IN THE MISSISSIPPI SUPREME COURT

NO. 2009-CA-00158

SCOTT PRINGLE, AS NEXT FRIEND AND LEGAL GUARDIAN OF S. W. PRINGLE, A MINOR — **APPELLANT**

V.

JAMES J. KRAMER, M.D., KRAMHEARST BEHAVIORAL INSTITUTE, LLC AND BRENTWOOD BEHAVIORAL HEALTHCARE, L.L.C. — **APPELLEES**

ON APPEAL FROM THE CIRCUIT COURT OF RANKIN COUNTY, MISSISSIPPI

BRIEF OF APPELLEES JAMES J. KRAMER, M.D., AND KRAMHEARST BEHAVIORAL INSTITUTE, LLC

ORAL ARGUMENT NOT REQUESTED

ROBERT S. ADDISON - BAR #[redacted]
raddison@danielcoker.com
JOHN A. WAITS - BAR #[redacted]
jwaits@danielcoker.com
DANIEL COKER HORTON & BELL, P.A.
4400 OLD CANTON ROAD, SUITE 400
POST OFFICE BOX 1084
JACKSON, MISSISSIPPI 39215-1084
TELEPHONE: (601) 969-7607
FACSIMILE: (601) 969-1116
Attorneys for Appellees James J. Kramer, M.D., and Kramhearst Behavioral Institute, LLC

IN THE MISSISSIPPI SUPREME COURT

NO. 2009-CA-00158

SCOTT PRINGLE, AS NEXT FRIEND
AND LEGAL GUARDIAN OF S. W.
PRINGLE, A MINOR — APPELLANT

V.

JAMES J. KRAMER, M.D.,
KRAMHEARST BEHAVIORAL
INSTITUTE, LLC AND BRENTWOOD
BEHAVIORAL HEALTHCARE, L.L.C. — APPELLEES

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. S. W. Pringle, Appellant;
2. Scott Pringle, Appellant;
3. James J. Kramer, M.D., Appellee;
4. Kramhearst Behavioral Institute, LLC, Appellee;
5. Brentwood Behavioral Healthcare, LLC, Appellee;
6. Shirley Payne and Dennis L. Horne, Attorneys for Appellants;
7. James P. Streetman, David Lee Gladden, and William A. Scott, Jr., Attorneys for Appellee Brentwood Behavioral Healthcare, LLC;
8. Robert S. Addison and John A. Waits, Attorneys for Appellees James J. Kramer, M.D., and Kramhearst Behavioral Institute, LLC; and
9. Honorable Samac S. Richardson, Circuit Court Judge.

Attorney for Appellees James J. Kramer, M.D.,
and Kramhearst Behavioral Institute, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

DOCKETED CASES

STATE STATUTES

STATEMENT OF ISSUES

1. Whether the lower court was correct when it dismissed the fourth Complaint filed by the Plaintiff as being time barred under MISS. CODE ANN. § 15-1-36.

2. Whether MISS. CODE ANN. § 15-1-69 applies to the facts of this case.

3. Whether MISS. CODE ANN. § 15-1-59 applies to the facts of this case.

STATEMENT OF THE CASE

A. Nature of the Case

The subject action is for alleged medical negligence arising from the death of Lisa Pringle on or about February 28, 2003, while a patient at the Brentwood Behavioral Healthcare, L.L.C. ("Brentwood") facility in Rankin County, Mississippi.

B. Course of Proceedings and Dispositions in Court Below

This case comes to this Court from the Circuit Court of Rankin County, Mississippi, following the dismissal with prejudice of the Plaintiff's fourth Complaint. This is the second time this case has been before this Court. The first appeal came from the Circuit Court of Madison County and dealt with that court's dismissal of the Plaintiff's first Complaint for failure to provide notice under MISS. CODE ANN. § 15-1-36(15). The present appeal arises from the Circuit Court of Rankin County's dismissal of the Plaintiff's fourth Complaint as being time barred. Following is a brief discussion of the proceedings in the four lawsuits filed by the Plaintiff.

