

IN THE SUPREME COURT OF MISSISSIPPI

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
MADISON COUNTY, MISSISSIPPI**

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

ORAL ARGUMENT REQUESTED

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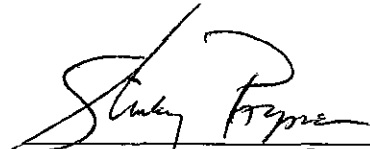
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. The Plaintiff, S. W. Pringle, is the minor daughter of the decedent, Lisa Pringle.
2. The action is brought on behalf of S. W. Pringle by her father (and divorced former husband of the Plaintiff's decedent Lisa Pringle) as next friend and natural guardian, Scott Pringle.
3. The parents of Lisa Pringle, and grandparents of S. W. Pringle, are Zane and Barbara Chapman, witnesses interested in this case.

4. The Defendant is James J. Kramer, M.D., and who is alleged to have caused the death of Lisa Pringle on or about February 28, 2003, by dispensing, administering, or prescribing a drug regimen which directly and proximately caused her death.
5. Defendant, Kramhearst Behavioral Institute, LLC, is the alter-ego of Defendant, James J. Kramer, duly organized and doing business in Madison County, Mississippi.
6. Defendant, Brentwood Behavioral Healthcare, LLC, is a corporation providing health care, particularly addressing mental health issues, doing business in Mississippi.
7. Attorneys for the Defendants are: James P. Streetman, III and William A. Scott, Jr., Scott, Sullivan, Streetman & Fox, P.C., for Brentwood Behavioral Healthcare, LLC, and Robert S. Addison and John A. Waits, Daniel, Coker, Horton & Bell, for James J. Kramer, M.D. and Kramhearst Behavioral Institute, LLC.
8. Attorneys for the Plaintiff are Shirley Payne and Dennis L. Horn, Horn & Payne, PLLC.
9. The trial judge below is Rankin County Circuit Court Judge Samac S. Richardson.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Shirley Payne", is written over a horizontal line.

Shirley Payne (MSB [REDACTED])
Attorney of Record for the Plaintiff

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STATEMENT OF THE ISSUES

1. Whether a case dismissed, without prejudice, under § 15-1-36(15), Miss. Code Ann., and re-filed within one (1) year, is saved from a statute of limitations by virtue of the general savings statute, § 15-1-69, Miss. Code Ann., or the minors' savings statute, § 15-1-59, Miss. Code Ann.?

2. Whether the same case, re-filed immediately before and after the dismissal of the first Complaint, is saved from the statute of limitations by either savings statute when refiled with one (1) year?

3. Whether the savings statutes apply to a medical malpractice case after the Mississippi Medical Malpractice Tort Reform Act of 2002,

a) under § 15-1-69, or

b) under § 15-1-59?

4. Whether this case should be remanded to the venue where it was filed prior to tort reform, the Circuit Court of Madison County, Mississippi, or the venue where the case was filed after tort reform, the Circuit Court of Rankin County, Mississippi?

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STATEMENT OF THE CASE

NATURE OF THE CASE

This medical malpractice action, brought under the wrongful death statute, requires this Court to construe § 15-1-36(15) Miss. Code Ann. (Supp. 2003) and the Savings Statute, § 15-1-69. Additionally, the minor's savings statute, §15-1-59 Miss. Code Ann, protects the decedent's child, the Plaintiff appellant S. W. Pringle, who was only seven years old when her mother died. R 86 & R 89.

COURSE OF PROCEEDINGS AND DECISION IN THE COURT BELOW

The Rankin County Circuit Court dismissed this action, again, on December 29, 2008, based on the statute of limitations. RE 9 - 13, R 167 -171. The Circuit Court, Judge Samac Richardson presiding, stated: "Therefore, Miss. Code Ann. §15-1-69 does not apply in this case and Plaintiff's filing of this lawsuit on February 7, 2008, is time barred." RE 12, R 170. In the

original action, Plaintiff's Madison County suit was dismissed by the Circuit Court for failure to give notice to the Defendants, in writing, sixty (60) days prior to filing suit as required by Miss. Code Ann. § 15-1-30(15). R 114- 115. That original Complaint had been dismissed by an Order reciting that it was "without prejudice." R 114. During the appeal of that original case, the Plaintiff twice again filed her identical Complaint, in Rankin County, to preserve every possible avenue for redress. These two additional Complaints were also dismissed "without prejudice." R 126. As to these other two filings, Judge Richardson ruled: "This Court further finds that §15-1-69 is not applicable to the dismissal of the two previously filed Rankin County suits as they were dismissed not as a 'matter of form.'" RE 12, R 170.

