

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

BRIEF OF APPELLANT

**APPEAL FROM THE CIRCUIT COURT
OF CLAY COUNTY, MISSISSIPPI**

**William W. Fulgham, Esq.
Mississippi Bar No. [REDACTED]
Erin S. Rodgers, Esq.
Mississippi Bar No. [REDACTED]
FULGHAM LAW FIRM, PLLC
533A Keyway Drive
P.O. Box 321386
Flowood, MS 39232
Tel: 601-932-9710
Fax: 601-932-9712**

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.

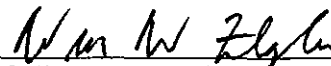
APPELLEE

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. William W. Fulgham, Esq. and Erin S. Rodgers, Esq.; Fulgham Law Firm, PLLC, Attorneys of record for Appellant
2. Mitchell McNutt & Sams, PA, whose attorney is John G. Wheeler, Esq., Attorney of record for Clay County Medical Corporation; Timothy Whittle; and Steve Noggle
3. Robert K. Upchurch, Esq. and Joshua Shey Wise, Esq.; Holland Ray Upchurch & Hillen, PA; Attorneys of record for Appellee James T. Trapp, M.D.
4. Michael Stringer as Natural Father and Next Friend of Alicia Stringer, a Minor, Appellant
5. Alicia Stringer, a Minor, Appellant
6. James T. Trapp, M.D., Appellee
7. Honorable Lee J. Howard, Trial Court Judge
8. Cynthia H. Zelinka, Court Reporter

This the 27th day of February, 2009.



William W. Fulgham

TABLE OF CONTENTS

| | |
|--|-----|
| CERTIFICATE OF INTERESTED PERSONS..... | i |
| TABLE OF CONTENTS..... | ii |
| TABLE OF CASES, STATUTES, & OTHER AUTHORITIES..... | iii |
| STATEMENT OF THE ISSUES..... | 1 |
| STATEMENT OF THE CASE..... | 1 |
| A. NATURE OF CASE, COURSE OF PROCEEDINGS, AND DISPOSITION..... | 1 |
| B. STATEMENT OF FACTS RELEVANT TO THE ISSUES..... | 3 |
| C. STANDARD OF REVIEW..... | 8 |
| SUMMARY OF THE ARGUMENT..... | 9 |
| ARGUMENT..... | 11 |
| A. The Trial Court erred by holding the discovery rule did not apply to toll the two (2) year statute of limitations for Plaintiff's medical malpractice claim on the basis Plaintiff had a known, non-latent injury and had access to her medical records..... | 11 |
| B. The Trial Court erred by finding that no genuine issue of material fact existed to be determined by a jury, as Defendant Trapp failed to prove his affirmative defense..... | 17 |
| CONCLUSION..... | 19 |
| CERTIFICATE OF SERVICE..... | 21 |

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

| | |
|---|----------------|
| <u>Cook v. Stringer</u> , 764 So.2d 481, 482 (Miss. App. 2000)..... | 8 |
| <u>Galloway v. Travelers Ins. Co.</u> , 515 So.2d 678, 683 (Miss, 1987)..... | 8 |
| <u>Huss v. Gayden</u> , 991 So.2d 162, 164-166, 168-169 (Miss. 2008)..... | 13, 14, 16, 18 |
| <u>Jackson Clinic v. Henley</u> , 965 So.2d 643, 649 (Miss. 2007)..... | 12 |
| <u>Jenkins v. Pensacola Health Trust, Inc.</u> ; 933 So.2d 923, 926-27 (Miss. 2006)..... | 18, 19 |
| <u>Joiner v. Phillips</u> , 953 So.2d 1123, 1127 (Miss. App. 2006)..... | 10, 15 |
| <u>Mantachie Natural Gas Dist. v. Mississippi Valley Gas Co.</u> , 594 So.2d 1170,1172 (Miss. 1992)..... | 9 |
| <u>Rein v. Benchmark Construction Co.</u> , 865 So.2d 1134, 1142 (Miss. 2004)..... | 9 |
| <u>Sarris v. Smith</u> ; 782 So.2d 721, 725 (Miss. 2001)..... | 14, 15 |
| <u>Smith v. Sanders</u> , 485 So.2d 1051-53 (Miss. 1986)..... | 14, 18 |
| <u>Sutherland v. Ritter</u> , 959 So. 2d. 1004, 1007, 1008-09 (Miss. 2007)..... | 12, 13, 14, 16 |
| <u>Sweeney v. Preston</u> , 642 So. 2d 332, 333 (Miss. 1994)..... | 14 |
| Miss. Code Ann. § 15-1-36 (1972)..... | 9, 11, 12 |
| Miss. Code. Ann. § 15-1-49 (1972)..... | 12 |
| Rule 56 M.R.C.P..... | 8 |

I. STATEMENT OF THE ISSUES

- A. The Trial Court erred by holding the discovery rule did not apply to toll the two (2) year statute of limitations for Plaintiff's medical malpractice claim on the basis that the injury was non-latent.
- B. The Trial Court erred by finding that no genuine issue of material fact existed to be determined by a jury, as Defendant Trapp failed to prove his affirmative defense.

