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

v.

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

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

A. Lance Reins (MS Bar [redacted]
Wilkes & McHugh, P.A.
One North Dale Mabry, Suite 800
Tampa, Florida 33609
Telephone: 813-873-0026
Facsimile: 813-266-8820
Attorney for Appellant

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Mississippi Rule of Appellate Procedure 34, Plaintiff/Appellant requests oral argument in this matter as the Circuit Court of Bolivar County and the Defendant/Appellee have misconstrued Mississippi statutes and case law. Oral argument is necessary to assist this Court in understanding the facts and issues presented by the instant appeal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

CODE

ARGUMENT

THE MISSISSIPPI SAVINGS STATUTE SAVES THE INSTANT ACTION FROM BEING TIME-BARRED

The Circuit Court of Bolivar County should be reversed. Pursuant to the applicable and persuasive authority set forth below, the Circuit Court erred in determining that Plaintiff's cause of action was barred by the statute of limitations and not subject to the savings clause of Miss. Code Ann. § 15-1-69 (Rev. 2003). R. 183 – 187. Specifically, the Circuit Court erred in holding that Plaintiff's first cause of action was not "duly commenced" within the meaning of the statute. R. 183 – 187. The Circuit Court further erred by granting Defendant's Motion to Dismiss on these grounds. R. 183 – 187.

Miss.Code Ann. § 15-1-69, the savings statute, allows a duly commenced action, which has been abated or avoided for any matter of form, to be refiled in the proper court within one year after the abatement or reversal of the original action. Four elements are required to trigger the application of the savings statute. Those include: (1) the action has been duly commenced within the applicable statute of limitations; (2) the complaint was filed in good faith; (3) the prior suit was dismissed as a matter of form without adjudication on the merits; and (4) the new action was commenced within one year of said dismissal. *Crawford v. Morris Transp., Inc.*, 990 So.2d 162, 170 (Miss. 2008). All elements have been met in the case at bar rendering the application of the savings statute appropriate and proper.[1]

[1] Defendant repeatedly asserts unfounded attacks on Plaintiff's counsel throughout its brief. Plaintiff refuses to respond to such baseless accusations. Perhaps Defendant feels it necessary to launch such personal attacks in an effort to counteract the weakness of its position in the instant appeal.

A. THE FIRST ACTION WAS "DULY COMMENCED" WITHIN THE MEANING OF THE SAVINGS STATUTE

Plaintiff's first action was "duly commenced" within the meaning of the savings statute. On August 25, 2004, approximately seven months after Ms. Pope's passing, James Payne, her great-nephew, filed a Complaint against the Defendants alleging that Ms. Pope was subject to negligence and gross negligence during her residency at Shelby Nursing and Rehabilitation Center (hereinafter "2004 Complaint"). Certainly, Plaintiff's 2004 Complaint was filed well within the statute of limitations. On March 14, 2005, Mr. Payne filed a Petition for Letters of Administration which were granted on April 14, 2005. Although Mr. Payne was subsequently determined to lack standing to bring a wrongful death suit on behalf of his great-aunt, the 2004 Complaint was "duly commenced" pursuant to Mississippi law. *Delta Health Group, Inc. v. Pope*, 995 So.2d 123, 126 (Miss. 2008).

Specifically, Mr. Payne relied on the state of Mississippi law at the time of filing outlined in *Richardson v. Methodist Hosp. of Hattiesburg, Inc.*, 807 So.2d 1244 (Miss. 2002)("Richardson I") and *Methodist Hosp. of Hattiesburg, Inc. v. Richardson*, 909 So.2d 1066 (Miss. 2005)("Richardson II"). In *Richardson* I, a personal injury and wrongful death action was brought against a hospital by a patient's daughter, individually and on behalf of the patient's heirs and wrongful death beneficiaries. The Circuit Court granted the hospital's motion for summary judgment. The decision was affirmed only on the wrongful death claim because Richardson had failed to present proof of a causal connection between the negligent care and the patient's death. *Id.* at 1245. Upon remand, the hospital sought dismissal arguing that although this Court upheld a survival action, the real party in interest, the patient's estate, was not a party to this action. *Richardson II*, 909 So.2d at 1068. The Circuit Court dismissed the survival

