IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2008-CA-00382

VERA HARRIS — APPELLANT

VS.

VONDA G. REEVES DARBY, ET AL. — APPELLEES

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

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# REPLY BRIEF FOR APPELLANT

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ORAL ARGUMENT REQUESTED

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## I. STATEMENT REGARDING ORAL ARGUMENT

Appellants request oral argument on the issues addressed in this appeal. This is the first known occasion for this Court to consider the precise issues raised and if the Defendants' position is upheld, much confusion will be created in the law which would be detrimental to the administration of justice in this State. To the extent this Court has additional questions which may not have been clearly addressed in the briefs, Appellants welcome the opportunity to explain why Defendants' position is so overwhelmingly contradicted by Mississippi law and why the lower court should be reversed.

## II. REPLY

### A. Plaintiff's motion to substitute parties was timely filed and the lower court's decision to the contrary is erroneous and should be reversed.

Plaintiff's motion to substitute parties was timely filed because Defendants never suggested the death of Lula Green upon the record. In Mississippi, the revival of an action is governed by Rule 25 of the Mississippi Rules of Civil Procedure. According to Rule 25, there is a 90-day time limitation for substituting parties after the death of a party, which is triggered by the filing of a suggestion of death. In this case, Defendants never suggested the death of Lula Green upon the record so the 90-day time period was never relevant. Accordingly, Plaintiff's motion to substitute was timely filed and the lower court's decision to the contrary is erroneous and should be reversed.

Further, the Saving Statute has absolutely nothing to do with the substitution of parties after the death of a party in an action which survives death. The Saving Statute is a remedial statute which allows a plaintiff to commence a second action after her first action has been dismissed or terminated. While at common law the death of a party would terminate the action, the passage of the Mississippi Survival Statutes over 150 years ago ended the common law era. Now, when an action survives, the pending action is not terminated by virtue of death – it survives. The parties must simply substitute the estate as the proper party and move forward as if death had not occurred. That is exactly what Plaintiff did and exactly why the lower court should be reversed.

#### 1. Revival of an action is governed by Rule 25 of the Mississippi Rules of Civil Procedure and not the Saving Statute.

Defendants are of the mistaken belief that the Saving Statute governs the revival of claims – it does not. The Mississippi statute which governed the revival of claims was

formerly codified in Miss. Code Ann. §11-7-25 and is now codified as Rule 25 of the Mississippi Rules of Civil Procedure.[1] Under Rule 25, the time limitation for substitution of parties is triggered by the filing of a suggestion of death. *Miss. R. Civ. P. 25.* That is the law in Mississippi. It is undisputed that Defendants never suggested the death of Lula P. Green upon the record. (P.R.E. tab 3, R. at 176; tab 5, R. at 75). It is well-settled in Mississippi that when "[a] motion for substitution of the estate [is] filed before any formal suggestion of death [is] filed . . . the ninety day calendar [is] never relevant." *Estate of Baxter v. Shaw Associates, Inc.*, 797 So.2d 396 (Miss. App. 2001).

**2. Defendants have misinterpreted and misapplied the term "abatement" as it relates to a claim that survives.**

The Saving Statute does not provide "when" an action abates by death, it simply provides that "if" the action abates, a new action may be commenced. *Miss. Code Ann. §15-1-69.* However, the word "abate," as used in the Saving Statute, is not solely connected to the "death of a party." *Id.* The word abate is also used in connection with "any matter of form." *Id.* While the Saving Statute allows a Plaintiff to commence a new action "if" her action abated, it is not the authority to determine whether or not an action has abated by the death of a party. Whether or not a pending action or a cause of action is abated upon death is determined by the nature of the cause of action i.e. a personal action, and whether or not a survival statute has been passed which excepts that particular type of cause of action from the common law rule i.e. a personal action.

