IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2009-IA-01181-SCT

RUTH FREDERICKS, M.D. and
J. MARTIN TUCKER, M.D. PETITIONERS/APPELLANTS

v.

C. ERIC MALOUF and KRISTINE K. MALOUF,
Individually and on Behalf of
KIMBERLY T. MALOUF, a Minor RESPONDENTS/APPELLEES

INTERLOCUTORY APPEAL FROM THE DECISION OF THE
CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY,
MISSISSIPPI, CIVIL ACTION NO. 251-03-77 CIV

BRIEF OF APPELLEES C. ERIC MALOUF AND KRISTINE K. MALOUF, INDIVIDUALLY AND ON BEHALF OF KIMBERLY T. MALOUF, 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 the judges of the Court of Appeals may evaluate possible disqualifications or recusal:

1. C. Eric Malouf
   Kristine K. Malouf
   Kimberly Malouf, a Minor - (Appellees herein)

2. Michael J. Malouf, Esq.
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3. J. Martin Tucker, M.D. - (Appellant herein)

4. Whitman B. Johnson, III, Esq.
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5. Ruth Fredericks, M.D. - (Appellant herein)

6. L. Carl Hagwood, Esq.
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   WILKINS TIPTON, P.A. - (Counsel for Appellant Ruth Fredericks, M.D.)

7. Honorable Tomie T. Green
   Hinds County Circuit Court Judge

RESPECTFULLY SUBMITTED

BY: _____
Michael J. Malouf, Jr.
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REQUEST FOR ORAL ARGUMENT

Malouf's respectfully submits that oral argument will be of valuable assistance to this Court. Oral argument will ensure a thorough and effective presentation of this appeal to help bring a final conclusion to this matter.

STATEMENT OF THE ISSUES

1. Does the rule that "venue proper for one is proper for all" apply in the context of medical negligence suits, or, alternatively, where the evidence supports a finding that treatment occurred in more than one county, can a plaintiff be deprived of his substantive right to choose among permissible venues?

2. Whether Defendants' failure to timely assert their *Motion for Transfer of Venue and Alternative Motion for Summary Judgment* constituted a waiver or abandonment of the motion?

3. Did the trial court err in finding that the Plaintiffs' claims were brought well within the statute of limitations period?

4. Where a physician's treatment proximately causes a child to be born with both physical and mental birth defects, should a treating physician be shielded from liability simply because the physician alleges that the plaintiffs' are asserting "wrongful life"claims?

STATEMENT OF THE CASE

On November 24, 1994, Dr. Ruth Fredericks began treating Mrs. Kristine (Krista) Malouf at St. Dominic Hospital in Hinds County for a seizure disorder. (R. at 35, 312, 430). Over the next several years, Fredericks treated Kristine at multiple locations, including St. Dominics Hospital, River Oaks hospital, and at Kristine's home via the telephone. (R. at 282, 314,315, 487). During such treatment Fredericks prescribed a drug known as "Depakote" to control Kristine's seizures. (R. at 303) In late 1995, Kristine informed Fredericks that she wanted to start a family. (R. at 73, 314,315) Fredericks advised Kristine that she could continue using Depakote with no complications during the pregnancy. (R. at 311) After being so advised by Fredericks, Kristine consulted her OB/GYN, Dr. Rusty Etheridge, who disagreed with Fredericks assertion that Depakote is a safe drug during pregnancy. (R. at 311-312) When Kristine informed Fredericks of Etheridge's disagreement with such assessment, Fredericks stated that Etheridge was not an expert and was incorrect. Fredericks then referred Kristine to a maternal/fetal specialist, Defendant Dr. Martin Tucker. (R. at 314). Tucker agreed with Fredericks that Dr. Etheridge was not a specialist and that Depakote could be taken during pregnancy without harm to Krista or the fetus. (R. at 8, 20, 72, 340, 377). Tucker only suggested that there may be a slight increased risk of spina bifida, but that it could be managed and not a concern. (R. at 341). Fredericks and Tucker specifically informed the Plaintiffs that Depakote would not increase the risk of cleft palate, facial abnormalities, physical defects, or mental delays. (R. at 16, 342, 380)

Kimberly was born on March 20, 1997. (R. at 61). For the first several years

of her life, there was no real concern that she suffered any type of abnormalities. Although she was slow to walk and was behind her peers, Kimberly's treating physicians dismissed any problems as simply "late development." Kimberly Malouf was later diagnosed with brain damage, mental defects, and disfigurement. (R. at 61, 66-69). The physical disfigurement included midfacial hypoplasia (flat nasal bridge with a broad base), a distinctive facial appearance, deficient orbital ridge, anteverted nostrils, thin upper lip with a thick lower lip, prominent forehead, as well as malformed fingers and toes. (R. at 47,413).

Plaintiffs filed their original Complaint against Ruth Fredericks, M.D., on December 31, 2002. (R. at 91) Plaintiffs alleged that Ruth Fredericks, M.D. was negligent in the prescribing, administering, monitoring, controlling and regulating of seizure medication given to Plaintiff Kristine Malouf during her pregnancy. Contrary to Fredericks' brief, Plaintiffs did not limit the scope of said Complaint to the use of "depakote." In fact, depakote is not mentioned anywhere in said Complaint. Rather, Plaintiffs original Complaint alleged that:

> Defendants were negligent in the monitoring, controlling and/or regulating seizure medication given to Kristine K Malouf during her pregnancy, causing permanent brain damage to Kimberly T. Malouf.

(R. at 92)

Said Complaint further alleged that:

> Defendants owed a duty to the Plaintiffs to render professional healthcare services consistent with the nationally-recognized, minimally acceptable level of competency which they would be expected to possess and apply, given (a) the quality and level of experience which they held themselves as possessing, and (b) the circumstances of the Plaintiffs' case.

(R. at 92)

Mississippi law requires only "notice" pleading. Plaintiffs' Complaint put Fredericks on notice of Plaintiffs' medical negligence claims against her. The claims included but were not limited to the prescribing, and use of anti-seizure medications during Kristine's pregnancy, including the prescribing of Depakote, and the failure to properly advise of all known risks of anti-seizure medications.

Plaintiffs' experts have opined that Fredericks actions and inactions fell below the nationally recognized standard for prescribing anti-seizure medications during pregnancy. (R. at 435) Fredericks' breaches of the standard of care included, but were not limited to: her failure to consider alternative seizure medications; failure to provide adequate folic acid as required by the seizure medications; failure to adequately warn of the side effects of the seizure medications; failure to properly advise patients not to get pregnant while using certain seizure medications such as Depakote; failure to warn against Fetal Valproate Syndrome and failure to properly adjust or control the seizure medication to avoid seizures and harm to the fetus. Plaintiffs experts have testified that such negligence by Defendants is the proximate cause of Kimberly's injuries. (R. 397-426 and R. 427-461).

Based on experts, medical records, and the treating physicians, Plaintiffs' had no reason whatsoever to suspect that Tucker's actions or inactions were responsible for Kimberly's abnormalities until Plaintiffs took Frederick's deposition on November 30, 2004. In her deposition, Fredericks advised that she and Tucker were jointly responsible for controlling Krista's seizure medication. (R. at 382). Prior to that time, Tucker denied he was responsible for any aspects of the seizure medications. (R. at 369).

