IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2008-CA-00382

VERA HARRIS — APPELLANT

VS.

VONDA G. REEVES DARBY, ET AL. — APPELLEES

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

BRIEF FOR APPELLANT

ORAL ARGUMENT REQUESTED

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VS.

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CERTIFICATE OF INTERESTED PERSONS

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

1. The Estate of Lula P. Green
   The Estate of the deceased plaintiff, Lula P. Green

2. Vera Mae Harris – Plaintiff and daughter of Lula P. Green
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   Jackson, Mississippi 39209

3. The daughters and sons of Lula P. Green:

   a. Ethel Ree Thompson
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      Jackson, Mississippi 39209

   b. Lucy Washington
      827 Deer Park
      Jackson, Mississippi 39203

   c. Sarah Gibson
      159 Horseshoe Circle
      Jackson, Mississippi 39203

   d. Ruby Perry
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      Florissant, Missouri 63033

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Waukegan, Illinois 60095

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i. Wallace Green
6525 Millender Drive
Marrero, Louisiana 70072

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Jackson, Mississippi 39207

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2. Did the lower court commit legal error when it held that party substitution pursuant to Rule 25 of the Mississippi Rules of Civil Procedure is the commencement of a new action, within the meaning of the Mississippi Saving Statute, Miss. Code Ann. §15-1-69, rather than a continuation of the prior action?
3. Did the lower court commit legal error when it held that the survivability of a personal action is governed by the Mississippi Saving Statute, Miss. Code Ann. §15-1-69, and not the Mississippi Survival Statute, Miss. Code Ann. §91-7-237?
4. Did the lower court commit legal error it held that the Mississippi Saving Statute, Miss. Code Ann. §15-1-69, governs the substitution of parties, rather than Rule 25 of the Mississippi Rules of Civil Procedure?
5. Did Defendants waive their objections to any alleged time-bar by actively participating in the litigation process of this action for over five months after the action was allegedly "dismissed by operation of law?"

II. STATEMENT OF THE CASE

A. Nature of the Case

The lower court incorrectly held that the Mississippi Saving Statute, Miss. Code Ann. §15-1-69 ("Saving Statute"), terminated Plaintiffs' pending action "by operation of law" at the instant of her death and imposed a one-year statute of limitations governing the substitution of

her estate as a party plaintiff. In reaching its incorrect decision, the lower court ignored relevant statutory authority and the Mississippi Rules of Civil Procedure which stand in direct contravention to its analysis and decision. Plaintiffs Vera Harris, individually and on behalf of her mother Lula P. Green, appeal the lower court's dismissal of their civil action, with prejudice, based on the erroneous ruling that Miss. Code Ann. §15-1-69 extinguished their civil action "by operation of law" at the instant of Plaintiff Lula P. Green's death, and required Plaintiffs to substitute the Estate of Lula P. Green as a party plaintiff within one year from death. The lower court dismissed Plaintiffs' civil action with prejudice because their motion to substitute parties was filed more than one year after Lula Green's death.

It is undisputed that Defendants never suggested the death of Lula Green upon the record and that Plaintiffs opened the Estate of Lula P. Green prior to Defendants' filing their motion to dismiss. (P. R. E. tab 3, R. at 176; tab 5, R. at 75)[1] The lower court's decision is fraught with legal error and must be reversed because the Saving Statute has no application whatsoever to this case, a Rule 25 party substitution is not the commencement of a new action, Miss. Code Ann. §91-7-237 directly mandates that Plaintiffs' action was not extinguished by her death and the substitution of parties is governed by Rule 25.

In the alternative, Plaintiffs assert that Defendants waived their objections to any alleged time-bar by actively litigating the merits of Plaintiffs' civil action for over five months after the alleged time-bar occurred. During this five month period, Defendants conducted written discovery, participated in numerous depositions, engaged in extensive motion practice and entered into several agreed orders relating to scheduling, discovery and setting the case for trial.

[1] All citations to Plaintiffs/Appellants' record excerpts will be made as (P.R.E), followed by the tab number, and the page number from the record i.e. (P.R.E. tab __, R. at __).

In fact, Defendants filed the subject Motion to Dismiss less than 60 days from trial and only after the close of discovery and final supplementation of expert opinions.[2]

B. Statement of Facts Relevant to the Issues and Disposition in the Court Below.[3]

Plaintiffs filed their Complaint on August 11, 2005, in the Circuit Court of the First Judicial District of Hinds County, Mississippi. (P.R.E. tab 6, R. at 6).[4] In their Complaint, Plaintiffs alleged that Lula P. Green suffered serious and life-threatening injuries when her colon was ruptured during the performance of a medically unnecessary and unindicated colonoscopy conducted by Defendants. (P.R.E. tab 6, R. at 6). Plaintiff Vera Harris is the daughter of Lula P. Green and Executrix of the Estate of Lula P. Green.[5] Plaintiff Vera Harris' claim is derivative of Lula P. Green's claim and because this civil action was dismissed based on alleged defenses against Plaintiff Lula P. Green's cause of action, this Brief is devoted to the dismissal of Lula P. Green's claim.[6]

It is undisputed that Plaintiffs' Complaint was timely filed pursuant to Miss. Code Ann. §15-1-36(2) and that Lula P. Green was alive at the time of filing. (P.R.E. tab 3, R. at 175; tab 5, R. at 75). On February 9, 2006, Plaintiff Lula P. Green died as a result of end stage renal disease. (R. at 51). No allegations of wrongful death are alleged by Plaintiffs and it is

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[2] This case was heavily litigated in preparation of trial and on March 27, 2007, the lower court entered an Order setting this matter for jury trial on the July 9, 2007, trial docket. (S.R. at 159). On April 13, 2007, due to a court conflict, the July 9, 2007, trial date was continued until September 4, 2007, by agreed Order. (S.R. at 179). After discovery was completed, both parties submitted proposed pre-trial orders to the lower court and prepared for trial.

[3] All references to the Record will be cited as (R. at __), to the Supplemental Record as (S.R. at __).

[4] Plaintiffs' Complaint was filed against Vonda G. Reeves Darby and Gastrointestinal Associates Endoscopy Center, LLC, and John Does 1-10 ("Defendants"). (P.R.E. tab 6, R. at 6).

[5] Vera Harris incurred monetary expense and other damage as her mother's primary caregiver post-injury.

[6] References to "Plaintiffs" shall include both Vera Harris and Lula P. Green while a reference to "Plaintiff" will indicate Lula P. Green only, unless stated otherwise.

undisputed that Lula P. Green's action is a "personal action" which survived to her estate pursuant to Miss. Code Ann. §91-7-233 and §91-7-237 (P.R.E. tab 3, R. at 175-176).