The Circuit Court also dismissed the case by ruling that the minors' savings statute, §15-1-69 Miss. Code Ann., "is also not applicable." RE 12, R 170. Judge Richardson ruled that because the child's father, who was the divorced husband of the decedent, had brought the case as next friend, "there exists a person qualified under § 11-7-13 to bring suit," so that the statute of limitations runs against both the personal representative of the deceased and the deceased's children, citing *Curry v. Turner*, 832 S.2d 508 (Miss. 2002). *Id.*

These rulings are in error.

The Plaintiff's decedent, Lisa Pringle, had died on February 28, 2003, while under Defendants' custody and treatment for clinical depression, not for a physical illness. R. 7. The original action in this case was filed, well within the two year statute of limitations, on August 31, 2004. R 106. The written confirmation of the meritorious basis for the cause of action had been obtained from a psychiatrist, a medical specialist as required by the new tort reform law, by facsimile only on August 30, 2004. *Id.*

August 31, 2004 was the day before tort reform legislation was to go into effect. September 1, 2004 marked the deadline for asserting non-economic damages against certain classes of defendants. That new damages cap is found at § 11-1-60 Miss. Code Ann. (Supp. 2004). Also effective on September 1, 2004, were the amendments to the Mississippi Apportionment Statute, § 85-5-7 Miss. Code Ann. (Supp. 2004), and provisions of the venue statute at §11-11-3(3) Miss. Code Ann. (Supp. 2004) requiring medical malpractice actions to be filed in the county where the alleged act or omission occurred. The above listed changes were added to the Mississippi Code as part of the Mississippi Medical Malpractice Tort Reform Act of 2002.

On the same day the Plaintiff filed her Complaint, she caused to be mailed the notice of intent to begin an action. Previous Brief of Appellant, R Exhibit 1 to Volume 3 of 3, p 3. The Plaintiff was relying on the existing law at the time holding that such a notice fulfilled the requirements specified in the procedural amendments to the State's statute of limitations appearing at § 15-1-36(15). Further, the Plaintiff's family and the Defendants had held repeated conversations, face- to-face meetings, and exchanges of correspondence prior to the filing of the case. *Id.*, By letters of March 4 and March 15, 2004, *Id.*, and by extensive conversations initiated by the decedent's parents, *Id.*, the Defendants had been put on notice of the potential wrongful death claim. The notice and the filing of the action were well within the two-year statute of limitations applicable to this medical malpractice action. The notice requirements had been addressed with good faith.

The original action was dismissed. R 114 - 115. The Circuit Court below granted the Defendants' Motion to Dismiss the original Complaint by its Order of August 3, 2005. R 114.

Notice of appeal was timely filed on August 8, 2005. R. 116. The Mississippi Supreme Court summarily affirmed the dismissal without written opinion. R 125.

Meanwhile, the Rankin County Circuit Court had before it two additional suits making the identical claims for relief. Plaintiff had re-filed her action in Rankin County on July 29, 2005, R 138, and again on August 9, 2005, R 142, both before and after the trial court had formally entered its written order of dismissal on the original suit. By consolidation, Judge Samac Richardson came to preside over both of the Rankin County cases. On January 10, 2008, the Circuit Court dismissed the two Rankin County suits without prejudice. R 146. On February 7, 2008, the Plaintiff again filed her identical Complaint, for the fourth time, in Rankin County Circuit Court. R 9. The Defendants filed their Motion for Protective Order, including therein their motions to dismiss, R 45, R 57, which the Circuit Court granted and from which this appeal lies. RE 9, R 167.

