2008-CA-00224

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2008-CA-00224

SALVADOR ARCEO, M.D. and ST. DOMINIC-JACKSON MEMORIAL HOSPITAL — **DEFENDANTS/APPELLANTS**

VS.

MYRTIS TOLLIVER, AS ADMINISTRATRIX OF THE ESTATE OF TOMMIE C. TOLLIVER, DECEASED, INDIVIDUALLY, AND ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES OF TOMMIE C. TOLLIVER, DECEASED — **PLAINTIFF/APPELLEE**

BRIEF OF THE APPELLANT, SALVADOR ARCEO, M.D.

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. Myrtis Tolliver, Respondent/Plaintiff, Wrongful Death Beneficiary of Tommie C. Tolliver, Deceased
2. Thomas Tolliver, Wrongful Death Beneficiary of Tommie C. Tolliver, Deceased
3. Meagan Tolliver, Wrongful Death Beneficiary of Tommie C. Tolliver, Deceased
4. Estate of Tommie C. Tolliver
5. Hon. Bobby B. DeLaughter, Circuit Court Judge[1]

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[1]Judge Delaughter recused himself from this matter on February 2, 2008, shortly after entering the order at issue in this appeal. (R. 264) The case was reassigned to Judge Yerger.

6. Hon. W. Swan Yerger, Circuit Court Judge

7. Salvador Arceo, M.D., Appellant/Defendant

8. St. Dominic-Jackson Memorial Hospital, Appellant/Defendant

9. Jennifer Lyle, R.N., Appellant/Defendant

10. E. Vincent Davis, Esq., Counsel for Appellee/Plaintiff

11. Deborah McDonald, Esq., Counsel for Appellee/Plaintiff

12. Eric Stracener, Jr., Esq., Counsel for Appellee/Plaintiff

13. Sharon F. Bridges, Esq., Counsel for Appellant/Defendant St. Dominic

14. Jonathan R. Werne, Esq., Counsel for Appellant/Defendant St. Dominic

15. Paul E. Barnes, Esq., Counsel for Appellant/Defendant

16. Kimberly N. Howland, Esq., Counsel for Appellant/Defendant

17. Gretchen W. Kimble, Esq., Counsel for Appellant/Defendant

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2. Did the Circuit Court err in applying a "substantial compliance" standard to the content requirements for pre-suit notice contained in Miss. Code Ann. § 15-1-36(15), when the only issue was non-compliance?

3. Has the statute of limitations run on Plaintiff's claim?

4. Does the "Savings Statute," Miss. Code Ann. § 15-1-69, apply to Plaintiff's claims and the dismissal of *Tolliver I*?

STATEMENT OF THE CASE

NATURE OF THE CASE

This medical malpractice wrongful death action arose from the care and treatment Plaintiff's daughter, Tommie Tolliver, received at St. Dominic-Jackson Memorial Hospital ("St. Dominic") during July 9-13, 2002. The issues on appeal relate to Plaintiff's multiple failures to comply with the notice requirements of section 15-1-36(15) of the Mississippi Code; the standards applicable to the interpretation and application of those requirements; the application of the statute of limitations; and the applicability, if any, of the "savings statute," section 15-1-69 of the Mississippi Code.

COURSE OF THE PROCEEDINGS AND DISPOSITION BELOW

Plaintiff filed her original lawsuit ("*Tolliver I*") against St. Dominic and Dr. Arceo on June 4, 2004. Defendants moved to dismiss based on Plaintiff's failure to send the pre-suit notice required by section 15-1-36(15). The circuit court denied that motion. On interlocutory appeal, this Court reversed the circuit court and rendered judgment in favor of Defendants, dismissing Plaintiff's original lawsuit, without prejudice. The mandate issued on March 15, 2007.

Plaintiff filed the present action on May 9, 2007. Defendants again moved to dismiss for failure to give adequate pre-suit notice and the expiration of the statute of limitations. After a hearing on November 30, 2007, Judge DeLaughter entered a written order on January 10, 2008 dismissing this action, without prejudice. Judge DeLaughter ruled that Plaintiff had again failed to comply with the pre-suit notice requirements, which required dismissal, but the statute of limitations had not run. Taking issue with Judge DeLaughter's decision not to dismiss this action *with* prejudice, Defendants timely perfected this appeal on January 30, 2008.

FACTS RELEVANT TO ISSUES ON APPEAL

Dr. Arceo examined Ms. Tolliver in St. Dominic's emergency room on July 9, 2002. (R. 8) Ms. Tolliver was admitted to the hospital and remained there until she passed away on July 13, 2002 from cardiac arrest secondary to meningococcal meningitis. (R. 8-10) Beyond these basics, the specific details of the circumstances and merits *vel non* of the Plaintiff's professional negligence claims against Dr. Arceo and St. Dominic are not at issue at the present time. Instead, this appeal turns on the procedural facts and circumstances surrounding Plaintiff's repeated failures to comply with the sixty day notice requirements of section 15-1-36(15).

The Original Lawsuit, "*Tolliver I*"

This matter now comes before this Court for the second time on appeal. Prior to filing her original complaint on June 4, 2004, Plaintiff did not give any notice of her intent to sue as required by section 15-1-36(15). *Arceo v. Tolliver*, 949 So. 2d 691, 697-98 (Miss. 2006) (hereinafter "*Tolliver I*"). However, despite Plaintiff's complete non-compliance with the statutory notice requirements, the circuit court declined to dismiss the original action. *Tolliver I*, 949 So. 2d at 693.

After accepting an interlocutory appeal in *Tolliver I*, this Court reversed the circuit court

and rendered judgment in favor of defendants, dismissing Plaintiff's original lawsuit without prejudice. *Tolliver I*, 949 So. 2d at 697-98. However, in the first appeal, this Court reached only the issue of whether dismissal was required for non-compliance with section 15-1-36(15), and expressly declined to address the other issues raised by Dr. Arceo and St. Dominic on appeal, stating "Because of our disposition of the statutory notice issue consistent with our recent decision in *Pitalo*, the remaining issues raised by the parties need not be addressed." *Tolliver I*, 949 So. 2d at 697. Now this matter has been refiled and worked its way back through the court system, and the issues which were not addressed in *Tolliver I*, including the statute of limitations and the applicability of the so-called Savings Statute, section 15-1-69 of the Mississippi Code, are now fully ripe for consideration by the Court.

The Current Lawsuit

The supreme court clerk issued the mandate dismissing the original action without prejudice on March 15, 2007. (R. 8) Prior to the issuance of the mandate, the Plaintiff sent Dr. Arceo and St. Dominic letters, dated February 28, 2007, which were less than expansive in content:

> This letter is being sent pursuant to Section 15-1-36 (15) of the Mississippi Code of 1972, as amended. This letter is to inform you of our intention to file suit on behalf of Tommie Tolliver. The basis of the suit is negligence.

