IN THE SUPREME COURT OF MISSISSIPPI

NO. 2008-CA-1192

MICHAEL STRINGER as Natural Father and Next Friend of ALICIA STRINGER, A Minor — APPELLANT

v.

JAMES T. TRAPP, M.D. — APPELLEE

REPLY BRIEF OF APPELLANT

APPEAL FROM THE CIRCUIT COURT
OF CLAY COUNTY, MISSISSIPPI

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STATEMENT REGARDING ORAL ARGUMENT

Since the issue and facts herein are straightforward and since there is long-standing precedent clearly on point, Appellant/Plaintiff agrees that the issue presented can be decided and resolved on the record and briefs of the parties alone, unless this Court deems otherwise. Therefore, oral argument is not requested.

INTRODUCTION

Regarding the substantive majority of the issues at bar, the Appellants would refer to the arguments and authorities set forth in their Brief of Appellant, as well as the response in the Brief of Appellee, offering rebuttal thereto as follows:

A. Dr. Trapp's argument is flawed, as he focuses solely on discovery of the injury as opposed to discovery of the *negligence*

Although Appellee's brief is well-written, this Court should not be pursued by or rely on it, as Appellee disregards long-standing Mississippi precedent, highlights only those portions of case law to his benefit and misapplies the law to the facts of the present case altogether.

For instance, Appellee claims that the discovery rule does not apply in this case since Appellant/Plaintiff knew of her injury – appendicitis. And that she knew of her appendicitis on January 12, 2005, which is when she had emergency surgery in Starkville. In addition to having appendicitis, Plaintiff had complications from a ruptured appendix, cecal necrosis and a grave infection, which required surgery, treatment and in-patient hospitalization until January 21, 2005, at which time she was finally released.

While Appellant/Plaintiff acknowledges that on these dates in January 2005 she was aware of certain aspects of her conditions, such as the pain she was experiencing and the limited comments of certain of her physicians, neither she nor her parents were aware of or could have been aware of Dr. Trapp's negligence and his role in causing and/or contributing to her complications. As discussed in the parties' briefs, Dr. Trapp is a radiologist and was one of the radiologists who worked at the hospital and interpreted scans in Plaintiff's case during her stay at Clay County Hospital in January 2005. It is nonsensical to claim that Plaintiff and/or her parents should have known of Dr. Trapp's negligence when Alicia's own treating physician at Clay County Hospital, Dr. Whittle, did not even know of Dr. Trapp's negligence at the time.

Specifically, in his attempts to diagnose Alicia's medical condition at the time, Dr. Whittle ordered several tests, including a CT scan as well as an ultrasound. Dr. Trapp read the CT scan and submitted his impression that there were two (2) cystic pelvic masses, measuring 8 and 6 centimeters respectively. It is presumed that Dr. Whittle partially relied on the radiologists CT scan impression, and thus determined that these "cysts" were ovarian in nature. R. at 139; R.E. 14. However, subsequently and without anyone's knowledge at the time, including Dr. Whittle's and especially Plaintiff's or her parents, *Dr. Trapp amended his impression*; this addendum clearly stated a different impression – that the masses were not thought to be ovarian cysts but instead abscesses caused from pelvic inflammatory diseases or the appendix. However, according to Dr. Whittle, Dr. Trapp failed to bring his new impression to anyone's attention – not even the treating physicians, as indicated by Dr. Whittle's discharge summary. R. at 140; R.E. 15. Had Dr. Trapp brought this to someone's attention, then Alicia could potentially have been treated and diagnosed sooner; instead her health deteriorated. It should also be noted that Dr. Whittle, as a defense for his alleged malpractice, may point to Dr. Trapp and argue that had he known of Dr. Trapp's new impression, he likely would have been able to properly treat Alicia and/or reduce complications.