The current suit was filed within one year of the dismissals, both from the appeal to the Mississippi Supreme Court and within one year of the dismissals of the other two attempted cases filed, bringing this case within the one year savings statutes, § 15-1-69 and § 15-1-59 Miss. Code Ann.

FACTS

This is a wrongful death action brought on behalf of the decedent's surviving child, the then eight-year-old S. W. R 86 & R 89. The Plaintiff's decedent, Lisa Pringle, was a thirty-five year old registered nurse. R. 9. She had been employed by Wackenhutt at the prison facility in Lauderdale County. *Id.* While tending to the prisoners there one night she was taken hostage at knife point by a convicted felon who threatened to rape her. *Id.* Lisa Pringle was finally rescued

by one of the other prisoners, but suffered post traumatic stress for which she was treated by Dr. Kramer, one of the Defendants in this action. *Id.*

In February, 2003, Lisa became depressed and tearful. *Id.*, and Exhibit 1 to Volume 3 of 3, *supra*, at p.3. Her father took her to Brentwood at Dr. Kramer's recommendation. *Id.* Lisa was admitted on February 25, 2003. *Id.* On the early morning of February 28, 2003, Lisa was found dead. *Id.* Dr. Kramer informed Lisa's father of her death and told him, "Lisa had passed away and he did not know why." *Id.* As Lisa's father questioned him further Dr. Kramer implied that Lisa must have committed suicide, saying, "she must have slipped in some Lorcet or Loretab and overdosed" *Id.* at p. 4.

On December 17, 2003, Lisa's father and mother asked Brentwood to provide them with a copy of Lisa's records. *Id.* They had made a trip to the Brentwood facility in person on that day. *Id.* They talked with a representative of Brentwood, a nurse named Donna Ferguson, and with Dr. Kramer personally. *Id.* Dr. Kramer talked about other patients who had committed suicide. *Id.* He said it would take some time to prepare the records. *Id.*

About a week later Darlene Stewart from Brentwood called Lisa's father, Mr. Zane Chapman. *Id.* She said the charge for the medical records would be \$200.00. *Id.* Mr. Chapman said that would be fine. *Id.* Then she said the parents would have to get a court order to obtain their daughter's records. *Id.*

The Defendants in the present case are medical professionals who knew, or had every reason to know, whether or not their malpractice had caused the alleged polypharmacy that brought about Lisa Pringle's death. This was knowledge the Defendants initially kept from the Plaintiff's family. However, the Defendants could interpret the questions from the Plaintiff's

family in light of their knowledge of the circumstances surrounding Lisa's death and know that the request for medical records could result in litigation once those records were revealed.

Mr. Chapman contacted Mr. Irvin Martin, a neighbor who is an attorney. *Id.* Mr. Martin wrote a letter to Brentwood and enclosed a check for the medical records. *Id.* Mr. Martin also sent an additional letter dated March 15, 2004, which stated, in pertinent part, "We reserve the right to file any claim...". *Id.* It was apparently after that March 15 letter was sent when the medical records were finally released to the Plaintiff's family from Brentwood. *Id.*

Lisa Pringle, the mother of the Plaintiff child, died allegedly as a result of the prescription drugs administered to her by the Defendant doctor and hospital following the mother's admission for treatment for depression. R 10. The mother was physically healthy at the time of her admission. The Defendant doctor, who is an internist and not a psychiatrist, prescribed the lethal medicines which were mis-administered by the hospital without baseline data, oversight, or protective protocols, allegedly causing the mother's death. R. 9, 10. The mother died within four days of her admission for treatment. *Id.*

