IN THE MISSISSIPPI SUPREME COURT
Cause No. 2009-CA-01988

The Estate of Ellen Pope, by and through James Payne, Individually and as the Personal Representative, for the use and benefit of the Estate of Ellen Pope, and on behalf of and for the use and benefit of the Wrongful Death Beneficiaries of Ellen Pope **Appellant/Plaintiff**

vs.

Delta Health Group, Inc.; Pensacola Health Trust, Inc.; and Unidentified Entities 1 through 10 (as to Shelby Nursing and Rehabilitation Center f/k/a Chateau Manor Nursing Center) **Appellees/Defendants**

APPEAL FROM THE CIRCUIT COURT OF BOLIVAR COUNTY, MISSISSIPPI

BRIEF OF THE APPELLEE, DELTA HEALTH GROUP, INC.

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following people have an interest in the determination of this case. These representations are made in order that the Justices of the Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

I. James Payne, Administrator of the Estate of Ellen Pope, Appellant

II. A. Lance Reins, Attorney for Appellant

III. Delta Health Group, Inc., Appellee

IV. Pensacola Health Trust, Inc.

V. Shelby Nursing and Rehabilitation Center

VI. Honorable Albert B. Smith, III, Bolivar County Circuit Court Judge

VII. Lynda C. Carter, Attorney for Appellee

VIII. Nicole C. Huffman, Attorney for Appellee

Respectfully submitted this the 26 day of August, 2010.

Lynda C. Carter, MSB[redacted]
Nicole C. Huffman, MSB[redacted]
Attorneys of Record for Appellee,
Delta Health Group, Inc.

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STATEMENT REGARDING ORAL ARGUMENT

In accordance with Mississippi Rule of Appellate Procedure 34, Defendant requests oral argument in this matter as Plaintiff has misconstrued case law such that Defendant asserts that oral argument would assist this Court in understanding the facts and issues relevant to this case.

STATEMENT OF THE ISSUES

The Circuit Court's grant of Summary Judgment was proper and well-founded.

I. Mississippi Code Ann. § 15-1-69, the "Savings Statute" Is Not Applicable

A. The First Action Was Not "Duly Commenced, " as Held by The Mississippi Supreme Court

B. The First Action Was Not Dismissed as a Matter of Form

C. The First Action Was Not Filed in Good Faith

D. A Different Party Plaintiff Exists in This Action-- the Estate Of Ellen Pope, versus the First Action– James Payne, Individual

II. The Statute of Limitations has expired on Plaintiff's claims

STATEMENT OF THE CASE [1]

Course of the Proceedings Below

The Plaintiff in this matter, the Estate of Ellen Pope, by and through James Payne, the duly appointed Administrator (as of April 12, 2005), filed the instant Complaint on June 29, 2009, against the Defendant, alleging negligence in the care and treatment of Ellen Pope during her residency at Shelby Nursing and Rehabilitation Center ("Shelby") from June 15, 1997 until the date of her death on January 12, 2004. R. at 3-8, 89[2]. It is undisputed that Ms. Pope died intestate and left no wrongful death beneficiaries. R. at 89; *Delta Health Group, Inc. v. Pope* 995 So.2d 123 (Miss. 2008).

As the statute of limitations on Plaintiff's Complaint has long since expired,

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1 Throughout Defendant/Appellee's Brief, citations to the lower courts record will be cited as "R.," citations to the Transcript as "T.R."

2 Plaintiff's new Complaint has an admission date of June 10, 1997, however his Memorandum of Authorities states the correct date of June 15, 1997.

Defendant filed a Motion to Dismiss and Motion for Sanctions under the Mississippi Litigation Accountability Act and Rule 11 of the Mississippi Rules of Civil Procedure. R at 28-87. In response, Plaintiff asserted that the savings statute was applicable, saving his cause of action from being barred by the Statute of Limitations. R. at 88-101. On October 14, 2009, the Court heard oral arguments of the parties and, due to Plaintiff's assertion of the savings statute, requested additional briefing on two (2) specific requisites of the savings statute - the requirements of due commencement and dismissal as a matter of form. T.R. at 42. The trial court received additional briefing from the Defendant,[3] and upon review of the same, agreed that the savings statute was not applicable and therefore, that the statute of limitations had indeed expired. R. at 185-87. The trial court then entered an Order dismissing Plaintiff's Complaint on November 9, 2009. R. at 185-87. It is from said Order that Plaintiff now appeals. R. at 188-92.

Statement of the Facts

Ellen Pope ("Pope") resided at Shelby Nursing and Rehabilitation Center ("Shelby"), a nursing home that, at the time of her residency, was being operated by the Defendant and later, Pensacola Health Trust, Inc.[4], from on or about June 15, 1997 until the date of her death on January 12, 2004. R. at 3. Pope died intestate, leaving

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3 Plaintiff chose not to file additional briefing as suggested by the trial court Judge.