At common law, the abatement of a suit is the complete termination of it. *Crane v. French,* 38 Miss. 503 (Miss. Err. & App. 1860). Further, at common law, all *pending*

[1] As stated in the Brief of Appellant, in 1991, the Mississippi legislature repealed roughly 200 statutes, including Miss. Code Ann. §11-7-25 because they either conflicted or were superseded by the Mississippi Rules of Civil Procedure. *1991 Miss. Laws Ch. 573 (S.B. 2792).*

*actions* abated by the death of a party, regardless of the nature of the suit. *1 C.J.S. Abatement and Revival §142* (*emphasis added*). However, the common law days ended with the passage of the survival statutes. Now, when a party to a personal action dies, the action survives i.e. it is not completely terminated. If it were completely terminated, a new lawsuit would have to be commenced. However, with the passage of the survival and revivor statutes (Rule 25 now), the parties are simply substituted and the case moves forward as though death had not occurred.[2] The present case did not abate i.e. was not completely terminated, because it survived. Because Plaintiff's action was not terminated, she did not need to commence a new action, she only needed to substitute her estate as a party plaintiff – which is exactly what she tried to do.

**3. Defendants concede that Plaintiff's suit survived her death.**

In their brief, Defendants take the position that Plaintiff's civil action "survived by operation of Section 91-7-237."[3] Plaintiff agrees. Plaintiff's pending personal action clearly survived her death and therefore did not abate i.e. was not completely terminated, according to Miss. Code Ann. §91-7-237. *Miss. Code Ann. §91-7-237.* The glowing fallacy in Defendants' argument is that it ignores the fundamental condition precedent to the application of Miss. Code Ann. §15-1-69 – a complete termination i.e. dismissal of

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[2] As stated in *1 Am. Jur. 2d Abatement, Survival and Revival §96*:

> [a]n action which has been revived is not a new action, but is the same action based on the same cause of action in which the rights formerly enforceable by or against the decedent are now enforceable by or against the decedent's personal representative or successor in interest. After revival, the action proceeds as if death had not occurred.

*1 Am. Jur. 2d, Abatement, Survival and Revival §96 citing McKnight v. Craig's Adm'r*, 10 U.S. 183 (1810).

[3] Page 4 of Appellees' Brief states "[a]fter Ms. Green's death, her cause of action for medical negligence survived by operation of Section 91-7-237."

the original action. *Miss. Code Ann. §15-1-69.* Afterall, the stated purpose of the Saving Statute is to allow a plaintiff to commence a second action after the original action has been dismissed. *Id.* Unless and until the original action is dismissed, the Saving Statute has no application whatsoever. Because Plaintiff's original action survived her death, it was still pending and Plaintiff had not need (and could not) commence a new action.[4]

**4. Defendants' position that the substitution of parties is the commencement of a new action is wholly unsupported and contrary to Mississippi law.**

Defendants' position that a Rule 25 substitution of parties is the commencement of a new action is absurd, wholly unsupported and contrary to Mississippi law.[5] In fact, Defendants did not attempt to rebut Plaintiff's overwhelming authority that a Rule 25 substitution is not the commencement of a new action but is rather the continuation of the original action. Defendants' brief contains not even the slightest reference to Rule 3 of the Mississippi Rules of Civil Procedure which is titled "Commencement of Action." *Miss. R. Civ. P. 3.* If the substitution of parties were the commencement of a new action, such a position would be supported by Rule 3. At a minimum, Defendants would have relied upon Rule 3 as a supporting authority for its creative and far-reaching position.

It is evident why Defendants fail to cite Rule 3 in their brief - Rule 3 clearly forbids and contradicts Defendants' position. In fact, Rule 3 specifically states that "[a] civil action is commenced by filing a complaint with the court." *Miss. R. Civ. P. 3(a).* Rule 3 does not state that a civil action is commenced by filing a motion to substitute parties under Rule 25 or by obtaining an order substituting parties under Rule 25 - but

[4] Plaintiff would be disallowed from filing a second lawsuit under the theory of priority jurisdiction.

[5] In their brief, Defendants state that "[t]he new survival action is now commenced by the filing of the Rule 25 motion to substitute." *See Brief of Appellees, pg. 16.*

that is how parties are substituted under Rule 25. *Miss. R. Civ. P. 25.* The only way a civil action can be commenced is by filing a complaint with the Court. *Miss. R. Civ. P. 3(a).* A Rule 25 substitution is not the commencement of a new action and Plaintiff's original brief sets forth a vast amount of support for that position. Defendants' arguments must fail as a matter of simple statutory interpretation and fundamental logic.

This entire appeal is dedicated to the question of 'was Plaintiff's motion to substitute timely filed?' The answer is yes it was. Defendants never suggested the death of Lula Green so the 90-day time period never began to run. Further, Defendants' argument that the Saving Statute controls the revival of claims has no merit whatsoever is simply a gross misinterpretation of Mississippi law.