II. STATEMENT OF THE CASE

A. NATURE OF CASE, COURSE OF PROCEEDINGS, AND DISPOSITION

This is a medical malpractice claim which first came into the Circuit Court of Clay County on January 5, 2007 upon the filing of a Complaint by Michael Stringer on behalf of his minor daughter, Alicia Stringer, against Clay County Medical Center d/b/a North Mississippi Medical Center, Timothy Whittle, M.D. and Steve Noggle, M.D. R. at 7 - 16. Plaintiff filed an Amended Complaint against the same parties on January 8, 2007, and subsequently on March 14, 2007, prior to service of process and any responsive pleadings, Plaintiff filed her Second Amended Complaint to add an additional party defendant, James Trapp, M.D. R. at 17 - 28. Plaintiff's causes of action arise out of acts and/or omissions, which occurred by the defendants during various treatment rendered on several occasions to Alicia Stringer in January 2005, including up to and through January 12, 2005. R. at 21 - 23; 139 - 141.

Prior to filing the Second Amended Complaint to include Defendant Dr. Trapp, Plaintiff gave him written notice of the potential claim on or about January 5, 2007, and Defendant Trapp has acknowledged that such notice, pursuant to statutory law, extended the two (2) year statute of limitations by sixty (60) days. R. at 76. Dr. Trapp was timely served with the Second Amended Complaint, and in response thereto, Defendant Trapp filed a Motion to Dismiss on June 7, 2007, asserting the affirmative defense of statute of limitations and that any malpractice claim against

him was time-barred by one (1) day. R. at 41 – 42. On June 22, 2007, Plaintiff filed a Response In Opposition to the motion, and Dr. Trapp filed a Rebuttal on October 18, 2007. R. at 101; 149. During the time between the filing of both Plaintiff's Response and Defendant's Rebuttal, Plaintiff's initial counsel, Orland Richmond, Esq., was forced to withdraw from this case due to a conflict of interest which later arose; at which time, William W. Fulgham, undersigned counsel, entered an appearance on October 2, 2007. R. at 142; 146. It should be noted that, during the pendency of Defendant Trapp's motion to dismiss, there was no discovery between these parties.

The Circuit Court of Clay County noticed Defendant Trapp's motion to dismiss for hearing, which was held on April 15, 2008. R. at 4; T. at 1. As the moving party, Defendant Trapp had the burden of proof to prove that no genuine issue of material facts existed entitling him to summary judgment as well as the burden to prove the affirmative defense of statute of limitations. T. at 3 - 19. At the hearing, Defendant Trapp failed to meet his burden, as he did not present any meaningful evidence. T. at 3 – 19. He did not offer live testimony, sworn affidavits, testimony by interrogatories or any other evidence proving that Plaintiff or her parents should have known or discovered Dr. Trapp's negligence by January 12, 2005, since this is the day she first learned that she had appendicitis, which therefore was a non-latent injury. T. at 4 - 10. Instead, Dr. Trapp based his entire argument on the fact that Plaintiff's various complaints mentions Dr. Trapp's radiology addendum dated January 11, 2005. T. 12 – 13. At the hearing, Plaintiff counter-argued that this alone was not proof that she or her parents knew or should have discovered by this early date of this radiologist's role and contribution to any misdiagnosis that was made in the treatment rendered to her; therefore, the discovery rule applied, tolling the

statute of limitations for a reasonable time. T. at 12 – 14. For these reasons, Plaintiff respectfully requested that the lower court deny Defendant Trapp's motion to dismiss. T. at 14-15.

As directed by Rules of Civil Procedure 12(b)(6) and 56 and well-settled case law, the trial court was required to view the facts in the light most favorable to the non-moving party, Plaintiff Alicia Stringer, when determining whether genuine issues of material fact exist upon which a reasonable jury could find for the non-moving party. It is also well-settled law that when a defendant, such as Dr. Trapp, alleges a claim is time-barred by the statute of limitations, it is an affirmative defense for which the defendant bears the burden of proof; the burden cannot be shifted to the plaintiff to disprove it. Nonetheless, in spite of this well-settled law, the trial court found in favor of Defendant Dr. Trapp and granted summary judgment, dismissing Dr. Trapp as a defendant. R. at 160 – 161. A Final Judgment in favor of Defendant Trapp was entered on June 2, 2008. R. at 163. From that Judgment, Plaintiff timely filed her Notice of Appeal to this Court. R. at 164.

