

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2008-CA-01192

**MICHAEL STRINGER, as Natural Father and
Next of Friend of ALICIA STRINGER, a Minor**

APPELLANT

v.

JAMES TRAPP, M.D.

APPELLEE

**BRIEF OF APPELLEE,
JAMES TRAPP, M.D.**

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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.

1. Honorable Lee J. Howard;
2. Michael Stringer, as Natural Father and Next of Friend of Alicia Stringer, a Minor, Appellant;
3. William W. Fulgham, Esq., Attorney for Appellant;
4. Fulgham Law Firm, PLLC, Attorneys for Appellant;
5. James Trapp, M.D., Appellee;
6. Robert K. Upchurch, Attorney for Appellee;
7. Joshua S. Wise, Attorney for Appellee; and
8. Holland, Ray, Upchurch & Hillen, P.A., Attorneys for Appellee.

RESPECTFULLY SUBMITTED, this the 29th day of May, 2009.

HOLLAND, RAY, UPCHURCH & HILLEN, P.A.

By: 

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STATEMENT REGARDING ORAL ARGUMENT

The issue presented can be resolved on the basis of the record and briefs of the parties.

Oral argument is not requested.

STATEMENT OF THE ISSUES

Whether the Circuit Court of Clay County properly dismissed the Plaintiff's claims against James Trapp, M.D.

STATEMENT OF THE CASE

A. Statement of the Proceedings

On January 5, 2007, Plaintiff, Michael Stringer, as Natural Father and Next of Friend of Alicia Stringer, a Minor, filed a Complaint in the Circuit Court of Clay County alleging medical negligence against Clay County Medical Corporation, d/b/a North Mississippi Medical Center, Timothy Whittle, M.D., and Steve Noggle, M.D. (Record Exerpts (hereinafter "R.E."); Tab 1, p. 7-16). The Complaint did not name Dr. Trapp as a Defendant¹, however, Dr. Trapp's interpretation of the Plaintiff's radiographic studies was referred to in ¶9. (R.E.; Tab 1, p. 7-16).

On January 8, 2007, the Plaintiff filed an Amended Complaint alleging medical negligence against Clay County Medical Corporation, d/b/a North Mississippi Medical Center, Timothy Whittle, M.D., and Steve Noggle, M.D. (R.E.; Tab 2, p. 17-28). The Amended Complaint did not name Dr. Trapp as a Defendant, but ¶10 makes allegations regarding Dr. Trapp which are identical to the allegations of ¶9 of the original Complaint. (R.E.; Tab 2, p. 17-28).

On March 14, 2007, the Plaintiff filed a Second Amended Complaint alleging medical negligence against Clay County Medical Corporation, d/b/a North Mississippi Medical Center, Timothy Whittle, M.D., Steve Noggle, M.D., and James Trapp, M.D. (R.E.; Tab 3, p. 29-39). The Second Amended Complaint named Dr. Trapp as a Defendant, and ¶11 makes allegations regarding Dr. Trapp identical to the allegations in ¶9 of the original Complaint and in ¶10 of the Amended Complaint. (R.E.; Tab 3, p. 29-39).

¹ Paragraph 9 of the Plaintiff's Complaint states: "On January 11, 2005, an addendum to the CT report was completed by Dr. James Trapp, the radiologist who performed the CT scan the previous day. The addendum indicated that the multiple fluid collections within the pelvis represented abscesses and likely resulted from pelvic inflammatory disease or appendicitis with rupture." (Emphasis added). The allegations of ¶11 of the Second Amended Complaint are identical to the allegations of ¶9 of the Complaint and ¶10 of the Amended Complaint.

With the exception of naming Dr. Trapp as a Defendant, the allegations of the Complaint, Amended Complaint, and Second Amended Complaint are identical. (R.E.; Tab 1, p. 7-16; Tab 2, p. 17-28; Tab 3, p. 29-39).

A suit against a health care provider for professional negligence is governed by the two-year statute of limitations set forth in MISSISSIPPI CODE ANNOTATED § 15-1-36. When a notice of claim pursuant to MISSISSIPPI CODE ANNOTATED § 15-1-36(15) is properly given, the two-year limitation period is extended for sixty (60) days. See *Proli v. Hawthorn*, 928 So.2d 169 (Miss. 2006). The Complaint, Amended Complaint, and Second Amended Complaint all establish that the Plaintiff “discovered” her cause of action (failure to diagnose her appendicitis) on January 12, 2005. The Plaintiff’s lawyer gave Dr. Trapp the notice provided by MISSISSIPPI CODE ANNOTATED § 15-1-36(15) on January 5, 2007, and pursuant to the statute, the Plaintiff had until March 13, 2007 in which to file her Complaint against Dr. Trapp.² Plaintiff’s Second Amended Complaint naming Dr. Trapp as a Defendant was not filed until March 14, 2007. (R.E.; Tab 3, p. 29-39)

On June 6, 2007, Dr. Trapp filed his Motion to Dismiss on the grounds that the Plaintiff’s claims against him were barred by the statute of limitations. (R.E.; Tab 4, p. 40-43; Clerk’s Papers, p. 40-77).