(R. 101-02) Some fifty-five days after the clerk issued the mandate, on May 9, 2007 Plaintiff filed the instant lawsuit. (R. 4)

Dr. Arceo and St. Dominic again moved for summary judgment and/or dismissal, asking the circuit court to dismiss this new lawsuit *with prejudice* because of, *inter alia*, Plaintiff's multiple failures to give adequate notice and/or the running of the statute of limitations. (R. 54-65, 115-36)

At a hearing on November 30, 2007, after hearing oral argument, the circuit court dismissed the instant lawsuit because the February 28, 2007 letter sent by Plaintiff did not substantially comply with the content requirements for such notice contained in 15-1-36(15). (Tr. 23-25) In the written order of dismissal, Judge DeLaughter adopted his bench ruling without elaboration, stating "the Court . . . hereby rules consistent with the comments and rulings of the Court from the bench at the motion hearing that the Motion to Dismiss is granted and this case should be, and hereby is, dismissed *without* prejudice." (R. 24)[2] At the hearing on Defendants' motions, the circuit court reasoned as follows:

> My recollection of the case law interpreting the applicable statutes here prior to the Supreme Court's decision in Easterling was that the Court and (sic) medical malpractice cases was affording the same interpretation that it was then affording concerning claims under the state Tort Claims Act, and that was substantial compliance and one of the factors to be considered was what prejudice would result from any particular ruling that was made on a motion to dismiss. And as is their prerogative in the Easterling case – Easterling v. The University of Mississippi Medical Center – the Court for the first time said that the statute's been on the books long enough that all the lawyers should know what it requires, and we're going to require strict compliance as to the requirement of the notice being filed at least 60 days prior to the filing of the lawsuit.
>
> And in this case, the lawsuit was filed prior to the Easterling decision. All that is to say this: I'm of the opinion that the lawsuit in this case under the applicable law at the time that it was initially filed was duly filed. The Court also finds that the defect ultimately found in the case by the Supreme Court was as a matter of form. This, in this Court's opinion, is evidenced by the fact that the Supreme Court's order of dismissal was one without prejudice.
>
> As to the refiling of the lawsuit, we're not dealing with an issue of whether notice was filed or whether notice was filed at least 60 days prior to the filing of the lawsuit. We're dealing here with the substance of what's contained in the notice.
>
> Now, my understanding of the current case law is that unlike the requirement of a notice being given and that notice being given within a specified period of time by statute, that the Supreme Court is still applying a substantial compliance

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[2]The circuit court's bench ruling may be found on pp. 23-25 of the hearing transcript, and for convenience these pages are separately reproduced in the Record Excerpts at Tab 14.

standard to what is contained in the notice.

However, in this instance the Court is of the opinion, number one, that a second notice was required. The Court interprets the statute to refer to the notice being required prior to the filing or any filing. It's not limited to the first filing. And if the Supreme Court is going to apply a strict compliance standard, then this Court is of the opinion that second notice was indeed required, however, that notice was not in substantial compliance with the requirements of the statute.

And the Court is of the opinion that the statute of limitations had been, along with the savings statute – the statute of limitations has not run, therefore, the motion to dismiss by St. Dominic Hospital and Dr. Arceo will be granted. The case is dismissed concerning both of those defendants but without prejudice.

(Tr. 23-25)

Dr. Arceo and St. Dominic took issue with the circuit court's conclusion that this action should not be dismissed *with* prejudice, and timely perfected this appeal. (R. 15, 19)

SUMMARY OF THE ARGUMENT

The Plaintiff has failed to comply with the minimal notice requirements contained in section 15-1-36(15) for the second time. The repeated violations of statutory notice requirements warrant dismissal of the present action, with prejudice. Before filing her original complaint in *Tolliver I*, the Plaintiff gave no notice at all. This first violation of the statute mandated dismissal, but Plaintiff was given the chance to fix her mistake and refile.

Despite the dismissal of her first lawsuit for failure to give any pre-suit notice, instead of exercising extra diligence before attempting to refile her lawsuit, Plaintiff made only a halfhearted attempt at giving notice, sending a letter which failed to include information expressly required by 15-1-36(15), specifically, the type of loss sustained and specific nature of the injuries suffered. As the circuit court recognized, previous decisions of this Court leave no room for doubt that Plaintiff's violation of the requirements of 15-1-36(15) required dismissal for the second time. (Tr. 23-25) However, the circuit court's ruling raised questions regarding

the correct standard for determining compliance with the content requirements of section 15-1-36(15) and the consequences for Plaintiff's multiple failures to comply, including the applicability, if any, of the statute of limitations and the savings statute. With respect, the circuit court erred in several particulars.

The circuit court erred first by applying a "substantial compliance" standard in determining whether the content of the notice letter conformed to the statutory requirements. Because Plaintiff left out an entire category of information required by 15-1-36(15), the issue was simply compliance or non-compliance. *See, e.g., South Central Reg'l Med. Ctr. v. Guffy*, 930 So. 2d 1252, 1258 (Miss. 2006) ("the failure to provide *any* of the . . . statutorily required categories of information falls short of the statutory requirement and amounts to non-compliance"). "Substantial compliance" only becomes an issue at all when some information in each of the required statutory categories is included and a court must determine whether the included information was "substantial" enough to constitute compliance. *Guffy*, 930 So. 2d at 1258. In this case, an entire category of information was omitted from the notice letter, so the issue was simply Plaintiff's non-compliance. The circuit court reached the right conclusion, even though the court applied the incorrect standard. Guidance from this Court, clarifying that the principles announced in *Guffy* concerning the Mississippi Tort Claims Act ("MTCA") also apply fully to cases involving section 15-1-36(15), would be helpful to both the bench and bar.

The circuit court also erred in concluding that the dismissal of Plaintiff's case for the second time should be made "without prejudice," thus giving the Plaintiff a potential third bite at the apple. This Court held in *Tolliver I* that dismissal without prejudice was the appropriate consequence of the Plaintiff's first violation of the notice requirements. However, the Plaintiff's second failure to comply with the sixty day notice requirements occurred despite being fully

aware that such a failure would undoubtedly require dismissal yet again. The second violation was not a minor omission based on lack of knowledge of the requirements, and as such, a sterner consequence is warranted: final dismissal *with* prejudice.

This appeal also requires consideration of two separate, yet closely related issues concerning the statute of limitations: (1) whether filing the original complaint without giving any notice whatsoever tolled the statute of limitations; and (2) whether a party who does not comply with the statutory notice requirements is entitled to claim the benefit of the sixty day extension provided in 15-1-36(15) to those who comply.

