. at 21. Six (6) days later, on September 7, 2004, Ms. Williams presented to the UMMC emergency department with complaints of abdominal pain, nausea, vomiting and a decreased appetite. R. at 23. Upon examination, it was discovered that a laparotomy sponge had been inadvertently left in Ms. Williams’ abdomen during her September 1, 2004 operation at UMMC. *Id.* UMMC physicians discussed the presence of the laparotomy sponge with Ms. Williams, who consented to an exploratory laparotomy, which was performed on September 8, 2004. *Id.* During the surgery on September 8, 2004, the laparotomy sponge was removed. *Id.*

Appellee, Latisha McGee’s allegations center upon a claim that UMMC breached the standard of care and thereby caused the death of Laura Williams on December 19, 2004. R. at 3. This alleged breach occurred, according to Ms. McGee’s expert, during the total abdominal hysterectomy at UMMC on September 1, 2004. R. at 49. Ms. McGee alleges and her expert opinion supports the notion that the laparotomy sponge which was retained during the September 1, 2004 operation, “added to Ms. Williams’ morbidity.” *Id.*

Latisha McGee sent her notice of claim letter to UMMC on November 21, 2005, one year and approximately two months after the laparotomy sponge had been inadvertently left in Ms. Williams’ abdomen during surgery. R. at 25. Ms. McGee has alleged that the retained sponge was the cause of the recurrence of cancer, which ultimately led to Ms. Williams’ death on December 19, 2004. R. at 8.

As stated above, Ms. McGee did not send her notice of claim letter to UMMC, a political subdivision of the State of Mississippi, until November 21, 2005, over one full year after the laparotomy sponge was inadvertently left in Ms. Williams' abdomen. R. at 25. Ms. McGee filed her Complaint on February 21, 2006 and served it upon UMMC on June 6, 2006. R. at 3-14. Thereafter, on July 3, 2006, UMMC responded with a Motion for Summary Judgment premised upon the expiration of the statute of limitation. R. at 15. McGee filed her Response to Defendant's Motion for Summary Judgment on November 30, 2006, which was supported by an expert opinion; however, neither the response nor the expert opinion presented the type of *evidence* required to overcome a motion for summary judgment. Supp. R. at 3. On January 16, 2007, UMMC filed its Reply to the Plaintiff's Response to Motion for Summary Judgment. R. at 42. On May 24, 2007, Honorable Circuit Judge Tomie T. Green entered an order denying UMMC's Motion for Partial Summary Judgment and finding that the Mississippi Supreme Court's decision in *Jenkins v. Pensacola Health Trust, Inc.*, 933 So. 2d 923 (Miss. 2006), was inapplicable to the facts in the case at bar due to the fact that *Jenkins* was decided subsequent to the decedent's December 19, 2004 death. R. at 50; R.E. at 3. It is this Order from which interlocutory appeal is sought.

III. SUMMARY OF THE ARGUMENT

As an initial matter, this interlocutory appeal presents no new or novel questions or law. Rather, it relates to the trial court's failure to properly apply the applicable law to the facts of this case. The statute of limitation for a wrongful death action, such as this lawsuit, begins to run on the date of the tortious injury, which leads to the death. *Jenkins v. Pensacola Health Trust, Inc.*, 933 So.2d 923 (Miss. 2006). Also, no discovery rule exists within the Mississippi Tort Claims Act. *Caves v. Yarbrough*, No. 2006-CA-01857-SCT, slip op. at ¶ 32 (Nov. 1, 2007). Through expert testimony, the Appellee, Latisha McGee, has linked the alleged wrongful death to the laparotomy sponge which was retained on September 1, 2004. Pursuant to *Jenkins v. Pensacola Health Trust, Inc.*, the statute of limitation began running on the date of the sponge retention, September 1, 2004, and expired on September 1, 2005, nearly three (3) months prior to UMMC's receipt of McGee's notice of claim letter. Further, case law is to be applied retroactively absent a clear statement that it is prospective.

IV. STANDARD OF REVIEW

The appropriate standard of review for questions of law is *de novo*. *Stephens v. Equitable Life Assur. Society of U.S.*, 850 So.2d 78 (Miss. 2003); *ABC Mfg. Corp. v. Doyle*, 749 So.2d 43 (Miss. 1999). Because an appeal regarding an issue involving the expiration of a statute of limitation involves a question of law, a *de novo* standard of review should be applied. Additionally, the denial of a motion for summary judgment is a question of law which requires a *de novo* review. *University of Mississippi Medical Center v. Easterling*, 928 So.2d 815 (Miss. 2006); *Monsanto Company v. Hall*, 912 So.2d 134 (Miss. 2005). Since the case at bar involves the denial of a motion for summary judgment, the issue in this appeal should be decided on a *de novo* basis.

V. ARGUMENT

1. WHETHER THE STATUTE OF LIMITATION FOR A WRONGFUL DEATH LAWSUIT IS SUBJECT TO THE STATUTE OF LIMITATION FOR THE UNDERLYING TORT?