On April 15, 2008, the trial Court heard Dr. Trapp’s Motion to Dismiss, and by Order dated April 29, 2008, the trial Court dismissed the Plaintiff’s claims against Dr. Trapp.³ (R.E.; Tab 5, p. 160-161).

² This date is calculated by adding sixty (60) days to January 12, 2007, which date is two (2) years plus sixty (60) days from the date the Plaintiff’s alleged cause of action against Dr. Trapp accrued.

³ Dr. Trapp filed a Motion to Dismiss pursuant to MISSISSIPPI CODE ANNOTATED § 15-1-36 and Rule 12(b)(6) of the MISSISSIPPI RULES OF CIVIL PROCEDURE, and the Court, in its April 29, 2008 Order, converted Dr. Trapp’s Motion to Dismiss to one for summary judgment.

A Final Judgment in favor of Dr. Trapp was filed on June 2, 2008. (R.E.; Tab 6, p. 162-163).

B. Statement of the Facts

The Plaintiff claims that the Defendants failed to diagnose her appendicitis. (R.E.; Tab 1, p. 7-16; Tab 2, p. 17-28; Tab 3, p. 29-39). In Paragraphs 6, 9, 12, 13 and 21 of her Complaint; Paragraphs 7, 10, 13, 14 and 21 of her Amended Complaint; and Paragraphs 8, 11, 14, 15 and 22 of her Second Amended Complaint, the Plaintiff makes the following allegations:

(Paragraphs 6, 7 and 8)

On or about January 6, 2005, Alicia was taken by her mother to West Point Family Medical Clinic for nausea, vomiting, abdominal cramping and diarrhea. At the clinic, Alicia was evaluated by Sharon Hall, a certified family nurse practitioner. Ms. Hall immediately referred Alicia to the emergency room at NMMC after results from administered tests revealed that Alicia's white blood cell count was elevated and/or abnormal. Considering the totality of Alicia's symptoms, Ms. Hall was of the opinion that she likely was suffering from **appendicitis**.

...

(Paragraphs 9, 10 and 11)

On January 11, 2005, an addendum to the CT report was completed by Dr. James Trapp, the radiologist who performed the CT scan the previous day. The addendum indicated that the multiple fluid collections within the pelvis represented abscesses and likely resulted from pelvic inflammatory disease or **appendicitis** with rupture.

...

(Paragraphs 12, 13 and 14)

On **January 12, 2005** and, during a time when Dr. Whittle was still at least a day away from performing surgery of any type on Alicia, her mother transferred her to the care of Dr. Pearson at the Oktibbeha County Hospital in Starkville, Mississippi. Dr. Person informed Alicia's parents that she would need emergency surgery and referred them to **Dr. Roger C. Clapp, Jr., a surgeon, who performed surgery on Alicia that day.**

...

(Paragraphs 13, 14 and 15)

The surgery revealed that the problem was, in fact, appendicitis and not gynecological in nature. By **January 12, 2005**, Alicia suffered from acute gangrenous perforated **appendicitis**, abdominal and pelvic abscesses and partial cecal necrosis.

...

(Paragraphs 21, 21 and 22)

Had the Defendants properly examined Alicia Stringer in accordance with the requests and complaints of Alicia Stringer along with the suggestive diagnosis from Ms. Sharon Hall **and reached proper diagnoses**, and rendered proper treatment, the damages and other injuries suffered by Alicia Stringer would have been prevented.

(R.E.; Tab 1, p. 7-16; Tab 2, p. 17-28; Tab 3, p. 29-39). (Emphasis added).

The allegations of the Plaintiff's Complaint, Amended Complaint and Second Amended Complaint conclusively establish that on January 12, 2005, the Plaintiff first knew or discovered that she had appendicitis, and that appendicitis was the condition which the Plaintiff alleged that Defendants failed to diagnose. (R.E.; Tab 1, p. 7-16; Tab 2, p. 17-28; Tab 3, p. 29-39).

The above quoted paragraphs from the Plaintiff's Complaint, Amended Complaint, and Second Amended Complaint establish that the Plaintiff knew of the alleged misdiagnosis on **January 12, 2005**, and the statute of limitations began to run on that date. (R.E.; Tab 1, p. 7-16; Tab 2, p. 17-28; Tab 3, p. 29-39). The trial court properly found that the Plaintiff failed to file her Complaint against Dr. Trapp within the limitation period established by MISSISSIPPI CODE ANNOTATED § 15-1-36 and dismissed the Plaintiff's Complaint against him.

SUMMARY OF THE ARGUMENT

Plaintiff was aware of the alleged misdiagnosis on January 12, 2005, and retained a lawyer on February 23, 2005, who requested and timely received her records from Clay County Medical Corporation for the treatment complained of. (Clerk's Papers, p. 102-103). Yet, for some unknown reason, the Plaintiff, having knowledge of the alleged misdiagnosis since January 12, 2005, waited over two (2) years to file her Complaint against Dr. Trapp. (R.E.; Tab 3, p. 29-39). Dr. Trapp's identity and his participation in the Plaintiff's care were fully disclosed in the medical records that the Plaintiff's lawyer received on April 14, 2005, and the Plaintiff's knowledge of Dr. Trapp is evidenced by the references to Dr. Trapp's interpretation of her CT scan in ¶9 of the Complaint and ¶10 of the Amended Complaint. (R.E.; Tab 3, p. 29-39; Tab 4, p. 40-43; Clerk's Papers, p. 40-47; Tab 5, p. 160-161; Tab 7, p. 149-156).