In *Tolliver I*, Plaintiff violated the statutory requirements by filing her original complaint without giving any notice whatsoever. As such the original filing was defective and insufficient to toll the two year statute of limitations provided in 15-1-36(2). If the statute was not tolled, then the limitations period expired on July 13, 2004, two years after the Plaintiff's daughter passed away on July 13, 2002.

In the instant case, Plaintiff is not entitled to receive the sixty day extension provided in section 15-1-36(15). Allowing a party who fails to comply with either the timing or content requirements for pre-suit notice to claim the benefit of the sixty day extension is not justified by the plain language of the statute. The pertinent portion of section 15-1-36(15) reads as follows: "[i]f 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 . . . ." A defective notice letter such as that sent by Plaintiff, which did not contain the information expressly required by the statute, should not be held sufficient to trigger the sixty day extension.

At the time Plaintiff filed her original complaint in *Tolliver I*, at most thirty-nine days

remained on the statute of limitations. Assuming the original complaint tolled the statute of limitations (a point disputed by Dr. Arceo and St. Dominic) when the supreme court clerk issued the mandate dismissing *Tolliver I* on March 15, 2007, Plaintiff had thirty-nine days to refile her lawsuit, which meant that the limitations period would expire on April 23, 2007. However, Plaintiff waited some fifty-nine days and did not file her new action until May 9, 2007, sixteen days after the statute of limitations expired. Unless the grossly deficient letter Plaintiff sent is held sufficient to trigger the sixty-day extension, then the statute of limitations expired before Plaintiff refiled her lawsuit.

As a last resort, the Plaintiff relies on the "savings statute," section 15-1-69 of the Mississippi Code, but this provision does not offer her any relief. By its terms the savings statute applies only to actions which are "duly commenced within the time allowed . . ." Section 15-1-36(15) states that "[n]o 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." (emphasis added). If an action cannot be "begun" until sixty days notice has been given, that action cannot be considered to be "duly commenced within the time allowed." The original complaint filed by the Plaintiff was premature and should be held a nullity, of no legal force or effect.

Additionally, a dismissal for failure to comply with the pre-suit notice requirements of 15-1-36(15) should not be treated as dismissal as "a matter of form." This Court has not yet addressed this issue, but if the savings statute is held to apply to such a dismissal, then the pre-suit notice requirements will be rendered meaningless, as this case would potentially demonstrate. The Court should take the same approach here as taken in *Owens v. Mai*, which held that the Savings Statute did not apply to a dismissal for lack of personal jurisdiction based

on failure to serve process, because the dismissal was not "for a matter of form." The Court should similarly hold that section 15-1-69 is inapplicable to the dismissal of a complaint for non-compliance with the notice requirements of section 15-1-36(15).

ARGUMENT

STANDARD OF REVIEW

This Court applies a *de novo* standard of review to all questions of law, including summary judgments and motions to dismiss. *University of Miss. Med. Ctr. v. Easterling*, 928 So. 2d 815, 817 (Miss. 2006), *cert denied* 127 S. Ct. 549; *City of Jackson v. Perry*, 764 So. 2d 373, 375 (Miss. 2000). Rule 56 of the Mississippi Rules of Civil Procedure allows a party against whom a claim is asserted to move for summary judgment at any time, and provides that:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Miss. R. Civ. P. 56(c). The burden of persuasion rests on the moving party to show that no genuine issue of material fact exists, although the benefit of reasonable doubt is given to the non-moving party. *See, e.g., Citifinancial Retail Servs. v. Hooks*, 972 So. 2d 775, 779 (Miss. 2006). The court must view the facts in the light most favorable to non-moving party. *See, e.g., One South, Inc. v. Hollowell*, 963 So. 2d 1156, 1160 (Miss. 2007). However, "the non-moving party cannot just sit back and remain silent, but . . . must rebut by providing significant, probative evidence showing that there are indeed genuine issues of material fact." *Murphree v. Federal Ins. Co.*, 707 So. 2d 523, 529 (Miss. 1997). Furthermore, "the presence of fact issues does not per se entitle a person to avoid summary judgment. The court must be convinced that the factual issue is a material one, one that matters in an outcome determinative sense." *Massey v. Tingle*, 867 So. 2d 235, 238 (Miss. 2004) (quoting *Hudson v. Courtesy Motors, Inc.*, 794 So. 2d 999,

1002 (Miss. 2001)).

A Rule 12(b)(6) motion tests the legal sufficiency of the complaint. For a motion to dismiss for failure to state a claim to be granted, "there must appear to a certainty that the plaintiff is entitled to no relief under any set of facts that could be proved in support of the claim." *Gulledge v. Shaw*, 880 So. 2d 288, 292 (Miss. 2004). When a trial judge considers matters outside the pleadings, the motion is treated as a Rule 56 motion for summary judgment. *Gulledge*, 880 So. 2d at 292.

THE NOTICE LETTER DID NOT COMPLY WITH THE CONTENT REQUIREMENTS OF SECTION 15-1-36(15)

That Dismissal is Required is Not Genuinely In Dispute

The single most significant aspect of the circuit court's ruling is that regardless of the standard applied, the letter sent by the Plaintiff simply did not comply with the content requirements of 15-1-36(15), either strictly or substantially, and this lawsuit therefore must be dismissed for a second time. This Court has repeatedly held that a plaintiff's failure to comply with the notice provisions of section 15-1-36(15) requires dismissal. *See, e.g.*, *Pitalo v. GPCH-GP, Inc.*, 933 So. 2d 927, 929 (Miss. 2006) (holding failure to send pre-suit notice is an "inexcusable deviation from the Legislature's requirements" and dismissal is warranted); *Nelson v. Baptist Mem'l Hosp.-N. Miss., Inc.*, 972 So. 2d 667, 672-73 (Miss. Ct. App. 2007) (holding that notice sent after the complaint was filed failed to comply with § 15-1-36(15) and dismissal was proper remedy). Therefore, whether dismissal is required is not genuinely at issue. The real issue is whether the dismissal should have been made with prejudice. In that regard, the details of Plaintiff's second failure to comply with section 15-1-36(15) are probative and show how little effort has been made to comply with the minimal statutory requirements. In addition, the Court should take the opportunity to correct the circuit court's erroneous application of the

substantial compliance standard to the content of the notice.