action since all the wrongful death beneficiaries were not the proper parties to advance a survival action inasmuch as no estate had ever been opened. *Id.* Subsequently, Richardson petitioned the chancery court to open an estate and was granted letters of administration appointing her as and administratrix of the estate. Richardson then filed an amended complaint in the pending circuit court action alleging a survival action. *Id.* at 1069. Upon the hospital's motion, the circuit court dismissed the wrongful death claims but allowed Richardson to proceed with the survival action. The case was once again brought before this Court via interlocutory appeal. *Id.* This Court found that Richardson, as Administratrix, properly ratified and joined the action with the amended complaint within a reasonable time after the hospital's objection that the wrongful death beneficiaries were not the real party in interest to prosecute a claim under the survival statute. *Id.* at 1072-73. Therefore, the substitution of patient's estate, pursuant to Miss. R. Civ. P. 12(b), as the real party in interest in the wrongful death action, was effected within a reasonable time after the hospital's objection and dismissal of action where Richardson immediately began proceedings to open the patient's estate and file an amended complaint naming the estate as proper party. *Id.* Accordingly, based upon the law as outlined in *Richardson I* and *II*, it was entirely proper for Mr. Payne to have filed the 2004 Complaint prior to setting up Ms. Pope's estate. *Richardson I* and *II* were controlling at the time of filing the 2004 Complaint and specifically allowed for a reasonable time to substitute the proper party pursuant to Miss. R. Civ. P. 12(b). Thus, although subsequently dismissed for a lack of standing, the 2004 Complaint was "duly commenced" within the statute of limitations and controlling Mississippi authority.

The term "duly commenced" has not been specifically defined by the Legislature nor case law. However, the seminal case of *Crawford v. Morris Transp. Inc.*, 990 So.2d

162 (Miss. 2008) provides guidance as to its meaning and mandates the reversal of the Circuit Court's dismissal in the instant matter. In *Crawford*, this Court specifically held that although a complaint had never been filed in the first action, the action was nevertheless deemed "duly commenced" within the meaning of the savings statute. *Id.* at 169. Recognizing that a complaint goes to the very heart of whether a civil action exists and commences a civil proceeding, the plaintiff's failure to file a complaint did not foreclose the action from being "duly commenced" within the savings statute. *Id.* at 173. Thus, despite the lack of a complaint or existence of a civil action, the action was still deemed "duly commenced" warranting the application of the savings statute. The cause here mandates the same result.

In its brief, Defendant boldly equates a lack of standing to a lack of due commencement under the savings statute. For support, Defendant relies on *Arceo v. Tolliver*, 19 So.3d 67 (Miss. 2009). However, such reliance is misplaced. In reality, *Arceo* actually supports the Plaintiff's position. In *Arceo*, the plaintiff filed a complaint, as well as two amended complaints, for medical malpractice and negligence against the defendant doctor. *Id.* at 69. The plaintiff failed to provide the notice required by Mississippi Code Section 15-1-36(15) prior to the filing of the complaints. *Id.* The trial court denied the defendant's motion to dismiss, or in the alternative, motion for summary judgment based upon the failure to comply with the statutory pre-suit requirements. *Id.* On appeal, this Court reversed the trial court's denial of the defendant's motion and dismissed the complaint without prejudice for the failure to provide the required pre-suit notice. *Id.* at 70. Subsequently, the plaintiff filed another complaint initiating the second action. In denying the defendant's motion for summary judgment, the trial court found that the pre-suit notice did not substantially comply with

the statutory requirements and that the application of the savings statute defeated the defense statute of limitation. *Id.*

The defendants asserted that the savings statute did not apply as the first action was not "duly commenced." *Id.* Specifically, the defendants argued that since the statutory notice requirements were not complied with, the plaintiff ***had no legal right to file the suit.*** *Id.* In rejecting these arguments, this Court instructed:

> Nevertheless, the commencement of litigation is determined by the Rules of Civil Procedure, not the requirements which may have existed prior to their adoption, nor pre-suit statutory requirements which do not govern judicial procedural rules. For purposes of the savings statute in a Rules world, "duly commenced" is a cause commenced consistent with the requirements of the Rules.