The Plaintiff had discovered her alleged misdiagnosis on January 12, 2005, and six (6) weeks later employed a lawyer who timely requested and received her medical records and filed a Complaint and Amended Complaint against the hospital and two (2) doctors and made allegations in both Complaints concerning Dr. Trapp's involvement in her care, but failed to exercise reasonable diligence in giving Dr. Trapp the notice required by MISSISSIPPI CODE ANNOTATED § 15-1-36(15) and failed to file a Complaint naming Dr. Trapp as a Defendant prior to the expiration of the statute of limitations. (R.E.; Tab 1, p. 7-16; Tab 2, p. 17-28; Tab 3, p. 29-39).

The substantive allegations of the Second Amended Complaint, which named Dr. Trapp as a Defendant, are identical to the substantive allegations of the Complaint and the Amended Complaint. The alleged acts of negligence in the Complaint, First Amended Complaint, and Second Amended Complaint are identical. All three Complaints referenced Dr. Trapp and

asserted that there was a failure to diagnose appendicitis which condition was known to the Plaintiff on January 12, 2005. (R.E.; Tab 1, p. 7-16; Tab 2, p. 17-28; Tab 3, p. 29-39). Since the Plaintiff knew of the alleged failure to diagnose, the Plaintiff was aware of her claim on January 12, 2005, and the statute of limitations began to run on that date. (R.E.; Tab 5, p. 160-161).

The discovery rule does not apply to the Plaintiff's claims against Dr. Trapp because the Complaint, Amended Complaint, and Second Amended Complaint conclusively establish January 12, 2005 as the date on which the Plaintiff discovered her cause of action. The Plaintiff's Complaint against Dr. Trapp was filed after the statute of limitations had run.

ARGUMENT

Standard of Review

The Plaintiff appeals an Order granting summary judgment to Dr. Trapp. The standard of review in considering on appeal a trial Court's grant or denial of summary judgment is de novo.⁴ *Sutherland v. Ritter*, 959 So.2d 1004, 1007 (Miss. 2007). If no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law, summary judgment should be entered in that party's favor. *Id.* The movant carries the burden of demonstrating that no genuine issue of material fact exists, and the non-moving party is given the benefit of the doubt as to the existence of a material fact issue. *Id.* A summary judgment is properly granted when no genuine issue of material fact exists. *Jackson Clinic for Women, P.A. v. Henley*, 965 So.2d 643, 649 (Miss. 2007).

⁴ As referenced in footnote 3, Dr. Trapp filed a Motion to Dismiss. The standard of review in considering on appeal a trial Court's grant or denial of a Motion to Dismiss is de novo. *Harris v. Miss. Valley State Univ.*, 873 So.2d 970, 988 (Miss. 2004). "When considering a Motion to Dismiss, the allegations in the Complaint must be taken as true." *Id.* All three (3) of the Plaintiff's Complaints referenced Dr. Trapp and all alleged that there was a failure to diagnose appendicitis and that the Plaintiff knew of the alleged misdiagnosis on January 12, 2005.

I. THE DISCOVERY RULE DOES NOT APPLY TO THE PLAINTIFF'S CLAIMS AGAINST DR. TRAPP

Medical malpractice claims are governed by MISSISSIPPI CODE ANNOTATED § 15-1-36. MISSISSIPPI CODE ANNOTATED § 15-1-36 establishes a two-year statute of limitations for medical negligence claims and provides that the limitation period begins to run "...from the date the alleged act, omission, or neglect shall or with reasonable diligence might have been **first known or discovered...**" (Emphasis added). In the case *sub judice*, "the alleged act, omission, or neglect" is a failure to diagnose the Plaintiff's appendicitis.

The statute of limitations commences when the plaintiff can reasonably be held to have knowledge of the injury itself, the cause of the injury, and the causative relationship between the injury and the conduct of the medical practitioner. *Powe v. Byrd*, 892 So.2d 223, 227 (Miss. 2004). The Plaintiff's Complaint, Amended Complaint, and Second Amended Complaint establish January 12, 2005 as the date on which the statute of limitations began to run. The Plaintiff argues that her lawyer did not discover her cause of action until April 14, 2005. The "discovery rule" applies to when the plaintiff, not plaintiff's lawyer, discovers or knew of the alleged negligence. The limitations period begins to run when "**the patient can reasonably be held to have knowledge of the injury itself**, the cause of the injury, and the causative relationship between the injury and the conduct of the medical practitioner." *Powe v. Byrd*, 892 So.2d 223, 227 (Miss. 2004). (Emphasis added). The purpose of the discovery rule is to ensure that an injured person is protected even though the injury can not be discovered through reasonable diligence. *Wayne Gen'l Hosp. v. Hayes*, 868 So.2d 997, 1001 (Miss. 2004). The Plaintiff's injury was discovered on January 12, 2005, when she discovered (as alleged in ¶¶13, 14, and 15 of her Complaints) that her "problem was, in fact, appendicitis and not gynecological in nature."