The Circuit Court Erred in Applying a "Substantial Compliance" Standard to the Content of the Notice

Section 15-1-36(15) contains requirements for both the timing and content of the pre-suit notice. Although no particular form is required, the statute expressly states that the notice "*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." *Id.* (emphasis added). Although the circuit court reached the right result, dismissal, the court erred by applying the "substantial compliance" standard to determine whether the content conformed to the statutory requirements. Because Plaintiff left out an entire category of information required by 15-1-36(15), namely "the type of loss sustained, including with specificity the nature of the injuries suffered," the issue was simply compliance or non-compliance. *See, e.g., South Central Reg'l Med. Ctr. v. Guffy*, 930 So. 2d 1252, 1258 (Miss. 2006) ("the failure to provide *any* of the . . . statutorily required categories of information falls short of the statutory requirement and amounts to non-compliance"); *see also Parker v. Harrison County Bd. of Super.*, No. 2007-CA-532-SCT, 2008 WL 2927587 at *5 (Miss. July 31, 2008) ("this Court does not even reach the issue of whether a plaintiff substantially complied with the statute if all seven categories of information are not contained in the notice letter").[3] To be sure, the meager information concerning the basis of claim stated in Plaintiff's notice letter would certainly raise the question of whether it was "substantial" enough, but since at least one of the statutorily required categories of information was omitted, that issue is moot.

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[3] Although these are both MTCA cases, the Court has repeatedly applied the same standards of construction and application to the statutes included in the Medical Malpractice Tort Reform Act of 2002, including section 15-1-36(15), and has given no reason to doubt that this practice of applying these analogous precedents will continue.

Plaintiff's Multiple Failures to Comply With Statutory Notice Requirements Warrant Dismissal With Prejudice

The content requirements for a notice of claim contained in section 15-1-36(15) are hardly onerous, yet for the second time Plaintiff failed to comply with even those very minimal requirements. The letters were clearly non-compliant because they did not contain any information whatsoever regarding the type of loss sustained, much less a description of the specific nature of the injuries claimed, all required by § 15-1-36(15). (R. 101)

Since Plaintiff once again failed to comply with § 15-1-36(15), her claim should be dismissed with prejudice. After determining that her first lawsuit had to be dismissed for failure to give any pre-suit notice whatsoever, this Court gave Plaintiff a second chance to properly (re)file her medical malpractice action in accordance with § 15-1-36(15). However, Plaintiff again failed to comply with the minimal pre-suit notice requirements, and at most made a half-hearted attempt to correct her mistakes. Parties should not be permitted to blithely ignore statutory notice requirements yet be allowed to repeatedly refile the same lawsuit over and over and over. Plaintiff's repeated failures to comply with section 15-1-36(15) warrant dismissal *with* prejudice.

THIS ACTION SHOULD BE DISMISSED AS TIME-BARRED BECAUSE THE STATUTE OF LIMITATIONS HAS EXPIRED

Even if the Court concludes that repeated failures to comply with statutory notice requirements do not warrant dismissal with prejudice, the statute of limitations provides another basis for final dismissal of this action, with prejudice. The statute of limitations analysis requires consideration of two separate but related issues: (1) whether filing the original complaint without giving any notice whatsoever tolled the statute of limitations and (2) whether a party who does not comply with the statutory notice requirements is entitled to claim the

benefit of the sixty-day extension provided in 15-1-36(15).

The Original Complaint Failed to Toll the Statute of Limitations

As a general rule, filing a complaint tolls the statute of limitations. *See, e.g., Owens v. Mai*, 891 So. 2d 220, 223 (Miss. 2005). However, Plaintiff's failure to comply with § 15-1-36(15) presents the Court with an exigent circumstance. If the original complaint filed in *Tolliver I*, absent any pre-suit notice, tolled the two year statute of limitations, then the mandatory requirements of § 15-1-36(15) would be rendered largely meaningless. The legislature specifically wrote the statute to say "No action" could be begun "unless" the Plaintiff gave "prior" notice. The Court should give effect to the statutory language by holding that merely filing a complaint, without proper and timely notice, is insufficient to toll the statute of limitations.

Because § 15-1-36(15) bars beginning a medical malpractice suit "unless the defendant has been given at least sixty (60) days' prior written notice," Plaintiff never duly commenced her original lawsuit in *Tolliver I*, and as a result, never tolled the statute of limitations. Plaintiff's refusal to follow the express mandate of § 15-1-36(15) does not justify or warrant tolling the statute of limitations. For § 15-1-36(15) to have any practical meaning and effect, a complaint filed in derogation of § 15-1-36(15) should be held powerless to toll the statute of limitations.

Plaintiff Failed To Obtain The Benefit of a Sixty-Day Extension

Even assuming *arguendo* that the Plaintiff's original complaint, filed June 4, 2004, tolled the statute of limitations, Plaintiff is still not out of the woods. Section 15-1-36(15) provides "[i]f 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." Miss. Code Ann. § 15-1-36(15); *Proli v. Hathorn*, 928 So. 2d 169,

174 (Miss. 2006) (holding statute of limitations period is extended, not tolled, for sixty days pursuant to § 15-1-36(15)); *see also* Miss. Code Ann. § 15-1-36(2) (providing two year statute of limitations for medical malpractice claims). Section 15-1-36(15) prohibits a plaintiff from filing suit during the sixty-day notice period, and that sixty-day period cannot be computed as part of the statute of limitations. *Scaggs v. GPCH-GP,* Inc., 931 So. 2d 1274, 1276-77 (Miss. 2006); *Pope v. Brock*, 912 So. 2d 935, 938 (Miss. 2005). Furthermore, if the requisite notice fails to comply with the mandatory provisions of Miss. Code Ann. § 15-1-36(15), then the statute of limitations should not be extended for sixty (60) days. *See* Miss. Code Ann. § 15-1-36(15); *cf. Scaggs v. GPCH-GP,* Inc., 931 So. 2d 1274, 1276-77 (Miss. 2006) (holding that adequate notice filed before statute of limitations has run will extend the statute of limitations for sixty days).

This Court has instructed that all courts of this state have a "duty to apply a strict standard of statutory construction, applying the plain meaning of unambiguous statutes." *Caves v. Yarbrough*, 2006-CA-01857-SCT, ¶ 22 (Miss. Nov. 1, 2007) (holding that the "discovery rule" did not apply to the Mississippi Tort Claims Act) (citing *Walker v. Whitfield Nursing Ctr., Inc.*, 931 So. 2d 583, 590 (Miss. 2006); *Arceo v. Tolliver*, 949 So. 2d 691, 694 (Miss. 2006); *Pitalo v. GPCH-GP, Inc.*, 933 So. 2d 927, 929 (Miss. 2006); *University of Miss. Med. Ctr. v. Easterling*, 928 So. 2d 815, 820 (Miss. 2006)). Furthermore, "[w]hen drafting Miss. Code Ann. Section 15-1-36(15), the Legislature did not incorporate any given exceptions to this rule which would alleviate the prerequisite condition of prior written notice." *Pitalo v. GPCH-GP, Inc.*, 933 So. 2d 927, 929 (Miss. 2006) (dismissing complaint for failure to send pre-suit notice pursuant to § 15-1-36(15)).