4 It should be noted that Pensacola Health Trust, Inc. ("PHT") was named in the style of the case, but is not a party to this Action as it had not been timely served. R. at 146-48. PHT had previously joined in this Defendant's Motion to Dismiss, subject to PHT's Motion to Dismiss for Failure to Properly Serve. R. at 146-48, 174. Plaintiff failed to ever properly serve PHT, thus, PHT is not technically a party to this appeal. However, even if it had been properly served, the same argument is applicable, providing the same end result-- a dismissal as to the entire case.

no wrongful death beneficiaries. On August 25, 2004, James Payne, Pope's great nephew, lacking any authority or right of claim whatsoever, filed a Complaint relating to Ms. Pope's death. R. at 43-75.[5] ("2004 lawsuit"). It was not until several months later that James Payne filed a Petition for Letters of Administration, which Petition was not granted until April 14, 2005, over nine (9) months after the lawsuit had been filed. *Pope*, 995 So.2d at 124.

This Defendant and Pensacola Health Trust, Inc. sought Summary Judgment in the 2004 lawsuit based on Plaintiff's lack of standing to bring suit - Payne was not a wrongful death beneficiary and at the time suit was filed, no Estate had been opened, contrary to his [mis]representation in the Complaint. *Id.* Summary Judgment was denied by the trial court, and the Mississippi Supreme Court retained the matter, considering the issue of standing, and the lack thereof, of James Payne to file the 2004 Complaint. *Id.* The trial court's decision was reversed by the Court, finding that Payne "unequivocally lacked standing to commence an action" as he was neither the properly appointed administrator[6] nor a wrongful death beneficiary at the time of the filing of the Complaint *Id.* at 126. The Supreme Court even went so far as to clarify that "the fact that Payne subsequently was appointed as Administrator does not change the undisputable fact that Payne lacked standing to *commence* the suit." *Id.* at 126. (emphasis in opinion). In light of the Supreme Court's holding, the trial court entered its

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5 Plaintiff and his counsel were presumably in a rush to file the 2004 Complaint before new tort reform litigation became effective on September 1, 2004.

6 In fact, the 2004 Complaint both misrepresented Payne as being the nephew of Ellen Pope as well as the administrator of her Estate. Payne had not even sought Letters of Administration until several months after the 2004 Complaint was filed.

Final Judgment of Dismissal with Prejudice on October 28, 2008. R. at 77.

Five months following the dismissal with prejudice by Judge Thomas, on or about March 23, 2009, the same counsel representing Plaintiff in the first lawsuit, Lance Reins of Wilkes & McHugh, served a notice letter to Defendant, indicating his intent to file the second lawsuit. R. at 86. Two days later, on March 25, 2009, counsel undersigned sent correspondence to Mr. Reins, reminding him that the statute of limitations had expired and putting him on notice that should the second Complaint be filed, Defendant would seek sanctions against Plaintiff and his counsel. R. at 87. Undeterred, Plaintiff filed the instant Complaint leaving Defendant with no choice but to seek dismissal of the Complaint and sanctions against both Plaintiff and his counsel. R. at 3-18.

On June 29, 2009, James Payne, now as the appointed Administrator of the Estate of Ellen Pope[7], filed the Complaint at issue in this matter. ("2009 Complaint"). R. at 3-18. This 2009 Complaint was filed by a different Plaintiff than the 2004 Complaint. R. at 3. James Payne brought the action in his representative capacity as the Administrator of the Estate of Ellen Pope– not in an individual capacity as he did in the 2004 Complaint.[8] R. at 3; *Pope*, 995 So.2d at 123-26. Subsequently, Defendant filed a Motion to Dismiss and Motion For Sanctions Under the Mississippi Litigation Accountability Act and Rule 11 of The Mississippi Rules of Civil Procedure, which

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7 Since he had been appointed Administrator prior to filing the 2009 lawsuit, he was now authorized to act on behalf of the wrongful death beneficiaries. Miss. Code Ann. § 11-7-13.

8 As referenced above, Payne did not qualify as a wrongful death beneficiary or as an officer of a "non-existent" estate at the time he filed the 2004 Complaint, and thus, he was deemed to have filed the Complaint in his individual capacity. *Id.* at 126.

Motion was heard by the trial court on October 14, 2009. R. at 28-87. At the Motion hearing, the trial court requested additional briefing on the issues of due commencement/dismissal as a matter of form, two of the requirements for application of the savings statute. T.R. at 42. Defendant provided such supplemental briefing; however Payne's counsel chose to rest upon his earlier briefing. T.R. at 42.

On November 9, 2009, the trial court entered its well-reasoned Order granting the Defendant's Motion to Dismiss. R. at 185-87. The trial court pointed out that Payne lacked standing to ever *commence* the first suit. R. at 186. The trial court further held:

> The Plaintiff's cause of action is defeated here because the first suit was never duly commenced . . . A lawsuit is commenced when a complaint is filed showing the pleader is entitled to relief. Here, when the first complaint was filed, the pleader, James Payne, was **not** entitled to relief. He was not the Personal Representative of the Estate and he is not a qualified wrongful- death beneficiary. Therefore, this second, subsequent suit is not subject to the savings clause since the first suit was never duly commenced, and the Plaintiff's suit is now barred by the statute of limitations.