SUMMARY OF ARGUMENT

The statute of limitations does not bar suit by the minor child, S. W. Pringle, who was eight (8) years old at the time this suit was originally filed, under the general savings statute, § 15-1-69 Miss. Code Ann., *Crawford v. Morris Transportation*, 990 So.2d 162, 2008 Miss. LEXIS 421 (Sept. 4, 2008), *Williams v. Skelton, M.D.*, 6 So.3d 428, 2009 Miss. LEXIS 138, *8, (P8) (Miss. April 9, 2009), *Marshall v. Kansas City Southern Railways Co.*, 7 So.3d 210, 2009 Miss. LEXIS 106 (Miss. March 5, 2009), *Thomas v. Miss. Baptist Medical Center*, 999 So.2d 842, 847 (Miss. 2008) and under the Mississippi minors' savings statute, § 15-1-59 Miss. Code

Ann., *Johnson v. Med Express Ambulance Services, Inc.*, F.Supp.2d (S.D. Miss. 2008), and *Pollard v. Sherwin-Williams*, 955 So.2d 764 (Miss. 2007).

Jurisdictional and statute-of-limitations issues are subject to a de novo review. *Crawford v. Morris Transportation, Inc.*, *supra*, at 168, (P19).

ARGUMENT

I. THE MISSISSIPPI SUPREME COURT HAS NOW HELD THAT IN A CASE SUCH AS THE INSTANT APPEAL A DISMISSAL UNDER § 15-1-36 MISS. CODE ANN. IS A MATTER OF FORM SUCH THAT THE CASE IS NOT BARRED BY THE STATUTE OF LIMITATIONS IF FILED AGAIN WITHIN ONE YEAR IN ACCORDANCE WITH THE GENERAL SAVINGS STATUTE, § 15-1-69 MISS. CODE ANN.

The Mississippi Supreme Court has now held that an action dismissed as a matter of form is saved from a statute of limitations where that dismissal was “on some matter not affecting the merits.” *Marshall v. Kansas City Southern Railways Co.*, 7 So.3d 210, 2009 Miss. LEXIS 106, *10 (P16) (Miss. March 5, 2009)(*en banc*). The *Marshall* decision reversed the court of appeals and the trial court and remanded to the trial court for further proceedings. The dismissal below had been based on a lack of subject matter jurisdiction, as was the dismissal in the case at bar, and the dismissal below had been without prejudice, as was the dismissal below in the case here presented. Under identical reasoning, this case must be reversed and remanded for further proceedings.

Subsequent to the *Marshall* decision, the Mississippi Supreme Court has held that the dismissal of a medical malpractice claim for failure to comply with the pre-suit requirements of § 15-1-36 was without prejudice in *Williams v. Skelton, M.D.*, 6 So. 3d 428, 2009 Miss. LEXIS 138, *8, (P8) (Miss. April 9, 2009)(certiorari granted “to reiterate that dismissal for failure to comply with the pre-suit requirements of Mississippi Code Annotated Section 15-1-36 should be without prejudice.”). The Court had previously held that failure to provide a sixty day notice

under § 15-1-36(15) resulted in a dismissal without prejudice since “we hold that the trial court had no authority to enter judgment on behalf of either defendant, as no argument on the merits was presented by either defendant.” *Thomas v. Miss. Baptist Medical Center*, 999 So.2d 842, 847 (P 22) (Miss. 2008).

These cases apply the same reasoning that had allowed a procedurally dismissed action to be saved on refiling in *Crawford v. Morris Transp., Inc.*, 990 So.2d 162 (Miss. 2008), argued below, R 212, R Vol. 3, where the original action had also been dismissed without prejudice. *Crawford*, as well as earlier precedent, had established that § 15-1-69, the savings statute, “applies to those cases ‘[w]here the plaintiff has been defeated by some matter not affecting the merits, some defect or informality, which [the plaintiff] can remedy or avoid by a new process, the statute shall not prevent him from doing so, provided he follows it promptly, by suit within a year.” *Id.*, at 174 (P 29) and *Marshall, supra*, at *10, (P16). Furthermore, the statute is “highly remedial” and “ought to be liberally construed.” *Crawford, supra*, 174 (P43).

