

**IN THE SUPREME COURT OF MISSISSIPPI**

**GAIL SAUL, for and on behalf of all Wrongful  
Death Heirs of RAYMOND L. COOK, and  
RAYMOND COOK, Individually, by and through  
GAIL SAUL, his Personal Representative**

**APPELLANT**

**vs.**

**No. 2008-TS-01474**

**SOUTH CENTRAL REGIONAL MEDICAL CENTER, INC.**

**APPELLEE**

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**APPELLEE'S BRIEF**

**TO THE CIRCUIT COURT FOR THE SECOND JUDICIAL DISTRICT OF  
JONES COUNTY, MISSISSIPPI**

**CIVIL ACTION NO. 2006-327-CV8**

**GAIL SAUL, For and On Behalf of All Wrongful  
Heirs of RAYMOND L. COOK, AND RAYMOND  
COOK, individually, by and through GAIL SAUL,  
His Personal Representative**

**PLAINTIFFS**

**vs.**

**Civil Action No. 2007-64-CV6**

**SOUTH CENTRAL REGIONAL MEDICAL  
CENTER, INC., KEVIN IVEY, M.D., ROBERT  
APPLEWHITE, M.D., DAVID SULLIVAN, M.D.,  
and JOHN DOES 1-10**

**DEFENDANTS**

---

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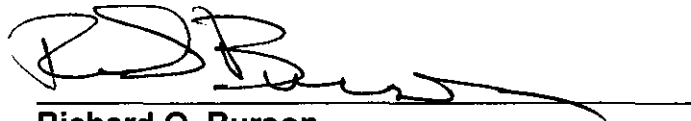
**SOUTH CENTRAL REGIONAL MEDICAL CENTER, INC.**

**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 disqualifications or recusal.

- 1) Appellant/Plaintiff, Gail Saul and any wrongful death beneficiaries of Raymond Cook.
- 2) Attorneys for Appellant/Plaintiff, Brandon L. Brooks, Esq. and Robin L. Roberts, Esq..
- 3) Robert Applewhite, M.D.
- 4) Kevin Ivey, M.D.
- 5) David Sullivan, M.D.
- 6) J. Robert Ramsay, Esq.
- 7) Raymond Fraser, Esq. and Stuart B. Harmon, Esq., Page Kruger & Holland, PA
- 3) Defendant, South Central Regional Medical Center, Laurel, Jones County, Mississippi.
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- 5) Honorable Billy Joe Landrum, Circuit Court Judge, Jones County, Mississippi.



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## **STATEMENT OF ISSUES**

The Hospital would rephrase the issues on appeal as follows:

- A. Whether the judicially created discovery rule under the Mississippi Tort Claims Act applies to claims such as Plaintiff's when the injuries at issue were not latent.
- B. Whether Plaintiff's survival claims and wrongful death claims against the Hospital are time-barred when the Hospital did not receive Plaintiff's notice letter "within one (1) year next after the date of the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based." Miss. Code Ann. § 11-46-11(3).
- C. Whether a notice of claim letter is in compliance with Mississippi Code Annotated Section 11-46-11(2) when it contains no mention of "the residence of the person making the claim at the time of the injury and at the time of filing the notice."

## **STATEMENT OF THE CASE**

### **A. Nature of the Case**

This is a medical negligence / wrongful death action brought by the heirs of Plaintiff's decedent, Mr. Cook, against South Central Regional Medical Center ("the Hospital") and three individual physicians who are not parties to the instant appeal. After being served with copies of a summons and complaint in this matter, the Hospital timely moved to dismiss Plaintiff's claims against it on statute of limitations grounds. Following extensive briefing of the issues and a hearing on the record, the trial court found Plaintiff's claims against the Hospital were barred by the one year statute of limitations and entered an Order Granting Defendant's Motion to Dismiss and Judgment of Dismissal on August 21, 2008. [R 41; RE 41]. The trial court certified its ruling as a final judgment pursuant to Rule 54(b) of the Mississippi Rules of Civil Procedure, and the instant appeal followed with the Hospital as the only defendant involved in the

appeal and leaving Plaintiff's claims against the remaining three physicians pending at the trial court level.

**B. Statement of Facts**

The instant medical negligence / wrongful death action against the Hospital is based entirely upon the care and treatment rendered to Mr. Cook between the dates of November 15, 2005, and December 2, 2005. According to Plaintiff's Complaint, following a laparoscopic cholecystectomy performed on November 15, 2005, by co-defendant, Dr. Kevin Ivey (hereinafter "Dr. Ivey"), who is not a party to this appeal, Mr. Cook "developed a severe abdominal bleed and began to experience tremendous post-operative pain, nausea, and vomiting, shoulder pain, and eventual abdominal distention." [R 4; RE 4] Mr. Cook's condition eventually deteriorated to the point where, on December 2, 2005, after consulting with Mr. Cook's physicians regarding his condition and poor prognosis, Plaintiff and her family authorized the Hospital to assign Mr. Cook a "no code" status. [R 32; RE 32] Mr. Cook died four days later on December 6, 2005. [R 4; RE 4]