**B. Plaintiff raised the issue of Defendants' waiver in the lower court and the issue is thus properly brought before this Court.**

Defendants erroneously argue that Plaintiff "is procedurally barred from arguing the 'waiver' issues she raises because she did not present those issues to the trial court." *See Brief of Appellee pg. 5.* To the contrary, Plaintiff stated in a lower court pleading that "Plaintiff further asserts all other grounds of waiver given defendants' delay in raising any argument presented within the confines of this pleading." (R. at 95). Thus, the waiver issue was presented to the lower court and is properly before this Court for consideration.[6]

More importantly, Defendants' brief offers no explanation as to why they overly litigated this action for over seventeen months after the case was allegedly "dismissed by operation of law." Defendants' entire response to Plaintiff's waiver argument is "[t]he Medical Defendants' participation in the litigation does not constitute a waiver of their

[6] The most likely reason why the lower court did not address the waiver argument in its Memorandum Opinion is that the Defendants drafted the lower court's Memorandum Opinion.

right to affirmatively assert that Harris is time-barred by Section 15-1-69 from having the Executrix substituted as plaintiff." *See Brief of Appellees, pg. 21.* Defendants did not even attempt to explain their actions or attempt to persuade the court that they have not waived their objections. Plaintiff has not waived her waiver objections, but Defendants have failed to make any showing to this Court that they have not waived their objections to the substitution of parties.

**C. The foreign caselaw cited by Defendants is not persuasive on any point raised in Defendants brief.**

Rather than analyze Mississippi caselaw and Mississippi statutes and rules, Defendants have cited single cases from Kentucky, Nebraska, Missouri and Oregon – not one of which bears any relation to the present case. Not a single case cited by Defendants addresses the issues raised in this appeal and not one case is factually similar to the facts presented in this appeal. First and foremost, every case cited by the Defendants involves a situation where the defendant died during the pendency of a suit. In the present case, the Plaintiff died after commencing her civil action. The distinction is material since when the defendant dies, estate probate statutes and service of process requirements inject other rules and time delays into the procedure. When the plaintiff dies, all of the defendants are already before the court and the substitution of parties does not affect the rights of the defendants.

Secondly, not one of the cases cited by the Defendants addresses a saving statute. Rather, each case addresses statutes relating to the filing of claims against an estate i.e. probate and service of process requirements. Mississippi has probate laws as well but they are not relevant to the issues presented in this appeal since the defendants are still alive.

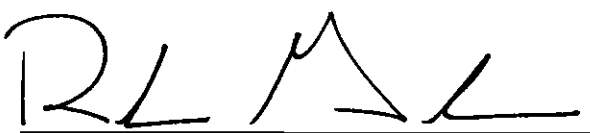
Finally, none of the cases cited by the Defendants analyze a rule or statute similar to Rule 25 or Miss. Code Ann. §15-1-69. This is a case of statutory and rule interpretation and a case which cites a completely dissimilar statute from another state under completely different factual scenarios should have absolutely no persuasive effect on this Court. Plaintiff has complied with Mississippi law even though the Defendants seek to rely on laws from Kentucky, Nebraska, Missouri and Oregon.

## III. CONCLUSION AND PRAYER FOR RELIEF

The lower court erred when it granted Defendants' motion to dismiss. Plaintiff's action survived her death and was therefore not terminated upon her death. Accordingly, the substitution of parties is governed by Rule 25 of the Mississippi Rules of Civil Procedure. Under the plain language of Rule 25, Plaintiff's motion to substitute was timely filed and the lower court should be reversed. The Saving Statute has no application whatsoever to this case and the lower court was erroneous when it held otherwise. For the reasons stated more fully herein and in Appellant's original brief, the lower court should be reversed and this action remanded to the trial court for further proceedings. Plaintiff further requests all other relief deemed proper in the premises including that all costs associated with this appeal be taxed against the Appellees.

Respectfully submitted,

VERA HARRIS

By: 

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**Certificate of Service**

I do hereby certify that a true and correct copy of the foregoing Reply Brief of Appellants has been delivered via hand delivery and/or United States mail, postage prepaid, to the following persons at their usual business address:

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This the 9th day of April, 2009.

Robert V. Greenlee