Id. at 74. Citing to *Hawkins v. Scottish Union & National Insurance Company*, 69 So. 710 (1915) as the continuing standard by which to measure the application of the savings statute, this Court reaffirmed that the savings statute is:

> Highly remedial . . . and ought to be liberally construed for the accomplishment of the purpose for which it was designed, namely, 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, ***and it would be a narrow construction of that statute to say that because, if plaintiff had, by mistake, attempted to assert his right in a court having no jurisdiction, he is not entitled to the benefit of it.***

Id. (emphasis added). Based upon this standard, this Court held that the first action was "duly commenced" as the dismissal based on the failure to comply with the statutory notice requirement did not touch on the merits. *Id.* at 75. The failure to provide the statutory notice ***deprived the claimant of the right to file the suit requiring dismissal.*** *Id.* at 74. However, despite the fact that ***plaintiff had no legal right to file the first action, it was nonetheless "duly commenced" within the meaning of the savings statute***. *Id.* "'Duly commenced' does not require that the action be commenced in a court having subject matter jurisdiction." *Id.* at 169 (*citing Hawkins v. Scottish Union*

& National Insurance Co., 69 So.710 (1915)). *See also Herrington v. Promise Specialty Hospital*, 665 F.Supp.2d 708, 710 (S.D. Miss. 2009)(the District Court rejected the defendant's arguments that an action was not duly commenced due to the failure to provide the required statutory notice rendering the first suit "not lawfully filed" and of "no legal effect").

Application of the *Arceo* case to the instant appeal requires reversal of the Circuit's Court decision. Mr. Payne lacked standing to file the 2004 Complaint. That is, he lacked the right to bring a wrongful death action on behalf of his great-aunt. *Delta Health Group, Inc. v. Pope*, 995 So.2d 123, 126 (Miss. 2008). According to *Arceo,* a lack of the legal right to file an initial action does not lead to the conclusion that it was not "duly commenced" as the Defendant would have this Court believe. Further, the 2004 Complaint was commenced in accordance with the Mississippi Rules of Civil Procedure which require the filing of a complaint containing a short and plain statement of the claim showing the pleader is entitled to relief and a demand for judgment in accordance with the principles outlined in *Richardson I* and *II. See, e.g., Crawford*, 990 So.2d at 173 (a complaint commences a civil proceeding).

For support, Defendant relies on *Bowling v. Madison County Bd. of Supervisors*, 724 So.2d 431, 441 (Miss. Ct. App. 1998). Brief of the Appellee, p. 10. However, the *Bowling* case offers no value to the determination of the issues presented in this appeal. In *Bowling*, a property owner filed a complaint challenging the decision by a board of supervisors to grant special exception to the applicant. After a dismissal for lack of jurisdiction by the circuit court, the property owner appealed. *Id.* at 433. The Appellate Court held that the property owner had to file an appeal and the failure to file a bill of exceptions within ten days of decision did not require dismissal. *Id.* at 441. The

savings statute was not applicable as the filings in the circuit court were appellate filings not belonging to an original action. That is, the statute applied to an action that was duly commenced with the proper filing of a complaint, and not the filing of an appeal. *Id.* Accordingly, Defendant's reliance on *Bowling* is entirely misleading.[2]

The *Hawkins* Court affirmed the true meaning behind the savings statute:

> Where the plaintiff has been ***defeated*** by some matter not affecting the merits, ***some defect or informality, which he 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.

Hawkins, 69 So. at 713 (emphasis added). This is precisely the situation presented by the instant appeal. Plaintiff has been defeated by a defect not affecting the merits that was remedied or avoided with the filing of a second action. For these reasons, the Circuit Court should have likewise found that the Plaintiff's first action was "duly commenced" despite the lack of standing.

B. DISMISSAL BASED UPON A LACK OF STANDING CONSTITUTES A DISMISSAL FOR A "MATTER OF FORM" WITHIN THE MEANING OF THE SAVINGS STATUTE

The analysis as to whether a dismissal is for a "matter of form" focuses on the "content or substance of the record to determine the purpose or reason for" the dismissal. *Marshall v. Kan. City S. Ry. Co.*, 7 So.3d 210, 215 (Miss. 2009). Within the context of the savings statute, avoidance or defeat for lack of subject matter jurisdiction is avoidance or defeat for a matter of form. *See, e.g., Hawkins,* 69 So. at 712; *Ryan v. Wardlaw*, 382 So.2d 1078, 1079 (Miss. 1980). As this Court has recently announced, "[s]tanding is an aspect of subject matter jurisdiction." *Schmidt v. Catholic Diocese of*

---

[2] Further, Defendant's incorrectly quote a statement from *Bowling*. The quote should actually state:

> These defects occurred in pleadings filed in the circuit court, but Section 15-1-69 applies to an ' action, duly commenced,' i.e., a complaint properly filed and not an appeal.