The Hospital did not receive Plaintiff's notice of claim letter until December 6, 2006, the one year anniversary of Mr. Cook's death. [R 32; RE 32] Plaintiff filed her Complaint on or about June 11, 2007, naming the Hospital and three other physicians who are not parties to this appeal, as defendants. Plaintiff's Complaint alleges that prior to December 2, 2005, the date that Plaintiff's family consented to assign Mr. Cook a "no code" status, the Hospital was negligent in failing to timely recognize that Mr. Cook needed blood volume replacement following the post-surgical abdominal bleed. [R 8; RE 8]



On October 12, 2007, the Hospital timely filed its Motion to Dismiss pursuant to Rule 12(b)(6) of the Mississippi Rules of Civil Procedure on the grounds that Plaintiff's December 6, 2006, notice letter had been received by the Hospital more than one year after the "tortious, wrongful or otherwise actionable conduct" occurred. Plaintiff responded to the Motion to Dismiss by arguing that "this is a medical malpractice action involving latent injuries" and that the discovery rule should apply to this action. [R 29; RE 29] The trial court agreed with the Hospital's reasoning and dismissed Plaintiff's claims against the Hospital as time-barred, holding that by December 2, 2005, "Plaintiff and her family 'knew or should have known' after their conversations with Mr. Cook's treating physicians that he had apparently (a) sustained severe and life-threatening postoperative complications following his gallbladder surgery, and (b) his death from the same was imminent." [R 41; RE 41] The instant appeal followed.

## SUMMARY OF THE ARGUMENT

The trial court's dismissal of Plaintiff's claims against the Defendant, South Central Regional Medical Center (hereinafter "the Hospital"), should be affirmed, because the Hospital did not receive Plaintiff's notice of claim letter until after the one year statute of limitations applicable to claims brought under the Mississippi Tort Claims Act had expired. While Plaintiff argues that the discovery rule should apply in order to toll the running of the statute of limitations until, at the earliest, the date of Mr. Cook's death, Plaintiff overlooks the fact that Mr. Cook's injuries, which form the basis of Plaintiff's wrongful death and survival claims, were not latent as they manifested themselves almost immediately. Since a latent injury is a necessary prerequisite to the availability of the discovery rule, Plaintiff's argument that the discovery rule tolled the running of the statute of limitations must fail.

Contrary to Plaintiff's argument on appeal, the one year statute of limitations applicable to claims brought against the Hospital began running prior to Mr. Cook's death. The statute of limitations governing claims against the Hospital provides that all claims shall be brought within one year "next after the date of the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based, and not after." Miss. Code Ann. § 11-46-11(3) (emphasis added). The trial court noted in its Order of Dismissal that that by December 2, 2005, "Plaintiff and her family 'knew or should have known' after their conversations with Mr. Cook's treating physicians that he had apparently (a) sustained severe and life-threatening postoperative complications following his gallbladder surgery, and (b) his death from the same was imminent." [R 41; RE 41] Since the Hospital did not receive Plaintiff's notice of claim letter until the

one year anniversary of Mr. Cook's death, December 6, 2006, Plaintiff's claims against the Hospital are time-barred. Thus, the trial court was correct in holding that Plaintiff's claims against the Hospital should be dismissed on statute of limitations grounds.

Furthermore, a ruling adopting Plaintiff's reasoning on appeal – that the statute of limitations on wrongful death and survivor claims should begin running no sooner than the date of death – would set a dangerous precedent and be contrary to this state's long history of enforcing the finality associated with the expiration of statutes of limitations. Despite the fact that the Legislature has clearly set forth an exclusive one year statute of limitations during which time a governmental entity may be sued pursuant to the Mississippi Tort Claims Act, according to Plaintiff's argument, that one year window may be enlarged tremendously, or in some cases even revived, depending on when the plaintiff's decedent dies in relation to the expiration of the statute of limitations. Not only would such an approach destroy the basic foundation of a set statute of limitations, but it would also amount to an improper judicial expansion of the waiver of sovereign immunity under the Mississippi Tort Claims Act.

Finally, Plaintiff's claims against the Hospital were also properly dismissed because Plaintiff's notice letter failed to comply with the notice provisions of Miss. Code Ann. § 11-46-11(2). Specifically, Plaintiff's notice letter failed to provide any information regarding the Plaintiff's residence at the time of Mr. Cook's injury and at the time that the notice letter was served. According to recent Supreme Court decisions addressing this issue, such an omission is a fatal flaw which mandates dismissal.

For the foregoing reasons the trial court's dismissal of Plaintiff's claims against the Hospital was appropriate and should be affirmed.

## ARGUMENT

- A. The judicially created discovery rule applicable to certain claims brought under the Mississippi Tort Claims Act does not apply to the instant facts, because Mr. Cook's injury was not latent.