Nothing in the text of section 15-1-36(15) justifies giving a plaintiff the benefit of the sixty-day extension when that plaintiff failed to timely give adequate pre-suit notice which

complied with the statutory requirements. Under the plain meaning of the statute, a plaintiff either receives or does not receive a sixty-day extension of the relevant limitations period. In order to be entitled to the extension, a plaintiff must give adequate pre-suit notice in accordance with the requirements of § 15-1-36(15). Since the purported new notice sent by Plaintiff to Dr. Arceo on or about February 28, 2007 was deficient, Plaintiff should not be allowed to claim the benefit of the sixty day tolling provision contained in 15-1-36(15).

Plaintiff's failure to trigger the sixty day extension is highly significant because limited time remained on the statute of limitations after she filed her original complaint in *Tolliver I.* Plaintiff's daughter, Ms. Tommie Tolliver, passed away on July 13, 2002. The statute of limitations began to run on July 13, 2002, and, unless tolled, expired two years later on July 13, 2004. When Plaintiff filed her original complaint on June 4, 2004, at most only thirty-nine (39) days remained on the two year statute of limitations (June 4, 2004 to July 13, 2004). When this Court dismissed Plaintiff's original action and the clerk issued the mandate on March 15, 2007, the statute of limitations once again began to run, and, absent new tolling or extension, expired thirty-nine days later on April 23, 2007. The Plaintiff re-filed her lawsuit on May 9, 2007, which was clearly outside the time remaining on the statute of limitations. Therefore, this action is time-barred.

SECTION 15-1-69 DOES NOT SAVE PLAINTIFF'S CLAIMS

Pursuant to Miss. Code Ann. § 15-1-69 (the "savings statute"), "[i]f any action, duly commenced within the time allowed, the writ shall be abated, or the action otherwise avoided or defeated . . . or for any matter of form . . . the plaintiff may commence a new action for the same cause, at any time within one year." Miss. Code Ann. § 15-1-69. The statutory thresholds that Plaintiff must overcome under the savings statute are: (1) the original action must have been

duly commenced; *and* (2) the dismissal must have been for a matter of form. In addition to the statutory requirements, the courts have supplied a requirement that a plaintiff must have commenced the action in "good faith." *Hawkins v. Scottish Union & Nat'l Ins. Co.*, 69 So. 710, 712 (Miss. 1915); *Wertz v. Ingalls Shipbuilding, Inc.*, 790 So. 2d 841, 844 (Miss. Ct. App. 2000).

Plaintiff Failed to "Duly Commence" the Original Action

"Duly commenced" has been defined as "a complaint *properly* filed and not on an appeal." *Bowling v. Madison County Bd. of Supervisors*, 724 So. 2d 431, 441 (Miss. Ct. App. 1998) (emphasis added). Plaintiff's original complaint was not properly filed, since she was prohibited from filing a medical malpractice action until she gave Defendants pre-suit notice and waited sixty days. *See Pope v. Brock*, 912 So. 2d 935, 938 (Miss. 2005) (holding plaintiff was "prohibited by law" from filing suit without waiting sixty days).

The plain language of § 15-1-36(15) states that no action may be "begun" unless notice is given. Common sense says that a complaint filed without giving the required notice could not possibly be "duly commenced." This interpretation is supported by the fact that in the text of section 15-1-36(15) the terms "begun," begin," and "commencement" are all used to refer to the act of initiating a lawsuit:

> 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 . . . 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 . . . .

Miss. Code Ann. 15-1-36(15) (emphasis added). For all practical purposes (but with some grammatical exceptions), the terms "begin," "begun" and "commence" could be used interchangeably in the text. Therefore, in this context, "duly commenced" must mean more than simply filing a complaint without any regard for the statutory prerequisites for filing suit.

The circuit court reliance on the *Easterling* case in its savings statute analysis is confusing and appears misplaced. (*See* Tr. 22-24) With respect, it is unclear that *Easterling* should affect the savings statute analysis one way or the other. However, if the retroactivity of *Easterling* has any relevance, it actually supports the conclusion that Plaintiff's original lawsuit was not duly commenced. This is so because *Easterling* applies retroactively to the original lawsuit.[4] Relying on the same reasoning as the circuit court, but applying the post-*Easterling* strict compliance standard, leads to the opposite conclusion: that the original lawsuit was not "duly filed" or "duly commenced."

Dismissal For Failure to Comply With Section 15-1-36(15) Should Not Be Treated As Dismissal For A Matter of Form

In addition, for the Savings Statute to apply, the original action must have been dismissed "as a matter of form." This Court has not yet passed on the issue of whether a dismissal for

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[4] The circuit court's conclusion that pre-*Easterling* law applied at the time the original complaint was filed is simply incorrect. As a rule, this Court's decisions "are presumed to have retroactive effect unless otherwise specified." *Mississippi Transp. Comm'n v. Ronald Adams Contractor, Inc.*, 753 So. 2d 1077, 1093 (Miss. 2000). When a decision is to have only a prospective effect, the Court indicates this result within its ruling. *Id.* (citations omitted). The retroactivity of *Easterling* and its progeny have been confirmed by recent decisions of this Court as well as decisions of the Mississippi Court of Appeals. In *Parker v. Harrison County Bd. of Super.*, No. 2007-CA-532-SCT, 2008 WL 2927587 (Miss. July 31, 2008), this Court held that the notice requirements of the MTCA apply retroactively to litigation that was ongoing: "[w]hile the plaintiffs here argue that since *Guffy* was not decided until after they filed suit, and as such should not be applied retroactively today, the plaintiffs are mistaken. Because this Court handed down *Guffy* while this litigation was ongoing between the parties, we find *Guffy* controlling." *Parker*, 2008 WL 2927587 at *5.

The Mississippi Court of Appeals applied this Court's precedents to reach similar conclusions in a pair of recent cases, *Stuart v. University of Miss. Med. Ctr.*, No. 2007-CA-864-COA, 2008 WL 2498251 (Miss. Ct. App. Jun. 24, 2008) and *Brown v. Southwest Miss. Reg'l Med. Ctr.*, No. 2006-CA-1947-COA, 2008 WL 222719 (Miss. Ct. App. Jan. 29, 2008). In each of these cases the court of appeals held that *Easterling* applied retroactively.

failure to comply with the notice requirements of 15-1-36(15) should be considered dismissal as a matter of form. Prior decisions have indicated that a dismissal for lack of subject matter jurisdiction is a matter of form. *See, e.g., Hawkins v. Scottish Union & Nat. Ins. Co.*, 110 Miss. 23, 69 So. 710 (Miss. 1915). Dismissal for lack of venue or improper joinder are also matters of form. *Canadian Nat'l/ Ill. Cent. R.R. Co. v. Smith*, 926 So. 2d 839, 845 (Miss. 2006).