Appellee's central argument is that the discovery rule does not apply and that the statute of limitations began to run on the very day Alicia first learned of her appendicitis and thus a "misdiagnosis" on January 12, 2005. However, technically, Dr. Trapp did not misdiagnose her. Instead, he diagnosed her with having appendicitis in his addendum *that he failed* to bring to the treating physician's attention, even though Dr. Trapp should have known that his failure and passage of time could cause Alicia's appendix to rupture and cause her further infection and/or other complications as it did. Again, that omission and failure to act is negligence on the part of Dr. Trapp, and it is negligence that neither Alicia nor her parents were aware of on January 12,

2005 when Alicia left Clay County Hospital. Again, they cannot be expected to have knowledge of such information from a radiologist they did not even meet, especially when the treating physician did not even possess such knowledge. R. at 139-141; R.E. 14-16. Stated differently, the Plaintiffs can not possess knowledge of information *that does not yet exist,* not the least of which was the amended medical record, which was not dictated until January 31, 2005, as set forth more fully below.

Mississippi law is very clear that the discovery rule does apply to toll the two (2) year statute of limitations in medical malpractice cases such as the present one. Mississippi Code Annotated § 15-1-36 (2) states that a claim cannot be maintained against a physician "unless it is filed within two (2) years from the date the alleged act, omission or neglect shall or within reasonable diligence might have been first known or discovered." Miss. Code Ann. § 15-1-36. Although Appellee would prefer otherwise, this statute does not say that the statute of limitations begins to run from when the injury is first known or discovered. While recently discussing and interpreting the discovery rule upon a certified question from the United States Court of Appeals for the Fifth Circuit, this Court provided that the central inquiry in applying the discovery rule is "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***." Huss v. Gayden, 991 So.2d 162, 165 (Miss. 2008) (citing Smith v. Sanders, 485 So.2d 1051, 1052-53 (Miss. 1986) (emphasis added)). In answering the certified question, the Huss Court further discussed and deferred to another of its recent decisions where "this Court recently focused the inquiry 'on when a plaintiff, exercising reasonable diligence, ***should have first discovered the negligence, rather than the injury.***'" Huss, 991 So.2d at 166 (quoting Sutherland v. Ritter 959 So.2d 1004, 1008 (Miss. 2007) (emphasis added)). Furthermore, even where the plaintiff admitted knowledge of the injury, this Court held:

> ...although a hidden or unseen injury might very well serve to trigger the discovery rule and toll the statute of limitations, it is not because the injury itself is hidden or unknown, but rather because the negligence which caused the injury is unknown. Furthermore, ***in the medical malpractice context, the discovery rule may apply in cases where the injury is not latent at all, but where the negligence which caused the injury is unknown.*** Huss at 166 (quoting Sutherland at 1008-09) (emphasis added).

Therefore, this Court has made clear that the determining factor is not necessarily when the injury is known or should be known. Instead, applying the discovery rule is a fact-intensive process which involves applying *all three* factors; specifically, when the patient can reasonably be held to have knowledge of the following: (1) the injury itself; (2) the cause of the injury; and (3) ***the causative relationship between the injury and the conduct of the medical practitioner.*** *Id.* at 165-66 (our emphasis added). In sum, the holding of this Court in recently answering the Fifth Circuit's certified question regarding Miss. Code Ann. § 15-1-36 and the discovery rule was that the "focus of inquiry under discovery rule into the running of limitations period for medical malpractice action is on when a plaintiff, exercising reasonable diligence, should have first discovered the negligence, ***rather than the injury.***" *Id.* at 162. (emphasis added).

Although the lower court did not have the benefit of the Huss decision rendered in September 2008, it did have the benefit of the Sutherland decision from 2007, both of which are directly on point. In applying the case law set forth by this Court in these two cases, it is clear in the present case that the statute of limitations against Dr. Trapp would not and did not begin to run on January 12, 2005 (date of surgery). Instead, the time period would begin to run from when the Plaintiff could reasonably have known or first discovered Dr. Trapp's negligence in his failure to report his addendum new findings/diagnosis to Alicia's treating physician. At the time that Alicia left Clay County Hospital on the morning of January 12, 2005, neither she nor her

parents knew or could have known of Dr. Trapp's revised interpretation and reading of her CT scan. And as previously noted, her own treating doctor did not even know of Dr. Trapp's addendum, as indicated in Dr. Whittle's summary discharge. R. at 140; R.E. 15. It should be further noted that Dr. Whittle's discharge summary, which references Dr. Trapp's error, was not dictated until January 30, 2005 and not transcribed until January 31, 2005. R. at 141; R.E. 16. Therefore, there was no way that Alicia or her parents could have known of Dr. Trapp's error as early as January 12, 2005 as this information and medical records were not even in existence at that time.