On November 28, 2005, pursuant to the request of Fredericks, Plaintiffs agreed to undergo an Independent Medical Examination with a specialized physician Dr. Duane Superneau, chosen and paid for by Fredericks. (R. at 396). Dr. Superneau's evaluation revealed for the first time that Kimberly suffers from a condition known as "Fetal Valproate Syndrome" resulting from the use of Depakote during her mother's pregnancy. (R. 26-29) Although this was an additional diagnosis, the allegations with regard to Fredericks' negligence are the same as alleged in Plaintiff's original Complaint regarding Fredericks failure to properly treat Plaintiffs' seizure disorder. However, it was the first notice that implicated Tucker might be a contributing cause to Kimberly's abnormalities. (R. at 395).

On May 5, 2006, Plaintiffs filed their Amended Complaint against Ruth Fredericks, M.D., and J. Martin Tucker, M.D. (R. at 34). Plaintiff's Amended Complaint does not create a "new cause of action." In fact, Plaintiffs have not abandoned their initial theories of causation as alleged in their original Complaint against Fredericks. Said theories are still viable and should be considered by a jury. Even Defendant's expert, Dr. John Dale Cleary, opined that the seizures and depakote are both attributed to Kimberly's injuries. Specifically, Defendant's expert stated:

> That Depakote has been associated with malformations. Having a seizure has been associated with malformations. The literature is very clear that most researchers cannot clearly separate those out from also the genetic makeup of the individuals and environmental factors and suggest that, in fact, all four of those contribute to the outcome that is observed. (Depo Cleary p106)

Fredericks first treated Kristine Malouf at St. Dominics Hospital in Hinds County on November 24, 1994. (R. at 35, 312, 430). Thereafter, Kristine was again

admitted to St. Dominics emergency room in Hinds County due to seizures during her pregnancy with Kimberly Malouf. On August 14, 1996, Fredericks and Tucker treated Kristine in Hinds County. (R. at 315). At each emergency room visit in Hinds County, Defendants again failed to advise Krista of the risks of Depakote, failed to try other anti-seizure medications with less risk to the fetus, and actually increased the dosage of depakote which further increased the risk to the fetus without properly timing the dosage which led to more seizures. As a result of Fredericks and Tucker's negligence, Kimberly Malouf suffered permanent and debilitating injuries, including fetal valproate syndrome.

PROCEDURAL HISTORY

1. This is the third petition filed by Defendant Fredericks with this Court. The first petition was a writ of mandamus and stay filed on April 17, 2009, requesting this Court to order the trial court to change the trial date because Fredericks' attorneys had a conflict. That writ was denied. The second was also a petition for writ of mandamus and stay, which was filed on July 2, 2009, and **requested this court to change the venue of the case**. That petition was also denied as being moot after the trial court on July 16, 2009, entered an order denying Fredericks' motion for change of venue. (Malouf Appendix C). Fredericks and Tucker now file this petition for interlocutory appeal, claiming that the trial judge erred in denying the motion.

2. On December 31, 2002, Plaintiffs filed an action for medical negligence against Fredericks in the First Judicial District of Hinds County, Mississippi. (R. at 91). Venue was proper as Fredericks resided in said district and the alleged act or

17, 480). Paragraph I of Plaintiffs' Complaint alleges in relevant part:

> Defendant, Ruth Fredericks, M.D., is a neurologist whose practice is within the State of Mississippi and may be served with process at **her place of business or her residence located in the First Judicial District of Hinds County, Mississippi.** (emphasis added)

(R. at 91).

3. Though Fredericks now claims that "Hinds County, Mississippi" refers only to said defendant's residence, said Complaint clearly alleged that her business location and her residence were both located in Hinds County. Fredericks admitted that allegation and filed her Answer and Defenses with eight (8) affirmative defenses, **but without an objection to venue**. (R. at 15). Fredericks never filed a motion for change of venue until June 2006 after Tucker was added as a Defendant. (R. at 4).

4. Further, Fredericks admitted that she lived in Hinds County, and one of her offices was located at the UM Medical Center in Jackson, in Hinds County. (R. at 476).

5. On May 5, 2006, Plaintiffs amended the original complaint to add Tucker as a defendant. (R. at 34). Tucker answered, essentially stating that the alleged act or omission committed by him took place at his office in Rankin County, Mississippi, and asked for a change of venue and severance from Frederick's trial. Fredericks subsequently joined in said motion. (R. at 4).

6. Said motion for change of venue was scheduled for hearing on August 15, 2006, at which time both Fredericks and Tucker announced that they wished to withdraw said motion. This appeal stems from the trial court's denial of Defendant's Motion for Transfer of Venue and alternative Motion for Summary Judgment. On February 20, 2009, well after the Court ordered deadline for filing such motions, and

after the case had been scheduled for trial, Tucker filed his Supplemental Join Motion and Brief in Support of Motion for Change of Venue and Alternative Motion for Summary Judgment. (R. at 76).

7. This case was initially set for trial in Hinds County for April 6, 2009, but was continued by the trial judge on April 2 due to a criminal trial conflict. At no time prior to said scheduled trial did either defendant attempt to have their amended motion heard.

8. On July 16, 2009, the trial court denied Defendants' Tucker and Fredericks Motion for Transfer of Venue. (R. at 213).

9. On July 28, 2009, this Court granted the Petition for Interlocutory Appeal and Stay of Trial Court Action filed by Fredericks and joined by Tucker, and further granted Emergency Petition for Interlocutory and for Stay of Trial Court Proceedings filed by Tucker.

SUMMARY OF THE ARGUMENT

The trial court did not abuse its discretion in denying Defendant's request for change of venue. Plaintiffs' original Complaint was filed on December 31, 2002, at that time the 2002 version of the venue statute was applicable. Fredericks agrees that venue was proper for her. Subsequently, on May 5, 2006, Plaintiffs filed their amended complaint adding Tucker as a party to this lawsuit. Plaintiffs' amended complaint did not create a "new cause of action." It merely added a party and asserted an additional claim within the original "cause of action." Further, pursuant to Miss. R. Civ. P. 15, Plaintiffs' amended complaint relates back to the date of filing because the "claim asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth .. in the original pleading" which is the Defendants negligent treatment of the seizure disorder. Therefore, the 2002 venue version of the venue statute applies and venue is proper in Hinds County, Mississippi.

In the alternative, if this Court finds that the 2004 venue statute applies, then venue is still proper in Hinds County, Mississippi. Both Fredericks and Tucker's negligent acts and omissions occurred, at least in part, in Hinds County, Mississippi. Both doctors treated Plaintiff Kristine Malouf in Hinds County, Mississippi. Therefore, venue is proper in Hinds County irrespective of whether this Court applies the 2002 or 2004 versions of the venue statute.