While no reported Mississippi case has considered whether a dismissal pursuant to § 15-1-36(15) was dismissal for a "matter of form," *Owens v. Mai*, 891 So. 2d 220 (Miss. 2005) is an analogous case. In *Owens*, the Mississippi Supreme Court held that dismissal for lack of personal jurisdiction/failure to serve process was not dismissal for a matter of form because "[t]o allow otherwise would seriously undermine the legal effect of Rule 4 as well as the legislative intent of the savings statute . . . . This would essentially allow plaintiffs who fail to serve process under Rule 4 to utilize the savings statute to preserve their claim(s) and/or extend the life of their claim(s)." *Id.* at 222. Likewise, the Court should not allow a plaintiff who repeatedly fails to comply with statutory prerequisites before filing suit to use the savings statute to extend the statute of limitations beyond two years. As in *Owens*, if Plaintiff is allowed to proceed with her claims, then the purpose and intended effect of § 15-1-36(15) would be undermined. To prevent the possibility that medical malpractice suits could be perpetually dismissed and re-filed, the dismissal of a lawsuit for failure to comply with 15-1-36(15) should not be treated as dismissal for a matter of form.

"Good Faith"

Even assuming *arguendo* that Plaintiff duly commenced her lawsuit in the technical sense, she nonetheless failed to begin the lawsuit in good faith. In order to benefit from the Savings Statute, a plaintiff must have commenced the original action "in good faith." *Hawkins*

v. Scottish Union & Nat'l Ins. Co., 69 So. 710, 712 (Miss. 1915); *see also Wertz v. Ingalls Shipbuilding, Inc.*, 790 So. 2d 841, 844 (Miss. Ct. App. 2000) (to come within savings statute, plaintiff must have exercised good faith in filing first action in wrong court). In this context, a lack of good faith would be "the bringing of a suit [that] would show such gross negligence and indifference as to cut the party off from the benefit of the savings statute." *Hawkins*, 69 So. at 712 (*quoting Smith v. McNeal*, 109 U.S. 426 (1883)). Plaintiff's failure to send any form of notice prior to filing her original complaint on June 4, 2004 exhibits "gross negligence and indifference" to the statutory prerequisites for bringing suit. It is not as if Plaintiff tried to give notice before filing the original lawsuit but failed in some minor particular. Plaintiff made no attempt whatsoever to comply with the statutory notice requirements of section 15-1-36(15) before filing the original lawsuit.

Plaintiff's omission of an entire category of required information from her notice letter further demonstrates "gross negligence and indifference" to the requirements of section 15-1-36(15). Plaintiff's lack of good faith, demonstrated by filing her original complaint without regard for the notice requirements, justifies denying her any benefit from the Saving Statute. The Savings Statute should not be treated as "Get Out of Jail Free Card" allowing perpetual refiling of medical malpractice lawsuits by parties who repeatedly fail to comply with statutory prerequisites.

CONCLUSION

Because of Plaintiff's repeated failures to comply with the notice requirements of section 15-1-36(15), the running of the statute of limitation, and the inapplicability of the Savings Statute, section 15-1-69, this Court should reverse and render, dismissing this action *with prejudice.*

WHEREFORE, PREMISES CONSIDERED, Dr. Salvador Arceo, M.D., requests that

the Court reverse the ruling of the Circuit Court of Hinds County and render a decision in favor of Dr. Arceo and St. Dominic, with prejudice.

Respectfully submitted, this the 27th day of August, 2008.

SALVADOR ARCEO, M.D.

BY: _____

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CERTIFICATE OF SERVICE

I, PAUL E. BARNES, do hereby certify that I have this day caused to be served via U.S. Mail a true and correct copy of the above and foregoing document to:

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THIS the 21st day of August, 2008.

PAUL E. BARNES

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ADDENDUM

ment hearing occurred outside the limitation period, the violation was closely related to the violations occurring within the limitation period and recovery was permitted on the theory that all violations were part of one continuing act. McCorkle v. McCorkle, 811 So. 2d 258 (Miss. Ct. App. 2001).

RESEARCH REFERENCES

ALR. Necessity and sufficiency of allegations in complaint for malicious prosecution or tort action analogous thereto that defendant or defendants acted without probable cause. 14 A.L.R.2d 264.

When cause of action accrues, for purpose of starting the running of the statute of limitations against an action for malicious prosecution. 87 A.L.R.2d 1047.

Scope of limitation statutes specifically governing assault and battery. 90 A.L.R.2d 1230.

What constitutes "publication" of libel in order to start running of period of limitations. 42 A.L.R.3d 807.

When statute of limitations commences to run against claim for contribution or indemnity based on tort. 57 A.L.R.3d 867.

What statute of limitations applies to action for contribution against joint tortfeasor. 57 A.L.R.3d 927.

When statute of limitations commences to run against malpractice action based on leaving foreign substance inpatients body. 70 A.L.R.3d 7.

Effect of injured employee's proceeding for workmen's compensation benefits on running of statute of limitations governing action for personal injury arising from same incident. 71 A.L.R.3d 849.

Tort claim against which period of statute of limitations has run as subject to setoff, counterclaim, cross bill, or cross action in tort action arising out of same accident or incident. 72 A.L.R.3d 1065.

Nature of termination of civil action required to satisfy element of favorable termination to support action for malicious prosecution. 30 A.L.R.4th 572.

Limitation of actions: time of discovery of defamation as determining accrual of action. 35 A.L.R.4th 1002.

Defamation action as surviving plaintiff's death, under statute not specifically covering action. 42 A.L.R.4th 272.

Tolling of statute of limitations, on account of minority of injured child, as applicable to parent's or guardian's right of action arising out of same injury. 49 A.L.R.4th 216.

Medical malpractice: statute of limitations in wrongful death action based on medical malpractice. 70 A.L.R.4th 535.

Application of "discovery rule" to postpone running limitations against action for damages from assult. 88 A.L.R.4th 1063.

Libel and slander: Charging one with breach or nonperformance of contract. 45 A.L.R.5th 739.

Actionability of malicious prosecution under 42 USCS § 1983. 79 A.L.R. Fed. 896.

Am Jur. 32 Am. Jur. 2d, False Imprisonment § 84.

CJS. 54 C.J.S., Limitations of Actions §§ 68-70.

§ 15-1-36. Limitations applicable to malpractice action arising from medical, surgical or other professional services.

(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.