B. STATEMENT OF FACTS RELEVANT TO THE ISSUES

Although the named plaintiff in this suit is Michael Stringer, the natural father of Alicia Stringer, a minor, for purposes of this brief, references made to Plaintiff and/or Appellant is actually in reference to the minor, Alicia Stringer, who was the defendants' patient and the one who suffered from the negligence complained of.

On or about January 6, 2005, Alicia Stringer, who was thirteen (13) years old at the time, sought medical treatment at her local family medicine clinic due to severe abdominal cramping, nausea, diarrhea and other symptoms for several days. R. at 32 – 33; 139. Based on blood test results showing a highly elevated white blood cell count and based on Alicia's symptoms, the

nurse practitioner was concerned and advised her to immediately go to the emergency room. R. at 32 – 33. At that point, Plaintiff's mom took her to the E.R. at North Mississippi Medical Center in West Point, Mississippi (hereinafter referred to as "NMMC"). R. at 33; 139. During this initial visit, Plaintiff was seen and treated by Dr. Noggle, who diagnosed her with having gastroenteritis, gave her medicine for the nausea and discharged her home. R. at 33; 139.

On January 10, 2005, after no improvement over the prior five (5) days, Alicia returned to the same family clinic for follow up; she was re-evaluated by the same nurse practitioner, who diagnosed her with abdominal pain of the right lower quadrant, and advised Plaintiff and her mother to immediately go to the emergency department. R. at 33; 139. Upon returning to the E.R. at NMMC, test results revealed that Alicia's white blood cell count was extremely elevated and had even increased from the previous week to a count of 32,000. R. at 33; 139. She was immediately admitted to the hospital under the care and treatment of Dr. Whittle, an OB/GYN. R. at 33; 139.

To assist Dr. Whittle in his diagnosis and the etiology of Plaintiff's abdominal pain, he ordered a CT scan of her abdomen. R. at 33; 139. The scan was performed the same day that Alicia was admitted (January 10, 2005). R. at 33; 139. The results of the scan were read and interpreted by a trained radiologist, Defendant Dr. Trapp. According to Dr. Trapp's initial radiology report on January 10, 2005, it was his impression and opinion that Plaintiff had several cystic masses in her pelvis; his initial report did not report or suggest that these masses were abscesses and/or appendicitis.¹ R. at 33; 139.

¹ This is significant because a cyst is usually benign; whereas, an abscess indicates infection and requires immediate attention.

Based partially on Defendant Trapp's radiology report, Plaintiff's treating physician, Dr. Whittle, suspected that the cystic masses were gynecologic in nature and ordered a pelvic ultrasound. R. at 140. The ultrasound was performed the next morning on January 11, 2005. The ultrasound results, along with Dr. Trapp's radiology report of the CT scan from the day before, suggested that the cysts were of ovarian pathology. R. at 139 – 140. During this time, Alicia continued to suffer and surgery was delayed. The treating physician discussed his findings (and/or lack thereof) with Plaintiff and her mom, telling them that he wanted to perform exploratory surgery to be scheduled two (2) days later on January 13, 2005. R. at 34; 141. After being informed that her 13 year old daughter likely had ovarian cysts and/or some other gynecologic problems which may even require a hysterectomy, Plaintiff's mom began to seek a second opinion, including contacting her own gynecologist in Starkville. R. at 34; 140.

On the following day, January 12, 2005, Plaintiff's mom requested that Alicia be transferred to her physician in Starkville. R. at 34; 140. Plaintiff was in fact transferred that day and admitted to the Oktibbeha County Hospital, where they diagnosed her with appendicitis, instead of ovarian pathology, and immediately performed emergency surgery. R. at 34; 140 – 141. Following the emergency appendectomy, Plaintiff remained hospitalized for ten (10) days, including time in the intensive care unit arising from complications from the delay caused by defendants' negligence. R. at 35.

Plaintiff will refrain from discussing the acts and/or omissions of all the defendants, as the issue on appeals pertains to the radiologist, Defendant Trapp, who interpreted Alicia's initial CT scan on January 10, 2005. R. at 33; 102 – 103; 139. As previously discussed, it was his impression that the sacs were cystic masses. R. at 48; 103; 139. However, he later amended his

findings and interpretation the next day in an addendum dated January 11, 2005. In his addendum, Defendant Trapp clarified that he believed the fluid collections were abscesses, as opposed to cysts, and that Plaintiff's condition was likely appendicitis with rupture, which it indeed was as later determined during Plaintiff's admission to Oktibbeha County Hospital. R. at 48; 103; 140. Apparently though, Dr. Trapp may not have alerted Alicia's treating physician, Dr. Whittle, of his revised impression and addendum to the original radiology report which suggested cystic masses and made no mention of appendicitis. R. at 140. Dr. Whittle's discharge summary acknowledges that there was an addendum to Alicia's CT scan indicative of appendicitis; however, he was never informed by the radiologist (Dr. Trapp) of the revision and as such, he proceeded with the suggestion of ovarian pathology instead of appendicitis. R. at 140. This discharge summary prepared by Dr. Whittle was not dictated by him until January 30, 2005 and was not transcribed until January 31, 2005. R. at 141.