On **August 31, 2004**, the Plaintiff filed his first Complaint in the Circuit Court of Madison County, Mississippi, alleging medical malpractice, styled, *Scott Pringle, as next and legal friend and legal guardian of S.W. Pringle, a minor vs. James J. Kramer, M.D., Kramhearst Behavioral Institute, LLC, and Brentwood Behavioral Healthcare, LLC*, Civil Action No. CI2004-0288. (R. 106) MISS. CODE ANN. § 15-1-36(15) required Plaintiff to give notice of his intent to file suit sixty (60) days prior to commencing his lawsuit. In clear violation of the statute, Plaintiff mailed his notice letter on **August 31, 2004**, the same day

he filed suit. (R. 114)[1] Even though Plaintiff had ample time to file within the two (2) year statute of limitations set forth in § 15-1-36, he chose instead to disregard the notice requirement in order to file suit prior to the September 1, 2004, effective date of Mississippi's Medical Malpractice Tort Reform Act.

The Kramer Defendants moved to dismiss the Complaint for failure to comply with MISS. CODE ANN. § 15-1-36(15). Brentwood joined in the motion. A hearing was held on July 18, 2005, at the conclusion of which, the lower court granted the Defendants' motion and dismissed the Plaintiff's Complaint without prejudice. On **July 29, 2005**, Plaintiff filed a second Complaint in the Circuit Court of Rankin County, Mississippi, alleging medical malpractice, naming the same parties and containing the exact same language and causes of action as the Madison County case. (R. 110) On **August 3, 2005**, the Order dismissing Plaintiff's Madison County Complaint was entered. (R. 114) Whereupon, Plaintiff filed his Notice of Appeal on **August 8, 2005**. (R. 116) In his appeal, Plaintiff argued that he had substantially complied with the notice provisions of § 15-1-36(15).

On **August 9, 2005**, Plaintiff filed a third Complaint again in the Circuit Court of Rankin County, Mississippi, naming the same parties as the Madison (then on appeal) and Rankin County case, and containing the exact same language and causes of action. (R. 118) On **February 6, 2006**, the Defendants moved to dismiss both Rankin County cases (second

---

[1]In his brief, Plaintiff asserts that letters were sent to the "Defendants" on March 4 & 15, 2004, advising of his intent to pursue a claim for medical negligence. (Appellant Brief, p. 4) However, a review of the letters reveal they were sent only to Brentwood and not Dr. Kramer. In any event, these letters were deemed insufficient pre-suit notice by the lower court.

and third) on the grounds that the Plaintiff had not abandoned his first Madison County case as it was on appeal, and therefore, the Madison County court retained exclusive jurisdiction over the claims asserted in the two Rankin County cases. (R. 147) The Rankin County cases (second and third) were assigned to Judge Samac S. Richardson, who had presided over the Madison County case. After the issues had been briefed and oral arguments held, on Defendants' motion to dismiss the Rankin County cases on priority jurisdiction, the lower court took the matter under advisement and held the two Rankin County cases in abeyance.

On **February 8, 2007**, this Court rendered its *per curiam affirmance* of the Madison County trial court's dismissal of the Madison County case. (R. 125) Plaintiff did not petition for rehearing. On **January 10, 2008**, the Rankin County trial judge entered an order dismissing both Rankin County cases under the doctrine of priority of jurisdiction. (R. 146) No appeal was taken by the Plaintiff following the dismissal of the Rankin County cases.

On **February 7, 2008**, almost five years after the death of Ms. Pringle, Plaintiff filed his fourth Complaint, in the Circuit Court of Rankin County against the same parties, containing the exact same language and causes of action as the first three Complaints. (R. 9) The Defendants moved to dismiss the fourth Complaint asserting that the two (2) year statute of limitations governing medical malpractice actions had expired. (R. 21) Plaintiff filed a written response on **October 14, 2008**. (R. 73) Oral argument was held by Judge Samac S. Richardson on November 24, 2008, and, thereafter, on **December 29, 2008**, Judge Richardson issued an order dismissing Plaintiff's Complaint with prejudice as being time

barred. (R. 167) Plaintiff perfected his Notice of Appeal to this Court on January 22, 2009. (R. 276)

C. Statement of the Facts

Prior to her death, Ms. Pringle was treated for depression and substance abuse by numerous physicians and hospitals. Dr. Kramer was one of the physicians who had treated Ms. Pringle for these disorders and Brentwood was one of the facilities at which Ms. Pringle had received treatment. On or about February 25, 2003, Ms. Pringle's father, Zane Chapman, contacted Dr. Kramer about admitting Ms. Pringle to Brentwood because he was concerned for her well being. According to Mr. Chapman, Ms. Pringle "was so depressed that she wanted to die." Accordingly, Ms. Pringle was admitted to Brentwood on February 25, 2003, for substance abuse and depression. On February 28, 2003, Lisa Pringle was found dead in her room by Brentwood employees.