(2) For any claim accruing on or after July 1, 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, and, except as described in paragraphs (a) and (b) of this subsection, in no event more than seven (7) years after the alleged act, omission or neglect occurred:

(a) In the event a foreign object introduced during a surgical or medical procedure has been left in a patient's body, the cause of action shall be deemed to have first accrued at, and not before, the time at which the foreign object is, or with reasonable diligence should have been, first known or discovered to be in the patient's body.

(b) In the event the cause of action shall have been fraudulently concealed from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence should have been, first known or discovered.

(3) Except as otherwise provided in subsection (4) of this section, if at the time at which the cause of action shall or with reasonable diligence might have been first known or discovered, the person to whom such claim has accrued shall be six (6) years of age or younger, then such minor or the person claiming through such minor may, notwithstanding that the period of time limited pursuant to subsections (1) and (2) of this section shall have expired, commence action on such claim at any time within two (2) years next after the time at which the minor shall have reached his sixth birthday, or shall have died, whichever shall have first occurred.

(4) If at the time at which the cause of action shall or with reasonable diligence might have been first known or discovered, the person to whom such claim has accrued shall be a minor without a parent or legal guardian, then such minor or the person claiming through such minor may, notwithstanding that the period of time limited pursuant to subsections (1) and (2) of this section shall have expired, commence action on such claim at any time within two (2) years next after the time at which the minor shall have a parent or legal guardian or shall have died, whichever shall have first occurred; provided, however, that in no event shall the period of limitation begin to run prior to such minor's sixth birthday unless such minor shall have died.

(5) If at the time at which the cause of action shall or with reasonable diligence might have been first known or discovered, the person to whom such claim has accrued shall be under the disability of unsoundness of mind, then such person or the person claiming through him may, notwithstanding that the period of time hereinbefore limited shall have expired, commence action on

such claim at any time within two (2) years next after the time at which the person to whom the right shall have first accrued shall have ceased to be under the disability, or shall have died, whichever shall have first occurred.

(6) When any person who shall be under the disabilities mentioned in subsections (3), (4) and (5) of this section at the time at which his right shall have first accrued, shall depart this life without having ceased to be under such disability, no time shall be allowed by reason of the disability of such person to commence action on the claim of such person beyond the period prescribed under Section 15-1-55, Mississippi Code of 1972.

(7) For the purposes of subsection (3) of this section, and only for the purposes of such subsection, the disability of infancy or minority shall be removed from and after a person has reached his sixth birthday.

(8) For the purposes of subsection (4) of this section, and only for the purposes of such subsection, the disability of infancy or minority shall be removed from and after a person has reached his sixth birthday or from and after such person shall have a parent or legal guardian, whichever occurs later, unless such disability is otherwise removed by law.

(9) The limitation established by this section as to a licensed physician, osteopath, dentist, hospital or nurse shall apply only to actions the cause of which accrued on or after July 1, 1976.

(10) The limitation established by this section as to pharmacists shall apply only to actions the cause of which accrued on or after July 1, 1978.

(11) The limitation established by this section as to podiatrists shall apply only to actions the cause of which accrued on or after July 1, 1979.

(12) The limitation established by this section as to optometrists and chiropractors shall apply only to actions the cause of which accrued on or after July 1, 1983.

(13) The limitation established by this section as to actions commenced on behalf of minors shall apply only to actions the cause of which accrued on or after July 1, 1989.

(14) The limitation established by this section as to institutions for the aged or infirm shall apply only to actions the cause of which occurred on or after January 1, 2003.

(15) 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.

SOURCES: Laws, 1976, ch. 473; Laws, 1978, ch. 464, § 1; Laws, 1979, ch. 347; Laws, 1983, ch. 482, § 1; Laws, 1989, ch. 311, § 2; Laws, 1998, ch. 573, § 1; Laws, 2002, 3rd Ex Sess, ch. 2, § 5, eff from and after Jan. 1, 2003.

Editor's Note — Laws, 1989, ch. 311,§ 7, effective from and after July 1, 1989, provides as follows:

"SECTION 7. The provisions of this act shall apply only to causes of action accruing on or after July 1, 1989."

Amendment Notes — The 2002 amendment, 3rd Ex Sess, inserted "institution for the aged or infirm" in (1) and (2); and added (14) and (15).

JUDICIAL DECISIONS

1. In general.
2. Discovery rule.
3. Accrual.
4. Applicability.
5. Particular cases.

1. In general.

A failure to understand the degree of permanency of an injury does not cause the statute of limitation to toll. Barry v. Thaggard, 785 So. 2d 1107 (Miss. Ct. App. 2001).

The six-year statute of limitations contained in § 15-1-49 does not apply to an action for medical malpractice; instead, the two-year statute of limitations contained in this section applies to such an action. Goleman v. Orgler, 771 So. 2d 374 (Miss. Ct. App. 2000).

Interlocutory appeal from the circuit court would be granted to determine whether the 6 year statute of limitations provided by Mississippi Code § 15-1-49, or the medical malpractice statute of limitations found in Mississippi Code § 15-1-36, applies to a medical malpractice action in which plaintiff alleged injury resulting from defendants' negligence in leaving a surgical needle in his heart during surgery performed on June 28, 1974, but of which plaintiff was unaware until June 21, 1982. Kilgore v. Barnes, 490 So. 2d 895 (Miss. 1986), appeal decided, 508 So. 2d 1042 (Miss. 1987).

In a medical malpractice action, physician's motion for summary judgment should be denied where the evidence in support of the motion failed to show that there were no factual issues as to whether the patient discovered within the 2 year limitations period that he had been injured by physician's failure to resect tumor. Smith v. Sanders, 485 So. 2d 1051 (Miss. 1986).

2. Discovery rule.

Although the plaintiff did not file suit until more than two years after her husband's death, the statute of limitations was tolled until she was able to secure her husband's medical records, since she exercised reasonable diligence in getting those records and could not reasonably have been expected to know of the defendants's tortious conduct without the records. Sarris v. Smith, 782 So. 2d 721 (Miss. 2001).

The discovery rule applies in medical malpractice cases involving latent injuries and diseases. Williams v. Kilgore, 618 So. 2d 51 (Miss. 1992).

A cause of action for medical malpractice involving negligence which occurred in 1964 but was not discovered until 1985 was not time-barred by either § 15-1-36 or § 15-1-49 where the complaint was filed within 2 years of the discovery of the injury. Williams v. Kilgore, 618 So. 2d 51 (Miss. 1992).

The 2-year statute of limitation does not begin to run until the patient discovers or should discover that he has a cause of action. Smith v. Sanders, 485 So. 2d 1051 (Miss. 1986).

Where a patient is aware of his injury 2 years immediately prior to filing his claim, but does not discover and could not have discovered with reasonable diligence the act or omission which caused the injury, an action does not accrue until the latter discovery is made. Smith v. Sanders, 485 So. 2d 1051 (Miss. 1986).