The lower court was correct in finding that the statute of limitations had not expired with regard to Plaintiff's claims. Fredericks does not dispute that Plaintiffs' claims against her were filed within the applicable statute of limitations period. The

only issue on appeal is whether or not Plaintiff's claims against Tucker were filed within the statute of limitations.

Despite diligent investigation, Plaintiff had no evidence that Tucker was negligent until the deposition of Fredericks on November 30, 2004. On said date, Defendant Fredericks, testified that she and Dr. Tucker were jointly responsible for maintaining the seizure medication. Prior to November 30, 2004, Plaintiffs had been repeatedly advised by Dr. Tucker that he, as the OB, was not responsible for prescribing, testing, controlling, or maintaining seizure medication. In fact, Tucker advised Plaintiffs that Dr. Fredericks, as the neurologist, was solely responsible. Plaintiffs were put on notice of Tucker's negligence on November 30, 2004, and confirmed on November 28, 2005 when Fredericks Independent Medical Examination by Dr. Duane W. Superneau revealed for the first time that Kimberly suffered from Fetal Valproate Syndrome. After the November 20, 2004 deposition and the November 28, 2005 IME report revealed Tucker's negligence, he was brought into this litigation on May 5, 2006, well within the statute of limitations.

ARGUMENT

I. Standard of Review

On appeal, this Court applies an abuse of discretion standard when reviewing the denial of a motion to transfer venue. The trial court did not abuse its discretion in denying Defendant Fredericks' motion for change of venue in its order dated July 16, 2009.

"In cases pertaining to a motion for a change of venue, this Court has repeatedly applied the abuse of discretion standard of review." *Rose v. Bologna*, 942 So. 2d 1287, (Miss. 2006).

This Court held in *Wayne General Hospital v. Hayes* 868 So.2d 997, 1002 (Miss. 2004):

> In reviewing a trial court's ruling on a motion to change venue, this Court applies the abuse of discretion standard. *Guice v. Miss. Life Ins. Co.*, 836 So.2d 756, 758 (Miss. 2003). A trial judge's ruling on such an application "will not be disturbed on appeal unless it clearly appears that there has been an abuse of discretion or that the discretion has not been justly and properly exercised in the circumstances of the case.

This Court applies a de novo standard when reviewing the denial of a summary judgment motion. Tucker contends the statute of limitations has expired regarding Plaintiff's claims against him, however Fredericks makes no such claim. Such a contention by Tucker inevitably requires a discovery rule analysis. In *Stringer v. Trapp*, 30 So. 3d 339, (Miss. 2010), this Court stated,

> The question of whether a statute of limitations is tolled by the discovery rule often turns on the factual determination of 'what the plaintiff knew and when.' *Huss*, 991 So. 2d at 168. Thus, '[o]ccasionally the question of whether the suit is barred by the statute of limitations is a question of fact for the jury ...

In the instant case, when Plaintiffs knew or should have known of Tucker's negligent

acts and omissions is a question for the jury. Plaintiffs' have offered overwhelming evidence that the statute of limitations has not expired, or in the alternative that the discovery rule tolled the statute of limitations for their claims against Tucker.

II. This Court Should Affirm The Trial Court's Denial of Defendant's Motion For Transfer Of Venue Because The 2002 Venue Statute Applies To This Case.

It is undisputed that when Plaintiffs filed their initial Complaint on December 31, 2002, the 2002 version of Section 11-11-3 was applicable to the instant case. Moreover, the 2002 version is also applicable to Plaintiffs' Amended Complaint. The provisions of Section 11-11-3, Miss. Code Ann. (1972) stated in part:

> Civil actions of which the circuit court has original jurisdiction shall be commenced in the county where the **defendant resides or in the county where the alleged act or omission occurred or where the event that caused the injury occurred.**

It is undisputed that Fredericks resided and maintained an office in Hinds County, Mississippi when initially served. Additionally, Fredericks negligent acts and omissions occurred in Hinds County as she treated Plaintiffs at St. Dominic's Hospital in Hinds County. Fredericks's Answer to the original Complaint did not dispute that venue was proper in Hinds County.

A. Fredericks Admits That Venue Was Proper When The Original Complaint Was Filed.

Fredericks admits that venue was proper in Hinds County when the original Complaint was filed on December 31, 2002. (R. at 17). Specifically, on page 6 of her Petition for Interlocutory Appeal, she states:

> As the Complaint was filed on December 31, 2002, Dr. Fredericks had **no arguable basis to file for a change of venue**. . . Had she done so, Dr. Fredericks would have surely been accused of filing a frivolous motion and been sanctioned based on the statute in effect when the Complaint was filed. (R. 218, emphasis added)

Again in her Brief before this Court, Fredericks admits:

> When the lawsuit was filed, Dr. Fredericks admitted that she was a resident of Hinds County, Mississippi....For that reason, Dr. **Fredericks would have had no basis for file a motion for transfer** of venue when the lawsuit was initially field....Dr Fredericks did not have a right to have venue transferred in 2002. (Fredericks' Brief at 28, emphasis added).

Although Fredericks agrees that she had "no basis" to file a motion for transfer, she now claims that the amended complaint now entitles her to seek a change of venue. No case law is cited by Fredericks to support such a claim, as case law is clearly to the contrary. As this Court held in *Wayne General Hospital v. Hayes,* 868 So.2d 997, 1002 (Miss. 2004):

> Moreover, "proper venue is determined at the time the lawsuit is originally filed, and subsequent dismissal of the defendant upon whom venue is based does not destroy proper venue." Estate of Jones v. Quinn 716 So.2d 624, 826 (Miss. 1998) (citing Blackledge v. Scott, 530 So.2d 1363, 1365 (Miss. 1988)

In support of her brief, Fredericks executed an affidavit stating that she was served with process at her office located in Rankin County. (Exhibit "D" of Fredericks' brief) What Fredericks fails to reveal in her affidavit is that she resides in Hinds County and has two (2) offices, one of which is located at the University of Mississippi Medical center located in the city of Jackson, First Judicial District of Hinds County. At her deposition taken on November 30, 2004, Fredericks testified, as follows:

Q. Could you state your current home address?

A. 2016 Cullywood Drive, Jackson, Mississippi.
Q. And your current professional address?
A. I have two. One is 1020 River Oaks Drive, Suite 420, Jackson, Mississippi. The other is 2500 North State Street, Clinical Sciences Building, University of Mississippi Medical Center.

(R. at 476).

Though Fredericks' affidavit was carefully crafted to be factually evasive, the location of Fredericks' offices is a non-issue. Miss. Code Ann. 11-11-3(3) (2007) clearly provides that venue is proper "in the county where the defendant resides" or where "the alleged act or omission occurred."

Defendant, Tucker, also does not dispute that venue for Fredericks is proper in Hinds County, but only alleges that, "as to him venue is proper only in circuit court of Rankin County..." (R. at 428).