Ms. Pringle's death was investigated by the Flowood Police Department (Incident no. 2003020494) by Det. Johnny Taylor and Sgt. David Gammill. During his inspection of Ms. Pringle's room, Sgt. Gammill located an unlabeled brown pill bottle wrapped in tissue, hidden in a black bra in one of Ms. Pringle's drawers. Ms. Pringle's death was initially ruled accidental, however, her death certificate was amended several times to ultimately include drug overdose.

The Plaintiff filed the instant action on February 7, 2008, five years following the death of Lisa Pringle. Mr. Pringle's death on February 28, 2003, triggered the running of the applicable statute of limitations. While the August 31, 2004, filing of the first Complaint

arguably tolled the statue of limitations, this Court's affirmance on February 8, 2007, started the statute of limitations clock, which ultimately expired on October 3, 2007. For clarity, a detailed time line is set forth below.

a) February 28, 2003 — Death of Lisa Pringle (2 year statute of limitations (790 days) began to run).[2]

b) 549 days later on August 31, 2004, Plaintiff filed his lawsuit in Madison County (statute of limitations is arguably tolled).

c) On August 3, 2005, Plaintiff's Complaint was dismissed (statute of limitations began to run again).

d) On August 8, 2005 (5 days later), Plaintiff filed his Notice of Appeal (statute of limitations is again arguably tolled; however, 554 days of the limitations period has elapsed).

e) On February 8, 2007, the Mississippi Supreme Court affirmed the Circuit Court of Madison County's dismissal of Plaintiff's Complaint (statute of limitations began to run again). Plaintiff had 236 days remaining on the statute of limitation (790 - 554 = 236).

f) 236 days later, the statute of limitations expired on October 3, 2007.[3]

---

[2]Giving the benefit of the doubt to the Plaintiff and adding an additional 60 days of tolling pursuant to MISS. CODE ANN. § 15-1-36(2), the statute of limitations is 790 days.

[3]Defendants do not concede that the improper filing of a lawsuit, as was done when the Madison County case was filed, tolls the statute of limitation. Defendants merely point out that even giving the Plaintiff the benefit of the doubt on that issue, the current suit is barred.

The present case was filed on **February 7, 2008.**

SUMMARY OF THE ARGUMENT

Plaintiff's Complaint is barred by the application statute of limitations. The subject action is one for alleged medical negligence arising from the death of Lisa Pringle on or about February 28, 2003. As such Plaintiff's claim is governed by the two (2) year statute of limitations found in MISS. CODE ANN. § 15-1-36. The subject lawsuit was filed on February 7, 2008, almost five years after the death of Lisa Pringle. Plaintiff's claim is time barred.

Plaintiff requests relief under two "savings" statutes. Specifically, Plaintiff argues MISS. CODE ANN. § 15-1-69 (the general savings statute) and MISS. CODE ANN. § 15-1-59 (the minor's savings statute) apply to the facts of this case.

Plaintiff asserts that the dismissal without prejudice of the Madison County case was a dismissal as a "matter of form" and thus, Plaintiff is entitled to relief under MISS. CODE ANN. § 15-1-69. However, a dismissal for failure to provide notice is not a dismissal as a "matter of form." To hold otherwise would go against the legislative intent of the general savings statute. The purpose of § 15-1-69 is to give equity to one who has made a mistake (*i.e.*, protect parties who have mistaken the forum in which their causes should be tried). Such was not the case here. Plaintiff's Madison County case was dismissed, not because Plaintiff made a mistake with his choice of forum, but because he chose to disregard the law set forth in MISS. CODE ANN. § 15-1-36(15). Plaintiff was not acting in good faith by choosing to disregard the notice requirement, but instead, acted with complete indifference

to the law in an attempt to circumvent the new tort reform laws which were to go into effect on September 1, 2004, the next day. Furthermore, the Madison County case was not ***"duly commenced"*** as required by MISS. CODE ANN. § 15-1-69. Accordingly, § 15-1-69 is not applicable to the dismissal of the Madison County case.