Since the test of when the discovery rule applies is not when the injury is known but rather when the *negligence* can reasonably be known, Appellant/Plaintiff would show this Court that she could not have known of Dr. Trapp's negligence until a reasonable time within which the medical records could have been available to her. Plaintiff argues that she acted with reasonable diligence in retaining an attorney a month after her several week hospital stay. Furthermore, her attorney was diligent in requesting the records, which were promptly produced approximately two (2) weeks after they were requested and received in mid April 2005 – only three (3) months after her surgery. While Plaintiff urges the later date in April 2005 as the appropriate date of discovery of Dr. Trapp's negligence since she and her attorney acted with reasonable diligence in seeking her medical records and obtained them at that time, the absolute earliest that Appellant/Plaintiff could have ever possibly known of Dr. Trapp's negligence would be sometime in February 2005, since the medical records were not in existence prior to then – again, Dr. Whittle's summary discharge was not even transcribed until January 31, 2005, several weeks after Alicia's discharge from the hospital. Regardless of whether the statute of limitations was tolled until February 2005 or April 2005, it certainly did not begin to run on January 12, 2005; therefore, she timely filed her Complaint against Dr. Trapp. For these reasons, the lower

court erred in dismissing Dr. Trapp as a defendant on the basis that the claim was time-barred.

B. Dr. Trapp attempts to change the discovery rule and move the time period when the statute of limitations begins to run by arguing what counsel "could" have done, which is irrelevant and non-persuasive

From pages 18 through 21 of Appellee's brief, Dr. Trapp completely disregards the discovery rule and instead suggests the creation of a moving statute of limitations of sorts, arguing what could have been done by Plaintiff or her counsel within two (2) years of her surgery and discharge date from Clay County Hospital (January 12, 2005). Specifically, Dr. Trapp argues that since Plaintiff could have filed suit against him at the same time she filed suit as the other defendants, then the statute of limitations has run. And further argues that since Plaintiff and her counsel had her hospital records since April 2005 and relied upon some of those records, then she has "one shot" to sue anyone and everyone at the same time that may be mentioned in those records, including Dr. Trapp. However, that is not the test, nor is it the point. Instead, it is a red herring that should not distract this Court from the real issue – when does the discovery rule apply against Dr. Trapp under the present circumstances of this case.

The inquiry is not when the plaintiff or her counsel "could" have filed suit – if that was the test, then arguably the statute of limitations could have been in 2005. Instead, our state has a specific statute which states that the there is a time period of two (2) years which begins from the time that the plaintiff has knowledge or with reasonable diligence should have knowledge of the medical practitioner's negligence. This rule of law applies individually to each practitioner – there is not necessarily a single date for all practitioners, although there may be times where that is the case. However, the present case is not such a case. In this case, neither Alicia nor her parents even knew about Dr. Trapp in January 2005 – they had never met with him or discussed Alicia's medical condition with him. Nor did Dr. Whittle discuss Dr. Trapp with them. Plaintiff and her parents did not know about Dr. Trapp and had no knowledge of his negligence until after

receipt of the medical records, including Dr. Whittle's discharge summary. Therefore, the statute of limitations period of two (2) years cannot begin to run against Dr. Trapp until receipt of medical records, since they had no prior knowledge of him and his negligence. As previously discussed in this Reply Brief, Alicia's own treating physician did not know about Dr. Trapp's failures. Furthermore, as those familiar with the legal and medical professions know very well, it can take some time for medical records to come into existence, which is also evidenced in this case by the fact that certain records, such as Dr. Whittle's discharge summary, was not dictated and transcribed until January 31, 2005.