The Estate of Lula P. Green was opened in the Chancery Court of Hinds County, Mississippi, Second Judicial District, on July 16, 2007, and Plaintiff Vera Harris was appointed Executrix. (P.R.E. tab 4, R. at 36).[7] Plaintiffs then filed their motion to substitute parties on July 20, 2007. (P.R.E. tab 4, R. at 32). It is undisputed that the death of Lula P. Green was never suggested upon the record and that the 90-day time period for substitution of parties, pursuant to Rule 25, never began to run. (P.R.E. tab 3, R. at 176 – 177; tab 5, R. at 75). On July 20, 2007, the same day Plaintiffs filed their motion to substitute parties, Defendants filed the subject motion to dismiss. (R. at 29).

Defendants' motion was predicated on the argument Miss. Code Ann. §15-1-55 time-barred Plaintiffs from substituting the Estate of Lula P. Green.[8] (R. at 38). On July 30, 2007, Plaintiffs filed their Response to Defendants' Motion. (R. at 71). In their Response, Plaintiffs vigorously opposed Defendants' position given that Miss. Code Ann. §15-1-55, the Estate Savings Statute, allows a decedent's estate representative to "commence" an action within the specified time period and, because Plaintiff's action had already been timely commenced, Miss. Code Ann. §15-1-55 was inapplicable to her action. (R. at 71). In addition to a response, Plaintiffs also filed an itemization of undisputed facts to which the Defendants' never responded. (P.R.E. tab 5, R. at 75 - 77). The facts stated therein are undisputed.

Thereafter, Defendants filed a reply to Plaintiffs' response. (R. at 80). In their Reply, Defendants changed course and pointed to Miss. Code Ann. §15-1-69, rather than Miss. Code

[7] After contacting Defendants' counsel via telephone in an effort to obtain an agreed order for substitution of parties, Plaintiffs' counsel was informed that no such agreement was possible.

[8] Defendants later changed their position to state that Miss. Code Ann. §15-1-69, rather than Miss. Code Ann. §15-1-55, time-barred Plaintiffs from substituting parties. The lower court's decision was based on Miss. Code Ann. §15-1-69 and not Miss. Code Ann. §15-1-55.

Ann. §15-1-55, as its new authority for the position that Plaintiffs were time-barred from substituting parties. (R. at 80). In their Reply, Defendants asserted that the one-year saving provision of Miss. Code Ann. §15-1-69 began to run at the instant of Lula P. Green's death and therefore, her estate had to be substituted as a party within one year from death. (R. at 81). Defendants further argued that since Lula P. Green's estate was not substituted before February 10, 2007, that Plaintiffs were time-barred from substituting the Estate of Lula P. Green as a party plaintiff. (R. at 81).

Given Defendants' change of position, Plaintiffs filed a rebuttal to Defendants' reply on August 13, 2007. (R. at 92). In their rebuttal, Plaintiffs urged the lower court to deny Defendants' motion and pointed the court to the flaw in Defendants' logic - in Mississippi, personal actions are not "dismissed by operation of law" upon the death of a party. Instead, Lula P. Green's pending action survived to her estate under Miss. Code Ann. §91-7-237 and her estate was authorized to prosecute the pending action pursuant to Miss. Code Ann. §91-7-233. (R. at 92).[9]

The lower court advised the parties that it would not entertain oral argument on the issues presented in the subject appeal.[10] Thereafter, on August 24, 2007, the lower court transmitted a letter, via facsimile, indicating that the court intended to grant Defendants' motion to dismiss and

[9] On August 14, 2007, Defendants filed a motion to strike Plaintiffs' rebuttal, stating that "Uniform Circuit Court Rule 4.03 does not contemplate rebuttal responses." (R. at 97). Plaintiffs filed their response to Defendants' motion to strike on August 16, 2007, again urging the lower court to deny Defendants' motion. (R. at 164). On August 16, 2007, Defendants filed a rebuttal to Plaintiffs' response to Defendants' motion to strike. (R. at 168).

[10] The lower court conducted a hearing on August 21, 2007, on a separate motion filed by the Defendants but re-advised the parties during that hearing, which was conducted in chambers, that no oral argument would be entertained on the motion and issues that are the subject of this appeal. No explanation was ever given regarding the lower court's decision to disallow oral argument.

directed Defendants to submit a proposed memorandum and final judgment.[11] On September 12, 2007, the lower court entered a final judgment dismissing Plaintiffs' action with prejudice and a memorandum opinion granting Defendants' motion to dismiss, which was treated as a motion for summary judgment. (P.R.E.; tab 2, R. at 179; tab 3, R. at 173 – 178). On October 8, 2007, Plaintiffs filed their notice of appeal. (R. at 180).

III. STANDARD OF REVIEW

The lower court erroneously granted summary judgment in favor of Defendants and incorrectly ruled that Plaintiffs' original action was time-barred, pursuant to Miss. Code Ann. §15-1-69, from substituting the Estate of Lula P. Green as a party plaintiff. (P.R.E. tab 2, R. at 179).[12] This Court employs a de novo standard of review of a lower court's grant or denial of summary judgment and the evidence must be viewed in the light most favorable to the party against whom the motion has been made. *Jackpot Mississippi Riverboat, Inc. v. Smith*, 874 So.2d 959, 960 (Miss. 2004); *McCullough v. Cook*, 679 So.2d 627, 630 (Miss. 1996). Further, the "application of a statute of limitations is a question of law." *Sarris v. Smith*, 782 So.2d 721, 723 (Miss. 2001). This Court applies a de novo standard of review when deciding issues of law. *Wayne Gen. Hosp. v. Hayes*, 868 So.2d 997, 1000 (Miss. 2004); *ABC Mfg. Corp. v. Doyle*, 749 So.2d 43, 45 (Miss. 2001).

IV. SUMMARY OF THE ARGUMENT

The lower court's decision is based on an illogical and self-contradictory analysis which is wholly unsupported by Mississippi law. In fact, the lower court's decision is completely contradicted by Mississippi law. The Saving Statute has no application whatsoever to an original

[11] The memorandum opinion drafted by the Defendants was adopted verbatim by the lower court. However, since the standard of review is *de novo*, it is of no consequence who drafted the lower court's opinion other than to construe same against Defendants as the drafter.

[12] The lower court considered Defendants' motion to dismiss as a motion for summary judgment since it considered matters outside of the pleadings. (P.R.E. tab 2, R. at 179).

action; it is designed to allow a plaintiff to commence a second action after her original action is dismissed for a matter of form. In the present action, the lower court relied upon the Saving Statute to grant summary judgment against Plaintiffs' original action, which was undisputedly timely filed pursuant to Miss. Code Ann. §15-1-36(2) and still pending at the time of the dismissal.