The threshold issue before the Court is whether the discovery rule applies under the instant facts. If not, then in order to affirm the trial court's dismissal of Plaintiff's claims against the Hospital, the Court need look no further than Plaintiff's Complaint to realize that her claims focus exclusively on alleged "tortious, wrongful or otherwise actionable conduct" which occurred more than one year prior to the date on which the Hospital received Plaintiff's notice letter. Miss. Code Ann. § 11-46-11(3)

In order to succeed on appeal, Plaintiff must convince the Court that the statute of limitations on the claims against the Hospital did not begin to run until, at the earliest, the date that Mr. Cook died, or December 6, 2005. While Plaintiff attempts to achieve this feat by asserting that the discovery rule should operate to toll the running of the statute of limitations until Mr. Cook's death or some later date, she overlooks the absence of the prerequisite to the discovery rule under the Mississippi Tort Claims Act – a latent injury. Since Mr. Cook's underlying injury – a post-operative abdominal bleed – was known almost immediately, the discovery rule does not apply under the present facts, and the trial court properly dismissed Plaintiff's claims as time-barred.

As Plaintiff points out in her appellate brief, in *Barnes v. Singing River Hospital*, 733 So.2d 199 (Miss. 1999), the Supreme Court incorporated a discovery rule into the Mississippi Tort Claims Act, even though the statutory language did not specifically provide for one. Contrary to Plaintiff's argument, however, the *Barnes* Court specifically limited its judicial creation to actions involving latent injuries. *Id.* at 205 ("we choose to

incorporate a discovery rule in actions brought under the [MTCA] involving latent injuries"). Thus, the judicially created discovery rule does not apply to all cases brought under the Mississippi Tort Claims Act, but instead, it only applies to those arising out of a latent injury.

In the recent case of *Caves v. Yarbrough*, 991 So.2d 142 (Miss. 2008), on which Plaintiff relies heavily throughout her appellate brief, the Supreme Court was persuaded by the doctrine of *stare decisis* to continue recognizing the judicially created discovery rule under the Mississippi Tort Claims Act, despite the fact that the statute itself contains no such provision. In short, the Court held in *Caves* "that by reenacting Section 11-46-11(3) without addressing or countermanding this Court's decision in *Barnes*, the Legislature acquiesced and tacitly approved and incorporated into the statute a discovery rule as announced in *Barnes*." *Id.* at 154.

It follows then that the Court is also bound by the doctrine of *stare decisis* to recognize the limitations on the judicially created discovery rule as set forth in *Barnes*. Since the *Barnes* Court clearly limited the creation of the discovery rule under the Mississippi Tort Claims Act to those "actions...involving latent injuries," then by the same reasoning employed in the *Caves* decision, "the Legislature acquiesced and tacitly approved and incorporated into the statute a discovery rule" only applicable to actions involving latent injuries. *Id.* (quoting *Barnes*, 733 So.2d at 205)(emphasis added). Conversely, since the *Barnes* Court limited its judicially created discovery rule to "actions...involving latent injuries," the Court is not bound by the doctrine of *stare decisis* to apply it to actions, such as the instant one, where the injury is not latent. *Barnes*, 733 So.2d at 205(emphasis added). Such a conclusion is consistent with the

Supreme Court's application of the statutory discovery rule found in Mississippi Code Annotated Section 15-1-49 which also requires a latent injury to be present in order for the discovery rule to apply. As the Supreme Court pointed out in *PPG Architectural Finishes, Inc. v. Lowery*, 909 So.2d 47 (Miss. 2005), "the discovery rule should only be applied in limited circumstances in negligence and products liability cases involving latent injury. Implicitly then, this Court has held that if a latent injury is *not* present the discovery rule would *not* apply." *Id.* at 50.

"A latent injury is defined as one where the 'plaintiff will be precluded from discovering harm or injury because of the secretive or inherently undiscoverable nature of the wrongdoing in question ... [or] when it is unrealistic to expect a layman to perceive the injury at the time of the wrongful act.'" *Id.* (quoting *Donald v. Amoco Prod. Co.*, 735 So.2d 161, 168 (Miss.1999)). "For an injury to be latent it must be undiscoverable by reasonable methods." *Id.*

When, as here, the judicially created discovery rule is not applicable, the Court should simply look to the plain meaning of the statute to determine when the statute of limitations should begin running. Mississippi Code Annotated Section 11-46-11(3) provides a bright line starting point for the beginning of the statute of limitations applicable to claims brought under the Mississippi Tort Claims Act. "It is well established that this Court must review a statute through common use of words and meanings." *Lowery*, 909 So.2d at 50 (citing *Perkins v. State*, 863 So.2d 47 (Miss.2003)). According to the clear statutory language, all such claims should be brought within one year "next after the date of the tortious, wrongful or otherwise actionable conduct on

which the liability phase of the action is based, and not after.” Miss. Code Ann. § 11-46-11(3) (emphasis added).