Appellee concedes that plaintiff and her counsel acted diligently in requesting and obtaining her medical records. See Appellee's Brief at 20. Dr. Trapp simply contends that Alicia failed to act diligently by not filing suit against Dr. Trapp at the same time as the other medical defendants. Again, the fact that plaintiff "could have" filed suit at an earlier time than she did against Dr. Trapp is not the test to determine the time period at which the statute of limitations begins to run. Dr. Trapp also argues that since Alicia and her counsel had her medical records for "almost two years", then she should have been able to file suit against Dr. Trapp at the same time as the other defendants. See Appellee's Brief at 21. However, the statute of limitations is not "almost two years." It is specifically a two (2) year period, which begins to run in medical malpractice cases when the patient knows or with reasonable diligence should discover the negligence. See Miss. Code. Ann. § 15-1-36.

Because neither plaintiff nor her parents could have known about Dr. Trapp's negligence until receipt of the medical records, Appellant/Plaintiff would respectfully show this Court that the statute of limitations began to run in April 2005, since they acted diligently in obtaining the medical records, as even Appellee concedes. See Appellee's Brief at P. 20. At the very least, the statute of limitations against Dr. Trapp should not begin to run any earlier than when the

medical records would have been in existence and the earliest they could have been obtained, which would likely have been sometime in mid to late February 2005, as it took almost two weeks for the hospital to produce the records. Even assuming that the statute of limitations began to run on February 1, 2005, which is the very day after Dr. Whittle's report was transcribed, Appellant/Plaintiff's lawsuit was still timely filed against Dr. Trapp.

C. Dr. Trapp's reliance on various cases where the discovery rule did not apply is misplaced because those cases are clearly distinguishable from this case

Although Dr. Trapp concedes that plaintiff and her counsel acted diligently in requesting and obtaining her medicals records, Appellee steadfastly argues that plaintiff did not act diligently and therefore the discovery rule does not apply. In making his argument to this Court, Dr. Trapp cites to various cases throughout his brief; however, those cases are distinguishable from the present case.

For instance, Dr. Trapp relies on Simpson v. Lovelace as support that this Court should find that this suit is time-barred as the Court of Appeals found there. However in Simpson, the plaintiff there had a visible injury to his leg which was operated on in August 1998; yet he did not pursue medical records or seek consultation concerning his known medical complications until three (3) years after the fact in 2001. See Simpson v. Lovelace, 892 So.2d 284, 285-86 (Miss. Ct. App. 2004). Mr. Simpson also did not take legal action until over four (4) years later when he filed suit in December 2002. Simpson, 892 So.2d at 285. Obviously, there is no comparison to Alicia in the present case and Simpson, as it is clear that Mr. Simpson failed miserably to act with reasonable diligence. Therefore, the Simpson Court held that the discovery rule did not apply since the plaintiff knew from the outset that something was not quite right and instead chose to ignore his medical problems for three (3) years until he finally consulted with another physician and learned of the specific cause (i.e. the first physician's negligence). Id. at

287. Unlike Mr. Simpson, Alicia and her parents did not ignore her problems and resulting complications from treatment or lack of treatment, and instead they acted quickly and with diligence to determine what negligence, if any, had occurred during her January hospital stay at Clay County Hospital.

Dr. Trapp has heavily relied on Joiner v. Phillips at the lower court level and in his appellate brief. Appellee claims that the present case and Joiner are similar because they both involve a radiologist. However, that is where the similarities end. The cases are distinguishable because in Joiner, the plaintiff knew of and conceded that she was aware of the radiologist's involvement from day one. Furthermore, the Joiner plaintiff did not act diligently and failed to request her medical records for a period over two (2) years – in the present case, the medical records were requested only two (2) months later. *See* Joiner v. Phillips, 953 So.2d 1123, 1126-27 (Miss. Ct. App. 2006). These are *significant* differences between Joiner and the present case that Dr. Trapp failed to point out.