Further, the lower court was wrong when it concluded, without support, that the Saving Statute somehow governs the substitution of parties. Rule 25 of the Mississippi Rules of Civil Procedure governs the substitution of parties and requires parties be substituted within 90 days after death is suggested upon the record. In the present action, it is undisputed that Plaintiff's death was never suggested upon the record. If death is not suggested upon the record, the 90-day time period is irrelevant. The lower court also erroneously held, again without support, that a Rule 25 party substitution is the commencement of a new action - it is not - it is a continuation of the original action. Afterall, the commencement of an action is governed by Rule 3 of the Mississippi Rules of Civil Procedure and, under Rule 15, an amended complaint naming the real party in interest relates back to the original filing date.

Finally, the lower court erroneously held that Plaintiffs' action was "dismissed by operation of law" at the instant of her death. Miss. Code Ann. §91-7-237 expressly states that Plaintiff's pending action, being a personal action, did not abate upon her death but rather survived to her estate. The Saving Statute has no application whatsoever to the survivability of an action after death, yet the lower court, again without support, held that it did.

The lower court somehow converted a remedial statute, designed to enlarge a plaintiff's rights, into a draconian statute which supersedes all other statutes of limitations, abolishes Rule 25 and the Survival Statutes thereby reinstating the ancient common law. The lower court's decision is overwhelmingly contradictory to c urrent Mississippi law and must be reversed.

Defendants' motion actually asserted a Rule 17 objection to the real party in interest which was moot from its inception since it was filed the same day Plaintiffs moved to substitute parties. The lower court failed to address Rule 17 in its decision or the fact that Defendants waived their objections by actively engaging in the litigation process for over five months after the alleged time-bar occurred. The lower court's decision is fraught with legal error and must be reversed.

V. ARGUMENT

A. The Mississippi Saving Statute is wholly inapplicable to this action.

The Mississippi Saving Statute has no application whatsoever to this action and the lower court's contrary decision is fundamentally flawed and wholly unsupported by, and contradicts, Mississippi law. The Saving Statute is inapplicable to this action because, by its plain meaning, it does not apply to original actions. *Miss. Code Ann. §15-1-69*. It is undisputed that Plaintiff's original action was never dismissed by the lower court prior to the filing of Plaintiff's motion to substitute parties. (P.R.E. tab 3, R. at 175; tab 5, R. at 75). The lower court dismissed Plaintiffs' original action.

1. The Saving Statute does not apply to original actions.

The Saving Statute does not apply to original actions. The Saving Statute, provides, in full:

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

Miss. Code Ann. §15-1-69 (emphasis added). It is axiomatic that an unambiguous statute should be interpreted by its plain meaning. *Finn v. State*, 978 So.2d 1270 (Miss. 2008). The plain meaning of the Saving Statute is to allow a plaintiff to "commence a new action" subsequent to a "determination of the original suit" under circumstances set forth in the statute. *Miss. Code Ann. §15-1-69*. Given the fundamental purpose of the Saving Statute, as indicated by its text, "there must be a final termination of the original action before a second action can be brought within the protection of the statute." *54 C.J.S. Limitations of Action §292*. Notwithstanding the plain language and purpose of the Saving Statute, the lower court dismissed Plaintiff's original action which was commenced within the applicable statute of limitations. (P.R.E. tab 3, R. at 175; tab 5, R. at 75).[13]

a. The Saving Statute presupposes that the original action was dismissed for a "matter of form."

The Saving Statute, by its plain meaning, presupposes that the original action has been "abated, or the action otherwise avoided or defeated, by the death of any party thereto, or for any matter of form" prior to the commencement of a new action. *Miss. Code Ann. §15-1-69*. In *Deposit Guaranty National Bank v. Roberts*, this Court held that the "saving statute applies to 'actions' and 'original suits' dismissed 'for any matter of form.'" *Deposit Guaranty National Bank v. Roberts*, 483 So.2d 348, 353 (Miss. 1986) (emphasis added). Indeed, the "saving" aspect of the Saving Statute is that it saves a plaintiff's second action from a statute of limitations bar if it is commenced within one year after dismissal of her original action for any matter of form, even if the second action is filed after the applicable statute of limitations has run against the cause of action. *Id.* Because the Saving Statute applies only to actions commenced subsequent

[13] Plaintiffs' cause of action accrued on August 10, 2004, and her Complaint was filed on August 11, 2005. It is undisputed that the two-year statute of limitations of Miss. Code Ann. §15-1-36(2) governs this action. *Miss. Code Ann. §15-1-36(2)* and that Plaintiffs' action was timely filed. (P.R.E. tab 5, R. at 75).

to the dismissal of a prior action, the Saving Statute, by its plain meaning, does not apply to original actions.

In the recent case of *Crawford v. Morris Transportation, Inc.*, the plaintiff set forth the four elements required to invoke the protections of the Saving Statute, which this Court analyzed with no apparent disapproval. *Crawford v. Morris Transportation, Inc.*, 2008 WL 4072291, *5 (Miss. Sept. 4, 2008). As stated in *Crawford*, the four elements were: (1) a "duly commenced" action within the applicable statute of limitations, (2) good faith in filing the complaint, (3) a dismissal of that original suit for a matter of form, and (4) the commencement of a new action within one year of said dismissal. *Id.* The issue in *Crawford* then turned to whether or not the dismissal of the plaintiff's original action was for a "matter of form." *Id.*[14] In the present case, however, there is no need to determine whether or not Plaintiff's original action was dismissed for a "matter of form," because Plaintiff's original action was never dismissed until it was dismissed for somehow not complying with the Saving Statute. (P.R.E. tab 1, R. at 1-5).

b. The death of a party in an action which survives is not a determination of the action.

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). By its plain language, the Saving Statute is not applicable until a second action is

[14] In *Moore v. Boyd*, it was stated that "even when a complaint is dismissed after the statute of limitations has expired, [Miss. Code Ann. §15-1-69] provides a one year grace period to refile if the reason for the dismissal was 'for any matter of form.' *Moore v. Boyd*, 799 So.2d 133, 138 (Miss. App. 2001) *Southwick, concurring*; see also *Wertz v. Ingalls Shipbuilding*, 790 So.2d 841 (Miss. App. 2001); *Bowling v. Madison County Board of Supervisors*, 724 So.2d 431 (Miss. App. 1998)

commenced subsequent to a "determination of the original suit" i.e. a dismissal by the court. *Miss. Code Ann. §15-1-69*; *Deposit Guaranty*, 483 So.2d at 353. Further, the United States Supreme Court has established that "the death of either party, pending suit, does not, if the cause of action survives, amount to a determination of the suit." *Clarke v. Mathewson*, 37 U.S. 164 (1838). In the present case, as shown below, Plaintiff's action was a personal action and therefore survived her death. As such, Plaintiff's death was not a determination of her original suit and she did not need to commence a new action.[15]

c. <u>The Saving Statute is an exception to the statute of limitations.</u>

The Saving Statute does not apply to original actions because it is an exception to the statute of limitations. *Lang v. Fatheree*, 15 Miss. 404 (Miss. Err. & App. 1846). As stated in *Lang v. Fatheree*:

> [t]his provision is not the subject of a plea; being a saving or exception, it must be replied. The defendant can only plead the general limitation, and the plaintiff may answer it by replying that he sued within six years, and his judgment was reversed, and that he has sued within one year after the reversal.