The Mississippi Court of Appeals agrees as it has held previously that in the absence of the discovery rule, for “medical malpractice and wrongful death actions filed under the Mississippi Tort Claims Act, the statute of limitations begins to run from the date of the ‘tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based.’” *Pounds v. Mississippi Department of Health*, 946 So.2d 413 (Miss. App. 2006). The plaintiff in *Pounds* argued that the statute of limitations on her wrongful death claims did not begin to run until the date of her child’s death rather than the earlier date of the last prenatal treatment. *Id.* at 416. The Court of Appeals disagreed, however, holding that the plaintiff’s claims were time-barred, because the defendant did not receive her notice of claim letter until more than one year after the date of the last alleged improper prenatal care and treatment was rendered. *Id.* The Court also pointed out that “[e]ven if the statute of limitations began to run on the date of death, the action would still be barred by the statute of limitations,” because the defendant did not receive the notice letter until two days after the one year anniversary of the child’s death. *Id.*

While the facts in *Pounds* are slightly different than those of the instant action in that Plaintiff did serve a notice letter exactly one year following Mr. Cook’s death, the Court’s holding in *Pounds* is still fatal to Plaintiff’s claims, because according to the *Pounds* decision, the date of the underlying conduct, as opposed to the date of death, starts the running of the statute of limitations on Plaintiff’s claims. *Id.* (“The statute of limitations on Pounds action expired no later than [one year anniversary of last prenatal

treatment]”). Thus, the Court need only look to the date of the conduct at issue to determine when the statute of limitations should begin running in cases such as this one that do not involve latent injuries and therefore the judicially created discovery rule is inapplicable.

The judicially created discovery rule set forth in *Barnes* does not apply to the instant case, because Mr. Cook’s injuries were not latent. According to the allegations of Plaintiff’s complaint, Mr. Cook “developed a severe abdominal bleed and began to experience tremendous post-operative pain, nausea, and vomiting, shoulder pain, and eventual abdominal distention.” Thus, Plaintiff essentially admits in her Complaint that Mr. Cook’s injuries were not latent as they became apparent to Mr. Cook and Plaintiff almost immediately. Additionally, Plaintiff’s notice letter indicates that all parties knew of Mr. Cook’s injuries no later than December 2, 2005, the date that Plaintiff’s family consulted with Mr. Cook’s physicians regarding his condition and prognosis and the decision was made to remove mechanical life support. Furthermore, the trial court concluded as much in its order dismissing Plaintiff’s claims against the Hospital. [R 41; RE 41] Clearly, Mr. Cook’s injuries were not latent, and therefore, the judicially created discovery rule does not apply.

Recognizing that the discovery rule is unavailable to save Plaintiff from the reality of the trial court’s analysis in dismissing Plaintiff’s claims against the Hospital, the Court need only determine whether “the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based” occurred more than one year prior to December 6, 2006, the date that the Hospital received Plaintiff’s notice letter. If so, then



Plaintiff's claims are time-barred, and the Court should affirm the trial court's dismissal of the same.

As has been discussed previously, Plaintiff's Complaint focuses exclusively on care and treatment rendered to Mr. Cook between the dates of November 15, 2005 and December 2, 2005. Plaintiff admits in her notice letter that "after consultation with the family, it was decided to remove mechanical life support. [Mr. Cook] was moved to the floor and given a 'no code' status on December 2, 2005. [Mr. Cook] survived until December 6, 2005." [R 32; RE 32]. Plaintiff's consultation with Mr. Cook's physicians regarding his condition and prognosis prior to authorizing a "no code" status and removal from mechanical life support demonstrates Plaintiff's awareness of Mr. Cook's injuries on or before December 2, 2005, as well as Plaintiff's appreciation of the severity of the same. Even giving Plaintiff the benefit of every doubt, it is clear that Plaintiff was aware of on or before and does not allege that the "tortious, wrongful or otherwise actionable conduct" occurred after December 2, 2005. Therefore, Plaintiff's claims are time-barred, because the Hospital did not receive Plaintiff's notice of claim on or before December 2, 2006.

However, assuming *arguendo*, that the discovery rule does apply under the present facts, the statute of limitations on Plaintiff's claims should only be tolled until Mr. Cook, or Plaintiff as his representative, knew, or by exercise of reasonable diligence should have known, "of both the damage or injury, and the act or omission which proximately caused it." *Caves*, 991 So.2d at 155. That date can be no later than December 2, 2005, because that is the date that Plaintiff and her family consulted with Mr. Cook's physicians regarding his condition and prognosis and elected to withdraw all

forms of mechanical life support. Thus, the trial court was correct in concluding that based on Plaintiff's representations in her notice letter and Complaint, on or before December 2, 2005, Plaintiff and her family knew or should have known that Mr. Cook "had apparently (a) sustained severe and life-threatening postoperative complications following his gallbladder surgery, and (b) his death from the same was imminent." Such postoperative complications followed by a continued deterioration in condition should have alerted Mr. Cook as well as Plaintiff of potential problems with Mr. Cook's medical treatment. Indeed, the Supreme Court has held that a plaintiff need "*not know with certainty* that the conduct was negligent as a matter of law" in order for the statute of limitations under the discovery rule to begin to run. *Lowery*, 909 So.2d at 51 (quoting *Wayne General Hospital v. Hayes*, 868 So.2d 997, 1000 (Miss. 2004)).