The issues in the case *sub judice* are analogous to those addressed in *Jackson Clinic for Women, P.A. v. Henley*, 965 So.2d 643 (Miss. 2007). In *Jackson Clinic for Women, P.A.*, parents of a stillborn child filed a medical malpractice action against the medical clinic, hospital, and physicians. *Id.* The defendants filed a motion for summary judgment which was denied by the Hinds County Circuit Court. *Id.* The defendants then filed a petition for interlocutory appeal. *Id.* The issue raised on appeal was whether the plaintiffs' claims were barred by the statute of limitations. *Id.* The Court held that the Plaintiff had discovered the alleged malpractice while she was in the hospital and that the statute of limitations began to run at that time. *Id.* The Court included in its opinion the following comments:

“[Plaintiff] believed that some type of negligence has occurred while she was in the hospital talking with [her sister]. [Plaintiff] knew that “something was wrong. Something was real wrong.” [Plaintiff] then proceeded to hire an attorney, obtain her medical records, and make an outline of all of the acts that she deemed negligent.” *Jackson Clinic for Women, P.A. v. Henley*, 965 So. 2d 643, 650 (¶15) (Miss. 2007).

Accordingly, the Court reversed the trial Court's order denying the plaintiffs' Motion for Summary Judgment and entered judgment in favor of the defendants. *Id.* at 651.

In the case *sub judice*, it is uncontradicted that the Defendants' alleged negligence in failing to diagnosis the Plaintiffs' appendicitis was first known or discovered on January 12, 2005, the day of her surgery which revealed “that the problem was, in fact, appendicitis and not gynecological in nature.” (R.E.; Tab 1, p. 12; Tab 2, p. 23; Tab 3, p. 34).

In Plaintiff's Response to Dr. Trapp's Motion to Dismiss, the Plaintiff submitted the following chronology:

- January 10, 2005 **Alicia Stringer presented to NMMC-West Point complaining of nausea, vomiting, diarrhea and abdominal pain**
- January 10, 2005 **Trapp reported initial findings of CT scan which revealed cystic or fluid filled masses in the pelvis**
- January 11, 2005 **Trapp submitted addendum stating that the multiple fluid collections within the pelvis represented abscesses and likely resulted from pelvic inflammatory disease or appendicitis with rupture**
- January 12, 2005 **Alicia Stringer underwent emergency surgery at Oktibbeha County Hospital**
- January 21, 2005 Alicia Stringer discharged from Oktibbeha County Hospital
- February 23, 2005 **Stringers retained Orlando R. Richmond, Sr. as counsel**
- March 29, 2005 Orlando R. Richmond, Sr. requested medical records from NMMC
- April 14, 2005 **Orlando R. Richmond, Sr. received medical records from NMMC**
- January 5, 2007 Complaint filed/Notices of Claim served
- January 8, 2007 Amended Complaint filed
- March 14, 2007 Second Amended Complaint filed naming James Trapp, M.D. as a defendant

(Clerk's Papers, p. 102-103). (Emphasis added).

The discovery rule is inapplicable to this case. See *Jackson Clinic for Women, P.A. v. Henley*, 965 So.2d 643, 650 (Miss. 2007). The Plaintiff's chronology establishes that Plaintiff retained a lawyer on February 23, 2005, just forty-two (42) days after Alicia's surgery and that on March 29, 2005, her lawyer requested her medical records from Clay County Medical Corporation. (Clerk's Papers, p. 102-103). On April 14, 2005, the Plaintiff's lawyer received her

medical records which included Dr. Trapp's report of her CT scan and his addendum, but waited over twenty (20) months later to bring suit against the hospital, Timothy Whittle, M.D. and Steve Noggle, M.D. and referred to Dr. Trapp in two Complaints but did not sue him until almost twenty-four (24) months later when the statute of limitations had expired. (Clerk's Papers, p. 102-103).

The Clay County Circuit Court Judge correctly relied on *Joiner v. Phillips*, 953 So.2d 1123 (Miss. Ct. App. 2006). *Joiner* involved a medical malpractice action against several medical providers and fictitious medical professionals. *Id.* at 1125. On June 22, 2000, Joiner filed a motion for leave to amend her complaint to add as defendants Dr. Ed Phillips and his radiological group. *Id.* Joiner's motion was granted and she filed her amended complaint naming Dr. Phillips and the radiological group as defendants. *Id.* Dr. Phillips and the radiological group filed a motion for summary judgment based on the affirmative defense of the statute of limitations. *Id.* An issue raised on appeal was whether the discovery rule applied to toll the statute of limitations period as to Joiner's claims against Dr. Phillips and the radiological group. *Id.* at 1126. The Mississippi Court of Appeals found that **Joiner was aware of her injuries on August 22, 1996.** *Id.* at 1126. (Emphasis added). However, Joiner did not request her medical records until nearly two years after her treatment. *Id.* at 1127. The court noted that the medical records were always available to Joiner but she failed to exercise due diligence in requesting the medical records and exploring the identity and what role Dr. Phillips had in Joiner's treatment. *Id.* Accordingly, the court held that the discovery rule did not apply to Joiner's claims and affirmed the summary judgment in favor of the defendants. *Id.* at 1127. The Circuit Court of Clay County properly found that:

"This case is entirely on-point with the case of *Joiner v. Phillips*, 953 So.2d 1123. *Joiner* also dealt with a radiologist and the

question of at what reasonable time should his contribution to the plaintiff's injury have been discovered. The *Joiner* Court concluded that since the plaintiff had a known, non-latent injury, and had access to her medical records, the radiologist's contribution should have been identified and suit filed against him within the statute of limitations period. The *Joiner* [Court] also concluded that the patient's claims did not relate back to the filing of the original Complaint." (Clerk's Papers, p. 160; R.E.; Tab 5, p. 160-161).