Bowling, 724 So.2d at 441.

Biloxi, 18 So.3d 814, 826 (Miss. 2009). "A lack of standing robs the court of jurisdiction to hear the case." *Id.* (internal citations omitted). Without standing, there can be no subject matter jurisdiction. Further, a dismissal of a suit for want of subject matter jurisdiction is a dismissal for a matter of form within the purview of the savings statute. *Hawkins*, 69 So. at 712.

In *Marshall v. Kan. City S. Ry. Co.*, 7 So.3d 210, 215-16 (Miss. 2009), this Court held that a dismissal based upon a lack of subject matter jurisdiction was a "matter of form," such that the one-year savings statute applied to permit survivors to proceed in trial court with their second action. In reaching its conclusion, the *Marshall* Court relied on *Crawford v. Morris Transp., Inc.*, 990 So.2d 162, 174 (Miss. 2008), wherein a voluntary dismissal without prejudice was considered a dismissal as a "matter of form". *Id.* As in *Crawford*, the *Marshall* plaintiffs "*inadvertently found [themselves] in a procedural quagmire and made a good-faith effort to preserve [their] claim [s].*" *Id.* (emphasis and clarifications in original). Accordingly, the second action was timely filed and not barred by the statute of limitations.

Moreover, in *Crawford*, this Court held that a dismissal based upon the absence of a complaint, which directly related to a court's exercise of jurisdiction, was a dismissal based upon a "matter of form" not affecting the merits. *Crawford*, 990 So.2d at 174. As such, the application of the savings statute to the plaintiff's second complaint was appropriate so that it was timely filed. *Id.*

Finally, in *Boles v. National Heritage Realty, Inc.*, 2009 WL 1783545 (N.D. Miss. June 23, 2009), applying Mississippi law, the federal district court affirmed that a dismissal of an initial action for lack of standing to bring a wrongful death action was an aspect of subject matter jurisdiction. *Id.* at *5. As the plaintiff lacked the capacity as a

proper party to bring the lawsuit, the initial action was avoided or defeated due to a lack of subject matter jurisdiction. "Mississippi case law since 1883 has clarified that dismissal for either lack of subject matter jurisdiction or lack of standing is 'a matter of form' within the meaning of the Mississippi's savings statute." *Id.* at * 6, fn. 4, *citing Ryan, v. Wardlaw*, 382 So.2d 1078, 1079 (Miss. 1980); *Kirk v. Pope*, 973 So.2d 981, 990 (Miss. 2007). Having filed a second action within one year after the dismissal based upon a lack of standing, the statute applied to "save" the plaintiff's otherwise time-barred cause of action. *Id.* The federal district court rejected the defendants' invitation to reach a conclusion which "would be contrary to the purpose of Mississippi's savings statute." *Id.* The cause here requires the same result.

Defendant improperly asserts that standing and/or commencement were not issues before the federal court in *Boles*. Brief of Appellee, p. 18. The specific issue before the federal court was:

> [w]hether Mississippi's savings statute saves a wrongful death action that an appellate court has rendered void *ab initio* because the administratrix lacked standing to file a wrongful death action as a result of the chancery's court's lack of subject matter jurisdiction over the estate.

Boles, 2009 WL 1783545 at * 4. The first wrongful death action was dismissed because the administratrix lacked capacity as a proper plaintiff to bring the lawsuit in the Leflore County Circuit Court as the estate was opened in the wrong county. *National Heritage Realty, Inc. v. Estate of Boles*, 947 So.2d 238 (Miss. 2006). Since no legitimate estate ever existed, there was never a legitimate plaintiff in the Leflore County Circuit Court action. *Id.* at 250.

After her appointment as administratrix in the proper county, she filed her second wrongful death action within a year of the first action's dismissal. The *Boles* defendants sought dismissal based upon the expiry of the statute of limitations. It was then

necessary for the federal court to determine whether or not the Mississippi savings statute saved the second wrongful death action from being time-barred. R. 108 - 121.

On March 11, 2009, after consideration of both parties' extensive memoranda, the federal district court judge entered an Order and Accompanying Memorandum Opinion finding that because the "first action" was avoided or defeated due to a lack of subject matter jurisdiction as the plaintiff lacked the capacity as a proper party to bring the lawsuit, a "matter of form", Mississippi Code §15-1-69 applied to the case to "save" it from a statute of limitations bar. R. 120 -121.