Therefore, since Mr. Cook's injuries were not latent and since it is undisputed that all of "the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based" occurred more than one year prior to December 6, 2006, all claims against the Hospital arising out of such conduct were properly dismissed by the trial court. However, even if the discovery rule does apply, Plaintiff's claims are still time-barred as the postoperative complications followed by a continued deterioration in condition, all of which occurred and were communicated to Plaintiff prior to December 2, 2005, should have alerted Mr. Cook as well as Plaintiff of potential problems with Mr. Cook's medical treatment. Accordingly, the trial court's dismissal should be affirmed.

- B. Plaintiff's survival claims and wrongful death claims against the Hospital are time-barred, because the Hospital did not receive Plaintiff's notice letter "within one (1) year next after the date of the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based." Miss. Code Ann. § 11-46-11(3).

The trial court was correct in holding that all of Plaintiff's claims against the Hospital, including wrongful death and survival claims, arising out of Mr. Cook's death are barred by the one year statute of limitations applicable to claims brought under the Mississippi Tort Claims Act. See Miss. Code Ann. § 11-46-11(3). Despite Plaintiff's argument to the contrary, the one year statute of limitations on Mr. Cook's individual claims, and therefore, Plaintiff's derivative claims, began running at least four days prior to his death. Mr. Cook's death should not, and did not, operate to reset the statute of limitations on Plaintiff's claims against the Hospital. Thus, Plaintiff's delay in serving the Hospital with her notice letter until the one year anniversary of Mr. Cook's death is fatal as the one year statute of limitations had already expired by that time.

Before examining the issue of when the statute of limitations on Plaintiff's wrongful death and survival claims against the Hospital began to run, a brief reminder of the purpose of statutes of limitations is in order. Statutes of limitations are intended to protect potential defendants from liability exposure over an indefinite period of time by requiring a claim to be brought within a statutorily prescribed time frame or else be forever lost. According to the United States Supreme Court in *U.S. v. Kubrick*, 444 U.S. 111 (1979), "statutes of limitations...represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them. *Id.* at 117 (citations and quotations omitted)(emphasis added). In other

words, while any given plaintiff certainly has a right to bring a claim, that right does not last for an indefinite period of time, because if no action has been commenced by some legislatively determined point, that plaintiff's right to bring a claim is trumped by the defendant's right to be free of continuing exposure.

The finality provided by the expiration of statutes of limitations has also been the long-standing law in Mississippi as Article 4, Section 97 of the Mississippi Constitution provides that "the legislature shall have no power to revive any remedy which may have become barred by lapse of time, or by any statute of limitations of this state." It is therefore a cornerstone legal principle in this state that a claim barred by the expiration of the applicable statute of limitations shall not, under any circumstances, be revived. In fact, going all the way back to 1835 in the case of *Davis v. Minor*, 2 Miss. 183 (1835), the High Court of Errors and Appeals of Mississippi explained the reasoning for maintaining the finality of time-barred claims as follows:

It is reasonable and just, and, indeed, altogether important, that some period of time by legislative enactment should be fixed, beyond which debts and property cannot be recovered; otherwise the debtors or owners would never be free from liability to useless litigation, and courts of justice would be thronged with suitors, seeking, either ignorantly or fraudulently, to possess themselves of that which in justice they should not claim to recover.

*Id.* at 190.

Having revisited the general purpose of statutes of limitations, the Court must now examine the particular statutes of limitations at issue in the present case – those governing wrongful death and survival claims brought under the Mississippi Tort Claims Act. It is well known that "the statute of limitations on bringing a wrongful death claim is subject to, and limited by, the statute of limitations associated with the claims of specific

wrongful acts which allegedly led to the wrongful death.” *Jenkins v. Pensacola Health Trust, Inc.*, 933 So.2d 923, 926 (Miss. 2006). Stated differently, the statute of limitations on wrongful death and survival claims is the same as that which would have governed had death not ensued and the plaintiff’s decedent brought suit in his individual capacity.

It is undisputed that in this instant case the one year statute of limitations set forth in the Mississippi Tort Claims Act applies to Plaintiff’s claims brought against the Hospital. What is hotly disputed, however, is when the one year statute of limitations began to run. Plaintiff argues that the statute of limitations on both her wrongful death and survival claims did not begin to run until the date of Mr. Cook’s death, at the earliest. However, this reasoning is flawed in that it overlooks the fact that Mr. Cook, or his personal representative, had the right to bring a cause of action to redress his injuries between the date of his abdominal bleed and the date of his death. So, according to Plaintiff’s argument, despite the one year statute of limitations set forth under the Mississippi Tort Claims Act, the Hospital would have been exposed to the possibility of being sued for the days between Mr. Cook’s abdominal bleed and his death plus the time period beginning on the date of his death and ending exactly one year later, at the earliest – a total limitations period of well over one year. To borrow Plaintiff’s words, “this just cannot be the law.”