After discharge from her hospital stay in late January, Plaintiff acted diligently and sought legal assistance to determine if there had been any malpractice by her treating physicians at NMMC, which caused and/or contributed to her ruptured appendicitis and resulting complications. R. at 103; T. at 13. Specifically, Plaintiff retained counsel in February 2005 and Plaintiff acted diligently by requesting medical records on March 29, 2005, which were subsequently received approximately fifteen (15) days later on April 14, 2005. R. at 103; 138; T at 13. In initial review of the medical records, it was patently obvious that the two (2) treating physicians at NMMC were negligent in their treatment and/or diagnosis of Plaintiff's condition. Therefore, Plaintiff subsequently filed a Complaint against the treating physicians only (Dr. Noggle and Dr. Whittle) within the statute of limitations on January 5, 2007 followed by an

Amended Complaint on January 8, 2005. R. at 7; 17.

Upon closer and further review of the medical records, including Dr. Whittle's discharge summary, Plaintiff discovered that the radiologist (someone who she had never met or knew of during her hospital stay) may have acted negligently and contributed to her injuries if he failed to notify the treating physician of his addendum report indicating appendicitis. R. at 102; 140. Therefore on January 5, 2007, the same date she filed her Complaint against the other defendant treating doctors, Plaintiff gave written notice to the radiologist, Defendant Trapp, of her claim. R. at 41; 103. Upon expiration of sixty (60) days and within the statute of limitations for her cause of action against Defendant Trapp, Plaintiff filed a Second Amended Complaint on March 14, 2007 adding him as a party defendant. R. at 29; 32.

Defendant Trapp was served with the Second Amended Complaint on or about May 18, 2007 and responded thereto by filing a motion to dismiss; arguing that any malpractice suit against him was time-barred and that Plaintiff missed the statute of limitations by one (1) day. R. at 41 – 42; T. at 11. Specifically, Defendant argued that Plaintiff's cause of action against him accrued on January 12, 2005, which is the date she first knew that she had appendicitis, a non-latent injury. R. at 153; T. at 7; 9. Defendant acknowledged that the limitations period was extended by sixty (60) days because of the required notice given; therefore, he argued that the statute of limitations expired on March 13, 2007 [i.e. two (2) years and sixty (60) days from January 12, 2007]. R. at 42; 76; T. at 8.

The lower court did not make any findings of fact or render any opinions at the hearing on Defendant's motion to dismiss, and its Order granting summary judgment does not set forth in great length the court's analysis of his decision. R. at 160 – 161; T. 3 – 19. From that decision,

Plaintiff appeals to this Court.

C. STANDARD OF REVIEW

Summary Judgment is appropriate and should be granted when the “pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.” M.R.C.P. Rule 56(c). The summary judgment process focuses the parties and the court on the question of whether disputes of relevant fact exist that need to be tried, or only disputes of relevant law for which there need be no trial. Cook v. Stringer, 764 So.2d 481, 482 (Miss. App. 2000).

Pursuant to Rule 56, the entry of summary judgment is mandated when, after adequate time for discovery and upon motion, a party:

...fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial. In such a situation, there can be “no genuine issue as to any material fact,” since a complete failure of proof necessarily renders all other facts immaterial. The moving party is “entitled to judgment as a matter of law” because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she had the burden of proof.

Galloway v. Travelers Ins. Co., 515 So.2d 678, 683 (Miss, 1987).

When analyzing a motion for summary judgment, the court:

looks at all the evidentiary matters before it--admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. The evidence must be viewed in the light most favorable to the party against whom the motion has been made. If, in this view, the moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his favor. Otherwise, the motion should be denied.

Mantachie Natural Gas Dist. v. Mississippi Valley Gas Co., 594 So.2d 1170,1172 (Miss. 1992).

“Where there is the slightest doubt over whether a factual issue exists, the court should resolve in favor of the non-moving party.” Rein v. Benchmark Construction Co., 865 So.2d 1134, 1142 (Miss. 2004).