R. at 187. (emphasis added).

SUMMARY OF THE ARGUMENT

As stated above, the crux of Plaintiff's argument is that Mississippi Code Ann. § 15-1-69 is applicable to the instant matter, thus saving the 2009 Complaint from the expired statute of limitations. Plaintiff's argument is grossly misplaced.

Miss. Code Ann. § 15-1-69 provides 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 verdict for the plaintiff, the judgment shall be arrested, or if a 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 after 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). More simply stated, Miss. Code Ann § 15-1-69 sets forth that in order for the "savings statute to be applicable, "(1) the first cause of action must be "duly commenced"; (2) the commencement must be in good faith; (3) the dismissal of the first cause of action must be for a matter of form; and (4) providing that (1) through (3) are met, the Plaintiff who filed the initial cause of action must file the new cause of action within one year from the date of dismissal of the first cause of action. *Crawford v. Morris Transp. Inc.*, ,990 So.2d 162, 170 (Miss. 2008).

The purpose of the savings statute is "**to save** one who has brought **his suit** within the time limited by law from loss of **his right** of action by reason of **accident or inadvertence** . . ." *Hawkins v. Scottish Union & National Ins. Co.*, 69 So. 710, 712 (Miss. 1915)(emphasis added)(citations omitted). The statute is to be applied in those limited situations where the Plaintiff "inadvertently found himself in a procedural quagmire and made a good faith effort to preserve his claim." (emphasis added). *Marshall v. Kansas City So. Railways Co.*, 7 So.3d 210, 214 (Miss. 2009) (citations omitted). The Mississippi Supreme Court has previously held that §15-1-69 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." *Id.* at 214. In other words, as has been admitted by the Plaintiff, the purpose behind 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)(emphasis added)(citation omitted). Appellant's Brief, p. 20.

Undoubtedly, whether the Plaintiff filing the initial lawsuit had authority to do so- whether he in fact had a right or claim in the initial lawsuit- is crucial to the determination of whether the first lawsuit was "duly commenced," the first requirement for the application of the savings statute. *Meath v. Bd. of Miss. Levee Com'rs*, 109 U.S. 268, 3 S.Ct. 284 (1883) (Plaintiff had no cause of action when he filed initial suit so the savings statute was not applicable).

As will be explained in detail below, the current Plaintiff is not entitled to the benefits of the savings statute for several reasons. First, the 2004 Complaint was never "duly commenced." As previously determined by the Mississippi Supreme Court, James Payne possessed no standing to commence either a wrongful death or survival action when the first suit was filed and, as such, it follows that he had no "right" of action in the 2004 Complaint to "save" and protect. Second, as a result of the lack of standing, the dismissal of the 2004 Complaint was not as a "matter of form." Third, the commencement of the suit by Payne, who blatantly misrepresented his authority to pursue the claims as the Administrator of the Estate, which Estate had not even been opened, cannot be said to have been undertaken in good faith. At the time the first suit was filed, Payne's counsel was well-versed in Mississippi's requirements for filing wrongful death actions, having filed hundreds, if not thousands of wrongful death cases, and Payne cannot claim ignorance of the law's requirements or of his fabrication of his authority at the time he filed suit. *Miss. Com'n on Jud. Perf. v. Williard* , 788 So.2d 736,

742 (Miss. 2001)(ignorance of the law is no excuse). Finally, there are different party Plaintiffs in each lawsuit. The Plaintiff filing the second lawsuit, the Estate of Ellen Pope, did not even exist at the time the first lawsuit was filed, and thus, cannot rely on the savings statute to "save" a cause of action previously filed by another party.

As the second lawsuit cannot be saved from the expiration of the statute of limitations, the trial court's dismissal of Plaintiff's Compliant was proper and should be affirmed.

STANDARD OF REVIEW

"When reviewing a trial court's grant or denial of a motion to dismiss or a motion for summary judgment, this Court likewise applies a de novo standard of review." *Whitaker v. Limeco Corp.,* 32 So.3d 429, 433-34 (Miss. 2010); *Burleson v. Lathem*, 968 So.2d 930, 932 (Miss. 2007); *Scaggs v. GPCH-GP, Inc.*, 931 So.2d 1274, 1275 (Miss.2006); Likewise, questions regarding standing are also subject to a *de novo* review. *Gartrell v. Gartrell,* 27 So.3d 388, 392 (Miss. 2009) *citing Dep't of Human Servs. v. Gaddis,* 730 So.2d 1116, 1117 (Miss.1998).

The appellate court may also affirm a correct decision on other grounds. In other words, if the trial court reached the proper outcome, but did so on the wrong grounds, it is in the interest of judicial economy for the appellate Courts to affirm the trial court's ruling. *See, Jackson v. State*, 811 So.2d 340, 342 (Miss. Ct. App .2001) (*citing Puckett v. Stuckey*, 633 So.2d 978, 980 (Miss.1993)).