Unsatisfied with this holding, the *Boles* defendants sought reconsideration of the order denying their motion to dismiss. However, once again, the federal district court disagreed with the defendants and denied their motion for reconsideration. *Boles v. National Heritage Realty, Inc.*, 2009 WL 1783545 (N.D. Miss. June 23, 2009). The federal court affirmed that the dismissal of the first action for a lack of standing to bring the wrongful death action was an aspect of subject matter jurisdiction and a "matter of form" within the meaning of the savings statute. *Id.* at *5. Notably, the *Boles* facts are nearly identical to those presented by this appeal. That is, in both cases, the plaintiffs lacked standing due to a failure to properly open an estate prior to the filing of the first action. Once a proper estate was opened, both of the plaintiffs filed a second action relying on the savings statute to defeat a statute of limitations defense. Therefore, as in *Boles*, this Court likewise should find that the instant dismissal for lack of standing is a dismissal as a "matter of form" within the purview of the savings statute.

Defendant's misunderstanding of the *Boles* decision is further evidenced with the assertion that the "flaw" entitling the plaintiff to rely on the savings statue was the initial chancery court action and not the circuit court action. *Id.* The "flaw" that actually entitled

the *Boles* plaintiff to the protections of the savings statute because it was a "matter of form" was the dismissal based upon her lack of standing in the first circuit court action. R. 120 -121; *Boles*, 2009 WL 1783545 at *4-5. Because the first circuit court action was a dismissal based on a "matter of form," the plaintiff was protected by the savings statute.

In the instant matter, the dismissal of the 2004 Complaint on the basis that Plaintiff lacked standing related directly to the court's exercise of jurisdiction. Without standing, a court does not possess jurisdiction to hear the case. Accordingly, pursuant to *Crawford, Marshall*, and *Boles*, a dismissal based upon the court's jurisdiction to entertain a case is one based upon a "matter of form" not affecting the merits and rendering the application of the savings statute in the instant matter proper.

C. THE 2004 COMPLAINT WAS FILED IN GOOD FAITH AND THE 2009 COMPLAINT WAS COMMENCED WITHIN ONE YEAR OF DISMISSAL

Additionally, Plaintiff exercised good faith in filing the 2004 Complaint within a year after its dismissal. The 2004 Complaint was dismissed by the Mississippi Supreme Court's decision in *Delta Health Group, Inc. v. Pope*, 995 So.2d 123 (Miss. 2008). On June 29, 2009, Plaintiff filed its second action alleging similar claims to those asserted in the 2004 Complaint. Certainly, Plaintiff filed the 2009 Complaint well within one year of its dismissal for a lack of standing.

Moreover, Plaintiff exercised good faith in filing its 2004 Complaint as the law in effect at the time of filing allowed for its filing prior to opening Ms. Pope's estate. As discussed in detail above, *Richardson I and II* were controlling at the time of filing the 2004 Complaint and specifically allowed for a reasonable time to substitute the proper party pursuant to Miss. R. Civ. P. 17. *Richardson II*, 909 So.2d at 1072-73. Given the

law in effect at the time of filing the 2004 Complaint, Plaintiff was justified in filing a complaint prior to opening Ms. Pope's estate.

Defendant asserts bad faith is evidenced by the fact that counsel was involved in *National Heritage Realty, Inc. v. Estate of Boles*, 947 So.2d 238 (Miss. 2006). However, contrary to Defendant's assertions, *Boles* was decided ***two years after*** the filing of the 2004 Complaint.

In *Pringle v. Kramer*, 40 So.3d 516 (Miss. 2010), this Court recently addressed the issue of good faith within the meaning of the savings statute. The *Pringle* plaintiff filed a wrongful death medical negligence action on behalf of his minor daughter. The action was subsequently dismissed for failure to comply with the statutory presuit requirements. *Id.* at 517. The father refiled the action within a year of the dismissal and sought refuge within the savings statute. *Id.* The father argued that he was acting in good faith at the time he filed the first action as the law at that time did not require a dismissal for failure to give presuit notice. *Id.* at 519. Given the state of the law at the time of filing, this Court agreed that the father did not act in bad faith when filing the first action as there was no reason to expect dismissal based upon the failure to comply with the statutory requirements. *Id.* Therefore, the father could avail himself of the protections offered by the savings statute. Notably,

> There is little case law from this Court interpreted what constitutes bad faith in filing an action for purposes of the general saving statute. Long ago, in *Hawkins*, this Court noted an example of bad faith:
>
> Cases might be supposed, perhaps, 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 saving statute. . . .