III. SUMMARY OF THE ARGUMENT

The trial erred by holding that the discovery rule set forth in § 15-1-36, did not apply in the present medical malpractice case to toll the statute of limitations as it pertained to the cause of action against Dr. Trapp, and thereby erred in granting summary judgment in his favor, dismissing him as a defendant in this case. The lower court’s order granting summary judgment did not set forth in great length its decision. Although the court mentioned whether or not the discovery rule applies depends on determining at what reasonable time the defendant’s negligence in contributing to the injury should have been discovered by the plaintiff, it appears from the brief order that the court still primarily focused on the fact that Plaintiff’s injury (appendicitis) was known and non-latent, thereby applying the wrong “test” in concluding that the discovery rule did not apply. Instead of latency v. non-latency, the court’s focus should have been to determine the date at which Dr. Trapp’s negligence should have been first known or discovered by Plaintiff, acting with reasonable diligence. Had the court applied the correct analysis as argued at the hearing and in Plaintiff’s Reply in Opposition brief, then the court would have denied summary judgment as it is clear that Alicia could not have known of the radiologist and his possible negligence until she received her medical records, which were not even existence on January 11 or January 12, 2005. As a matter of fact, the discharge summary, indicating Defendant Trapp’s negligence, was not even dictated by Dr. Whittle until

January 30, 2005, and not even transcribed until January 31, 2005.

Furthermore, the circuit court erroneously relied on a 2006 Court of Appeals decision, Joiner v. Phillips, which was cited and argued by Defendant Trapp in his Rebuttal brief and at the hearing as the basis for the court to rule in his favor and find that Plaintiff's claim was time-barred. Specifically, the trial court found that it should reach the same conclusion as the Joiner court (i.e. that the discovery rule did not apply so claim was time-barred) simply because that case also happened to involve a radiologist as well as a plaintiff with a known, non-latent injury. Even though the Joiner decision is clearly distinguishable from the present case because that particular plaintiff failed to act with reasonable diligence in requesting her medical records and even though there have been subsequent decisions since Joiner rendered by the Mississippi Supreme Court in 2007 and 2008 clarifying that the focus of the inquiry to be employed when determining the applicability of the discovery rule is when plaintiff should have discovered the negligence as opposed to discovery of the injury itself, the lower court still relied on Joiner in granting summary judgment to Defendant Trapp.

The trial court further erred in finding that no genuine issue of material fact existed for a jury to determine. The court acknowledged that summary judgment should be denied if there is any doubt and further acknowledged that all evidence should be viewed in the light most favorable to the non-moving party; yet, the court failed to follow this standard.

No evidence, other than his "word" and reference to Plaintiff's complaints, was offered by Defendant Trapp in support of his affirmative defense of statute of limitations. He failed to meet his burden of proof that the claim was time-barred, as he failed to present evidence that either Plaintiff or her parents knew or should have discovered Dr. Trapp's negligence by the date

she first learned of having appendicitis. Defendant Trapp also presented no evidence that Plaintiff failed to act diligently in seeking her medical records. Further, Defendant failed to prove that Alicia's medical record(s), which revealed Dr. Trapp's negligence, were even in existence or available to Plaintiff on the same date she learned she had appendicitis, and in fact, those medical records were not yet in existence.

Since Plaintiff claimed that she did not and could not have discovered Dr. Trapp's negligence by January 12, 2005 and since Defendant argued that she should have known without presenting the requisite proof, Defendant failed to prove his affirmative defense and a genuine question of material fact existed for the jury to determine – i.e. on what date should Plaintiff have first known, with reasonable diligence, of Dr. Trapp's negligence? In viewing this evidence, or lack thereof, presented by Defendant in the light most favorable to Plaintiff, the lower court should have denied Defendant Trapp's motion to dismiss.

IV. ARGUMENT

A. The Trial Court erred by holding the discovery rule did not apply to toll the two (2) year statute of limitations for Plaintiff's medical malpractice claim on the basis Plaintiff had a known, non-latent injury and had access to her medical records.

As provided by the legislature, the statute of limitations in medical malpractice cases is “two (2) years from the date *the alleged act, omission or neglect* shall or with reasonable diligence might have been first known or discovered....” Miss. Code Ann. § 15-1-36 (our emphasis added). In his motion to dismiss, Defendant Trapp asserts that the claim against him was time-barred because the cause of action accrued and the statute of limitations began to run on January 12, 2005, when Plaintiff knew she had appendicitis. However, this argument is misplaced. While Plaintiff acknowledges that she knew she had appendicitis on that date and

became aware that there may have been negligence/misdiagnosis by her treating physicians, Dr. Noggle and Dr. Whittle, she did not and could not have known at that early of a date of the radiologist's negligence in his failure to inform the treating physician of his addendum to the CT scan report, where he changed his impression to include the diagnosis of appendicitis. Plaintiff could not be expected to know of this omission by Dr. Trapp when she had never even met him or discussed her medical case with him, and when the treating physician, Dr. Whittle, did not even know until sometime later about Defendant Trapp's addendum.