ARGUMENT

I. MISSISSIPPI CODE ANNOTATED §15-1-69, THE SAVINGS STATUTE IS NOT APPLICABLE

A. THE MISSISSIPPI SUPREME COURT HAS ALREADY DETERMINED THAT THE FIRST LAWSUIT WAS NOT DULY COMMENCED

In order for the savings statute to be applicable, it is imperative for the 2004 Complaint to have been duly commenced. Miss. Code §15-1-69. Such a requirement is consistent with longstanding Mississippi law. If at the time a Plaintiff files suit, the Plaintiff has no cause of action, the savings statute is not available. *Meath*, 3 S.Ct. at 288. While the Plaintiff herein tries to fit the proverbial square peg into a round hole in comparing the instant lawsuit to cases in which the savings clause was found applicable, the Plaintiff fails to address the first requirement and examine what "commencement" of an action entails.

As set forth above, the first and most overarching consideration as to the application of the savings statute is whether or not the first cause of action was "duly commenced." Clearly, the Supreme Court in *Pope* has unequivocally stated, **at least four (4) times**, that James Payne's 2004 Complaint was **never commenced**:

> (1) "The fact that Payne subsequently was appointed as administrator does not change the undisputable fact that Payne lacked standing to *commence* the suit." *Pope*, 995 So.2d at 126.(emphasis added);
>
> (2) "Since Payne did not qualify as a wrongful-death beneficiary or as an officer of an estate, he unequivocally lacked standing to *commence* an action." *Id.*(emphasis added);
>
> (3) "This Court is without authority to expand the enunciated beneficiaries by granting standing to a great-nephew and empowering him with a legal right to *commence* suit." *Id.*(emphasis added);
>
> (4) "To allow a great-nephew without standing to *commence* the action is not only violative of the law long established by our Legislature, which determines who may bring a wrongful-death action, whether by

> kinship or through an estate, but also subverts our Rules of Civil Procedure." *Id.* (emphasis added). R. at 79-85.

Logically, if a case was never commenced, it cannot be considered "duly commenced," as required for the application of the savings statute. However, if this Court's language contained in the *Pope* opinion is still not compelling enough, the case law addressing the issue of when an action is "commenced" confirms that Payne's 2004 Complaint was never "duly commenced."

"Duly commenced" has been defined as "a complaint *properly* filed and not on an appeal." *Bowling v. Madison County Bd. of Supervisors.* 724 So.2d 431, 441 (Miss. Ct. App. 1998)(emphasis added). Admittedly, the requirement of a lawsuit being "duly commenced" has not been given significant discussion since *Bowling* until recently in *Arceo v. Tolliver*, 19 So.3d at 67.

In *Arceo*, the Mississippi Supreme Court noted that "the commencement of an action" is determined by the rules and procedures promulgated by the judicial branch, the Rules of Civil Procedure, as well as any statutes that govern judicial procedural rules. *Id.* at 74. Stated more clearly, whether an action is "commenced" depends upon: (1) the Mississippi Rules of Civil Procedure, specifically, Rules 3(a) and 8(c), and (2) statutes creating or providing for the cause of action, which, in this case, is the Wrongful Death Statute found in Miss. Code Ann. § 11-7-13.

In *Arceo*, the "flaw" in the cause of action was the plaintiff's failure to serve the pre-suit notice letter, which failure mandated dismissal. *Id.* The Supreme Court rightfully held that the lack of the pre-suit notice did not affect whether or not the Complaint was "commenced," explaining that the plaintiff complied with Rules 3(a) and 8(c), which rules

provide that a civil action is commenced by the filing of a complaint that "contain(s) a short and plain statement showing *the pleader is entitled to relief*." *Id.* (emphasis added).[9] In other words, in order to commence an action, the party filing the Complaint must have a colorable interest or entitlement to assert the claims, i.e., standing. *City of Belmont v. Miss. State Tax Commission*, 860 So.2d 289, 296 (Miss. 2003)(citations omitted).

Recently, the Supreme Court has restated our "general standing rule." "Mississippi parties have standing to bring a lawsuit 'when they assert a colorable interest in the subject matter of the litigation or experience an adverse effect from the conduct of the Defendant, or as otherwise provided by law.'" *Schmidt v. Catholic Diocese of Biloxi*, 18 So.3d 814 (Miss. 2009)(citing *City of Picayune v. S. Reg'l. Corp.*, 916 So.2d 510, 525 (Miss. 2005)(add'l citations omitted). "The 'individual's legal interest or entitlement to assert a claim. . . must be grounded in some legal right recognized by law, whether by statute or by common law.'" *Id.* at 827. "Stated another way, standing is determined by:

> [W]hether the particular plaintiff had a right to judicial enforcement of a legal duty of the defendant or. . . whether a party plaintiff in an action for legal relief can show in himself a present, existent actionable title or interest, and demonstrate that this right was complete at the time of the institution of the action.

Id.