Plaintiff further argues that this case is subject to MISS. CODE ANN. § 15-1-59, the savings statute for minors. Again, Plaintiff is simply wrong. Where there exists a person qualified to bring suit on behalf of the minor, the minor savings statute does not apply. In the present case, at the time of Lisa Pringle's death there was a qualified person to bring suit on behalf of the minor child — her father, Scott Pringle. Furthermore, MISS. CODE ANN. § 15-1-36(3)&(7) define the minority age limit as six years old for purposes of determining what statute of limitations rules apply in a wrongful death medical malpractice action. An individual is allowed two years from their sixth birthday to file their suit *if* they are younger than six years of age when the action becomes discoverable, but one who is older than six years old at that time is not allowed extra time. Since the cause of action accrued to the minor when said minor was eight years old, § 15-1-59 is inapplicable to the facts of the present case.

ARGUMENT

Plaintiff's Complaint is barred by the applicable statute of limitations. MISS. CODE ANN. § 15-1-36(2) states:

> (2) For any claim accruing on or after July 1, 1998, and except as otherwise provided in this section, no claim in tort may be brought against a licensed physician, osteopath, dentist, hospital,

> institution for the aged or infirm, nurse, pharmacist, podiatrist, optometrist or chiropractor for injuries or wrongful death arising out of the course of medical, surgical or other professional services unless it is filed within ***two (2) years*** from the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered, and, except as described in paragraphs (a) and (b) of this subsection, in no event more than seven (7) years after the alleged act, omission or neglect occurred.

MISS. CODE ANN. § 15-1-36(2) (emphasis added). The subject lawsuit was filed on February 7, 2008, almost five years after the death of Lisa Pringle. As such, Plaintiff's claim is time barred. Plaintiff requests relief under two "savings" statutes. Specifically, Plaintiff argues MISS. CODE ANN. § 15-1-69 (the general savings statute) and MISS. CODE ANN. § 15-1-59 (the minor's savings statute) apply to the facts of this case. For the reasons set forth below, these statutes are simply not applicable.

A. <u>There is no Relief for the Plaintiff Under the General Savings Statute (§ 15-1-69)</u>

In an effort to bring this case under the purview of Mississippi's general savings statute, Plaintiff argues that the prior Court's dismissal of the Madison County case was a dismissal as a "matter of form." In support, Plaintiff cites several cases that stand for the general proposition that a failure to provide 60 days notice under § 15-1-36(15) is a dismissal "without prejudice." See *Marshall v. Kansas City Southern Railways, Co.*, 7 So. 3d 210 (Miss. 2009); *Williams v. Skelton, M.D.*, 6 So. 3d 428 (Miss. 2009). In essence, Plaintiff argues that a dismissal "without prejudice" is by law, a dismissal as a "matter of form." While Defendants do not dispute that this Court has recently opined that a dismissal for failure to provide adequate notice under § 15-1-36(15) should be "without prejudice,"

Defendants vehemently dispute Plaintiff's assumption that such a dismissal is by law, a dismissal as a "matter of form."

1) Dismissal was not as a "matter of form."

Even though the Madison County Court's dismissal of the first Complaint was "without prejudice," is was not a dismissal as a "matter of form" as defined by the general savings statute.[4] MISS. CODE ANN. § 15-1-69 states in part that:

> "if in any action, ***duly commenced*** within the time allowed, the writ shall be abated, or the action otherwise avoided or defeated, by the death of any party thereto, ***or for any matter of form***, or if, after judgment for the Plaintiff shall be reversed on appeal, the Plaintiff may commence a new action for the same cause, at any time within one year of the abatement or other determination of the ***original*** suit, or after reversal of the judgment therein, and his executor or administrator may, in case of the Plaintiff's death, commence such new action, within the said one year." (emphasis added).[5]

---

[4]Plaintiff further asserts that the Rankin County Court's dismissal of the two subsequently filed Rankin County cases was also a dismissal as a "matter of form" and thus he is entitled to relief under the general savings statute. However, the general savings statute found in MISS. CODE ANN. § 15-1-69 only applies to the "original" suit. *Id.* As such, it offers no relief to the Plaintiff following the dismissal of the two Rankin County cases. Furthermore, the Rankin County cases were *void ab initio* (*i.e.*, not merely voidable, but null and void from the beginning) under the doctrine of priority jurisdiction. *Soriano v. Gillespie, et al.*, 857 So. 2d 64 (Miss. App. 2003).