Less than two (2) years ago, this Court recognized the confusion that existed among the bar due to the Court's prior use of "latent injury"; therefore, the Supreme Court took the opportunity to further explain and clarify its use of this term in prior decisions interpreting the discovery rule in § 15-1-36. Sutherland v. Ritter, 959 So. 2d. 1004, 1007 (Miss. 2007). The Court explained that the confusion of the term "latent injury" obviously stemmed from the use of that term in the discovery rule set forth in the general statute of limitations, Miss. Code. Ann. § 15-1-49, providing that the statute of limitations is tolled until a plaintiff discovers or should have discovered a latent injury. The Sutherland Court went on to explain that the discovery rule in a medical malpractice is different, stating "[t]he inquiry does not center on a latent injury, but rather on 'the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered....'" Sutherland, 959 So. 2d at 1008 (citing Miss. Code. Ann. § 15-1-36); *see also* Jackson Clinic v. Henley, 965 So.2d 643, 649 (Miss. 2007) (quoting the Sutherland holding that the inquiry does not center around a latent injury).

Therefore, in the medical malpractice context the focus is when, with reasonable diligence, the negligence should have been discovered, not the injury. *Id.* The Court further held

that “the discovery rule may apply in cases where injury is not latent at all, but where the *negligence* which caused the known injury is unknown.” *Id.* at 1008-09 (our emphasis added). In Sutherland, the lower court granted summary judgment in the psychiatrist’s favor and this court affirmed based on sworn deposition testimony by the patient plaintiff that he knew of the potential negligence by and no later than the date he was discharged from the hospital, which was nearly two (2) years after his psychiatrist had treated him with a certain drug he claims harmed him. *Id.* at 1005-06. Yet, Mr. Sutherland did not file suit against the doctor until nearly five (5) years after he was first treated by the psychiatrist, nearly three (3) years after the date that he admitted in his deposition that he first discovered the negligence, and more than two (2) years after a subsequent treating physician informed him that he suffered an injury caused by the drug prescribed by the psychiatrist. Sutherland, 959 So. 2d at 1005-06. Therefore, unlike the present case, the statute of limitations in Sutherland had clearly run. It should be noted that the lower court there applied the discovery rule and the limitations period did not begin to run when the plaintiff was first treated by the psychiatrist and/or when the plaintiff was first injured by the drug prescribed; instead, the lower court found that the statute of limitations began to run almost two (2) years later from the date when the plaintiff admitted that he knew or with reasonable diligence should have known of the psychiatrist’s possible negligence. Sutherland at 1009.

As recent as only five (5) months ago (from the date of this brief), the Mississippi Supreme Court further explained and clarified the discovery rule as applied in medical malpractice cases when it answered a certified question from the United States Court of Appeals for the Fifth Circuit. *See Huss v. Gayden*, 991 So.2d 162 (Miss. 2008). In this case, this Court upheld its prior opinion set forth in the Sutherland case that “...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 v. Gayen, 991 So. 2d at 166 (citing Sutherland, 959 So. 2d at 1008-09). The Huss court pointed out that while the legislature adopted a shorter limitations period for medical malpractice cases from the three (3) year limit in general negligence cases to two (2) years instead, it “adopted a ‘discovery standard’ for triggering and running of the statute.” Huss at 165 (citing Sweeney v. Preston, 642 So. 2d 332, 333 (Miss. 1994)). And to determine the triggering date of when the two (2) year medical malpractice statute of limitations begins to run, this Court stressed that “[t]he 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.*” *Id.* at 165 (citing Smith v. Sanders, 485 So.2d 1052-53 (Miss. 1986) (emphasis added)).

The Court has further recognized that there are cases sometimes where the plaintiff knows of his injury prior to the two years, but “could not have discovered with reasonable diligence the act or omission which caused the injury. In such cases the action does not accrue until the latter discovery is made.” *Id.* at 166 Of course the patient plaintiff must act with reasonable diligence in discovering same, and if he or she fails to do so, then the discovery rule will not apply. For instance, the Court has provided that “[s]ome plaintiffs might need medical records in order to know of negligent conduct, and yet still be barred if they failed to *diligently* seek those records.” Sarris v. Smith; 782 So.2d 721 (Miss. 2001) (our emphasis added). The Sarris court found that the plaintiff (decedent’s widow) acted diligently in requesting her husband’s medical records and that she could not have known of any negligence until receipt of those records, even though the injury (i.e. death) was clearly known and non-latent. As such this

Court found that the statute of limitations was tolled and did not begin to run until nine (9) months after the death of the husband, which is when the medical providers first produced the medical documents to the widow and she first had access to them. Sarris, 782 So. 2d at 725.