Appellee also relies on the case of Sutherland v. Ritter, as does Appellant/Plaintiff, but for different points. Plaintiff relies on Sutherland, as it is a seminal case which clarifies that the discovery rule inquiry in medical malpractice cases does not center on whether an injury is latent and instead clarifies that the focus on when the plaintiff might first know, with reasonable diligence, the negligence. *See* Sutherland v. Ritter, 959 So 2d 1004, 1008 (Miss. 2007). Dr. Trapp relies on Sutherland claiming that the plaintiff there knew of his claim "no later than the date of discharge" from the hospital, inferring that Alicia should have known of her claim against Dr. Trapp by the date of her discharge from Clay County Hospital on January 12, 2005. See Appellee's Brief at 17. However, Dr. Trapp's quote and reliance on Sutherland is taken out of context. In Sutherland, the discovery rule *was* applied, unlike the present case, and even so the two (2) year statute of limitations had still expired.

In Sutherland, the plaintiff was prescribed a medication in June 1999, and almost immediately began suffering side effects from this medicine. Sutherland v. Ritter, 959 So 2d 1004, 1005-06 (Miss. 2007). There, the plaintiff knew what was causing his complications (i.e. the drug) and who prescribed the medicine. However, it was not until nearly two (2) years later on April 16, 2001 after taking the medication and suffering from the side effects that plaintiff began to inquire into his condition when he checked himself into the hospital. See Sutherland, 959 So.2d at 1005-06. At that time and by the time of his discharge on April 19, 2001, he was instructed by his new physician to quit taking the prescription medication. Sutherland at 1006. He then failed to take any legal action until January 2004. *Id.* at 1006. The Sutherland court *did* apply the discovery rule and tolled the statute of limitations for nearly two (2) years after Mr. Sutherland was first prescribed the medication, finding that at the very latest the statute of limitations began to run on April 19, 2001. *Id.* at 1009-10. Therefore, even by applying the discovery rule and tolling the statute until 2001, the two (2) year medical malpractice statute of limitation had clearly run by January 2004 when Mr. Sutherland first filed his notice of claim. *Id.*

Therefore, unlike Mr. Sutherland, Mr. Simpson, Ms. Joiner and other plaintiffs in the various cases cited by Dr. Trapp in his brief, Alicia and her parents did act reasonably and diligently; and the discovery rule should likewise apply in her case since she could not have known of Dr. Trapp's involvement and failures until reviewing the medical records. Again, there are numerous distinctions in the various case citations in Appellee's brief to the present case.

D. Based on Defendant Dr. Trapp's own argument, it is clear that reasonable minds can and do differ on the date when Plaintiff should have discovered the basis for a cause of action against him; therefore, summary judgment was error

As initially raised in Appellant/Plaintiff's brief, the statute of limitations defense is one on which the defendant bears the burden, and must prove that no reasonable minds could differ as to the date of the discovery rule and specifically when the plaintiff, with reasonable diligence, should have known of the medical practitioner's negligence. Otherwise, it is an issue of fact to be determined by the jury. Alicia contends that Dr. Trapp has failed to meet his burden in proving his defense. The precedent is clear that, while the statute of limitations itself is procedural, its effect is a substantive right, and "when a valid factual dispute exists, the issue is settled by the finder of fact, a jury." Huss v. Gayden, 991 Sol2d 162, 166 (Miss. 2008). Therefore, it is a fact issue for the jury to determine when reasonable minds could differ. Should this Court determine that reasonable minds could differ as to when Alicia and her parents should have, with reasonable diligence, known of Dr. Trapp, his involvement and his negligence, then the lower court's ruling should be reversed, allowing Dr. Trapp to present his defense to the jury at trial for its consideration and determination.

CONCLUSION

The Court, respectfully, should reverse the trial court's decision to grant summary judgment to the Appellee, based on the arguments supported by the record and set forth herein and in the Brief of Appellants. Appellants would further request that they be awarded all costs of appeal and that this matter be remanded to the trial court for further proceedings.

This the 20th day of July, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William W. Fulgham, hereby certify that I have this day served, via U.S. Mail, postage prepaid, a true and correct copy of the foregoing on:

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This the 20th day of July 2009.

William W. Fulgham