[5]Plaintiff asserts that the one year period under the savings statute began to run on February 8, 2008, when this Court entered its *per curium affirmance* of the dismissal of the Madison County case. However, a clear reading of the statute indicates that the one year began to run from the "abatement or other determination of the original suit **or** after reversal of the judgment therein." *Id.* Defendants maintain that the savings statute is not applicable to the facts of the present case. However, even if the savings statute were applicable, Plaintiff did not avail himself of the statute timely. The only time the statute references the one year beginning following an appeal is when there has been a "reversal" of the judgment. *Id.* Such was not the case here. This Court affirmed the adverse judgment against the plaintiff. Therefore, even if this Court were to apply the savings statute, Plaintiff's case is barred in that it was not filed within one year of the Madison County court's dismissal on August 3, 2005.

When the Plaintiff filed his first suit, the law provided "[n]o action based upon the health care provider's professional negligence may be begun unless the defendant has been given at least sixty (60) days' prior written notice of the intention to begin the action." MISS. CODE ANN. § 15-1-36(15) (emphasis added). It is undisputed that Plaintiff failed to comply with his legal obligations when he chose to file suit without providing any notice to the Defendants. The Madison County Court was correct in dismissing Plaintiff's Complaint for failing to provide notice. Such a dismissal is not a "matter of form" for purposes of the savings statute. *Owens v. Mai*, 891 So. 2d 220 (Miss. 2005) The rationale set forth by this Court in *Owens* is applicable to the facts of the present case. Terry Owens was killed on the premises of Crystal Springs Mobile Home Park ("Crystal Springs"). Crystal Springs was owned and operated by Paul Mai. In November of 1997, Owens' wife filed a wrongful death action against Mai for negligent employment and supervision. *Id.* Owens attempted to serve Mai by leaving a copy of the summons and complaint with Mai's wife at their home. Mai did not dispute that a copy of the complaint was given to his wife; however, he asserted that he never received a copy of the summons by mail as required by Rule 4(d)(1)(B) of the Mississippi Rules of Civil Procedure. *Id.*

Three years later, in May 2001, Mai moved to dismiss the complaint for failure to serve process, which was granted by the trial court. Owens filed a second complaint on November 2, 2001. Mai moved to dismiss the second complaint as being barred by the statutes of limitations which was also granted by the trial court. *Id.* The trial court held that a dismissal for failure to serve process was not a "matter of form" as contemplated by MISS.

CODE ANN. § 15-1-69. Owens appealed and the Court of Appeals reversed, stating that a failure to serve process is in effect a dismissal for failure to establish jurisdiction, and such was considered a "matter of form" under § 15-1-69. *Id.* Mai petitioned for *writ of certiorari.* This Court granted Mai's petition and held that the "dismissal of a suit for failure to serve process is not a jurisdictional matter for purposes of the savings statute." *Id.*

This Court reasoned that if a plaintiff failed to serve process in compliance with Rule 4, the plaintiff could proceed on the grounds that the trial court's dismissal was jurisdictional and constitutes a "matter of form" dismissal for purposes of the savings statute. This would essentially allow plaintiffs who fail to serve process under Rule 4 to utilize the savings statute to "preserve their claim(s)" and/or "extend the life of their claim(s)." *Id.* Such was not the intent of § 15-1-69. Applying this rationale, this Court held that when a case is dismissed because the Defendant was not properly served . . . such a dismissal is not a "matter of form" that comes within the intent of MISS. CODE ANN. § 15-1-69. *Id.*

Owens is analogous to the present case. Plaintiff failed to give notice to Defendants but instead rushed to file his Complaint on August 31, 2004, so that he could "preserve his claim" under the laws that existed prior to the September 1, 2004, enactment of the Medical Malpractice Tort Reform Act. To rule that the lower court's dismissal under § 15-1-36(15) was a dismissal as a "matter of form" would allow the Plaintiff to, in essence, "extend the life" of his claim for one year by consciously violating the statutory notice provision. The

legislative intent of § 15-1-69 is to guard against mistakes in forum choice . . . not to provide relief to those who consciously violate a legislative notice requirement.[6] Defendants are mindful of *Arceo v. Tolliver, et al.*, No. 2008-CA-00224-SCT, (*Tolliver II*) where this Court held that the failure of the Plaintiff to provide statutory notice fell within the parameters of a "matter of form" such that the savings statute applied. *Tolliver II* is distinguishable from this case. *Tolliver II* not only analyzed the substance (form) of the previous notice, but the Court also noted that, good faith in initiating the action under the savings statute was never raised before the trial court, and therefore, was not before the Court for consideration. *Id.* at ¶ 39. In the present case, no notice was provided, and Plaintiff's motives in initiating the Madison County suit without providing notice was raised in the lower court and is presently before this Court for consideration.