Id. The analysis in *Lang* evidences the purpose and logical application of the Saving Statute and strongly supports Plaintiff's position that the Saving Statute is an exception to the statute of limitations used to allow a plaintiff to file a second action after her original action is dismissed and therefore the Saving Statute does not apply to original actions.

Further, this Court in *Ryan v. Wardlaw* stated the purpose of the Saving Statute:

> a highly remedial statute [which] ought to be liberally construed for the accomplishment of the purpose for which it was designed, namely, to save one who has brought his suit within the time limited by law from loss of his right of action by reason of accident or inadvertence....

[15] Practically speaking, it is the determination of the suit that prompts the need to commence the new action. Otherwise, as in the present case, the case is still pending and not only is a new action unnecessary, it is disallowed under the theory of priority jurisdiction. *Crawford v. Morris Transportation, Inc.*, 2008 WL 4072291; *Parmley v. Pringle*, 976 So.2d 422, 426 (Miss. App. 2008).

Ryan v. Wardlaw, 382 So. 2d 1078, 1080 (Miss. 1980). The lower court's application of the Saving Statute in the present action is inapposite to the purpose of the Saving Statute, as stated in *Ryan v. Wardlaw*. Further, the fundamental design of the Saving Statute is to save a subsequently-filed action from a statute of limitations bar and not to act against an original action which is already governed by a substantive statute of limitations. *Ryan v. Wardlaw*, 382 So.2d at 1080; *Lang v. Fatheree*, 15 Miss. at 404; *Miss. Code Ann. §15-1-69.*

The procedural impropriety of Defendants' motion underscores the substantive impropriety of the lower court's ruling. The Saving Statute is not a statute of limitations *per se* - it is an exception to the statute of limitations, and it does not apply to original actions.

2. A Rule 25 substitution is not the commencement of a new action – it is the continuation of the prior action.

The lower court, citing no authority, erroneously held that Miss. Code Ann. §15-1-69 "gives a deceased plaintiff's executor or administrator one year from the date of death to commence the new action in the name of the deceased plaintiff's executor or administrator" and that "[u]nder Rule 25(a), the action is 'commenced' by the substitution of the executrix for the deceased plaintiff." (P.R.E. tab 3, R. at 177). This aspect of the lower court's ruling is flawed because the substitution of parties is not the commencement of a new action – it is a continuation of the prior action. The United States Supreme Court in *Clarke v. Matthewson* held in 1838 that "a bill of revivor is not the commencement of a new suit, but a mere continuance of the old one." *Clarke*, 37 U.S. at 166. Plaintiff's position is supported not only by the United States Supreme Court but also by the Mississippi Rules of Civil Procedure.

a. Commencement of an action is governed by Rule 3 of the Mississippi Rules of Civil Procedure.

Neither the lower court nor the Defendants cite any authority for the erroneous conclusion that a Rule 25 substitution of parties is the "commencement of a new action." (P.R.E.

tab 3, R. at 177). In fact, the lower court's conclusion is in direct conflict with Rule 3 of the Mississippi Rules of Civil Procedure which provides that "[a] civil action is commenced by filing a complaint with the court." *Miss. R. Civ. P. 3(a); see also Crawford v. Morris Transportation, Inc.* 2008 WL 4072291 at *6. Rule 3 also provides that "the purpose of Rule 3(a) is to establish a precise date for the fixing of the commencement of the civil action" and "the first step in a civil action is the filing of a complaint with the clerk or judge." *Miss. R. Civ. P. 3(a) cmt.* Further, Rule 3 provides that "ascertaining the precise date of commencement is important in determining ... whether it is barred by a statute of limitations." *Id.*

As stated in Rule 25, however, "the court shall, upon motion, order substitution of the proper parties." *Miss. R. Civ. P. 25(a)(1)* (emphasis added). There is nothing in Rule 3 which states that a motion to substitute parties is the commencement of a new action. *Miss. R. Civ. P. 3.* Further, there is nothing in Rule 25 which states that a motion to substitute filed under that Rule is to be regarded as the commencement of a new action. *Miss. R. Civ. P. 25.* Finally, there is nothing in Miss. Code Ann. §15-1-69 which references the substitution of parties. *Miss. Code Ann. §15-1-69.* Not only is the lower court's decision wholly unsupported by Mississippi law, it conflicts with Mississippi law and the Mississippi Rules of Civil Procedure.

b. An amended complaint reflecting the substitution of parties relates back to the original date of filing under Rule 15.

The substitution of parties under Rule 25 is not the commencement of a new action because, after substitution, an amended complaint reflecting the party substitution relates back to the original date of commencement pursuant to Rule 15(c) of the Mississippi Rules of Civil Procedure. *Miss. R. Civ. P. 15(c).* Rule 15(c) provides, in relevant part, that "whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or

occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." *Miss. R. Civ. P. 15(c).*

While Rule 15(c) does not specifically address the requirements for an amended complaint that changes plaintiff, as opposed to defendants, this Court recently addressed this issue in *MS Comp Choice, SIF v. Clark, Scott & Streetman*, 981 So.2d 955 (Miss. 2008). In *MS Comp Choice*, this Court held that "an amendment substituting a plaintiff relates back to the date of the original complaint under Rule 15(c) if the new plaintiff is the real party in interest." *MS Comp Choice*, 981 So.2d at 962.