Defendant Trapp and the lower court erroneously relied on another case, which was similar only to extent that it happened to also involve a radiologist (like Dr. Trapp) as well as a plaintiff who had known, non-latent injury (like Plaintiff). See Joiner v. Phillips, 953 So.2d 1123 (Miss. App. 2006). In granting summary judgment to Dr. Trapp, the lower court deferred to the *Joiner* decision stating that it was “entirely on-point” with the present case. However, Plaintiff would respectfully show this Court that, even though both cases involve a radiologist and non-latent injury, they are otherwise distinguishable. Specifically, in Joiner, the plaintiff failed to act diligently in obtaining her medical records by waiting nearly two (2) years after her treatment to request them. Joiner, 953 So.2d at 1127. In the present case, Plaintiff *did* act diligently in seeking legal assistance to determine if there was any negligence committed, and as opposed to two (2) years, Plaintiff requested her records approximately two (2) months after being released from the hospital, where she had emergency appendectomy and was in the intensive care unit. The *Joiner* court also made reference to the Sarris decision, indicating that the discovery ruled applied in that case because the plaintiff acted diligently in requesting medical records, unlike Mrs. Joiner who failed to request them for nearly two (2) years. To the extent that the lower court relied on *Joiner* because the plaintiff there had a known, non-latent injury as well, Plaintiff would show this Court that there have been more recent decisions by the Mississippi Supreme Court; these subsequent decisions clarify that the test is not whether the injury was latent, but whether the negligence causing the injury was latent, and at what point, acting diligently, should the plaintiff

have discovered such negligence.

Therefore even though the Plaintiff in this case knew of her injury (i.e. appendicitis) as early as January 12, 2005, the discovery rule should apply to toll the statute of limitations, as she did not have knowledge and could not have discovered Dr. Trapp's negligence as of this early date. The Court has made clear from prior precedent, including its most recent decisions of Huss and Sutherland, that the inquiry centers around knowledge and discovery of the *negligence*, not injury. The focus is not whether the injury is latent, but whether the negligence causing the injury is latent. In this case, Defendant Trapp's negligence was indeed latent; according to the discharge summary prepared by the treating physician, Dr. Whittle, he was not even aware of Dr. Trapp's addendum revising his impression to include appendicitis until well after January 12, 2005. Therefore, how can a patient such as Alicia, who never even met with or consulted with the radiologist, be expected to have discovered his negligence when the treating physician, who knew and consulted with this radiologist on this case, apparently had not discovered it either? The answer is simple: she cannot be expected to have known or discovered it at that time.

The lower court erred in failing to apply the discovery rule to toll the statute of limitations to such reasonable time that Plaintiff would have had access to her medical records. Plaintiff and her parents acted diligently in obtaining her records. While the lower court found that she had access to this information and her medical records on January 12, 2005, that is simply not true. Even assuming that Plaintiff had requested her medical records on January 12, 2005, she would not have received them that same day, as it took nearly two (2) weeks for NMMC to produce them when they were requested by counsel on March 29, 2007 and received on April 14, 2007. While Plaintiff argued to the lower court that the statute of limitations should

have been tolled until April 14, 2007 and still takes that position, the Plaintiff would show that the lower court should have, at the *very least*, tolled the statute for a period of 15 days, which is the exact time period it took NMMC to produce Plaintiff's medical records. The argument that Plaintiff had access to her records and should have discovered Dr. Trapp's negligence is further flawed because the medical record that indicates negligence by Dr. Trapp (i.e. the discharge summary) did not even exist. Dr. Whittle did not even dictate his notes and discharge summary until January 30, 2005, and it was not transcribed until January 31, 2005, nearly three (3) weeks after Plaintiff was discharged on January 12, 2005.

Defendant Trapp argued to the lower court that Plaintiff's claim was time-barred by one (1) day. However, regardless of which reasonable time period above is applied, it is clear that the statute of limitations had not run against Dr. Trapp. Whether the cause of action accrued on April 14, 2005 (i.e. the date medical records received), or January 27, 2005 (i.e. adding 15 days to the date the appendicitis was known on January 12th since it later took NMMC to produce those records when requested); or even at some point after January 31, 2005 (which is the date Dr. Whittle's discharge summary was first transcribed and came into existence), all of these dates are well beyond one (1) day or even (2) days. Therefore, for these reasons, the lower court erred in finding that the cause of action against Defendant Trapp was time-barred.