2) The purpose of § 15-1-69 is to give equity to one who has made a mistake.

This Court has held, "the purpose of the savings statute is to protect parties who have mistaken the forum in which their causes should be tried; who simply entered the temple of justice by the door on the left, when they should have entered by the door on the right." *Ryan v. Wardlaw*, 382 So. 2d 1078, 1080 (Miss. 1980). Such was not the case here. Plaintiff's Madison County case was dismissed, not because Plaintiff entered the "wrong door" of the

---

[6]Like the Plaintiff in *Owens*, Plaintiff argues that the lower court's dismissal of the original Madison County case was "jurisdictional" and as such constitutes a dismissal as a "matter of form." (Appellant Brief, p. 8) However, such is not supported by the record or Mississippi law. This Court has held that "the notice requirements in the MTCA are not jurisdictional." *Stuart v. University of Mississippi Medical Center*, No. 2007-CT-00864-SCT (August 20, 2009). This Court can follow the rationale set forth in *Stuart* regarding notice under the MTCA and equally apply it to the notice requirements of MISS. CODE ANN. § 15-1-36(15).

courthouse, but because he chose to disregard the law set forth in MISS. CODE ANN. § 15-1-36(15). This was no accident or innocent mistake, but a conscious, tactical decision by the Plaintiff to avoid tort reform. (§ 11-1-60 [cap on non-economic damages]; § 85-5-7 [change to laws regarding apportionment]; and § 11-11-3 [changes to the venue laws]. (Appellant Brief, p. 4) In order to benefit from the savings statute, the Plaintiff must have acted in good faith in filing the first action. "The savings statute, MISS. CODE ANN. § 15-1-69, is only available when the cause in good faith is erroneously misfiled." *Wertz v. Ingalls*, 790 So. 2d 841, 844 (Miss. 2000) (*see also, Hawkins v. Scottish Union, et al*, 69 So. 710 (1915) where the Court held where the want of jurisdiction in the Court was so clear that the bringing of a suit therein would show such gross negligence and **indifference** as to cut the party off from the benefit of the savings statute.) Plaintiff was not acting in good faith by choosing to disregard the 60-day notice requirement, but instead, acted with complete indifference to the law in an attempt to circumvent the new tort reform laws which were to go into effect on September 1, 2004.

3) Madison suit was not duly commenced.

Furthermore, as stated above, pursuant to § 15-1-36(15), "no action . . . ***may be begun unless*** the Defendant has been given at least sixty (60) days prior written notice." Since Plaintiff's Madison County case was not properly initiated (*i.e.*, "begun" as stated in the statute) that case was not ***"duly commenced"*** as required by MISS. CODE ANN.

§ 15-1-69.[7] Accordingly, § 15-1-69 is not applicable to the dismissal of the Madison County case.

B. <u>There is no Relief for the Plaintiff Under the Minor's Savings Statute (§ 15-1-59)</u>

Plaintiff further argues that this case is subject to MISS. CODE ANN. § 15-1-59, the savings statute for minors. While the minor savings statute arguably applies to wrongful death actions, the two statutes (savings and wrongful death) are at odds with one another. The minor savings statute states:

> If any person entitled to bring any of the personal actions mentioned shall, at the time at which the cause of action accrued, be under the disability of infancy or unsoundness of mind, he may bring the actions within the times in this chapter respectively limited, after his disability shall be removed as provided by law. However, the saving in favor of persons under disability of unsoundness of mind shall never extend longer than twenty-one (21) years.