Since the plaintiff in *Arceo* had a colorable interest, a legal right to assert the claim, he met the requisites of Rule 8(c), and thus, his action was "duly commenced." To the contrary, James Payne had no colorable interest or legal entitlement at the time the 2004 Complaint was filed, in violation of Rule 8(c), and therefore, as held by the Supreme Court, as well as the lower trial court, his action was not duly commenced. *Pope*, 995 So.2d at

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[9] The Plaintiff in *Arceo* was the parent of the deceased child, and therefore, he was entitled to pursue the action as a Wrongful Death Beneficiary under Miss. Code Ann. § 11-7-13.

126.[10] R. at 192.

In summary, recognizing that James Payne wholly lacked standing to commence the wrongful death lawsuit relating to the death of Ellen Pope, the Mississippi Supreme Court held that James Payne "unequivocally lacked standing to commence an action." *Id.* Further, consistent with the Supreme Court's more recent decision in *Arceo*, which specifically addressed the determination of when an action is commenced under the savings statute, the *Pope* Court held that "allow[ing] a great-nephew without standing to commence the action is not only **violative of the law long established by our Legislature**. . . but also **subverts our Rules of Civil Procedure.**" *Id.* (emphasis added). Thus, just as the *Arceo* Court articulated the mandatory elements that determine whether or not a cause of action is "commenced" - The Mississippi Rules of Civil Procedure and any statutes governing judicial procedural rules - the *Pope* Court articulated that both of these elements were absent in the 2004 Complaint and therefore, determined that 2004 Complaint was never duly commenced.

With the 2004 lawsuit not having been duly commenced, the current Plaintiff cannot rely on the savings statute to save the cause of action from the statute of limitations.

B. DISMISSAL FOR LACK OF *LOCUS STANDI* IS NOT A DISMISSAL AS A "MATTER OF FORM"

Plaintiff boldly asserts that the dismissal of the 2004 Complaint for a lack of standing "constitutes a lack of subject matter jurisdiction" and therefore, was a dismissal as a matter

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[10] In contrast in *Boles*, the Plaintiff had a legal right to petition to open the Estate and attempted to do so, but she erroneously chose the wrong venue to file the Chancery Court proceeding. *Nat'l Heritage Realty, Inc. v. Estate of Boles*, 947 So.2d 238, 245-46 (Miss. 2006).

of form, allowing Plaintiff to rely on the savings statute. Plaintiff's argument is flawed for many reasons, but most importantly, is erroneous because the *Pope* decision focused solely on Payne's lack of standing to commence the action, **never** referencing or discussing whether or not the Circuit Court had subject matter jurisdiction. Clearly, this demonstrates that standing is a separate and distinct issue that must be addressed before subject matter jurisdiction is even considered.

In the instant matter, Plaintiff argued to the trial court that the dismissal in *Pope* was due to a lack of subject matter jurisdiction, despite the fact that the *Pope* Court's holding was based upon standing alone and never discussed subject matter jurisdiction. Plaintiff attempts to make the two terms synonymous. To the contrary, although standing is one aspect of subject matter jurisdiction, *locus standi* and subject matter jurisdiction are two distinct legal principles. *See, Kirk v. Pope*, 973 So.2d 981, 989 (Miss. 2007).[11] *Locus standi* examines an individual's right to "bring an action or to be heard in a given forum." *Black's Law Dictionary* 952 (7th ed. 1999). In other words standing is determined by "whether the particular plaintiff had a right to judicial enforcement of a legal duty of the defendant or ... whether a party plaintiff in an action for legal relief can show in himself a present, existent actionable title or interest, and demonstrate that this right was complete at the time of the institution of the action." *Schmidt,* 18 So.3d at 827. On the other hand, subject matter jurisdiction is the Court's authority "to entertain and proceed with a case." *Bullock v. Roadway Express, Inc.* 548 So.2d 1306, 1308 (Miss. 1989). Stated another way, standing is examined from the Plaintiff's perspective while subject matter jurisdiction looks from the

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[11] See also the trial court's order, acknowledging that there are other aspects of subject matter jurisdiction besides standing. R. at 187.

Court's perspective. To be sure, subject matter jurisdiction may certainly be lacking despite a Plaintiff, with proper standing, having filed the Complaint.

Further, the U.S. Supreme Court, citing a Mississippi case to explain the phrase "for matter of form" contained in the savings statute, held that since Plaintiff's case was defeated because he "had no cause of action," i.e., he had no "legal title in the claim sued on," his suit was not defeated for any "matter of form." *Meath*, 3 S. Ct. at 288. Clearly, a lack of standing not only defeats a claim of due commencement, as shown above, but also defeats a claim of dismissal for matter of form.

In fact, in the cases that analyze when subject matter jurisdiction dismissals are deemed dismissals as a "matter of form," the fact that the Plaintiff's "errors" can be "corrected" (through new process or re-filing of the Complaint) is addressed when making that determination. *Hawkins,* 69 So. at 713. Clearly, such "correction" cannot be made in the instant action to cure Payne's errors. In other words, James Payne's lack of standing could not be cured through a new issue of process or through re-filing of the same Complaint in the proper jurisdiction, which "cure" would remedy pure subject matter jurisdiction issues. *Id.* James Payne never had, nor could he ever receive, authority to pursue an action in his individual capacity; thus, his error in the 2004 Complaint could never be cured.