B. Fredericks Waived Objection To Venue.

Fredericks never objected to venue until June 2006 when she joined in Defendant Tucker's motion, 3 ½ years after the original complaint was filed. The law in Mississippi is well settled that if an objection to venue is not timely asserted, it is waived. *American Family Life Assurance of Columbus v. Ellison*, 4 So.3d 1049 (Miss. 2009); *Wofford v. Citi Service Oil Co.*, 236 So.2d 743 (Miss. 1970). Additionally, Miss. R. Civ. P. 12(h) provides that a defense of improper venue is waived if not properly presented as required by Miss. R. Civ. P. 12:

> (h) Waiver or Preservation of Certain Defenses.
>
> (1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g) (emphasis added)

The lower court held in its July 16, 2009, Order, "the Defendants' continued

participation in litigation for three (3) years after the Motion to Transfer Venue was filed waived improper venue." (R. at 215) The lower court did not abuse its discretion in finding that Defendants waived their objection to venue. (See also Trial Court's Response to Writ of Mandamus, Malouf Appendix C).

C. Defendants Abandoned Said Motions

On August 15, 2006, at the hearing on Defendants' Motion to Transfer of Venue and alternative Motion for Summary Judgment, Defendants withdrew said motion. Said motion was not timely amended or renewed. In fact, this case was scheduled for trial for April 6, 2009, but due to the trial court's conflict, was continued the week prior to trial. No time prior to said scheduled trial did Defendants seek a hearing on this matter either before this Court or the trial court.

Defendants assertions that they could not set a hearing date is simply false. The lower court specifically denies this assertion. (Malouf Appendix C). Defendant Tucker's original Motion to Change Venue was filed on June 5, 2006, which was joined by Fredericks on June 12, 2006. At the hearing of said motion on August 15, 2006, Defendants announced to the Court that they wished to withdraw their motion for change of venue. On August 15, 2006, Defendants had an opportunity to be heard on their motions, but rather dismissed said motions. Subsequent to the withdrawal of said motions, Defendants failed to renew or file amended motions until February 20, 2009, when Tucker filed his Supplemental Motion for Change of Venue and For Summary Judgment, which was filed well past the motion deadline of June 28, 2007. (R. 488)

> 3. That counsel shall serve all other pretrial motions, both dispositive and non-dispositive, excepting only evidentiary in limine motions, no later than June 28, 2007. (emphasis not added)
>
> These deadlines may not be extended by agreement of the parties, but only by permission of the Court upon the showing of good cause.

R. at 488).

Defendants argue that the trial court has refused or failed to hear their motions. Again, this is absolutely false. Defendants have had several hearing dates in which various motions were heard and in which Defendants were provided an opportunity to bring these issues before the court. Said hearing dates include but are not limited to: Notice of Hearing set for April 18, 2006; Notice of Hearing set for August 15, 2006; Notice of Hearing set for February 1, 2008. (R. at 490, 491, 492) (Record Exc. at 7,8, 9). The trial court's docket sheet details Defendants' numerous hearing dates obtained from the lower court. (R. at 1-15)

The lower court held:

> [i]nasmuch as no genuine effort was made to schedule, notice or renew the 2006 motion until after the time had lapsed for the filing of dispositive motions in 2009, the court is of the opinion that the 2006 Motion to Transfer Venue had been abandoned.

(R. at 214-215).

The trial court did not abuse its discretion in finding that Defendants abandoned said motions.

D. Venue Is Also Proper For Tucker In Hinds County, Mississippi.

Fredericks and Tucker both incorrectly base their entire argument for the transfer of venue under the presumption that the 2004 venue statute applies. In particular, they rely on §11-11-3(3) which was not effective until January 1, 2003

after the filing of this action. In relying on the 2004 venue statute, Tucker argues that venue should be transferred to the Circuit Court of Rankin County, Mississippi because that is where he treated the Plaintiffs. However, Dr. Tucker also treated Plaintiff Krista Malouf at St. Dominic's Hospital in Hinds County, Mississippi. Moreover, Tucker does not address the point that Defendant Fredericks, who remains a viable Defendant, resides in Hinds County, has an office in Hinds County, and treated the Plaintiffs in Hinds County, Mississippi. There is no doubt that venue was proper at the time this action was originally filed and remains proper in Hinds County.

Even if Rankin County is a permissible venue for Tucker, the Mississippi Supreme Court in *Bayer Corp. v. Reed,* 932 So.2d 786 (Miss. 2006), reiterated Plaintiff's right to choose among permissible venues. "It is the plaintiff's prerogative to decide where, among permissible venues, to sue the defendant." *Bayer,* at 788-9 (citing *Forrest County Gen. Hosp. v. Conway*, 700 So.2d 324, 326 (Miss. 1997). The Court further stated:

> We have described a plaintiff's ability to choose a forum as a "right": "Of right, the plaintiff selects among the permissible venues and his choice must be sustained unless in the end there is no credible evidence supporting the factual basis for the claim of venue."

Bayer, at 790 (quoting *Flight Line, Inc. v. Tanksley*, 608 So.2d 1149, 1155 (Miss. 1992).

In the instant case, Plaintiff has the right to choose among permissible venues. At the time of the filing of the complaint venue was proper in the First Judicial District of Hinds County and remains so today. Additionally, Plaintiffs' Amended Complaint, venue was proper under both the 2002 venue statute and

the amended statute as both Defendants' negligent acts and omission occurred in the First Judicial District of Hinds County, Mississippi. Fredericks and Tucker both treated Kristine in Hinds County, at each treatment Defendants failed to properly monitor and control the anti-seizure mediation, failed to recommend an alternative anti-seizure medications, Defendants failed to advise Plaintiffs of the dangers of Depakote, failed to prescribe folic acid, failed to prescribe anti-seizure medication consistent with the nationally-recognized, minimally acceptable level of competency, and actually increased the Depakote dosage which also increased the harm to the fetus. The law is clear that Plaintiffs have the right to choose among permissible venues and therefore venue is proper in Hinds County.

E. The Amended Complaint Is Not A New Cause Of Action

On May 5, 2006, Plaintiffs filed their Amended Complaint against Ruth Fredericks, M.D., and J. Martin Tucker, M.D. Plaintiffs' amended complaint does not create "a new theory of causation." The amended complaint arises from the exact same facts, conduct, transactions, and occurrences set forth in the original complaint regarding the negligent prescribing of anti-seizure medication during pregnancy.

Plaintiffs have not changed, withdrawn or abandoned their theories of negligence alleged in their original Complaint against Fredericks. Said theories are still viable and should be considered by a jury. Even Defendant's expert, Dr. John Dale Cleary opined that Fredericks improper monitoring of the anti-seizure medications which caused seizures during Kristine's pregnancy is a probable cause of Kimberly's problems. Specifically he stated:

> That Depakote has been associated with malformations. Having a seizure has been associated with malformations. The literature is very clear that most researchers cannot clearly separate those out from also the genetic makeup of the individuals and environmental factors and suggest that, in fact, all four of those contribute to the outcome that is observed. (*Dep. Cleary* at 106)

Pursuant to Miss.R.Civ.P. 15(c), Plaintiff's Amended Complaint relates back to the original Complaint. Said claims "asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading..." Although this issue is not presently before this Court, on April 27, 2006 in its Order Denying Motion Ore Tenus the lower court held, "plaintiffs' Amended Complaint regarding failure to warn and lack of informed consent is not a new cause of action but a amended claim in the same cause, and therefore, relates back to the original complaint." (Appendix A). Therefore, Defendant's assertion that this is a new cause of action is without merit.