Previously, under *Arceo v. Tolliver*, 949 So.2d 691 (Miss. 2006) , and *Nelson v. Baptist Memorial Hospital-North Mississippi, Inc.*, 972 So.2d 667 (Miss. Ct. App. 2007), the Mississippi Courts held that such dismissals were to be without prejudice. In *Arceo*, the Supreme Court specifically held a dismissal without prejudice to be the remedy for the plaintiff's failure to abide by the sixty-day notice requirement under section 15-1-36(15). *Arceo*, 949 So.2d at 697-98 (P16). In *Nelson*, the Court of Appeals, relying on *Arceo*, explained that: “Dismissal without prejudice prevents the plaintiff from being barred from filing a new suit on the same cause of action,” also citing *Williams v. Mid-South Paving Co.*, 200 Miss. 103, 121, 25 So.2d 792, 798 (1946).

The same reasoning lead to a plaintiff's re-filing her medical malpractice action in *Davis v. Weston*, 220 W.Va. 28, 640 S.E.2d 91 (W.Va. 2006). In that case, a plaintiff estate had commenced a medical malpractice action against a nursing home. The West Virginia circuit court dismissed that action for failure to comply with the pre-suit notice requirement that parallels the requirements of §15-1-36 Miss. Code Ann. here. On appeal, the dismissal was held to be without prejudice and the case was remanded with leave for the plaintiff to re-file her claim.

The court in *Davis v. Weston* there stated: "Where a dismissal is without prejudice, our savings statute, [cite omitted] may be utilized to permit the re-filing of a medical malpractice action involuntarily dismissed for failure to comply with the mandates of [the pre-suit notice requirements] because such dismissal would not be a dismissal on the merits." *Davis v. Weston, supra*, 220 W.Va. at 32, 640 S.E.2d at 95. The action could then be re-filed after compliance with the notice requirement. This step has already been satisfied by the minor child, S. W., in the current case. The order of dismissal from Madison County in the present case specifically held that notice itself was sufficient, though not timely, and held that the dismissal was without prejudice. R 114. The case presently before this Court must therefore be remanded for re-filing since it was dismissed without prejudice and the notice requirement has been fulfilled.

Davis v. Weston emphasized that the pre-suit notice requirements "are not intended to restrict or deny a citizen's access to our courts..." *Id.* It also considered the good faith efforts of the plaintiff to bring the matter forward by "a good faith and reasonable effort to further the statutory purposes." *Id.*

Good faith in the institution of the action dismissed is an element in determining the right to invoke the statute in Mississippi as well, and is shown by the Plaintiff, S. W., as in *Marshall*

and *Crawford, supra*. The Plaintiff has continually sought to have the merits of her case heard in a Mississippi state court. The Plaintiff inadvertently found herself in a procedural quagmire and made a good faith effort to preserve her claim. *Marshall, supra*, at *15-17, (P 26 - 28).

A lack of good faith must be supported by a fact finding in the Court below, *Wertz v. Ingalls Shipbuilding Inc.*, 790 So.2d 841, 845 (P8) (Ct. App. Miss. 2000)(finding lack of good faith because of filing diversity action from Louisiana with no intent to establish residency there). There was no such finding by Judge Richardson below and nothing in the record suggests any lack of good faith¹ on the part of the Plaintiff.

To the contrary, in Mississippi, the law as it existed at the time the instant Complaint was filed provided that the remedy for a failure to comply with a statutory notice and waiting period was an order staying the lawsuit until the proposed defendant obtained the benefit of the waiting period. *Williams v. Clay County*, 861 So.2d 953, 977 (P100) (Miss. 2003); *Jackson v. City of Wiggins*, 760 So.2d 694, 696 (P3) (Miss. 2000); *Jones ex rel. Jones v. Miss. Sch. for the Blind*, 758 So.2d 428, 429 (P4) (Miss. 2000); *Jackson v. City of Booneville*, 738 So.2d 1241, 1246 (P21) (Miss. 1999); *City of Pascagoula v. Tomlinson*, 741 So.2d 224, 228 - 229(P11) (Miss. 1999), and *Carpenter v. Reinhard*, 345 F. Supp. 2d 629 (N.D. Miss. 2004). However, if the defendant entity failed to request a stay, the issue was waived. *Leflore County v. Givens*, 754 So.2d 1223, 1232 (P25) (Miss. 2000); *Tomlinson*, 741 So.2d at 228-229 (P11), all as summarized by the Mississippi Court of Appeals in *Stuart v. UMMC*, 2008 Miss. App. LEXIS 774, *4-5 (P6). As a matter of law, then, the Plaintiff, S. W., abided by the then controlling precedent and