When Plaintiff died, her pending action survived to her estate, who became the real party in interest to her action. *Miss. Code Ann. §91-7-237*; *Miss. R. Civ. P. 17(a).* Indeed, upon substitution, "the executor stepped into the shoes of [Plaintiff] in prosecuting the action pursuant to Miss. Code Ann. §91-7-237." *Estate of Beckley v. Beckley*, 961 So.2d 707, 711 (Miss. 2007). Further, the executrix of the estate of a deceased party is expressly stated in Rule 17 as the real party in interest. *Miss. R. Civ. P. 17(a).*[16] Because an amended complaint reflecting the substitution of parties relates back, it is not the commencement of a new action, it is a continuation of the prior action. The lower court's unsupported ruling to the contrary is legally erroneous.

c. <u>A Rule 25 motion to substitute is served in accordance with Rule 5, which further proves that a Rule 25 motion to substitute is not the commencement of a new action.</u>

The substitution of parties under Rule 25 is not the commencement of a new action because a Rule 25 motion for substitution "shall be served on parties as provided in Rule 5." *Miss. R. Civ. P. 25(a)(1).* Rule 5 governs service of "every pleading subsequent to the

[16] Rule 17 provides that "every action shall be prosecuted in the name of the real party in interest. An executor ...may sue in his representative capacity...." *Miss. R. Civ. P. 17(a).*

complaint." *Miss. R. Civ. P. 5(a).* The Defendants' position is that when Plaintiff died, her action was terminated "by operation of law" and the Saving Statute required her to "commence a new action" by way of a motion to substitute. (P.R.E. tab 3, R. at 174). Defendants' position, however, is wholly contradicted by the plain language of Rules 5 and 25 of the Mississippi Rules of Civil Procedure. If a motion to substitute was the "commencement of a new action," service of process would have to be effectuated in accordance with Rule 4, not Rule 5. *Miss. R. Civ. P. 4.*

As shown above, a Rule 25 substitution is not the commencement of a new action, it is the continuation of the prior action and the lower court's ruling to the contrary is legally erroneous. The lower court's decision is in direct contravention to the Mississippi Rules of Civil Procedure and otherwise is wholly unsupported by Mississippi law.

3. The Saving Statute does not govern the survivability of actions upon the death of a party.

The lower court's ruling that "[s]ection 15-1-69 applies to several situations where a plaintiff's action has been terminated for a reason other than on the merits and one of those is the death of the plaintiff" is patently erroneous. (P.R.E. tab 3, R. at 177). The fundamental flaw in this aspect of the lower court's decision is that it disregards the distinction between the death of a party and an abatement of the action by virtue of death. The lower court erroneously interpreted Miss. Code Ann. §15-1-69 as abating Plaintiff's action upon death. Such a holding is in direct contravention to the Mississippi Survival Statutes. Whether or not a personal action abates upon death is already the subject of a specific statute directly contrary to the lower court's decision. Specifically, Miss. Code Ann. §91-7-237 specifically mandates that Plaintiffs' personal action did not abate but rather survived to her estate. *Miss. Code Ann. §91-7-237.* This aspect of the

lower court's decision is fundamentally flawed and wholly unsupported by, and in direct contravention to, current Mississippi law.[17]

a. The Mississippi Survival Statute, Miss. Code Ann. §91-7-237, declares that personal actions do not abate upon the death of the plaintiff.

The Mississippi Survival Statute, Miss. Code Ann. §91-7-237, clearly mandates that personal actions do not abate upon the death of a party thereto. *Miss. Code Ann. §91-7-237.* Section 91-7-237 provides, in full:

> §91-7-237. Death of party not to abate suit in certain cases.
>
> When either of the parties to any personal action shall die before final judgment, the executor or administrator of such deceased party may prosecute or defend such action, and the court shall render judgment for or against the executor or administrator. If such executor or administrator, having been duly served with a scire facias or summons five days before the meeting of the court, shall neglect or refuse to prosecute or defend the suit, the court may render judgment in the same manner as if such executor or administrator had voluntarily made himself a party to the suit. The executor or administrator who shall become a party shall be entitled to a continuance of the cause until the next term of court.

Miss. Code Ann. §91-7-237 (emphasis added).[18] According to the plain language of Miss. Code Ann. §91-7-237, a pending personal action does not abate upon death – it survives. *Id.*

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[17] 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.* Furthermore, the word "abate" 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.

[18] The abatement of a suit is the complete termination of it. *Crane,* 38 Miss. at 503. At common law, all *pending 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*). Further, "by the ancient common law, all personal actions abated by the death of either party before judgment." *Portevant v. Z.E. Pendleton's Adminstrators*, 23 Miss. 25, 35 (Miss. Err. & App. 1851) (emphasis added); *see also Torry v. Robertson*, 24 Miss. 192 (Miss. Err. & App. 1852). While most *causes of action* could be recommenced by the estate representative, "personal actions" could not, and the cause of action itself died with the party. *1 C.J.S. Abatement and Revival §142* (*emphasis added*). This was the "evil" of the common law - but that was then, this is now. "The evil of the common law was that all personal actions died with the person; the remedy of the statute is to

As stated in *Crane v. French*, the object of this statute is "to declare *what actions shall not abate*, but shall survive to or against the representatives of parties, who may die after their commencement." *Crane v. French*, 38 Miss. 503, 520 (Miss. Err. & App. 1860). Further, in *Ingersoll v. Ingersoll*, it was stated that "our law and practice on this subject are plain and simple, and made so by our statutes, declaring that no suit or bill *shall abate* by the death of *either party*, where the right of *action survives*.[19] *Ingersoll v. Ingersoll*, 42 Miss. 155 (Miss. Err. & App. 1868).

Any uncertainty that a pending personal action does not abate, notwithstanding the plain language of the Survival Statute Mississippi precedent, is foreclosed by the title of the statute ("[d]eath of party not to abate suit in certain cases.") *Id.* (emphasis added). *See Bellew v. Dedeaux*, 126 So.2d 249 (Miss. 1961) ("[i]f there is any uncertainty in the body of a statute, the title may be resorted to for purpose of ascertaining legislative intent and relieving ambiguity.") With regard to which pending actions survive under Miss. Code Ann. §91-7-237, the statutory text is clear that pending "personal actions" do not abate upon the death of a party. *Miss. Code Ann. §91-7-237.*

b. Plaintiff's action did not abate because it is a personal action within the meaning of Miss. Code Ann. §91-7-237.

Plaintiff's claim is one for personal injury sounding in negligence and is therefore a personal action within the meaning of Miss. Code Ann. §91-7-237. It is not disputed that Plaintiff's action is a personal action. In *McNeely v. City of Natchez*, this Court proclaimed that "the term 'personal action' in statute relating to actions which survive deceased persons means

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cause the action, or the right of action, to survive to the personal representative." *Illinois Central R. Co. v. Pendergrass*, 12 So. 954 (Miss. 1891).

[19] While under Miss. Code Ann. §91-7-233, the *right to pursue* Plaintiff's personal action survived to Plaintiff's estate, her *pending cause of action* survived as well, also to her estate, pursuant to Miss. Code Ann. §91-7-237. *Miss. Code Ann. §91-7-233, 237.*

action for recovery of personal property for breach of contract, or for injury to person or property. *McNeely v. City of Natchez*, 114 So. 484, 486 (Miss. 1927); *see also Sovereign Camp, W.O.W. v. Durr*, 192 So.45 (Miss. 1939). The *McNeely* definition of "personal action" was recently reaffirmed by this Court in *Estate of Beckley v. Beckley*, 961 So.2d 707 (Miss. 2007). *See also In Re Estate of England*, 846 So.2d 1060 (Miss. App. 2003).