Fredericks cites *Tolliver v. Mladineo*, 987 So. 2d 989 (Miss. Ct. App. 2008) in support of her contention that "[b]ecause the amended complaint is a new cause of action, the 2004 amendment to the venue statute applies." (Fredericks Brief at 32). In reality, *Tolliver* is inapposite from the instant case. *Tolliver* is a wrongful death case grounded in medical negligence. The decedent's brother originally brought suit against the medical providers on December 16, 2002. The decedent's brother was granted leave to file an amended complaint on June 16, 2004. The amendment substituted the decedent's brother for the decedent's son as the party plaintiff. The substitution was necessary as the decedent's brother did not have standing to bring the suit under our wrongful death statute because the decedent left a surviving spouse and children. Subsequently, the case was

dismissed for plaintiff's counsel's failure to attend a mandatory docket call. On appeal, the Court of Appeals held that the chancellor abused his discretion by granting the original plaintiff leave to amend the complaint to substitute a party. Therefore, the amended complaint did not relate back to the date of filing and the statute of limitations had expired. The court correctly reasoned that the original plaintiff lacked standing to bring the lawsuit. Therefore, the amended complaint did not relate back to the date of first filing. The court stated,

> Because an amended complaint cannot relate back to an original complaint if the original complaint is brought without standing, such an amended complaint substituting a party as plaintiff should be regarded as the initiation of a new action with regard to analysis pursuant to the statute of limitations.

Id. at 996, emphasis added. In *Tolliver*, clearly the amended complaint was a completely new lawsuit, since the original plaintiff lacked standing. In the instant case, there is no question that Plaintiffs' had standing to file their original Complaint on December 31, 2002, and *Tolliver* is therefore inapplicable.

Additionally, Fredericks' reliance on *Basset v. Wang*, an Illinois appellate court case, is misplaced. 523 N.E. 2d 1020 (Ill. App. 3d Div. 1988). The *Bassett* Court only applied the newly enacted Tort Reform to the defendant brought in by the amended complaint. The original defendant was not subject to the Tort Reform. Therefore, *Basset* offers Fredericks no relief as Fredericks was not brought into this lawsuit via the Plaintiffs' Amended Complaint.

Moreover, *Basset* represents a sharp disagreement among the Illinois Appellate Division. Said disagreement concerns whether Illinois' newly enacted tort reform applied to amended complaints in which the original complaint was filed prior to the enactment of tort reform. In *Gray v. Roy*, 515 N.E. 2d 333 (Ill. App. 3

Dist. 1987), the plaintiff brought a medical malpractice action against a single medical provider before the enactment of Tort Reform.. Once Tort Reform was enacted, the plaintiff amended his complaint to bring in an additional medical provider as a defendant. The additional defendant contended that the newly enacted tort reform applied because the plaintiff amended his complaint after the onset of same. The trial court disagreed. On appeal, the appellate court affirmed the trial court's decision and held that the defendant brought in by amendment was not subject to the restrictions of tort reform. *Id.* at 335.

In the instant case, the 2002 version of the venue statute was applicable when Plaintiffs' brought their claims against Fredericks. Plaintiffs' amended complaint did not create a new cause of action. The lower court did not abuse its discretion in holding that the Amended Complaint relates back to the original filing.

F. Venue Proper For One Is Proper For All.

Defendants ignore M.R.C.P. 82(c), which states,

> Where several claims or parties have been properly joined, the suit may be brought in any county in which any one of the claims could properly have been brought. Whenever an action has been commenced in a proper county, additional claims and parties may be joined, pursuant to Rules 13, 14, 22 and 24, as ancillary thereto, without regard to whether that county would be a proper venue for an independent action on such claims or against such parties.

As stated in *Wayne General Hospital v. Hayes,* 868 So.2d 997, 1002 (Miss. 2004):

> In *Estate of Jones*, we concluded that 'in suits involving multiple defendants, where venue is good as to one defendant, it is good as to all defendants. . . .' Moreover, in such cases, 'venue as to the remaining

defendants continues despite the fact that venue would have been improper, if the original action had named them only.'

Proper venue is determined at the time the original lawsuit is filed. Fredericks and Tucker both admit that Hinds County was proper venue for the original Complaint. Neither Fredericks nor Tucker have any basis, in fact or in law, to now assert that venue is no longer proper in Hinds County.

III. In The Alternative, If This Court Finds That The Amended Venue Statute Controls, Then Venue Is Still Proper In Hinds County, Mississippi.

Though Plaintiffs strongly contend that venue is controlled by law applicable at the time of filing, even under the current 2004 statute (which was amended after the original complaint was filed) venue is still proper in Hinds County because the negligence of both defendants occurred, at least in part, in Hinds County.

On August 15, 1996, Fredericks and Tucker both treated Plaintiff at St. Dominic's according to Frederick's deposition:

Q. Any other records that you believe were pertinent in this exhibit to August 15th?
A. Just Dr. Tucker's note.
Q. If you could read Dr. Tucker's note as best you can.
A. Well, it's a handwritten note. "24-year-old G1 p0 white female well-know to me. Nine weeks pregnant gestation. **Agree with increased Depakote**. Patient and her husband presently obviously" - - I can't read his writing.

(R. at 478-479).

Tucker also testified in his deposition on January 5, 2007, that he had staff privileges and treated Krista at St. Dominics:

Q. In 1994, 1995 where did you have hospital privileges?
A. I had active staff privileges at Woman's Hospital, at River Oaks Hospital, and St. Dominic's Hospital.
Q. How about '96?
A '96 would have been the same.
Q. And the same for '97?
A. Yes. . . .

(R. at 486).

...

Q. What is this document?
A. This is a copy of a consultation I provided at St. Dominic Hospital on August 15, 1996.
Q. Why did you do a consultation?

A. Dr Fredericks requested a consultation for me to see Krista after Krista was admitted with a seizure at about nine weeks gestation.

(R. at 487).

During Kristine Malouf's deposition taken by Tucker's attorney on December 20, 2006, after the Amended Complaint was filed, Krista testified under oath that Fredericks treated her at St. Dominic's:

Q. Okay. And did - Dr. Fredericks, was she coming to take care of you at - in St. Dominic's?
A. She would - yes. And she met us at the emergency –

(R. at 484).

Kristine also testified by affidavit that the alleged acts and omissions which form the basis of this lawsuit occurred in part at St. Dominic's Hospital in the city of Jackson, First Judicial District of Hinds County, Mississippi. (R. at 480).

Though Tucker contends he consulted with Plaintiffs at his office in Rankin County, "treatment" is more than an isolated incident. As stated above, Tucker and Fredericks both treated Kristine in Hinds County and agreed to increase the dosage of Depakote which is the basis of the subject lawsuit. It

should be noted that at each and every treatment in Hinds County, Defendants: failed to properly monitor and control the anti-seizure mediation; failed to recommend an alternative anti-seizure medications; failed to advise Plaintiffs of the dangers of Depakote; failed to prescribe folic acid; failed to prescribe anti-seizure medication consistent with the nationally-recognized, minimally acceptable level of competency; failed to properly time the dosage of seizure medication resulting in additional seizures; and actually increased the Depakote dosage which also increased the harm to the fetus. Therefore, even under the 2004 venue statute, venue is still proper in Hinds County because the negligent acts and omissions of both Defendants occurred in Hinds County.