There are at least four (4) key similarities between *Joiner* and the case *sub judice*. First, both cases involved a medical malpractice claim against a radiologist. Second, in both cases, the plaintiffs had an alleged known, non-latent injury. Third, the actionable injury was known prior to the receipt of the medical records. Fourth, in both cases, the plaintiffs failed to exercise due diligence in timely filing their claims. *Id.* Like *Joiner*, the Plaintiff had a known, non-latent injury (appendicitis) and the discovery rule is inapplicable to her claim against Dr. Trapp. (R.E.; Tab 5, p. 160-161).

The ruling in *Barry v. Thaggard*, 785 So.2d 1107 (Miss. Ct. App. 2001) is also relevant to the issue presented by the Plaintiff's appeal. *Barry* was a medical malpractice action against physician and medical center for the negligent treatment of a snakebite. *Id.* The plaintiff was bitten by a snake and was treated by Dr. Thaggard. *Id.* at 1109. Several weeks later, Barry went to the emergency room of Durant Hospital because his condition had not improved. *Id.* On August 17, 1996, Barry was sent to the University Hospital in Jackson for surgery and was placed under the care of Dr. Calvin Ramsey. *Id.* Barry brought suit against Dr. Thaggard. Dr. Thaggard moved the Court for summary judgment on the basis that Barry's claim was barred by the statute of limitations. The trial Court granted Dr. Thaggard's Motion and dismissed the case. On appeal, the Appeals Court held that Barry's cause of action against Dr. Thaggard for medical malpractice accrued on the date he saw Dr. Ramsey and the statute of limitations began running on that date.

Id. at 1110. The ruling in *Barry* is applicable to the case *sub judice* because on January 12, 2005, the Plaintiff was operated on by Dr. Roger C. Clapp, Jr. and her appendicitis was diagnosed, and the statute of limitations began to run since, on that date, the Plaintiff knew of her alleged misdiagnosis. (R.E.; Tab 1, p. 7-16; Tab 2, p. 17-28; Tab 3, p. 29-39).

Dr. Trapp also relies on *Sutherland v. Ritter*, 959 So.2d 1004 (Miss. 2007). The Plaintiff Sutherland brought a medical malpractice action against Dr. Ritter alleging that Dr. Ritter was negligent in prescribing Zyprexa for Sutherland which allegedly caused a medical condition called Tardive Dyskinesia Syndrome (TDS). *Id.* The Mississippi Supreme Court held that Sutherland knew of his claim “no later than the date of his discharge” from the hospital. *Id.* at 1009. The Court stated:

“[W]e find that **Sutherland’s own suspicions and actions thereon**, together with the passage of time from when Sutherland first recognized the adverse effects from the Zyprexa until Sutherland checked himself into the hospital in April 2001, were **enough to satisfy the statutory requirement of discovery** of the alleged medical negligence on the part of Dr. Ritter. **Sutherland originally knew or suspected that Dr. Ritter’s prescription of Zyprexa caused his undesirable side effects no later than the date of his discharge from St. Dominic on April 19, 2001**, because he stated that ‘[t]he Zyprexa was destroying my life’ and that ‘[i]t was not a belief, it was a knowing.’” *Id.* at 1009. (Emphasis added).

In the case *sub judice*, the Plaintiff has admitted in three (3) Complaints that she discovered her claim on January 12, 2005. (R.E.; Tab 1, p. 7-16; Tab 2, p. 17-28; Tab 3, p. 29-39). In addition to the admissions in her Complaints, the Plaintiff in her Memorandum Brief in Support of her Response in Opposition to Dr. Trapp’s Motion to Dismiss admits that the surgery performed on January 12, 2005 at Oktibbeha County Hospital revealed that her “...problem was, in fact, appendicitis...”. (R.E.; Tab 8, p. 3). The lower Court judge correctly found that the Plaintiff knew of her non-latent injury on January 12, 2005 and failed to file her Complaint

against Dr. Trapp with the limitation period prescribed by MISSISSIPPI CODE ANNOTATED §15-1-36.

II. THE PLAINTIFF FAILED TO EXERCISE REASONABLE DILIGENCE IN FILING HER CLAIM AGAINST DR. TRAPP AND HER CLAIM IS TIME-BARRED

Under the “discovery rule”, the central inquiry is:

“The time that the patient discovers, or should have discovered by the exercise of reasonable diligence, that he probably has an actionable injury. The operative time is when the patient can reasonably be held to have knowledge of the injury itself, the cause of the injury, and the causative relationship between the injury and the conduct of the medical practitioner.” *Sarris v. Smith*, 782 So.2d 721, 724 (Miss. 2001). (Emphasis added).