Given that Lula Green died during the pendency of her personal action, Miss. Code Ann. §91-7-237 is applicable to her case. *Miss. Code Ann. §91-7-237.* Further, by the plain language of Miss. Code Ann. §91-7-237, her pending personal action did not abate upon her death but survived to her estate. *Id.* Because Plaintiff's action did not abate, Miss. Code Ann. §15-1-69 is inapplicable to this case and Plaintiff did not need to commence a new action.

4. The substitution of parties is governed by Rule 25 of the Mississippi Rules of Civil Procedure – not the Saving Statute.

The lower court erroneously concluded that the Saving Statute governs the substitution of parties. (P.R.E. tab 3, R. at 177-178). Rule 25 of the Mississippi Rules of Civil Procedure governs the substitution of parties in four circumstances, one of which is when "a party dies and the claim is not thereby extinguished . . . ." *Miss. R. Civ. P. 25(a)(1).* Further, Mississippi Code Annotated §13-3-17, titled "[s]ubstitution of parties upon death," states that "[s]ubstitution of parties in case of death of a party shall be governed by the Mississippi Rules of Civil Procedure." *Miss. Code Ann. §13-3-17* (emphasis added). Because Plaintiff's action survived pursuant to Miss. Code Ann. §91-7-237, it was not extinguished by her death, and Rule 25 governs the substitution of parties.[20]

[20] Because Plaintiff's pending action and her cause of action survived her death, her action was not abated *ipso facto* by her death. *1 C.J.S. Abatement and Revival §136.* There must be a suggestion of such death to the court to effect an abatement. *Id.*

The lower court cavalierly brushed aside Rule 25 in its Memorandum Opinion when it ruled that:

> the 90-day deadline for moving to substitute under Rule 25(a) arises only after a Suggestion of Death is filed. The 90-day deadline cannot and does not replace the one-year period enacted by the Legislature in §15-1-69 which gives all executors or administrators one year from the plaintiff's death to be substituted whether or not a Suggestion of Death is filed.

(P.R.E. tab 3, R. at 177-178). Once again, the lower court cites no support for that erroneous conclusion. In fact, the 90-day time limitation contained within Rule 25 is the only time limitation governing the substitution of parties and it is triggered by the filing of a suggestion of death upon the record.[21]

a. The plain language of Rule 25 shows that a suggestion of death of required before a pending personal action can be abated due to the death of a party.

Rule 25(a)(1) provides, in full:

> Rule 25. Substitution of Parties
> (a) Death
> (1) If a party dies and the claim is not thereby extinguished, the court shall, upon motion, order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of summons. The action shall be dismissed without prejudice as to the deceased party if the motion for substitution is not made within ninety days after the death is suggested upon the record by service of a statement of the fact of death as herein provided for the service of the motion.

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[21] Prior to the enactment of the Mississippi Rules of Civil Procedure, the procedure for substitution of parties was governed by Miss. Code Ann. §11-7-25. The statutory predecessor to Rule 25 clearly mandates a time limitation that is triggered by the filing of a suggestion of death. Section 11-7-25 was originally enacted in 1848 (Hutchinson's 1848, ch. 58, art. 1 (47)).

In 1991, the Mississippi Legislature repealed roughly 200 statutes, including Miss. Code Ann. §11-7-25, because they either conflicted with or were superseded by the Mississippi Rules of Civil Procedure. *1991 Miss. Laws Ch. 573 (S.B. 2792)*. While Miss. Code Ann. §11-7-25 was repealed in 1991 by Senate Bill 2792, its statutory language is codified now in Rule 25. *Id.; Miss. R. Civ. P. 25.*

Miss. R. Civ. P. 25(a)(1) (emphasis added). Rule 25 clearly states that a case cannot be dismissed for failure to substitute parties unless a plaintiff fails to move the court for substitution within 90 days after her death is suggested upon the record. *Miss. R. Civ. P. 25.* It is undisputed that Defendants never suggested the death of Lula Green upon the record. (P.R.E. tab 3, R. at 176; tab 5, R. at 75).

This issue has been decided by this Court in *Criscoe v. Adams* where this Court was called upon to interpret section 724, Code of 1906, which is a predecessor to Miss. Code Ann. §11-7-25 and Rule 25.[22] *Criscoe v. Adams*, 85 So.119 (Miss. 1920). In *Criscoe*, this Court held that "[t]his section changes the common-law rule in circuit courts" and "the action is not dismissed, but remains a pending suit until the second term, when, if no action is taken, the court dismisses it." *Id.* at 121 (emphasis added). The language used by the *Criscoe* Court regarding "until the second term" was in relation to the statutory time period to file a motion to substitute parties following the suggestion of death upon the record. *Id.*

Two conclusions are drawn from *Criscoe*. One, Plaintiff's action did not terminate upon her death, as argued by the Defendants and accepted by the lower court, and two, the time period for substitution of parties is triggered by the filing of a suggestion of death upon the record and not by the death of the party.

b. Plaintiff's death was never suggested upon the record and the 90-day time period for substitution never began to run.

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 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

[22] The *Criscoe* case is cited in the official comment to Rule 25.

396 (Miss. App. 2001). The lower court's contrary conclusion that the time period for substitution is not based on the filing of the suggestion of death is in direct conflict with Mississippi law.

The issue of timeliness of a motion for substitution also was addressed in Ray *v. Estate of Harvey*, 2006 WL 2356163 (Aug. 14, 2006). In *Ray*, the Federal Southern District of Mississippi held that

> Under the plain language of the rule, the ninety-day period for measuring timeliness of a motion to substitute runs from the date that the suggestion of death is served – not . . . from when the deceased party has died. No time limit is specified for the service of the suggestion of death.

*Ray, 2006 WL 2356163 at *1* (emphasis added). While *Ray* was interpreting Rule 25 of the Federal Rules of Civil Procedure, this Court has held that "[i]n construing rules of civil procedure, courts look for guidance to the federal cases since the Mississippi Rules of Civil Procedure were patterned after the Federal Rules of Civil Procedure. *Penn Nat. Gaming, Inc. v. Ratliff*, 954 So.2d 427 (Miss. 2007).

There should be no dispute that Rule 25 governs the substitution of parties when a party dies and the claim is not extinguished. Further, 25 plainly provides that the 90-day time period for substitution is triggered by the suggestion of death upon the record. In the present action, Plaintiff's death was never suggested upon the record and therefore the 90-day time period never began to run and Plaintiff's motion to substitute was therefore timely filed. The lower court's decision to the contrary is in direct contravention to Mississippi law and should be reversed.