Tucker relies on *Adams v. Baptist Mem'l Hospital-Desoto, Inc.*, 965 So. 2d 652 (Miss. 2007), to support his contention that this Court must transfer venue to Rankin County. However, in *Adams*, clearly the 2004 version of the venue statute applied as the decedent's injuries occurred on or about November 12, 2004 when the decedent sustained injuries at a casino in Tunica County. The decedent was subsequently treated for her injuries in DeSoto County; however, she died in her sleep the next day. The decedent's husband brought suit against the casino and the medical providers in Tunica County. The trial court severed the claims against the defendants and transferred the medical negligence claims to DeSoto County while retaining venue in Tunica County against the Casino. On appeal, this Court reversed the trial court's order of severance and remanded the case with instructions to transfer the entire case to DeSoto County. *Adams* does not address the appropriate venue where all defendants are medical

doctors. Therefore *Adams* is clearly distinguishable and inapplicable because the case involved medical and non-medical defendants. Additionally, *Adams* does not apply the 2002 venue statute.

Nevertheless, the logical extension of *Adams* would be that venue is proper in either county where any one of the Defendant's negligent acts or omissions occurred, if multiple medical providers are joined as defendants and the Defendant's negligent acts and omission occurred in more than one county. While this Court has not addressed this issue, Professor Jeffrey Jackson has opined:

> Presumably, if this casino patron had been treated in two different counties by health care providers, venue would be proper in any county where the decedent received medical treatment from a defendant. Also, it is likely that the court's reasoning would apply even if the case did not involve wrongful death.

Mississippi Civil Procedure, Jeffrey Jackson, 1 MS Prac. Civil Proc. § 3:12.

A. This Court Should Not Sever Plaintiffs' Claims Against Fredericks and Tucker.

Tucker asks this Court to sever Plaintiffs' claims and transfer the claims against him to the Rankin County Circuit Court. However, "Mississippi is among the majority of states which does not allow splitting a cause of action" and this Court should not sever Plaintiffs' claims in this case. *Adams v. Baptist Mem'l Hospital-Desoto, Inc.*, 965 So. 2d 652, 655 (Miss. 2007) (*citing Alexander v. Elzie*, 621 So. 2d 909, 910 (Miss. 1992).

In *Rose v. Bologna*, 942 So. 2d 1287 (Miss. 2006), the acts and omissions of four different medical providers combined to cause the decedent's

death and this Court refused to sever and transfer the plaintiff's medical negligence claims. Although the decedent received treatment for her injuries in at least three different counties, one of the medical providers treated the deceased in Bolivar County. Therefore, the plaintiff brought suit in Bolivar county against all four health care providers. Two of the providers filed motions to sever and transfer the claims against them to Washington and Grenada counties – the counties where they provided treatment to the deceased. Applying the 2004 version of the venue statute, the trial court ruled that the cases must be severed as each doctor has a right to be sued "only in the county in which the alleged act or omission occurred." *Id.* 1289. On appeal, this Court reversed the trial court's decision to sever and transfer the plaintiff's claims against the respective medical providers. This Court held that venue was proper for all the defendants in Bolivar county where one of the providers treated the decedent.

Regarding the Court's decision in *Rose*, the Mississippi Civil Procedure treatise states:

> [a]lthough the Court relied on the history of the wrongful death statute in reaching its conclusions, it seems that the rule would be the same if the malpractice action were not one arising from death.
>
> ...
>
> Although the medical venue provision contains mandatory language regarding where claims against physicians "shall" be brought, **the statute should not require that a plaintiff with a single claim against different physicians sue each physician in the county where that individual physician's act or omission occurred. This would cause a substantial fragmentation of actions, and wreak havoc on orderly judicial administration.**

Mississippi Civil Procedure, Jeffrey Jackson, 1 MS Prac. Civil Proc. § 3:12.

Tucker's request to sever the case is improper and impractical. Plaintiffs'

claims arose from the same facts alleged in the original Complaint. The same facts and evidence will be used at both trials which requires that the cases against both Defendants be tried at the same time. It would be more than impractical to conduct two separate trials and judicial economy and common sense would allow the injured party to have her day in court in one proceeding. Also, there is a possibility of inconsistent verdicts if Defendants were tried separately. Obviously, at Tucker's trial, he would blame Fredericks, and at Fredericks trial she would blame Tucker. There is no way to separate the Defendants without extreme prejudice to Plaintiffs. This becomes all the more apparent considering the fact this litigation has already spanned the better part of a decade.

B. Defendants Consented To Venue In Hinds County.

Even though Fredericks and Tucker both admit they have staff privileges and treat patients at St. Dominics, they attempt to avoid venue in Hinds because they maintain offices in Rankin County. It is apparent that ongoing medical care may occur in more than one county, particularly in a metropolitan area. Such care however only occurs with the doctor's consent. When a doctor treats a patient in two or more counties, he undoubtedly willingly consents to venue where he has treated/mistreated his patient, regardless of where his office may be situated. A physician should not be allowed to complain about venue in a county where he voluntarily maintains staff privileges and routinely treats patients, particularly when such treatment gives rise to a cause of action. The

"legislative intent" that Tucker referred to in his brief was meant to protect a physician from a county he's never been in, not one in which he routinely and voluntarily treats patients.

IV. Plaintiff Chooses Venue.

The law is clear, that Plaintiff has the right to choose the venue of the case.

In the recent Mississippi Supreme Court case, *Bayer Corp. v. Reed*, 932 So.2d 786 (Miss. 2006), the Court reiterated Plaintiff's right to chose among permissible venues. "It is the plaintiff's prerogative to decide where, among permissible venues, to sue the defendant." *Bayer*, at 788-9 (*citing Forrest County Gen. Hosp. v. Conway*, 700 So.2d 324, 326 (Miss. 1997). The Court further stated:

> We have described a plaintiff's ability to choose a forum as a "right": "Of right, the plaintiff selects among the permissible venues and his choice must be sustained unless in the end there is no credible evidence supporting the factual basis for the claim of venue." *Bayer,* at 790 (quoting *Flight Line, Inc. v. Tanksley*, 608 So.2d 1149, 1155 (Miss. 1992).

V. This Court Should Affirm The Trial Court's Denial Of Defendant Tucker's Alternative Motion For Summary Judgment.

Fredericks does not dispute that Plaintiffs' claims against her were filed within the applicable statute of limitations period. The only issue on appeal is whether or not Plaintiff's claims against Tucker were filed within the statute of limitations.

The applicable statute of limitations in this case is §15-1-36(1) which applies to "any claim accruing on or before June 30, 1998." Said statute does

not contain a statute of repose. Additionally, 15-1-36(1) provides a discovery rule which states that the claim must be filed within two (2) years from the date the alleged neglect was first known or "discovered."