On page 11 of the Appellant’s Brief, Plaintiff **“acknowledges that she knew she had appendicitis [on January 12, 2005]”** and that she **“became aware that there may have been negligence/misdiagnosis [on January 12, 2005].”** (Emphasis added). Yet, Plaintiff argues that the statute of limitations did not begin to run as to Dr. Trapp because she “could not have discovered Dr. Trapp’s negligence [on January 12, 2005].” (Emphasis added). This argument is contrary to the Plaintiff’s admissions in her Complaints and Appellant’s Brief, that she knew she had appendicitis on January 12, 2005 and was aware her problem was “...not gynecological in nature.” The Plaintiff argues that the discovery exception to the statute of limitations starting should apply because she was ignorant of the facts that would have permitted her to bring a claim against Dr. Trapp. This argument is misplaced and is contrary to the Plaintiff’s admissions in her Complaints and Appellant’s Brief. Pursuant to MISSISSIPPI CODE ANNOTATED § 15-1-36(15), suit must be commenced within “two (2) years from the date of the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered.” (Emphasis added). The Plaintiff’s Second Amended Complaint naming Dr. Trapp as a

Defendant was filed more than two (2) years and 60 days after January 12, 2005, the date she discovered the alleged misdiagnosis. The Plaintiff has never offered any explanation for her failure to sue Dr. Trapp, when based upon the same hospital records, she sued the hospital, Dr. Whittle and Dr. Noggle. It is respectfully submitted that there is no explanation for this failure.

The recent decision of *Simpson v. Lovelace*, 892 So.2d 284 (Miss. Ct. App. 2005) is relevant to the Court deciding this issue. In *Simpson*, the plaintiff brought a medical malpractice action alleging that the defendants negligently operated on his right leg. *Id.* In that case, as in the case *sub judice*, the plaintiff failed to file his action within the two (2) year limitations period prescribed by MISSISSIPPI CODE ANNOTATED § 15-1-36. The plaintiff argued that he did not discover or know of his claim until after the surgery and that the statute of limitations did not begin to run until he discovered the defendant's negligence. *Id.* at 286. In affirming the circuit court's grant of summary judgment, the Court noted that the plaintiff had a visible, post operative abnormality in his right leg after surgery. *Id.* The Court found:

“...[T]here was a basis for the initiation of reasonable diligence on Simpson's part such that might have allowed him to discover Dr. Lovelace's alleged acts of negligence. On these facts, we find that Dr. Lovelace's alleged acts of negligence might have been discovered within the two (2) year time limit had Simpson engaged in due diligence to discover such and that he had a reasonable basis to initiate that diligence which he failed to do. Had he done so, he likely would have acquired knowledge of the injury, the cause of the injury, and the causative relationship between the injury and the conduct of Dr. Lovelace. For the foregoing reasons, we find that Simpson's suit is barred by the applicable two-year statute of limitations. As a result, the trial judge did not err in granting the defendant's motions for summary judgment.” *Id.* at 287.

Similarly, the Plaintiff has admitted in her Complaint, Amended Complaint, Second Amended Complaint, Response to Dr. Trapp's Motion to Dismiss, Memorandum Brief in Support of her Response in Opposition to Dr. Trapp's Motion to Dismiss, and Appellant's Brief that she was

aware of the alleged negligence (misdiagnosis of the Defendants) on January 12, 2005. (R.E.; Tab 1, p. 7-16; Tab 2, p. 17-28; Tab 3, p. 29-39; Clerk's Papers, p. 102-106; Tab 8, p. 1-6). The discovery exception does not apply since, as in *Simpson*, the Plaintiff had knowledge of all of the facts necessary for her to bring a claim against Dr. Trapp prior to the expiration of the statute of limitations. The undisputed facts do not allow the discovery exception to apply to the Plaintiff's claim against Dr. Trapp.

On page 7 of Appellant's Brief, Plaintiff states that "[u]pon closer and further review of the medical records" the Plaintiff "discovered that the radiologist may have acted negligently and contributed to her injuries if he failed to notify the treating physician of his addendum report indicating appendicitis." (Emphasis added). Plaintiff argues that the discovery rule should apply because she discovered Dr. Trapp "[u]pon closer and further review of medical records..." The Plaintiff received her medical records on April 14, 2005, just over two (2) months after January 12, 2005, when she discovered her alleged misdiagnosis. The medical records obviously identified Dr. Trapp and contained his January 10, 2005 report on the Plaintiff's CT scan and his January 11, 2005 addendum to that report since the Plaintiff in her Complaint, Amended Complaint, and Second Amended Complaint made the following reference to Dr. Trapp:

(Paragraphs 9, 10 and 11)

On January 11, 2005, an addendum to the CT report was completed by Dr. James Trapp, the radiologist who performed the CT scan the previous day. The addendum indicated that the multiple fluid collections within the pelvis represented abscesses and likely resulted from pelvic inflammatory disease or **appendicitis** with rupture.

Dr. Trapp does not contend that the Plaintiff failed to exercise reasonable diligence in seeking the medical records. He contends that the Plaintiff had her medical records, which identified Dr. Trapp and the documented his reading of her CT scan, and that despite that

knowledge and information, the Plaintiff failed to file suit against him within the period of limitation. The Plaintiff's lawyer received the medical records on April 14, 2005, and had almost two (2) years to make decisions on who to name as Defendants. The Plaintiff has never offered any reason or explanation for her failure to name Dr. Trapp as a Defendant when she knew him to be one of the physicians involved in the care and treatment during her hospitalization at Clay County Medical Corporation, which care and treatment she believed to be negligent.