In a medical malpractice action against a dentist for alleged nerve damage to his

In suit by purchaser for false representations as to acreage of tract sold, evidence failed to establish that vendor fraudulently concealed false representations after sale, and hence suit begun more than seven years after sale was barred. Dunn v. Dent, 169 Miss. 574, 153 So. 798 (1934).

Evidence held to show that factor charging principal brokerage charges on lumber sold, but not showing them on statements rendered, except in one instance, when it was explained as "demurrage," which means delay, concealed cause of action for overcharges until shortly before bill was filed. D.S. Pate Lumber Co. v. Weathers, 167 Miss. 228, 146 So. 433 (1933).

8. Pleading.

Insurance purchasers sufficiently alleged in their complaint that an insurance agent engaged in affirmative acts of concealment that prevented the purchasers from discovering their cause of action until the limitations had expired; however, the purchasers alleged specific facts that, if proven, made it reasonably possible for a state court to toll the statute of limitations period. Reed v. Am. Gen. Life & Accident Ins. Co., 192 F. Supp. 2d 641 (N.D. Miss. 2002).

Party averring concealed fraud must prove facts justifying his claim. Gordon v. Anderson, 90 Miss. 677, 44 So. 67 (1907).

RESEARCH REFERENCES

ALR. Effect of fraud to toll the period for bringing action prescribed in statute creating the right of action. 15 A.L.R.2d 500.

When statute of limitations or laches commences to run against action to set aside conveyance or transfer in fraud of creditors. 100 A.L.R.2d 1094.

Fraud, misrepresentation, or deception as estopping reliance on statute of limitations. 43 A.L.R.3d 429.

Fiduciary or confidential relationship as affecting estoppel to plead statute of limitations. 45 A.L.R.3d 630.

When statute of limitations commences to run on action under state deceptive trade practice or consumer protection acts. 18 A.L.R.4th 1340.

Fraud as extending statutory limitations period for contesting will or its probate. 48 A.L.R.4th 1094.

Fraudulent concealment of cause of action for wrongful death as affecting period of limitations. 88 A.L.R.4th 851.

Modern status of the application of "discovery rule" to postpone running of limitations against actions relating to breach of building and construction contracts. 33 A.L.R.5th 1.

Causes of action governed by limitations period in UCC § 2-725. 49 A.L.R.5th 1.

Attorney Malpractice — Tolling or Other Exceptions to Running of Statute of Limitations. 87 A.L.R.5th 473.

Am Jur. 51 Am. Jur. 2d, Limitation of Actions §§ 179 et seq.

CJS. 54 C.J.S., Limitations of Actions §§ 206, 207.

§ 15-1-69. Commencement of new action subsequent to abatement or defeat of original action.

If in any action, duly commenced within the time allowed, the writ shall be abated, or the action otherwise avoided or defeated, by the death of any party thereto, or for any matter of form, or if, after verdict for the plaintiff, the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed on appeal, the plaintiff may commence a new action for the same cause, at any time within one year after the abatement or other determination of the original suit, or after reversal of the judgment therein, and his executor or adminis-

trator may, in case of the plaintiff's death, commence such new action, within the said one year.

SOURCES: Codes, Hutchinson's 1848, ch. 57, art. 1 (16); 1857, ch. 57, art. 19; 1871, § 2163; 1880, § 2686; 1892, § 2756; Laws, 1906, § 3116; Hemingway's 1917, § 2480; Laws, 1930, § 2314; Laws, 1942, § 744.

Cross References — Other actions having one year statute of limitations, see §§ 15-1-33, 15-1-35.

JUDICIAL DECISIONS

1. In general.
2. Defeat of action in general.
3. —Matter of form.
4. —Reversal of judgment.

1. In general.

This section did not apply to an action originally filed in federal court since the plaintiff did not erroneously file the action in good faith where he had moved to another state in an attempt to establish diversity jurisdiction and without a good faith intent to establish residence. Wertz v. Ingalls Shipbuilding, Inc., 790 So. 2d 841 (Miss. Ct. App. 2000).

This section does not extend to suits filed within the permitted one-year grace period after the same cause of action has been dismissed in a court of another state. S & H Grocery, Inc. v. Gilbert Constr. Co., 733 So. 2d 851 (Miss. Ct. App. 1998).

The "savings" provision of the statute does not apply to suits within the permitted one-year grace period after the same cause of action has been dismissed in a court of another state. S & H Grocery, Inc. v. Gilbert Constr. Co., 724 So. 2d 965 (Ct. App. 1998).

On account of all expired time in particular case, plaintiffs could not avail selves of protection afforded by § 15-1-69. Brown v. Dow Chem. Co., 777 F. Supp. 504 (S.D. Miss. 1989).

This section is applicable to orders dismissing suits for lack of jurisdiction, and thus operated to save a personal injury action which was dismissed for lack of jurisdiction and refiled a few days beyond six years after plaintiff had reached majority, but within one year from the date of dismissal. Ryan v. Wardlaw, 382 So. 2d 1078 (Miss. 1980).

This section [Code 1942, § 744] does not apply where the former action was instituted in another state. C & L Rural Elec. Coop. Corp. v. Kincade, 175 F. Supp. 223 (N.D. Miss. 1959), aff'd, 276 F.2d 929 (5th Cir. 1960).

This section [Code 1942, § 744] does not extend time prescribed for institution of suit under Louisiana compensation laws. Dunn Constr. Co. v. Bourne, 172 Miss. 620, 159 So. 841 (1935).

Good faith in the institution of the action dismissed is an element in determining the right to invoke this section [Code 1942, § 744]. Hawkins v. Scottish Union & Nat'l Ins. Co., 110 Miss. 23, 69 So. 710 (1915).

The section [Code 1942, § 744] applies to suits in equity as well as law. Weathersly v. Weathersly, 31 Miss. 662 (1856).

The right given is to the parties to the first suit, and not to different parties. Ross, Strong & Co. v. Sims, 27 Miss. 359 (1854).

The section [Code 1942, § 744] does not abridge the time of limitation, but enlarges it. A second suit may be brought after the expiration of the year if the general statutes do not bar. Lang v. Fatheree, 15 Miss. (7 S. & M.) 404 (1846).

2. Defeat of action in general.

Code 1942, § 744 allowing one to bring an action within one year after a previous action has been defeated for reasons other than upon the merits did not apply to that portion of the plaintiff's suit which was founded on a cause of action created by Code 1942, § 1075, and therefore that portion of the suit which was founded on § 1075, and brought more than three years after the alleged destruction of trees, although within one year after defeat of the action for a reason other than