This Court has recently held:

> The operative time [for the running of the statute of limitations] is when the patient can reasonably be held to have **knowledge of the injury itself, the cause of the injury, and the causative relationship between the injury and the conduct of the medical practitioner**. *Smith v. Sanders*, 485 So.2d 1051, 1052 (Miss.1986).

In *Stringer v. Trapp*, 30 So. 3d, 339 (Miss. 2010), the decedent's father initially brought suit against three different medical providers alleging various theories of medical negligence. Over two years later, the plaintiff amended his complaint to name an additional provider as a defendant. The newly added defendant filed a motion to dismiss alleging that the statute of limitations had expired. The trial court converted the defendant's motion to dismiss to a motion for summary judgment and dismissed the newly added defendant from the lawsuit. On appeal, this Court undertook a discovery rule analysis and reversed the trial court's decision. This Court reasoned that since the plaintiff diligently investigated the case, then "what the plaintiff knew and when" was a factual question to be resolved by the jury.

Throughout this litigation, Plaintiffs have diligently investigated their case but no negligence could be attributed to Tucker. When specifically asked, Plaintiff Eric Malouf testified at his deposition:

> . . . Nobody has ever - no doctor's ever said Kimberly has fetal valproate syndrome. So if that ever became an issue and if somebody told me that Dr. Tucker was negligent, then I would

consider it, but nobody has diagnosed Kimberly with fetal valproate syndrome. Nobody has said that Depakote has caused Kimberly's problems. . . . (Eric depo p. 17)

Eric further tesitifed:

Q. Mr. Malouf, who was responsible for administering the Depakote, which doctor?
A. Well, according to - of course, Dr. Fredericks was our neurologist and Dr Tucker, the - the baby doctor, as I call him, he told us that he - that was - that wasn't his responsibility, that was Dr. Fredericks' responsibility. And we had to rely on her, so my answer is Dr. Fredericks was the only one monitoring and regulating the seizure medication and the only on e that made any changes prior to hiring Dr. Tiwari.
Q. Okay. Did he [Tucker] in fact refer any question about Depakote to Dr. Fredericks?
A. If he [Tucker] had any questions about that - he made no judgment calls on Depakote, what to take, when to take it, what level - when to take a level. He made no recommendation of that at all. Any - anytime he had a question or concern, my understanding was, he called Dr. Fredericks. (R. 369, p 131, line 12 - p132, line 7)

Q. And you relied upon Dr. Fredericks to give you proper advice as to the proper levels of Depakote?
A. The entire time we solely relied on Dr. Fredericks. Early on, Dr. - after the August 14th seizure, Dr. Tucker made it clear that - that he could not treat us for epilepsy, that that was - Dr. Fredericks would do that. (R. 369, p 132, lines 17-24)

It was not until the deposition of Fredericks on November 30, 2004, that she claimed that Tucker was jointly responsible. On said date, Defendant Fredericks, who is designated as an expert in this matter, testified that she and Dr. Tucker were jointly responsible for prescribing, controlling, and maintaining the seizure medication. (Fredericks, p 89) (R. at 382). Prior to this expert testimony, Plaintiffs had been repeatedly advised by Dr. Tucker that he, as the OB, was not responsible for any aspect of the seizure medication. Instead, Tucker advised Plaintiffs that Dr. Fredericks, as the neurologist, was solely

responsible. (R. at 64, 384) Not until November 30, 2004, was it known that Tucker was jointly responsible for the failure to control the seizures, failure to properly monitor and regulate anti-seizure medications which caused or contributed to Kimberly's injuries. (R. at 64).

Moreover, Plaintiffs' claim against Tucker for lack of informed consent arose out of his failure to warn Plaintiffs of the side effects of the seizure medication. On or about November 28, 2005, Plaintiffs acquired **knowledge of this injury** – fetal valproate syndrom – and the causative relationship between the injury and Tucker's conduct. (R. at 66-69). On that date, the independent medical examiner, Duane W. Superneau, M.D., conducted genetic testing and concluded that the medication caused or contributed to Kimberly's injuries. In his report, Dr. Superneau found that Kimberly's injuries were caused or contributed to by the prescribed seizure medication. (R. at 66-69). Therefore, under the discovery rule, neither of Plaintiffs' claims against Tucker are barred by the statute of limitations.

Tucker contends that Maloufs were put on notice that Depakote caused Kimberly's injuries by Dr. Burke's medical records. (Tucker Appendix 2). However, said documents are not part of the current record and not properly before this Court. Nevertheless, Dr. Burke is a Pediatric Orthopaedic Specialist, not a neurologist. Dr. Burke's concern with the use of Depakote was solely related to the issues of Spinal Bifida, which was explained in the prior sentence of his medical records regarding a "tethered cord or diastematomyelia." (Tucker Appendix 2) Diastematomyelia is defined as " A congenital defect in which the

spinal cord is divided into halves by a bony or cartilaginous septum, often seen in spina bifida. (Citing The American Heritage® Medical Dictionary Copyright © 2007, 2004 by Houghton Mifflin Company.) Spina bifida is a well know side effect of Depakote. However, it was conclusively established that Kimberly did not have spina bifida, and it was therefore concluded by her treating physicians that Kimberly's problems were only related to the seizures during pregnancy from Fredericks' negligence, not Depakote.

Pursuant to Dr. Burke's requests, Kimberly was also seen by a pediatric neurologist, Dr. Colette Parker. Dr. Parker testified that Kimberly had several MRI's which failed to support a finding of spina bifida, but rather a finding of Periventricular Leukomalacia (PVL). (Malouf Appendix B, Parker depo p15) Dr. Parker futher opined that PVL was an "intrauterine insult...most common cause would be some sort of hypoxic event or interference with the blood flow." (Malouf Appendix B, Parker depo p21) Again, this would support a finding that Kimberly's problems were related to the seizures, not Depakote.

When asked about Dr. Superneau's finding of Fetal Valproate Syndrome, Dr. Parker agreed with said finding and testified:

> A. And I do want to say that fetal valproate syndrome is a clinical diagnosis. We often refer to may of these disorders as fetal anticonvulsant syndromes, inferring there are several minor dysmorphic features associated with developmental delays that are associated with the history of intrauterine exposure to many anticonvulsants. These dysmorphic features are <u>often very mild</u> and subtle and so often are <u>not picked up early in childhood</u>, and then **only with growth, as the dysmorphisms become more obvious, is the diagnosis made**.
> Q. And that's the reason why Dr. Superneau was able to identify it?

A. Right.
Q. As well as being related to valproic acid?
A. Right.

(Parker depo p35)

Dr. Parker testified that Dr. Superneau was the first doctor to identify fetal valproate syndrome because Kimberly's dysmorphic features were not present early in childhood. Kimberly's physicians, including Dr. Parker, could not and were not able to identify fetal valproate syndrome or depakote as being a cause of Kimberly's problems until recently. Until Dr. Superneau's report, Maloufs were never put on notice that Depakote was a cause of Kimberly's problems, and certainly never had the adequate proof now required to file a medical malpractice claim as required by statute and this Court.