In order to fully appreciate the slippery slope which Plaintiff’s reasoning creates, consider the following hypothetical: John Doe sustains a compensable injury on January 1, 2005. The underlying tort giving rise to Mr. Doe’s injury is governed by the Mississippi Tort Claims Act’s one year statute of limitations. Assuming that the statute of limitations on Mr. Doe’s claims, as well as those of his heirs and successors, begins

to run immediately, those claims will be forever barred by the statute of limitations if a notice of claim is not served on or before January 1, 2006. However, applying Plaintiff's reasoning, should Mr. Doe eventually die from his injuries at any time having never pursued his claim, Mr. Doe's heirs will be afforded the opportunity to bring wrongful death and survivor claims for up to one year following his death, regardless of how much time, if any, remains on the statute of limitations on his individual claims. So, if Mr. Doe died six (6) months after his injury, the potential defendants would be exposed to possible claims being filed for a total period of one (1) year and six (6) months. If, on the other hand, Mr. Doe died six (6) months after the expiration of the statute of limitations, according to Plaintiff's reasoning, his heirs would have one (1) year from the date of his death to bring their claims, thus exposing the potential defendants to potential claims being filed for an additional one (1) year period following Mr. Doe's death. Thus, after having received a six (6) month reprieve following the expiration of the one year statute of limitations on Mr. Doe's claims, the potential defendants would again be exposed to possible claims for another year! Clearly, Plaintiff's line of reasoning could be used under such circumstances to improperly enlarge or revive an otherwise expired statute of limitations, ultimately exposing a Mississippi Tort Claims Act defendant to potential claims being filed against it for up to two (2) years as opposed to the one (1) year statute of limitations established by the Legislature. See Miss. Code Ann. § 11-46-11(3). Again, "the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Kubrick*, 444 U.S. at 117.

The more reasoned approach is to calculate the running of the statute of limitations on survival and wrongful death claims without regard to the date of death.

See, e.g., *Thiroux v. Austin*, 749 So.2d 1040, 1042 (Miss. 1999)(“a wrongful death action, since it is predicated on an underlying tort, is limited by the statute of limitations applicable to the tort resulting in the wrongful death”). The Court should apply the statute of limitations analysis utilized in *Thiroux* and *Jenkins* to the facts of the instant action. In doing so, the Court should look to the “date of the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based” in order to determine when the statute of limitations on Mr. Cook’s medical negligence claims against the Hospital began to run. Since Plaintiff’s wrongful death and survival claims against the Hospital are derivatives of Mr. Cook’s underlying medical negligence claims, Plaintiff’s claims are “subject to, and limited by, the statute of limitations” applicable to Mr. Cook’s medical negligence claims had he not died. *Jenkins*, 933 So.2d at 926. Thus, Plaintiff should not be allowed to use Mr. Cook’s death as an opportunity to rewind or revive the statute of limitations applicable to claims against the Hospital arising out of treatment rendered to Mr. Cook.

The above analysis appears to be more in line with the Legislature’s intent of establishing a one year statute of limitations for claims brought under the Mississippi Tort Claims Act which begins to run on the “date of the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based, and not after.” Miss. Code Ann. § 11-46-11(3). By limiting the statute of limitations on Plaintiff’s wrongful death and survival claims to the amount of time remaining on Mr. Cook’s statute of limitations at the time of his death, the Court will ensure that the Legislature’s limited waiver of sovereign immunity set forth in the Mississippi Tort Claims Act is not

judicially expanded by enlarging or allowing the one year statute of limitations to reset upon Mr. Cook's death.<sup>1</sup>

While the Hospital is mindful of the Supreme Court's holding in *University of Mississippi Medical Center v. McGee*, 999 So.2d 837 (Miss. 2008)(statute of limitations for survival claims may begin to run prior to death while that of wrongful death claims will not begin running until, at the earliest, death), the Hospital would urge the Court to reconsider its ruling in light of the above analysis. Although it was well-reasoned, the Court's holding in *McGee* flies in the face of this state's long-standing legal principles of enforcing statutes of limitations and refusing to revive the same. In short, when the Court's holding in *McGee* is applied to the facts similar to those of the instant action, the Hospital is exposed to potential claims being filed against it for a period of time of more than one year. By enlarging the statute of limitations applicable to claims arising out of the same "tortious, wrongful or otherwise actionable conduct," the *McGee* Court improperly expanded the limited waiver of sovereign immunity set forth by the Legislature in the Mississippi Tort Claims Act. See, *Kubrick*, 444 U.S. at 117-18 (referring to a statute of limitations analysis under the Federal Tort Claims Act, the United States Supreme Court stated, "we should not take it upon ourselves to extend the waiver beyond that which Congress intended").