Finally, as noted by the trial court, the cases cited by Plaintiff to support his leap as to the Supreme Court's ruling are likewise distinguishable as none deal with lack of *locus standi* of the party filing the lawsuit. R. at 187. *See e.g. Lowry v. International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America,* 220 F.2d 546 (5th Cir. 1955)(dealt with dismissal for lack of jurisdiction over a party *defendant,* which dismissal

was held to be a matter of form); *Canadian National v. Illinois Center Railroad Co. v. Smith*, 926 So.2d 839. 842-43 (Miss. 2006)(Court held that original complaint was "duly commenced" and that dismissals due to mis joinder and improper venue were dismissals as a "matter of form"); *Crawford,* 990 So.2d at 173-74. (Supreme Court held that dismissal of federal court action was due to a lack of subject matter jurisdiction such that a later filing in the proper forum, Mississippi state court, came within the savings statute); *Marshall v. Kansas City Southern Railways Company,* 7 So.2d 210, 214-16 (Miss. 2009)(All parties agreed that the initial complaint that was removed to federal court was "duly commenced" such that its later dismissal based on lack of subject matter jurisdiction laid the foundation for the savings clause to apply to a later complaint filed in state court, which later complaint was removed, but then remanded so that the cause of action remained in state court); *Ryan,* 382 So.2d at 1078. (Plaintiff's action was erroneously dismissed by trial court but was later reinstated after the expiration of the court term. As the reinstated case was dismissed for lack of jurisdiction due to the expired term, such dismissal was a matter of form and a new complaint came within the savings statute).

Since the 2004 Complaint was never duly commenced due to Plaintiff's lack of standing, Plaintiff's appeal must fail and the trial court's ruling should be affirmed by this Court.

C. JAMES PAYNE DID NOT ACT IN GOOD FAITH WHEN FILING THE FIRST LAWSUIT

Even if the Court finds that Plaintiff's initial suit was "duly commenced" and then dismissed as a matter of form, Plaintiff still cannot rely on the savings statute to save the 2009 cause of action from the statute of limitations because Payne did not act in good faith

in filing the 2004 Complaint. The savings statute is to be applied in those *limited* situations where the Plaintiff "inadvertently found himself in a procedural quagmire and made a good faith effort to preserve his claim." (emphasis added). *Marshall*, 7 So.3d at 216. The Mississippi Supreme Court has previously held that §15-1-69 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." *Id.* In other words, as admitted by the Plaintiff, the purpose behind 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*, 382 So.2d at 1080.(emphasis added)(citation omitted).

Plaintiff's firm in this matter is intimately familiar with nursing home litigation in Mississippi. Although they no longer have a Mississippi office, beginning in 1999 until just recently, Wilkes and McHugh, P.A. filed hundreds of nursing home cases throughout the state. As such, they were very much aware of the requirements of having an administrator or other officer of an estate appointed prior to the filing of a wrongful death claim if their client was not in the class of wrongful death beneficiaries under statute. It bears mentioning that the Plaintiff's counsel herein was also involved in the *Boles* matter, once again demonstrating their knowledge, two years before the initial *Pope* case was filed, of the requirements in Mississippi to have an Estate opened before filing a wrongful death action by a non-statutory beneficiary. *Boles*, 947 So.2d 238. For Plaintiff to argue that "good faith" was exercised in filing the 2004 Complaint by someone who lacked any authority to pursue a wrongful death suit finds no support in fact or law as the *Boles* case, filed two years prior, demonstrates Plaintiff counsel's awareness of the statutory

requirements.

Plaintiff boldly asserts that he was acting in good faith, when the record and even the 2009 Complaint[12], demonstrates to the contrary, illustrating a pattern of misrepresentation to the trial courts, Mississippi Supreme Court, and likely, to the chancery court appointing Payne Administrator of the Estate of Ellen Pope. Even so, this Court pointed out the blatant and purposeful misrepresentations of James Payne. More specifically, this Court stated that "[i]t bears noting that the claimant in *Pope* was likely appointed administrator only by **misrepresenting his relationship to the decedent**." *Burley v. Douglas,* 26 So.3d 1013, 1025, fn 14 (Miss. 2009). (emphasis added).

Further, unlike the *Boles* case, the "flaw" here was not a mistake as to the forum in which to bring the instant cause of action or the forum in which to institute the Estate of Ellen Pope. In *Boles,* the Plaintiff's procedural quagmire was the choice of the incorrect county to open the decedent's Estate.[13] *Id. See also Frederick Smith Enterprise Co.,* 36 So.2d 812. The Plaintiff in *Boles* had the entitlement under the Estate statute (91-7-63) to commence the Chancery Court action, to petition the Chancery Court to open the Estate of the decedent and appoint that Plaintiff as Administrator of the Estate of Boles. Thus, that Plaintiff met the requirements of Mississippi Rules of Civil Procedure 3(a) and 8(c). However, the Plaintiff therein went into the "wrong door" - she petitioned to open the Estate where the decedent had previously resided, not in the county where she resided at her

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12 Again, the 2009 Complaint contains the same misrepresentation that Payne was the nephew of Pope.