"[T]o claim benefit of the discovery rule, a plaintiff must be reasonably diligent in investigating the circumstances surrounding the injury. The focus is on the time that the patient discovers, or should have discovered by the exercise of reasonable diligence, that he probably has an actionable injury." *Wayne Gen. Hosp. v. Hayes*, 868 So.2d 997, 1001 (Miss. 2004). (Emphasis added). In *Wayne*, the Court held, as a matter of law, that at the time of a child's death, her parents "had enough information such that they knew or reasonably should have known that some negligent conduct had occurred, even if they did not know with certainty that the conduct was negligent as a matter of law." *Id.* at 1001. The Court explained in *Wayne* "[i]t should have been apparent to the plaintiffs that some negligent conduct had occurred" even if they did know what that conduct was. *Id.* The issue is when plaintiff discovered or reasonably should have discovered her injury and of the alleged negligence, not when she became fully aware of the extent of the injury and of the alleged negligence. See *Peavey Electronics Corp. v. Baan U.S.A., Inc.*, 2009 WL 921438 (Miss. Ct. App. 2009). (Emphasis added). It is undisputed that Plaintiff was aware of her misdiagnosis on January 12, 2005. It is clear that the Plaintiff did not use reasonable diligence and that the trial court did not err in finding that the Plaintiff failed to exercise reasonable diligence in bringing her claim against Dr. Trapp. *Id.*

In *Sims v. Bear Creek Water Association*, 923 So.2d 230 (Miss. Ct. App. 2005), the foundation of plaintiffs' home and driveway began shifting because of faulty water main that was keeping the subsoil too moist. *Id.* at 232. The Simses argued that the discovery rule applied to toll the statute of limitations as to their claim against Bear Creek Water Association. *Id.* at 233. The Court in finding the discovery rule inapplicable found:

“In the case subjudice, the knowledge of the existence of the injury was knowledge of a fact which would entitle the Simses to bring suit. As discussed above, due to the information in Miller’s July 15, 1999 report, the Simses **knew that there was an injury, and that Bear Creek was responsible for at least part of the injury.** As asserted by the trial court, even if the Simses did not know the identity of the party, M.R.C.P. 9(h) and 15 are designed to provide a mechanism for a **plaintiff ignorant of the identity of the responsible defendant** to file within the statute of limitations despite such ignorance. Therefore, the statute of limitations began to run on July 15, 1999, when the Simses became aware of the injury.” *Id.* at 234. (Emphasis added).

Accordingly, the Court refused to apply the discovery rule because the Simses had knowledge of the facts that would have allowed them to bring a claim against Bear Creek prior to the expiration of the applicable statute of limitations. *Id.* at 234.

In the case *sub judice*, the Plaintiff knew of her misdiagnosis on January 12, 2005, knew that the misdiagnosis occurred during her January 2005 hospital admission at the Clay County Medical Corporation. Yet, the Plaintiff contends the alleged negligence of Dr. Trapp was not discovered until April 14, 2005, when her lawyer received the medical records of her January 5, 2005 admission to Clay County Medical Corporation. If that is true, how then did the Plaintiff discover the negligence of the hospital, Dr. Whittle, and Dr. Noggle prior to April 14, 2005? The “discovery rule” announced in Section 15-1-36 applies when the plaintiff, not plaintiff’s lawyer, discovers the alleged negligent act or omission. The statute of limitations began to run on January 12, 2005, the date on which the Plaintiff discovered that she had appendicitis, the

condition which the Plaintiff alleges Dr. Whittle, Dr. Noggle, and Dr. Trapp all failed to diagnose. The trial court properly rejected the Plaintiff's "discovery rule" argument as it was clear that the Plaintiff knew of and failed to exercise reasonable diligence in bringing her claim against Dr. Trapp. *Wright v. Quesnel*, 876 So.2d 362, 367 (Miss. 2004); *Wayne Gen'l Hosp. v. Hayes*, 868 So.2d 997, 1001 (Miss. 2004); *Sutherland v. Ritter*, 959 So.2d 1004, 1009 (Miss. 2007); *PPG Architectural Finishes, Inc. v. Lowery*, 909 So. 2d 47, 52 (Miss. 2005); *Powe v. Byrd*, 892 So.2d 223, 228 (Miss. 2004).

III. THE CIRCUIT COURT CORRECTLY HELD THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT REGARDING DR. TRAPP'S STATUTE OF LIMITATIONS DEFENSE

The issue of whether the applicable statute of limitations has run is a question of law. *Wayne Gen'l Hosp. v. Hayes*, 868 So.2d 997, 1000 (Miss. 2004). A plea of the statute of limitations is an affirmative defense for which the party asserting it has the burden of proof. *Huss v. Gayden*, 991 So.2d 162, 165 (Miss. 2008). The Mississippi Supreme Court has held that the statute of limitations commences upon discovery of an injury, and that discovery is an issue of fact decided by a jury where there is a genuine dispute. *Schiro v. American Tobacco Co.*, 611 So.2d 962, 964 (Miss. 1992). "Occasionally the question of whether the suit is barred by the statute of limitations is a question of fact for the jury; however, as with other putative fact questions, the question may be taken away from the jury if reasonable minds could not differ as to the conclusion." *Smith v. Sanders*, 485 So.2d 1051, 1053 (Miss. 1986).