¹
“Good faith” is typically defined as a lack of malice, *Louisiana Oil Corp. v. Renno*, 173 Miss. 609, 157 So. 705 (Miss. 1934) or honesty in fact, *Black v. Peoples Bank & Trust Co.*, 437 So.2d 26, 29 (Miss. 1983), and was held in these cases to raise a jury question.

thereby filed her action in good faith. See Brief and Reply Brief of Appellant in the first appeal, Exhibit 1, Vol. 3 of 3.

II. THE PLAINTIFF CHILD IS PROTECTED FROM THE STATUTE OF LIMITATIONS BY THE MINORS' SAVINGS STATUTE.

The Circuit Court below erred in holding that the next friend of the child was a person qualified to bring the action under the wrongful death statute so that the statute of limitations ran against both the next friend and the child. RE 12, R 170. As this Court has held, in recently construing the minors savings statute, § 15-1-59 Miss. Code Ann., "Even though the action must be brought by a guardian who is not under the disability, the statute of limitations is tolled until the disability of infancy is removed upon emancipation." *Shelnut v. Dept. of Human Services*, 2009 Miss. LEXIS 125, *17 (P 30) (Miss. March 19, 2009). The next friend of S. W. is her natural father, but he was divorced from the child's mother at the time of the mother's death. R 81. The father was not a person who himself could have brought the wrongful death action. He brought the action solely as the guardian of his daughter. R 9. The minority of the Plaintiff child has not been removed; she has not been emancipated; she is still a minor. R 86, R 89. The minors' savings statute protects the child even though her father was not under a disability. *Shelnut, supra*.

The Mississippi Supreme Court explained the philosophy behind this rule as follows:

To allow the statute of limitations to run during the disability of the minor, the very period through which the minor needs and is entitled to the support of his parents, would defy reason. To bar the child because of a parent's failure to timely assert the child's claim for support is to deprive the child of that support which belongs to him for reasons over which the child has no control.

Id.

Particularly with regard to the wrongful death statute, the Supreme Court of Mississippi has held 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 926 (Miss. 2006) (*en banc*); *accord, Lee v. Thompson*, 859 So. 2d 981, 990 (Miss. 2003) (*en banc*); *Thiroux ex rel. Cruz v. Austin ex rel. Arceneaux*, 749 So. 2d 1040, 1042 (Miss. 1999). The statute of limitations for medical negligence claims is Miss. Code Ann. § 15-1-36(2), *id.*, which pertinently provides that:

[f]or 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....

The Defendants in this action are a licensed physician and a hospital under § 15-1-36(2). The case was filed within the two years as required..² Miss. Code Ann. § 15-1-59, known as the “minor savings statute,” provides as follows:

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.

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The first suit was filed within 2 years of the mother’s death. There is also an argument that the 2 year statute of limitations should run from the date Plaintiff learned that her mother’s death resulted from actionable negligence, which occurred when she first obtained an expert’s opinion as to that fact, on August 29, 2004, the day before her first lawsuit was filed. See, *Caves v. Yarbrough*, 2007 Miss. LEXIS 710 (Dec. 6, 2007)(rehearing granted)(MTCA case), opinion withdrawn, substituted opinion at 991 So.2d 142 (Miss. 2008). The discovery rule applies to § 15-1-36 Miss. Code Ann. *Huss v. Gayden*, 991 So.2d 162, 2008 Miss. LEXIS 449 (Miss. Sept. 25, 2008).

However, the saving in favor of persons under disability of unsoundness of mind shall never extend longer than twenty-one (21) years.

“There is no question . . . that the savings clause, set out in § 15-1-59 of the Miss. Code Ann., applies to a wrongful death action.” *Lee v. Thompson*, 859 So.2d 981, 988 (Miss. 2003) (*en banc*).