The Court's decision in *McGee* should be overruled to the extent that it exposes a defendant entitled to the protections of the Mississippi Tort Claims Act to potential

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<sup>1</sup> See, e.g., *Kubrick*, 444 U.S. at 117-18 (when interpreting the statute of limitations applicable to claims brought under the Federal Tort Claims Act, 28 U.S.C. § 2401(b), the United States Supreme Court proceeded with caution stating: "We should also have in mind that the Act waives the immunity of the United States and that in construing the statute of limitations, which is a condition of that waiver, we should not take it upon ourselves to extend the waiver beyond that which Congress intended").



claims being filed against it for a period of time more than one year. In other words, to the extent that survival claims and wrongful death claims arise out of the same “tortious, wrongful or otherwise actionable conduct,” their respective statutes of limitations should be the same and should begin running at the same time – the date that the “tortious, wrongful or otherwise actionable conduct” occurred, unless the discovery rule is applicable due to latent injury. Miss. Code Ann. § 11-46-11(3). To hold otherwise would subject defendants under certain circumstances to limitations periods of uncertain length and the possibility of revival upon death, both of which are contrary to the Legislature’s clear intent set forth in Mississippi Code Annotated Section 11-46-11(3). Again, “the right to be free of stale claims in time comes to prevail over the right to prosecute them.” *Kubrick*, 444 U.S. at 117.

How does this apply to the facts of the instant action? The statute of limitations on Mr. Cook’s claims against the Hospital began to run from the date of the “tortious, wrongful or otherwise actionable conduct” or the alleged failure to recognize that Mr. Cook needed blood volume replacement as a result of his abdominal bleed. While the exact date of this alleged omission is not clear, it is abundantly clear from Plaintiff’s notice letter and complaint that all alleged acts or omissions occurred prior to December 2, 2005, the date that Mr. Cook was removed from life support. Even giving Plaintiff the benefit of every doubt, Mr. Cook, or his personal representative, had the right to bring a cause of action to redress his injuries for one year following the date of the alleged omission, which again, occurred no later than December 2, 2005. The clock does not reset or rewind on Plaintiff’s wrongful death and survivor claims, which are based on the same alleged omissions, simply because Mr. Cook died on December 6, 2005. If it did,

the Hospital would be exposed to potential claims being asserted against it for the same "tortious, wrongful or otherwise actionable conduct" for more than one year in direct contravention of the Legislature's limited waiver of sovereign immunity.<sup>2</sup>

Since Mr. Cook's injuries were not latent and the discovery rule does not apply, Plaintiff's right to bring her claims was extinguished by the expiration of the statute of limitations and the Hospital's right to be free of all claims arising out of the alleged omissions vested "one (1) year next after the date of the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based, and not after." Miss. Code Ann. § 11-46-11(3). Again, giving Plaintiff the benefit of every doubt, the statute of limitations expired no later than December 2, 2006, with no notice of claim letter having been received by the Hospital by that time. Therefore, the trial court correctly held that Plaintiff's claims against the Hospital were time-barred due to Plaintiff's failure to serve the Hospital with a notice of claim letter prior to the expiration of the one year statute of limitations.<sup>3</sup>

C. Plaintiff's notice letter which contains no mention of "the residence of the person making the claim at the time of the injury and at the time of filing the

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<sup>2</sup> Miss. Code Ann. § 11-46-11(3) limits the exclusive time frame during which a plaintiff may sue a governmental entity and take advantage of the limited waiver of sovereign immunity: "[a]ll actions brought under the provisions of this chapter shall be commenced within one (1) year next after the date of the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based, and not after." Miss. Code Ann. § 11-46-11(3).

<sup>3</sup> Without rehashing the same arguments and authority set forth above, even if the *McGee* decision is not overruled, the trial court's dismissal of Plaintiff's claims against the Hospital should still be affirmed with respect to the dismissal of Plaintiff's survival claims, because *McGee* stands for the proposition that the statute of limitations on survival claims begins running when the underlying statute of limitations on the decedent's claims begin running. The statute of limitations on Mr. Cook's claims began running no later than December 2, 2005. Therefore, Plaintiff's notice letter was received at least four days after the one year statute of limitations had expired. Such a holding in the instant case would be identical to the Court's holding in *McGee*. See *McGee*, 999 So.2d at 841.

notice” does not comply with the notice requirements set forth in Mississippi Code Annotated Section 11-46-11(2), and is therefore invalid.

Although Plaintiff’s notice letter’s failure to comply with the content requirement of Mississippi Code Annotated Section 11-46-11(2) is ancillary in light of the statute of limitations issue, above, it remains a fatal flaw, nonetheless. Specifically, Plaintiff’s notice letter did not contain the “residence of the person making the claim at the time of the injury and at the time of filing the notice.” Miss. Code Ann. § 11-46-11(2). According to recent caselaw interpreting the notice requirements set forth in Mississippi Code Annotated Section 11-46-11(2), failure to comply with the same renders the notice letter invalid. The notice letter must be valid in order to provide the appropriate ninety (90) days pre-suit notice required by Mississippi Code Annotated Section 11-46-11(1). The failure to provide valid notice is grounds for dismissal.