B. The Defendants' objection is nothing more than a moot Rule 17 objection to the absence of the real party in interest.

Given that the Saving Statute is wholly inapplicable to this action, and that Rule 25 governs the substitution of parties, Defendants objection is nothing more than a moot Rule 17 objection to the absence of the real party in interest i.e. Plaintiff's estate. Defendants' objection

is a Rule 17 objection because it takes issue with the absence of Plaintiff's estate as a party plaintiff. Defendants' objection was moot when made because Plaintiff's estate was opened and was actively seeking substitution at the time the objection was made.

a. Rule 17 forbids the dismissal of an action for the absence of the real party in interest until a reasonable time has been allowed to cure the objection.

Rule 17(a) provides that "[e]very action shall be prosecuted in the name of the real party in interest" and that "[a]n executor ... may sue in his representative capacity." *Miss. R. Civ. P. 17(a)*. Rule 17(a) further provides:

> **[n]o action shall be dismissed** on the ground that it is not prosecuted in the name of the real party in interest **until a reasonable time has been allowed after objection for** ratification of commencement of the action by, or joinder or **substitution of, the real party in interest; and such** ratification, joinder or **substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.**

Miss. R. Civ. P. 17(a) (**emphasis added**).[23] Defendants' objection was made on the same day Plaintiff moved to substitute parties.[24] Consequently, Defendants' objection was moot when it was made and should have been overruled by the lower court and Plaintiff's estate should have been substituted in accordance with Rule 25.

b. This Court's decisions in *Methodist Hospital v. Richardson* and *Necaise v. Sacks* strongly support Plaintiff's position and are undermined by the lower court's decision.

This Court's recent decisions in *Methodist Hospital v. Richardson* and *Necaise v. Sacks*, evidence not only that the Saving Statute has no application to this case, but also that Defendants' objection is nothing more than a moot Rule 17 objection to the absence of the real party in interest. *Methodist Hospital v. Richardson*, 909 So.2d 1066 (Miss. 2005); *Necaise v.*

[23] Defendants' objection to the absence of Plaintiff's estate as a party was made after Plaintiff's counsel contacted Defendants' counsel via telephone to seek an agreed order of substitution.

[24] It should also be remembered that the court appointed executrix, Vera Harris, has been a party to this action since its inception. Vera Harris commenced the action on behalf of herself and her mother. (P.R.E. tab 6, R. at 6).

Sacks, 841 So.2d 1098 (Miss. 2003). Inexplicably, the lower court ignored *Methodist Hospital, Necaise* and Rule 17 in its memorandum opinion. (P.R.E. tab 3, R. at 173-178). Regardless, the lower court's decision directly conflicts with each of those cases which further evidences the fundamental misapprehensions of law advanced by the Defendants and accepted by the lower court.

In *Methodist Hospital*, the plaintiff died before the action was commenced on May 12, 1998. *Methodist Hospital*, 909 So.2d at 1067. On July 23, 2002, the lower court dismissed the plaintiff's survival action since the decedent's estate was not a party to the lawsuit. *Id.* at 1068. Thereafter, on August 7, 2002, over four years after the plaintiff died, the decedent's estate was opened and the Administratrix filed an amended complaint on August 16, 2002, asserting herself as the plaintiff in her representative capacity.

In its analysis, this Court stated that Rule 17 of the Mississippi Rules of Civil Procedure "provides for a reasonable time upon objection for joinder of the real party in interest." *Id.* at 1072. Further, this Court found that the defendant first objected to the party status on June 21, 2002, the date the motion to dismiss was filed, and that by opening the estate within one month of the trial court's dismissal, "the real party in interest had joined the suit within a reasonable time after objection." *Id. at 1073.* Regarding the defendant's statute of limitations argument, this Court ruled that because the "original complaint contained a separate cause of action for survival, the action was brought within the appropriate two-year statute of limitation" and "[t]herefore, [defendant] was properly placed on notice, and this issue is without merit." *Id.*

In *Necaise*, the action was commenced on August 19, 1998 by plaintiff Charles Freeman. On January 9, 1999, Mr. Freeman died and, when no wrongful death claim was thereafter asserted, his action survived to his estate as a survival action. *Necaise*, 841 So.2d at 1106. The Estate of Charles Freeman was opened on September 7, 1999, but was never substituted as a

party plaintiff. *Id.* Instead, the decedent's daughter was substituted "individually and on behalf of the wrongful death beneficiaries." *Id.* at 1099. On August 31, 2001, over 2 ½ years after death, the decedent's daughter filed a motion for leave to amend her complaint, naming herself as the plaintiff in her capacity as executrix of her father's estate. *Id.* at 1102. Said motion for leave to amend was denied and the case was dismissed by the lower court. This Court reversed the lower court and ruled that the decedent's daughter was "able to maintain this suit which was commenced by her father during his lifetime."

In the present case, the Estate of Lula P. Green was opened before Defendants objected to its absence as a party to the action. (P.R.E. tab 3, R. at 174). Further, if the lower court's decision were correct, this Court would not have allowed the estates in *Richardson* or *Necaise* to be substituted given that neither was not substituted within one year of the plaintiff's death. The estate in *Richardson* was substituted over four years after the plaintiff's death yet this Court allowed it to be substituted because the substitution took place within a reasonable time after objection.

In the present case, Defendants did not object to the absence of the estate as a party until July 20, 2007, which was the same day Plaintiff moved to substitute parties and after Plaintiff's estate had been opened. If a party can be substituted within a reasonable time after objection, then it can certainly be substituted before the objection. Regardless, this Court's holdings in *Richardson* and *Necaise* clearly indicate that Mississippi law does not require the estate of a deceased party be substituted within one year of death.

C. The lower court's decision, if affirmed, will have disastrous effects upon the numerous rules of procedure and statutes.

The lower court's ruling, if affirmed, will have disastrous far reaching implications. Courts have a duty to give statutes a practical application and, when interpreting a statute, "it is

the court's duty to adopt a construction of the statutes which purges the legislative purpose of any constitutional invalidity, absurdity, or unjust inequality." *University of Mississippi Medical Center v. Robinson*, 876 So.2d 337 (Miss. 2004). Further, "when construing statute, all possible repercussions and consequences of construction should be considered." *Chandler v. City of Jackson Civil Service Com'n*, 687 So.2d 142 (Miss. 1997).

The lower court's ruling, if affirmed will create countless conflicts between statutes and the Mississippi Rules of Civil Procedure. If the Saving Statute is applied to original actions, it will be converted from a remedial statute, designed to enlarge a plaintiff's rights, to a superseding substantive statute of limitations which will abridge all other statutes of limitations.[25] The absurd results which will follow the lower court's decision are countless. In addition to abridging all other statutes of limitations, the lower court's decision, if affirmed, will abrogate the Survival Statutes and relegate Mississippi back to the ancient common law which was abolished nearly 200 years ago.