13 Under Miss. Code Ann. §91-7-63, Letters of Administration for an Estate must be granted by the chancery court of the county where the Intestate resided. The initial chancery court proceeding was filed where the decedent had previously lived, not where she resided at the time of her death.

death, and therefore, the Chancery Court she erroneously chose lacked subject matter jurisdiction over the matter. In summary, the Petitioner/Plaintiff in the Chancery Court duly commended her action in good faith, but chose the wrong county, requiring the case to be dismissed for lack of subject matter jurisdiction, a dismissal as a matter of form. Unlike in the *Pope* decision, the *Boles* Court specifically noted that the error of the Plaintiff with regard to the county where she filed the Chancery action related to one of subject matter jurisdiction of the Chancery Court. *Id.* at 249. ("we find . . . the estate statute prescribing where an estate must be filed goes to subject matter jurisdiction.")

It is important to note that the action in *Boles* that was "flawed," entitling the Plaintiff therein to rely on the savings statute, was the initial action - the chancery court action - not the circuit court action filed following the inappropriate granting of Administrative powers to the Plaintiff. *Estate of Boles v. National Heritage Realty, Inc.*, 4:07-cv-99-SA-DAS [Doc. 27] (N.D. Miss. March 11, 2009)R. at 117; 120-121. Thus, contrary to Plaintiff's assertions in his brief, standing and/or due commencement were not issues before the federal court in *Boles*. Appellant's Brief, pp. 16-17, Not surprisingly, Plaintiff also misrepresented in his brief that standing was a consideration in *Crawford* and *Marshall*, which it was not. *See*, Appellants Brief at Page 19. (Plaintiff states that "[a]s in *Crawford* and *Marshall*, the dismissal of Plaintiff's "first action" was based on the court's lack of jurisdiction because the Plaintiff lacked standing."). As such, as the trial court astutely noted, all of the cases relied upon by Plaintiff did not deal with the very issue at hand - standing. R. at 187.

In the instant matter, there is no "but for" analysis or error that could be corrected by a mere refiling. The Plaintiff, in bad faith, misrepresented his authority to file the Circuit Court Complaint. *Pope*, 995 So.2d at 124. As a result, he lacked *locus standi* and had no

authority to commence the action. *Id.* at 126. This error was not a simple declared subject matter jurisdiction mistake as the one in *Boles*.

To be sure this Court in *Boles* directly discussed subject matter jurisdiction (of the Chancery Court) while this Court in *Pope* never mentioned subject matter jurisdiction in its opinion, because James Payne never made it past the standing analysis. Thus, *Boles* "matter of form" discussion and the subsequent application of the savings statute by the federal district Court has absolutely no relevance to the instant matter, as appropriately determined by the trial court. R. at 187.

D. THE SAVINGS STATUTE IS OF NO EFFECT TO THE CURRENT PLAINTIFF– THE ESTATE OF ELLEN POPE

As demonstrated above, the *Pope* Court held a cause of action for wrongful death and/or survival did not belong to James Payne as he was (a) not within the statutory class of wrongful death beneficiaries entitled to bring such an action and (b) he was not a duly appointed officer of the Estate. *Pope*, 995 So.2d at 126. For sake of argument, any claims that could have been part of the 2004 Complaint would have had to have been the individual claims of James Payne, which did not exist. He had no authority to assert any other claims. *Pope*, 995 So.2d at 125-126. Conversely, the claims being asserted in the 2009 Complaint are the Estate of Pope claims, as well as claims on behalf of the Wrongful Death Beneficiaries. There are no individual claims of James Payne in the 2009 Complaint.

The savings statute does not apply to subsequent lawsuits by different parties. Various courts, in discussing the application of the savings statute, have done so only when the second lawsuit is filed by the **same Plaintiff** who filed the first action. The savings statute's express purpose is to "**save one** who has brought **his** suit . . . from loss of **his**

right of action. .." *Hawkins,* 69 So.2d at 712. (emphasis added). "Once **a party** has utilized the benefit of the savings statute, it can not be available to **her again**" *Arceo*, 19 So.2d at 76. The Plaintiff in the 2004 Complaint was solely James Payne; he had no authority to act in any other capacity. The Plaintiff in the instant Complaint is the Estate of Ellen Pope, acting through its legally appointed administrator. Since the 2009 Complaint asserts a right of action of a party not previously before the Court, the savings statute, by virtue of the specific language of that statute and its interpretation in *Hawkins*, does not apply.