As the Court is well aware, no suit may be brought against a political subdivision like the Hospital unless the Plaintiff first provides a valid notice of claim letter at least ninety (90) days prior to commencing the action. Miss. Code Ann. § 11-46-11(1). In order for a correspondence to be considered a valid notice of claim letter it must:

...contain a short and plain statement of the facts upon which the claim is based, including the circumstances which brought about the injury, the extent of the injury, the time and place the injury occurred, the names of all persons known to be involved, the amount of money damages sought and the residence of the person making the claim at the time of the injury and at the time of filing the notice.

Miss. Code Ann. § 11-46-11(2)(emphasis added).

The Supreme Court addressed the issue of compliance with Miss. Code Ann. § 11-46-11(2) in *South Central Regional Medical Center v. Guffy*, 930 So.2d 1252 (Miss.2006). There, the Court held that:

With respect to the seven required categories of information, **the failure to provide one of the seven categories is failure to comply**. Thus, the term "substantial compliance" in this context is rendered meaningless. Either the written notice complied with Miss.Code Ann. § 11-46-11(2) by **disclosing all seven required categories** of information, or it did not comply with the statute by **failing to disclose all seven required categories** of information.

*Id.* at 1258 (emphasis added).

The *Guffy* Court further explained:

[T]he failure to provide *any* of the seven statutorily required categories of information falls short of the statutory requirement and amounts to non-compliance with Miss.Code Ann. § 11-46-11(2). However, where some information in each of the seven required categories is provided, this Court must determine whether the information is "substantial" enough to be in compliance with the statute. If it is, the result is "compliance," not "substantial compliance" with the requirements under Miss.Code Ann. § 11-46-11(2).

*Id.*(emphasis added).

More recently, in the case of *Parker v. Harrison County Board of Supervisors*, 987 So.2d 435 (Miss. 2008), the Supreme Court relied on the *Guffy* decision and held that a notice of claim letter that did not contain, among other omissions, "the residence of the persons making the claim at the time of the injury; and the plaintiffs' residence at the time of filing the notice," failed to comply with the content requirements set forth in Mississippi Code Annotated Section 11-46-11(2). *Id.* at 441. Despite the fact that the notice letter in *Parker* did contain information pertaining to the circumstances which brought about the injury and the time and place the injury occurred, the Supreme Court affirmed the trial court's granting of summary judgment in favor of defendants noting "because of the plaintiffs' total failure to provide the required information in the other five statutory categories, we need not discuss whether this information was 'substantial enough.'" *Id.* n.9 (quoting *Guffy*, 930 So.2d at 1258).

Such is the case in the instant action. Plaintiff's notice letter contains no mention of "the residence of the person making the claim at the time of the injury and at the time of filing the notice." Miss. Code Ann. § 11-46-11(2). In fact, Plaintiff, Gail Saul, did not even send the notice letter. Mr. Cook's son, Dale Cook, sent the notice letter to the Hospital. Regardless of who sent the letter, though, absolutely no information is provided regarding Gail Saul's residence at the time of Mr. Cook's injury. [R32; RE32] Likewise, absolutely no information is provided regarding Gail Saul's residence at the time that the notice letter was sent to the Hospital. [R32; RE32] These omissions render Plaintiff's notice letter invalid. See *Guffy*, 930 So.2d at 1258; See also, *Parker*, 987 So.2d at 441.

Since Plaintiff's notice letter is invalid, Plaintiff cannot be said to have provided the Hospital with a valid notice of claim at least ninety (90) days prior to filing her Complaint. Therefore, dismissal of Plaintiff's Complaint was appropriate in light of Plaintiff's failure to comply with the notice requirements set forth in Mississippi Code Annotated Section 11-46-11.

### **CONCLUSION**

The trial court's Order Granting Dismissal should be affirmed, because (1) the statute of limitations on Plaintiff's claims had expired prior to the Hospital receiving Plaintiff's notice of claim and (2) Plaintiff's notice of claim did not comply with the content requirements of the Mississippi Tort Claims Act notice statute. Alternatively, if the Court is inclined to reverse the trial court's dismissal of Plaintiff's wrongful death claims, the trial court's dismissal of Plaintiff's survival claims should still be affirmed on

statute of limitations grounds since the statute of limitations on Mr. Cook's medical negligence claims began running prior to his death.

Respectfully submitted, this the 8<sup>th</sup> day of April, 2009.

A handwritten signature in black ink, appearing to read "Richard O. Burson", is written over a horizontal line.

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**CERTIFICATE OF SERVICE**

I, Richard O. Burson, hereby certify that I have this date served a true and correct copy of Appellee's Brief to the following via United States Mail, postage prepaid:

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This the 8<sup>th</sup> day of April, 2009.



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