Id. (emphasis in original) *citing Hawkins*, 69 So. at 712. As in *Pringle*, Plaintiff filed the 2004 Complaint in accordance with the law in effect at that time. As such, it cannot be

said that he acted in bad faith in its filing to preclude him from the shelter of the savings statute.

Finally, Defendant makes the novel argument that the savings statute does not apply as the 2009 Complaint was not filed by the same Plaintiff who filed the 2004 Complaint. Brief of Appellee, p. 20. However, Defendant misstates the facts entirely. The 2004 Complaint was filed by Mr. Payne on behalf of "[t]he 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 malpractice, gross negligence, fraud, wrongful death and breach of fiduciary duty arising out of [Ms. Pope's] time at [the nursing home]. *Pope*, 995 So.2d at 124; R. 473-74. In other words, Mr. Payne brought the 2004 wrongful death action on behalf of Ms. Pope's estate and the wrongful death beneficiaries. The 2009 Complaint contains precisely the same Plaintiff, the Estate of Ms. Pope, as the 2004 Complaint. R. 3-18. As such, Defendant's misstatement regarding the party before the Court in both Complaints is entirely incorrect.

CONCLUSION

Plaintiff's 2009 Complaint meets all the requirements for application of the savings statute. That is, (1) the 2009 Complaint was duly commenced within the applicable statute of limitations; (2) the 2004 Complaint was filed in good faith in accordance with the law in effect at the time of filing; (3) the 2004 Complaint was dismissed as a matter form without an adjudication on the merits and (4) the 2009 Complaint was filed within one year after the dismissal based upon a lack of standing. Accordingly, the savings statute, Miss. Code Ann. § 15-1-69, permits Plaintiff's filing of the 2009 Complaint.

Time and time again, this Court has reaffirmed the importance of the savings statute in noting that:

> It is a ***highly remedial statute*** and ***ought to be liberally construed*** for the accomplishment of the purpose for which it is designed, namely, 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, 69 So. at 713; *Marshall*, 7 So.3d at 214 (emphasis added). The application of the savings statute to the Plaintiff's 2009 Complaint fulfills this very purpose.

For the reasons stated above, Plaintiff respectfully requests that this Court reverse the Circuit Court's grant of Defendant's Motion to Dismiss and grant all other relief, both general and specific, to which he is entitled.

WILKES & McHUGH, P.A.

A. Lance Reins
Mississippi Bar Number [redacted]
WILKES & MCHUGH, P.A.
One North Dale Mabry, Suite 800
Tampa, Florida 33609
Telephone: 813-873-0026
Facsimile: 813-266-8820
Attorney for Appellant/Plaintiff

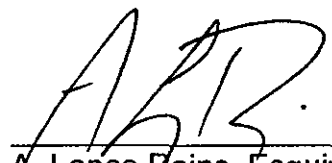
CERTIFICATE OF FILING

I hereby certify that I, A. Lance Reins, Esquire, counsel for the Appellant, on this 13th day of October, 2010, deposited with Federal Express for delivery to the Mississippi Supreme Court Clerk's Office, the following original documents and copies:

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

A CD-ROM containing a copy of Appellant's Reply Brief pursuant to Mississippi Rules of Appellate Procedure 28(m).

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



A. Lance Reins, Esquire
Mississippi Bar No. [redacted]
Wilkes & McHugh, P.A.
One North Dale Mabry Hwy., Ste 800
Tampa, Florida 33609
Telephone: (813) 873-0026
Facsimile: (813) 286-8820
Attorney for Appellant/Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Brief of the Appellant has been furnished by with Federal Express for delivery, to the following on this the 13th day of October, 2010:

Hon. Albert B. Smith, III
Bolivar County Circuit Court Judge
P. O. Box 478
Cleveland, MS 38732

Lynda C. Carter, Esq.
Nicole Huffman, Esq.
Wise, Carter, Child & Caraway, P.A.
2781 C.T. Switzer Sr. Drive, Suite 307
Biloxi, MS 39531

A. Lance Reims
WILKES & MCHUGH, P.A.
One North Dale Mabry, Suite 800
Tampa, Florida 33609
Telephone: 813-873-0026
Facsimile: 813-266-8820
Attorney for Appellant/Plaintiff