MISS. CODE ANN. § 15-1-59. At odds with this language is that of the wrongful death statute. The wrongful death statute reads in relevant part:

> The action for such damages may be brought *in the name of the personal representative of the deceased person or unborn quick child for the benefit of all persons entitled under the law to recover*, or by widow for the death of the wife, or by the parent for the death of a child or unborn quick child, *or in the name of a child, or in the of a child for the death of a parent*, or by a brother for the death of a sister, or by a sister for death of a brother, or by a sister for the death of a sister, or a brother for a death of a brother, or *all parties interested may join in the suit, and there shall be but one (1) suit for the same death which shall ensue for the benefit of all parties concerned*, but the

---

[7]*Commence* as defined by Black's Law is "to initiate by performing the first act or step. To begin, institute or start". Black's Law Dictionary, Sixth Edition (1990).

> determination of such suit shall not bar another action unless it be decided on the merits.

MISS. CODE ANN. § 11-7-13 (emphasis added). The contrast of two statutes was recognized and discussed at length by the Mississippi Supreme Court in *Curry v. Turner*, 832 So. 2d 508 (Miss. 2002).

In *Curry*, the Court examined the language of the two statutes and specifically the wrongful death statute's requirement that there be only one suit for recovery. The Court conceived a scenario where the minor savings state would allow plaintiffs of majority age to file suit within the statute of limitations and another group of plaintiffs under the protection of the minor savings statute to file suit after their disability was removed. *Id.* at 516. Such a scenario would be in opposition with the "one suit" requirement of the wrongful death statute. The Court attempted to reconcile the two statutes in its analysis and further stated:

> The wrongful death statute also provides that a suit can be brought in the name of the personal representative of the deceased on behalf of all, not just persons of majority age. All parties concerned are allowed to join this suit. The wrongful death statute assumes the minor children of a deceased will be represented by the deceased's personal representative or represented separately. **They would still be required to join in the single action for damage** and allowed to share in any award gained by another beneficiary.

Id. (emphasis added). While expressing that the two statutes are "at irreconcilable odds with one another where there exists a person qualified under the wrongful death statute to bring suit" the Court held that where such a qualified person exists, the minor savings statute

would not apply to the wrongful death action and the applicable statute of limitations would not be tolled. *Id.* "A common sense reading of the wrongful death statute indicates the statute of limitations runs against both the personal representative of the deceased and the deceased's children." *Id.* at 517. Said another way, "[t]he existence of a person qualified to sue on behalf of all negates the need for a savings." *Anderson v. R & D Foods, Inc.,* 913 So. 2d 394, 399 (Miss. App. 2005).

At the time of Lisa Pringle's death, Scott Pringle was qualified to bring suit on behalf of his minor daughter. In fact, Mr. Pringle has filed all four Complaints as next friend and legal guardian of S.W. Pringle. Plaintiff was qualified to bring suit and has been acting on behalf of the minor since the death of Lisa Pringle. The Plaintiff argues that he was not married to Lisa Pringle at the time of her death, having been divorced from her in March of 1999. As such, he was not entitled to bring this lawsuit on behalf of the decedent's surviving minor child and the minor savings statute would apply and protect the Plaintiff in this case. However, there is no requirement that the personal representative of the minor child be married to the decedent at the time of death. As the natural father of the minor child, he would have standing to file suit on behalf of the minor.

In accordance with the wrongful death statute, the minor savings statute, and the holding by the Mississippi Supreme Court in *Curry*, the minor savings statute is not applicable to this matter and Plaintiff's argument on this issue must fail. Furthermore, Plaintiff overlooks MISS. CODE ANN. § 15-1-36(3) which states,

> . . . if at the time at which the cause of action shall . . . have been first known . . . the person to whom such claim has accrued shall be six (6) years of age or younger, then such minor or the person claiming through such minor may . . . commence action on such claim at any time within two (2) years next after the time at which the minor shall have reached his sixth birthday.

In addition to subsection (3), MISS. CODE ANN. § 15-1-36(7) provides:

> For the purposes of subsection (3) of this section, and only for the purpose of such subsection, the disability of infancy or minority shall be removed from and after a person has reached his sixth birthday.

Subsection (3) read in conjunction with (7) essentially defines the minority age limit as six years old for purposes of determining what statute of limitations rules apply in a wrongful death medical malpractice action. When an individual turns six years old they no longer have minority status for purposes of subsection (3), and thus anyone older than six years old is not privy to the extended statute of limitations provided for minors therein, and is bound by subsections (1) and (2), which requires the action to be brought within two years of the act. Put another way, an individual is allowed two years from their sixth birthday to file their suit *if* they are younger than six years of age when the action becomes discoverable, but one who is older than six years old at that time is not allowed extra time. Since the cause of action accrued to the minor when said minor was 8 years old, § 15-1-59 is inapplicable to the facts of the present case.