Not only will the lower court's decision cause statutes to conflict, it will abrogate and/or impermissibly alter several Rules of Mississippi Civil Procedure. This Court has previously ordered that "in the event of a conflict between [the Mississippi Rules of Civil Procedure] and any statute or court rule previously adopted these rules shall control." *Order Adopting the Mississippi Rules of Civil Procedure, May 26, 1981.* At the forefront of the list of Rules which will be abrogated by the lower court's decision is Rule 25 which, according to the lower court, "cannot and does not replace the one-year time limitation contained in Miss. Code Ann. §15-1-69." (P.R.E. tab 3, R. at 177). If the lower court is affirmed, Rule 25 will be rendered meaningless.

[25] For example, if P's cause of action accrues on January 1, 2009, and has a 3-year statute of limitation, and she files suit on January 1, 2010, then thereafter dies on January 2, 2010, under the lower court's decision, she will have until January 2, 2011 to substitute parties or her action will be dismissed with prejudice. P's three year statute of limitations will become a two year statute of limitations.

Notwithstanding this Court's clear directive in its 1981 Order, the lower court has advanced a theory that threatens to undermine this Courts inherent rule-making authority as stated in *Newell v.* State, 308 So.2d 71 (Miss. 1975).[26] The lower court thumbed its nose at the text of Rule 25 and casually ignored Rules 3, 4, 5, 15 and 17 of the Mississippi Rules of Civil Procedure as if they were mere suggestions or afterthoughts. Counsel and litigants rely on this Court's rules as the proper method to practice law in this State. If the Rules are undermined, so our civil justice system will be. The depth of the legal error committed by the lower court evidences the lack of thought and reasoned analysis put into its decision.[27] The lower court must be reversed.

D. Alternatively, Defendants waived any objections to an alleged time-bar by actively litigating the merits of this action.

The Saving Statute is wholly inapplicable to this case. However, should this Court disagree with Plaintiff's primary position, the lower court must still be reversed because Defendants have waived any objection to the alleged untimely substitution of parties or time-bar. Specifically, the Defendants (1) failed to raise the affirmative defense in its statute of limitations in its Answer and (2) actively and extensively participated in the litigation process of this action for over 5 months after the alleged time-bar occurred.

a. Defendants failed to raise the affirmative defense of statute of limitations in its Answer.

Defendants filed its Answer and Defenses ("Answer") to Plaintiff's Complaint on October 5, 2005. (R. at 17). In its Answer, Defendants failed to raise the statute of limitations as an affirmative defense. (R. at 17 – 28). Rule 8(c) of the Mississippi Rules of Civil Procedure

[26] See also this Court's recent holdings in *McClain v.Clark*, 2008 WL 4593646 (Miss. Oct. 16, 2008); and *Wimley v. Reid*, 2008 WL 4254587 (Miss. Sept. 18, 2008).

[27] It should not be forgotten that the Defendants' counsel drafted in Memorandum Opinion adopted verbatim by the lower court.

requires that statute of limitations defense be raised in the Defendant's Answer. *Miss. R. Civ. P. 8(c)*. Further, "it is fundamental that the statute of limitations is an affirmative defense which must be raised in the answer or it is waived." *Whitefoot v. Bancorpsouth Bank*, 856 So.2d 639, 645 (Miss. App. 2003). Not only did Defendants not raise the statute of limitations as a defense in its answer, it actively and aggressively litigated the merits of this action for over 5 months after the alleged time-bar occurred.

b. Defendants actively and aggressively participated in the litigation process of this action long after the alleged time-bar occurred.

Defendants' Motion asserted that on February 10, 2007, Plaintiff's timely filed Complaint suddenly became time-barred by the Saving Statute. However, between the alleged February 10, 2007, time-bar and the filing of the subject motion to dismiss, Defendants actively and aggressively participated in the litigation process of this action and thereby waived their objections to any alleged time-bar or untimely substitution. *MS Credit Center, Inc. v. Horton*, 926 So.2d 167 (Miss. 2006); East *Mississippi State Hospital v. Adams*, 947 So.2d 887 (Miss. 2007).

In *MS Credit Center*, this Court addressed the issue of waiver in the context of a Defendant who engaged in the litigation process by "consenting to a scheduling order, engaging in written discovery, and conducting [plaintiff's] deposition." *MS Credit Center*, 926 So.2d at 180. Additionally, the defendant in *MS Credit Center* engaged in the litigation process for eight months prior to raising its arbitration defense. *Id.* at 180. This Court held that:

> Absent extreme and unusual circumstances – an eight month unjustified delay in the assertion and pursuit of any affirmative defense or other right which, if timely pursued, could serve to terminate the litigation, coupled with active participation in the litigation process, constitutes waiver as a matter of law.

Id. Further, this Court's decision in *MS Credit Center* was affirmed in *East Mississippi State Hospital.*

In the present case, Defendants actively engaged in the litigation of this action for over five months after the alleged time-bar occurred.[28] Specifically, the entire Supplemental Record contains the litigation conduct which occurred between February 10, 2007, and July 20, 2007, which includes documents establishing that Defendants: (1) filed motions, (2) filed responses to motions, (3) filed rebuttals to responses to motions (4) noticed motions for hearing, (5) attended hearings (6) conducted written discovery, (7) conducted depositions of Defendants, (8) entered into multiple scheduling orders and orders setting this action for trial (9) supplemented its expert designation, (10) challenged plaintiff's expert designation, (11) requested a trial date on numerous occasions, and (12) submitted a pre-trial order. The vast majority of the litigation activity in this action was conducted after the alleged time-bar occurred. Under the holdings of this Court and the facts presented in the Record, Defendants have clearly waived any objections it has to any alleged untimely substitution and/or the statute of limitations.

VI. CONCLUSION AND PRAYER FOR RELIEF

The lower court erred when it granted Defendants' motion to dismiss. The Saving Statute has no application whatsoever to this case and the notion that a complaint can be both timely filed and time-barred is illogical and wholly unsupported by Mississippi law. Plaintiffs timely filed their complaint and timely moved to substitute parties in accordance with Rule 25 of the Mississippi Rules of Civil Procedure. The lower court should have denied Defendants' motion and granted Plaintiff's motion to substitute parties and Plaintiff's motion for leave to amend her complaint to reflect the party substitution. For the reasons stated more fully herein,

[28] The Supplemental Index to the Appellate Record reveals the complete litigation history of this action, the vast majority of which took place after February 10, 2007.

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,

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Certificate of Service

I do hereby certify that a true and correct copy of the foregoing 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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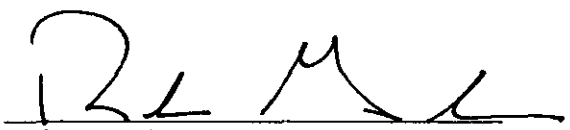
This the 20th day of October, 2008.



Robert V. Greenlee