Plaintiff argues that the time in which the statute of limitations began to run is an issue of fact that should be decided by a jury. Plaintiff's argument is incorrect. "Reasonable minds" could come to no conclusion other than the Plaintiff had knowledge of her alleged injury and the alleged malpractice on January 12, 2005.

The Plaintiff cites *Jenkins v. Pensacola Health Trust, Inc.*, 933 So.2d 923 (Miss. 2006) to support her position that Dr. Trapp failed to meet his burden of proof regarding his statute of limitations affirmative defense. Plaintiff's argument is misplaced. The *Jenkins* Court held that:

“When a defendant pleads the statute of limitations as a defense and shows that the suit is thereby barred, he has met this burden of proof. Here, [the defendant] pled the statute of limitations as a defense and must therefore show that the claims for which [the plaintiff] did not provide a specific date of occurrence were barred by the statute. ... Therefore, as to claims for which no specific date of occurrence has been shown, we reverse the trial Court and hold that summary judgment shall be affirmed only as to claims where specific dates are proven.” *Id.* at 927.

In *Jenkins*, the Court held that the defendant met its burden of proof as to the plaintiff's claims where a specific date was proven more than three (3) years prior to the filing of the wrongful death lawsuit. *Id.* In this case, Dr. Trapp met his burden of proof by showing via the Plaintiff's Complaint, Amended Complaint, Second Amended Complaint, Response to Dr. Trapp's Motion to Dismiss, and Memorandum Brief in support of her Response in Opposition to Dr. Trapp's Motion to Dismiss that the specific date of the occurrence was January 12, 2005, the date on which the Plaintiff was aware of her alleged known, non-latent injury.

Mississippi Appellate Courts have held a “genuine issue of dispute” as the running of the statute of limitations where the plaintiff has suffered an unknown, latent injury. *Schiro v. American Tobacco Co.*, 611 So.2d 962, 964 (Miss. 1992); *Cannon v. Mid-South X-Ray Company*, 738 So.2d 274, 276-77 (Miss. Ct. App. 1999). In this case, Plaintiff admits in the Appellant's Brief that she suffered an alleged known, non-latent injury. The Mississippi Supreme Court has held that the statute of limitations commences where there is no genuine issue of dispute. In the recent decision of *Huss v. Gayden*, 991 So.2d 162, 164 (Miss. 2008), the Mississippi Supreme Court commented that there is no genuine issue of material fact as to the

running of the statute of limitations “where the relevant dates are either undisputed by admission or pleading, or are so manifest that reasonable minds could not differ.” *Id.* (Emphasis added). See also *Sutherland v. Ritter*, 959 So.2d 1004, 1009 (Miss. 2007); *Smith v. Sanders*, 485 So.2d 1051, 1053 (Miss. 1986). In the case *sub judice*, the Plaintiff’s own pleadings establish that the statute of limitations began to run on January 12, 2005. The material facts in this case are undisputed.

Dr. Trapp respectfully submits that there is no undisputed material fact in this case, and the trial Court was correct in granting summary judgment.

CONCLUSION

Dr. Trapp respectfully submits that pursuant to the Plaintiff’s admissions in her trial court pleadings and the Appellant’s Brief, and the authorities cited in this brief, that he met his burden of proof as to his statute of limitations affirmative defense. The Plaintiff admits she discovered her claim on January 12, 2005 but failed to file her action against Dr. Trapp until March 14, 2005 after the expiration of the applicable statute of limitations. Thus, her claim against Dr. Trapp is time-barred, and the Order of the Circuit Court of Clay County dismissing the Plaintiff’s claims against Dr. Trapp should be affirmed.

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CERTIFICATE OF SERVICE

I, Robert K. Upchurch, attorney for Appellee, James Trapp, M.D., do hereby certify that I have this day mailed via United States mail, proper postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee, James Trapp, M.D., to the following:

Honorable Lee J. Howard
Clay County Circuit Court Judge
P.O. Box 1344
Starkville, MS 39760

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DATED, this the 29th day of May, 2009.


ROBERT K. UPCHURCH, MSB [REDACTED]

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2008-CA-01192

**MICHAEL STRINGER as Natural Father and
Next of Friend of ALICIA STRINGER, a Minor**

APPELLANT

v.

JAMES TRAPP, M.D.

APPELLEE

CERTIFICATE OF FILING

I, JOSHUA S. WISE, one of the attorneys for the Defendant/Appellee, James Trapp, M.D., do hereby certify that I have this day mailed the original and three (3) copies and an electronic disk of the Brief of Appellee, James Trapp, M.D., by U.S. mail, postage prepaid, to Betty W. Sephton, Mississippi Supreme Court Clerk, P.O. Box 249, Jackson, Mississippi 39205-0249.

RESPECTFULLY SUBMITTED, this the 29th day of May, 2009.

HOLLAND, RAY, UPCHURCH & HILLEN, P.A.

By: 

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