C. Plaintiff's Request the Case be Remanded to Madison County

Plaintiff requests that this case be remanded to the Circuit Court of Madison County to proceed under the laws in effect prior to September 1, 2004. Plaintiff cites this Court to

Crawford v. Morris Transportation, 990 So. 2d 162 (Miss. 2008) in support of his request. However, in *Crawford*, the case was simply remanded to the court from which it was appealed following this Court's application of § 15-1-69. *Crawford* in no way supports Plaintiff's request. Furthermore, Madison County is not the proper venue. The Madison County case was dismissed in August 2005, with the dismissal having been affirmed by this Court in February 2007. Plaintiff's request is without merit and contrary to Mississippi law. This is the second attempt by the Plaintiff to avoid the Medical Malpractice Tort Reform Act. The first attempt came when he filed suit on August 31, 2004, without first notifying the Defendants pursuant to § 15-1-36(15).

D. Constitutional Challenge

Plaintiff also asserts that to hold that the savings statute inapplicable, would deny the minor Plaintiff of her right of access to the courts and to have her case decided by a jury as guaranteed by the Mississippi Constitution. (Appellant Brief, p. 14) This argument is procedurally barred as this issue was not addressed at the lower court level and there is no record of the Attorney General being put on notice of this claim. Miss. R. Civ. P., Rule 44(a); *Oktibbeha County Hospital v. Mississippi State Department of Health, et al.*, 956 So. 2d 207 (Miss. 2007). Furthermore, these arguments have previously been raised and found to be without merit. *Arceo v. Tolliver*, 949 So. 2d 691 (Miss. 2006) (this Court held that while the right under our state and federal constitutions to access to our courts is a matter beyond debate, this right is coupled with responsibility, including the responsibility to comply with legislative enactments, rules, and judicial decisions).

CONCLUSION

Plaintiff has failed to come forward with any evidence that the Complaint filed on February 7, 2008, for the death of Lisa Pringle on February 28, 2003, is timely. The dismissal of the original action by the Circuit Court of Madison County on August 3, 2005, was not a dismissal as a "matter of form" and, therefore, the savings statute found in MISS. CODE ANN. § 15-1-69 is not applicable. Furthermore, for the reasons stated above, the minor savings statute found in MISS. CODE ANN. § 15-1-59 is also not applicable. As such, Plaintiff's lawsuit is time barred.

WHEREFORE, PREMISES CONSIDERED, Appellees respectfully request that the Court affirm the lower court's dismissal of the Plaintiff's Complaint with prejudice.

RESPECTFULLY SUBMITTED, this the 3rd day of September, 2009.

JAMES J. KRAMER, M.D., and
KRAMHEARST BEHAVIORAL INSTITUTE, LLC

BY: _____/JAW
OF COUNSEL

BY: _____
OF COUNSEL

ROBERT S. ADDISON - BAR #[redacted]
raddison@danielcoker.com
JOHN A. WAITS - BAR #[redacted]
jwaits@danielcoker.com
DANIEL COKER HORTON & BELL, P.A.
4400 OLD CANTON ROAD, SUITE 400
POST OFFICE BOX 1084
JACKSON, MISSISSIPPI 39215-1084
TELEPHONE: (601) 969-7607
FACSIMILE: (601) 969-1116

CERTIFICATE OF SERVICE

I, John A. Waits, of counsel for James J. Kramer, M.D., and Kramhearst Behavioral Institute, LLC, do hereby certify that I have this day served via United States mail a true and correct copy of the above and foregoing Brief of Appellees James J. Kramer, M.D., and Kramhearst Behavioral Institute, LLC to:

Dennis L. Horn, Esq.
Shirley Payne, Esq.
Horn & Payne, PLLC
P.O. Box 2754
Madison, MS 39130-2754

James P. Streetman, III, Esq.
David Lee Gladden, Jr., Esq.
William A. Scott, Jr., Esq.
Scott, Sullivan, Streetman & Fox, P.C.
P.O. Box 13847
Jackson, MS 39236-3847

Honorable Samac S. Richardson
Rankin County Circuit Court Judge
P.O. Box 1885
Brandon, MS 39043

THIS, the 3rd day of September, 2009.

JOHN A. WAITS

M31-112480/lrg