B. The Trial Court erred by finding that no genuine issue of material fact existed to be determined by a jury, as Defendant Trapp failed to prove his affirmative defense.

Although the lower court granted summary judgment, the motion filed by Defendant Trapp was a motion to dismiss on the basis that the claim filed against him was time-barred by the two (2) year statute of limitations. However, the lower court erred in finding in favor of Defendant because asserting that the limitations period has expired is an affirmative defense for

which a defendant, including Dr. Trapp, bears the burden of proof.

In the recent decision of Huss v. Gayden, previously referred to and cited above, this Court held that “[u]nder Mississippi law, the pleas of statute of limitations is an affirmative defense for which the party asserting it has the burden of proof.” Huss, 991 So. 2d at 165 (2008). The Mississippi Supreme Court further held that, since the defendant failed to establish the necessary proof to show that the plaintiff should have known or discovered the negligence, “the success *vel non* of this disputed affirmative defense requires a *jury* determination....” Huss at 165 (our emphasis added). In answering the Fifth Circuit’s certified question, the Huss court concluded by holding that the failure by the defendant physician to establish the proof necessary precluded him from prevailing on the limitations defense as a matter of law, and that such issue should be determined by the *fact-finder* (i.e. jury) except when dates are undisputed by admission or pleading or otherwise such that reasonable minds could not differ. *Id.* at 164, 168-169.

Mississippi’s law that the defendant has the burden of proof to prove an affirmative defense, including defense of statute of limitations, is well-settled. See Jenkins v. Pensacola Health Trust, Inc.; 933 So.2d 923 (Miss. 2006) (holding burden of proving affirmative defense lies upon party who relies upon that defense); see also Smith v. Sanders; 485 So.2d 1051 (Miss. 1986) (stating plea of statute of limitations is affirmative defense and party asserting it has burden of proof).

In the Jenkins case, the lower court granted summary judgment in defendant’s favor on the basis that the statute of limitations had expired; however, the Mississippi Supreme Court reversed, finding that the defendant nursing home failed to meet its burden of proof in proving

the date that plaintiff knew or should have known of the underlying negligence. Jenkins, 933 So. 2d at 926-27. The Jenkins court also found that the lower court erred by placing the burden on the plaintiff to disprove the defendant's statute of limitations defense. *Id.* at 927.

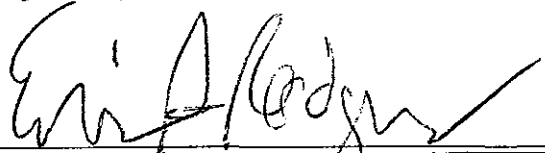
Plaintiff would show this Court that Defendant Trapp failed to meet his burden of proof in establishing that Plaintiff or her parents knew or should have discovered Dr. Trapp's negligence by January 12, 2005. As previously mentioned, Dr. Trapp presented no evidence by way of live testimony, deposition transcript, responses to request for admissions or interrogatories to the lower court. The burden to show and prove this was on Defendant, and could not be displaced to Plaintiff. Seeing how the lower court could only rely on arguments of counsel since no evidence was presented and seeing how reasonable minds could differ as to the date when Plaintiff should have discovered the negligence, the lower court erred in finding that no genuine issue of material fact existed for the jury to determine. The lower court further erred by failing to apply the proper standard in considering a motion to dismiss/summary judgment. Had the lower court viewed the evidence (or lack thereof) in the light most favorable to the non-moving party, Plaintiff, the motion to dismiss would have and should have been denied. Instead, the lower court erred in granting summary judgment to Dr. Trapp.

V. CONCLUSION

As error was committed by the trial court on these issues, Plaintiff/Appellant respectfully requests that the findings and rulings of the trial court be reversed and that this matter be remanded accordingly.

This the 27th day of February 2009.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Erin S. Rodgers", is written over a horizontal line.

William W. Fulgham (MS Bar No. [REDACTED])

Erin S. Rodgers (MS Bar No. [REDACTED])

Attorney for the Appellants

FULGHAM LAW FIRM, PLLC
533A Keyway Drive
P.O. Box 321386
Flowood, MS 39232
Telephone: (601) 932-9710
Facsimile: (601) 932-9712

CERTIFICATE OF SERVICE

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

John G. Wheeler, Esq.
Mitchell McNutt & Sams, PA
P.O. Box 7120
Tupelo, MS 38802-7120


*Attorney for Clay County Medical Corporation;
Timothy Whittle; & Steve Noggle*

Robert K. Upchurch, Esq.
Joshua Shey Wise, Esq.
Holland Ray Upchurch & Hillen, PA
P.O. Box 409
Tupelo, MS 38802-0409

Attorneys for Appellee James T. Trapp, M.D.

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

This the 27th day of February 2009.



William W. Fulgham