Mississippi Code Annotated § 11-46-11 mandates that all lawsuits against the State of Mississippi and its political subdivisions, such as UMMC, must be commenced within one (1) year after the alleged negligence. Ms. McGee has alleged that UMMC was negligent in inadvertently leaving a laparotomy sponge within Laura Williams' abdomen on September 1, 2004. Based on Miss. Code Ann. § 11-46-11, Ms. McGee had until September 1, 2005 to commence her negligence claim against UMMC. Ms. McGee, however, waited until November 21, 2005 to send her notice of claim letter to UMMC. Thus, Appellee's underlying negligence claim is clearly barred by Miss. Code Ann. 11-46-11 and should, therefore, be dismissed with prejudice.

Also, the discovery rule is no longer of any help to Appellee pursuant to *this Court's recent holding in Caves v. Yarbrough*, No. 2006-CA-01857-SCT, slip op. at ¶ 32 (Nov. 1, 2007).¹ In addition, due to the expiration of the statute of limitations on McGee's underlying negligence claim, the wrongful death claim also fails as a matter of law. In *Jenkins v. Pensacola Health Trust, Inc.*, the Supreme Court entertained the precise issue presented by the case at bar, namely, "whether the statute of limitations for wrongful death lawsuits is subject to the statute of limitations for the underlying tort." 933 So. 2d 923, ¶ 6 (Miss. 2006). In the course of resolving this issue, the Court remarked, "Wrongful death claims must be based on a claim of some wrongful conduct which led

¹ Even if the discovery rule did apply to this claim, Laura Williams discovered the existence of the retained laparotomy sponge on September 7, 2004. Therefore, without the protection of *Caves v. Yarbrough*, the absolute latest that the statute of limitation would have expired is September 7, 2005, nearly three months before Appellee mailed her notice of claim correspondence to UMMC.

to the death. Each act of alleged wrongful conduct, whether an intentional or negligent act, has its own statute of limitations.” *Id.*

According to Ms. McGee’s Complaint, the wrongful conduct which allegedly caused the decedent’s death was the retained laparotomy sponge, and while the statute of limitations for most medical negligence actions is two (2) years, all medical malpractice actions against UMMC carry a one (1) year statute of limitation pursuant to Miss. Code Ann. § 11-46-11. The *Jenkins* Court 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*, 733 So. 2d at ¶ 8. Consequently, the 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.

Thus, it necessarily follows that because the one year statute of limitation has expired on Ms. McGee’s underlying negligence claim, which arose solely as a result of the retained laparotomy sponge, and because McGee alleges that the retained laparotomy sponge caused Ms. Williams’ wrongful death, the wrongful death claim is likewise barred. Consequently, Ms. McGee was required to have filed this lawsuit on or before September 1, 2005. Her failure to do so warrants immediate dismissal with prejudice of this action.

2. WHETHER CASE LAW IS RETROACTIVE, ABSENT SPECIFIC LANGUAGE TO THE CONTRARY?

At the hearing of this matter, Appellee's counsel argued that *Jenkins* was inapplicable to this lawsuit because the *Jenkins* opinion was decided after the death of Laura Williams. The trial court accepted this argument in denying UMMC's Motion for Summary Judgment. This Court has previously held, "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 not intended to apply retroactively, and therefore, Appellee's oral argument on this point was, likewise, completely without merit.

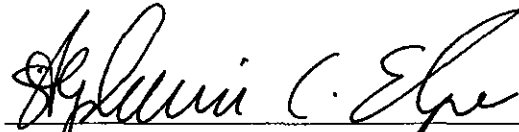
VI. CONCLUSION

According to *Jenkins v. Pensacola Health Trust, Inc.* and its progeny, 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. In this case, Latisha McGee, the Appellee, through expert testimony, has linked the alleged wrongful death to the laparotomy sponge which was retained on September 1, 2004. Therefore, pursuant to *Jenkins v. Pensacola Health Trust, Inc.*, the statute of limitation began running on this date, September 1, 2004, and expired on September 1, 2005, nearly three (3) months prior to UMMC's receipt of Appellee's notice of claim letter. Further, case law is to be applied retroactively absent a clear statement that it is prospective. Because *Jenkins* contains no such limitation, it is applicable to this action.

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 21st day of February, 2008.



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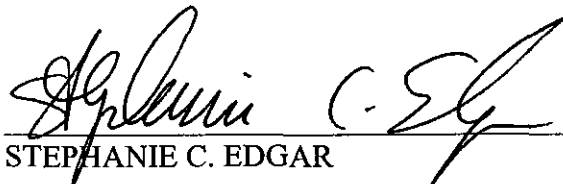
CERTIFICATE OF SERVICE

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:

Hon. Tomie T. Green
Hinds County Circuit Court Judge
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This the 21st day of February, 2008.


STEPHANIE C. EDGAR