One issue that arises has to do with possible different age classes of claimants. The wrongful death statute prescribes that there be but one action filed, and if one could be filed by adult beneficiaries at one date and a later action could be filed when a minor reaches his or her adulthood, there would be two actions, not one as the wrongful death action requires. The Mississippi Supreme Court has dealt with this anomaly by allowing the savings statute to protect a child’s right to file a case later if there is no other adult available to file an action. § 11-7-13 Miss. Code Ann. In the present case, the Plaintiff’s father had divorced her mother, so he cannot bring the action; he is not a surviving relative as named in the wrongful death statute. *Id.* The other surviving relatives are the deceased mother’s parents, but they are in the second tier of beneficiaries under the wrongful death statute. *Id.* In the present case, the child S. W. Pringle is the only heir of the decedent, her mother, within her class of beneficiaries, and as such is provided the protections of the minors’ savings statute. *Johnson v. Med Express Ambulance Service, Inc.*, 565 F. Supp.2d 699 (S.D. Miss. 2008).

To construe the savings statute otherwise would be to deny the Plaintiff child in this action of her rights of access to the courts and the right to have her case decided by a jury, as guaranteed by the Mississippi Constitution, Article 3, §24, §25 and §31. *Pollard v. Sherwin-Williams*, 955 So.2d 764, 773, P24 (Miss. 2007), and *see, Caves v. Yarbrough, supra*, (P54), (Miss. 2007)(Graves, J. dissenting). The decision of the Circuit Court below must be overturned to implement the minors’ saving statute on behalf of the minor child S. W.

III. THIS CASE MUST BE REMANDED TO ITS COURT OF ORIGIN TO PROCEED UNDER THE THEN CONTROLLING LAW, PRIOR TO THE IMPOSITION OF THE MISSISSIPPI MEDICAL MALPRACTICE TORT REFORM ACT.

Applying the savings statute to the original case requires that the action be resumed in Madison County, along with the opportunity for the Plaintiff to pursue her wrongful death action for economic and non-economic losses. Ordinarily, when a savings statute is implemented, the date for filing the new action relates back to the filing date for the preceding action for limitations purposes. *Frysinger v. Leech*, 32 Ohio St. 3d 38, 42 (Ohio 1987). The return to the original court and the original date of filing was the result in *Crawford, supra*. The savings statute measures its one year applicability from the date of final dismissal of the first case, and returns the case to its court of origin. In *Crawford*, the same case was returned to the same state court in which the action began, that is, to the circuit court in which it had first been filed, after the federal action was dismissed.

The same result relating back to the court and date of the original action was reached in *Davis v. Weston, supra*, and *Gates v. Integrus Baptist Medical Center of Oklahoma, Inc. and Heigle, M.D.*, 84 P.3d 115 (Ct. App. Ok. 2003). In *Gates*, the plaintiff had filed in state court, taken a voluntary dismissal, filed in federal court but was dismissed for lack of subject matter jurisdiction, and then re-filed within a year back in the original state court. The *Gates* court applied the savings statute to authorize the re-filing in the original state court. There, as here, the proper result is a reversal of the circuit court's dismissal and a remand back to the state court of origin.

If the savings statute allows one to re-file the "same" lawsuit, this case should be re-filed in Madison County where it was first filed, before the changes imposed by the Mississippi Medical Malpractice Tort Reform Act. In the alternative, applying the savings statute to any of

the timely filed Rankin County cases allows the Plaintiff to resume her action subject to the statutory revisions of the Medical Malpractice Tort Reform Act.

CONCLUSION

This Court must reverse the decision of the Circuit Court below and remand this action to proceed in the Circuit Court of Madison County, Mississippi, or in the alternative, the Circuit Court of Rankin County, Mississippi.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I, Shirley Payne, do hereby certify that I have this date served via United States Mail, postage prepaid, a true and correct copy of the foregoing Brief of Appellant Scott Pringle, as next friend and legal guardian of S. W. Pringle, a Minor, to the following:

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This the 12th day of June, 2009.


SHIRLEY PAYNE