Plaintiff has already admitted that the "proper" party in this matter– the party to whom the cause of action belongs - is the *Estate* of Ellen Pope. *Pope,* 995 So.2d at 125. ("Payne counters by asserting to this Court that '[t]he Estate was, at all material times in this lawsuit, the proper party.'"). Such an admission is consequently why Payne attempted to substitute himself, then - clothed with the proper authority as the duly appointed Administrator of the Estate of Ellen Pope, in place of James Payne, the individual, lacking the proper authority, in the 2004 action. *Id.* Simply put, Plaintiff has already recognized and admitted the difference between the "person" who filed the 2004 Complaint– James Payne versus the "entity" who filed the 2009 Complaint– the Estate of Ellen Pope, by and through James Payne. This dichotomy is fatal to the application of the savings statute.

Finally, the language of savings statute addresses the only circumstance in which the original Plaintiff may differ from the Plaintiff in the refilled action, where "**his** executor or administrator may, in case of **the plaintiff's** death, commence such new action, within the said one year." Miss. Code Ann. § 15-1-69. (emphasis added). It follows that, for the Estate of Ellen Pope to rely on the savings statute, the Estate must have been a valid party

Plaintiff in the first suit, meaning the Estate had to have been opened before suit was filed, which it was not. This is not the factual scenario with which the Court is now faced. As a result, the trial court's decision must be affirmed.

This Court should not be persuaded to ignore Mississippi precedent and to do that which the Supreme Court in *Pope* held that it would not do - allow a stranger to file an action - keeping open the Courthouse door until such time as the proper Plaintiff is available to assume the helm of the litigation. *Pope*, 995 So.2d at 126. To apply the savings statute in a case where Plaintiff in the initial litigation had no standing would lead to the same egregious end result that the *Pope* Court refused to allow.

II. THE STATUTE OF LIMITATIONS HAS EXPIRED ON PLAINTIFF'S CLAIMS

Plaintiff apparently concedes that if the 2009 Complaint is not "saved" by Mississippi Code Annotated §15-1-69, then it is to be properly dismissed as being barred by the statute of limitations. Appellant's Brief, p. 21. (Plaintiff stated that the second complaint at issue herein was "filed beyond the statute of limitations").

Mississippi Code Annotated §15-1-36 provides a two year statute of limitations for claims filed on or after January 1, 2003. As the 2009 Complaint was filed over five (5) years after Ellen Pope's death, the statute of limitations has clearly expired. Since the savings statute is not applicable, as shown above, Plaintiff's Complaint must be dismissed.

CONCLUSION

The ultimate issue in this case has already been decided by this Court in *Pope* - that is - the 2004 lawsuit was never duly commenced. Lacking "due commencement," the saving statute is inapplicable and cannot be used to "save" Plaintiff's claims from the

expired statute of limitations. The 2004 lawsuit was dismissed for a lack of *locus standi* - not as a matter of form, also preventing reliance on the savings statute.

Further, James Payne misrepresented himself to the chancery court as well as to the circuit court despite his counsel being acutely aware of the requirements in Mississippi for wrongful death actions. Such behavior is indicative of a lack of good faith, prohibiting application of the savings statute.

Finally, even if somehow the first action was "duly commenced," in good faith, which it was not, the savings statute can not be invoked by a wholly new Plaintiff. The 2004 lawsuit was filed by James Payne, individually, while the 2009 Complaint was filed by the Estate of Ellen Pope.

In summary, Plaintiff's 2009 Complaint and the instant appeal is nothing more than an improper attempt to circumvent the 2008 *Pope* decision by asking this Court to abandon its well reasoned precedential opinion. As such, the decision of the circuit court should be affirmed.

WHEREFORE, PREMISES CONSIDERED, the Appellees respectfully request that the Appellant's appeal be denied and the decision of the circuit court be affirmed.

Respectfully submitted,

Delta Health Group, Inc.

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CERTIFICATE OF FILING

I, NICOLE C. HUFFMAN, attorney for the Defendant/Appellee, do hereby certify that I have this day caused to be sent via US Mail to the Mississippi Supreme Court Clerk's Office, the following documents and copies:

The original and four (4) copies of the above Appellee's Brief.

One (1) disk containing the Appellee's Brief.

This certificate of filing is made pursuant to Rule 25(a) of the Mississippi Rules of Appellate Procedure.

This the 26th day of August, 2010.

NICOLE C. HUFFMAN

CERTIFICATE OF SERVICE

I, NICOLE C. HUFFMAN, do hereby certify that I have this day caused to be mailed, by United States Mail, certified, first-class, postage pre-paid, pursuant to Miss. R. App. P. 25, a true and correct copy of the foregoing to:

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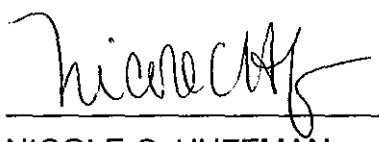
Honorable Albert B. Smith, III
Bolivar County Circuit Court
200 S. Court Street
Cleveland, MS 38732

This the 26th day of August, 2010.



NICOLE C. HUFFMAN