Tucker incorrectly contends that this case is controlled by *Rawson v. Jones*, 816 So. 2d 367 (Miss. 2001). In *Rawson,* this Court merely held that the medical defendants were not proper fictitious parties under Miss. R. Civ. P. 9 because the plaintiff's knew their identities from the inception of their case. In the instant case, Plaintiffs' are not contending that Tucker is a fictitious party. They simply contend, after diligent search and inquiry, they had no reason to believe that Tucker was negligent until they took Fredericks' deposition on November 30, 2004 and received the IME report of November 28, 2005.

Further, Plaintiffs are barred from bringing an action against a physician unless he has been properly advised by a competent expert that the physician has breached a standard of care. The knowledge that permitted this action did not become known until Fredericks' deposition on November 30, 2004 and Dr.

Superneau's IME report on November 28, 2003.

VI. The Statute Of Repose In 15-1-36(2) Does Not Apply To Plaintiffs' Claims.

Because the subject claims arose before 1998, section 15-1-36(1) applies to Plaintiffs' claims. Said section does not contain a statute of repose. Therefore, Tucker's claims are without merit.

Alternatively, if this Court applies 15-1-36(2)'s statute of repose to claims against Tucker, then Plaintiffs' claims are still proper via the minor savings statute of 15-1-36(3) and the discovery rule of 15-1-36-(2). The savings statute tolls the statute of repose and the statute of limitations until the minor child reaches her sixth birthday. Applying 15-1-36(3) to the instant case, Kimberly was born on March 20, 1997 and the savings statute tolled the statute of limitations until on or about March 20, 2003. Additionally, the Discovery rule tolled the statute of limitations until Plaintiffs acquired knowledge of the **causative relationship between the injury and Tucker's conduct** on November 30, 2004. At which time the statute of limitations began to run. As the trial court noted, Plaintiffs' filed their Amended Complaint on May 5, 2006, well within the statute of limitations period.

VII. Plaintiffs Have Not Asserted A "Wrongful Life" Claim.

Defendant wrongfully asserts that the Plaintiffs have asserted a "wrongful

life claim." This is a misconception on the part of the Defendants and such a claim is contained nowhere in the pleadings.

The Amended Complaint in this matter alleges that on or about March 20, 1997, Plaintiff, Kristine K. Malouf, gave birth to Kimberly T. Malouf, who was born with permanent injuries and brain damage as a result of the Defendants' negligence in the prescribing, monitoring, controlling and/or regulating seizure medication given to Kristine Malouf during her pregnancy, their negligent acts in failing to provide the appropriate pre-pregnancy counseling of Plaintiffs, failing to properly warn Plaintiffs of the complications and/or effects of the seizure medication they prescribed and failing to obtain the appropriate informed consent. Additionally, the Complaint alleges that Defendants deviated from the standard of care and caused permanent injuries and brain damage to Kimberly T. Malouf.

Moreover, Tucker completely misinterprets this Court's holding in *66 Federal Credit Union, et. al, v. Tucker*, 853 So. 2d 104 (Miss. 2003). In *66 Federal Credit Union*, this Court held that "the wrongful death statute, Miss. Code Ann. § 11-7-13 (Supp. 2002), includes an unborn child that is 'quick' in the womb as a 'person.'" *Id.* at 106. This Court's holding in *66 Federal Credit Union* in no way supports Tucker's contention that Plaintiffs are somehow asserting impermissible "wrongful life" claims.

Additionally, Tucker's reliance on *Downtown Grill, Inc. v. Connell*, is misplaced. 721 So. 2d 1122. *Downtown Grill* is a malicious prosecution case that in no way supports Tucker's contention that Plaintiffs are asserting a

"wrongful life" claim. In fact, Plaintiffs have never asserted a "wrongful life" claim. Plaintiffs' claims are grounded in medical negligence and further center on the fact that the minor child, Kimberly Malouf, has suffered and will continue to suffer severe and permanent injuries and disfigurement as a direct and proximate result of the Defendants' negligence.

CONCLUSION

For the above and foregoing reasons, the Plaintiffs request that this Court affirm the trial court's denial of the Defendants' Motion for Change of Venue and Alternative Motion for Summary Judgment.

Respectfully submitted, this the 28th day of June, 2010.

C. ERIC MALOUF and KRISTINE K. MALOUF, Individually and on Behalf of KIMBERLY T. MALOUF, a Minor

BY: _____
Michael J. Malouf, Jr.

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MSB NO[redacted]
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CERTIFICATE OF SERVICE

I, Michael J. Malouf, Jr., one of the Attorneys for Appelless herein, do hereby certify that I have this day mailed, by U. S. Mail, first-class postage prepaid, a true and correct copy of the above and foregoing BRIEF OF APPELLEES C. ERIC MALOUF AND KRISTINE K. MALOUF, INDIVIDUALLY AND ON BEHALF OF KIMBERLY T. MALOUF, A MINOR to:

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Honorable Tomie T. Green
Hinds County Circuit Court Judge
P. O. Box 327
Jackson, Mississippi 39205

DATED this the 28th day of June, 2010.

Michael J. Malouf, Jr.

IN THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

C. ERIC MALOUF and KRISTINE K. MALOUF,
Individually and on Behalf of
KIMBERLY T. MALOUF, A Minor — PLAINTIFFS

VS. — NO. 251-03-77CIV

RUTH FREDERICKS, M.D. and
JOHN DOES 1 - 5 — DEFENDANTS

ORDER DENYING MOTION ORE TENUS

This cause came on to be heard on the *motion ore tenus* that the plaintiff's Amended Complaint provides a new cause of action and does not relate back to the original complaint making it subject to all aspects of tort reform enacted as it related to damages, and the Court, after hearing argument of counsel, finds that the motion is not well taken and should be denied.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the plaintiffs' Amended Complaint regarding failure to warn and lack of informed consent is not a new cause of action, but new claim in same cause and, therefore, does relate back to the original complaint, and therefore, the defendant's *motion ore tenus* is denied.

SO ORDERED AND ADJUDGED, this the 27th day of April, 2006.

Tomie Green
CIRCUIT COURT JUDGE

Presented by:

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ATTEST A TRUE COPY
APR 27 2006
BARBARA DUNN, CIRCUIT CLERK
BY _____ D.C.

EXHIBIT
tabbies "A"

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IN THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

C. ERIC MALOUF AND KRISTINE K. MALOUF, INDIVIDUALLY AND ON BEHALF OF KIMBERLY T. MALOUF, A MINOR — PLAINTIFFS

V. — NO. 251-03-77CIV

RUTH FREDERICKS, M.D. AND J. MARTIN TUCKER, M.D. — DEFENDANTS

ORAL DEPOSITION OF COLETTE PARKER, M.D.

Taken at the instance of the Defendant, Ruth Fredericks, M.D., on Friday, February 6, 2009, in the offices of Wilkins, Stephens & Tipton, 4735 Old Canton Road, Suite 108, Jackson, Mississippi, beginning at 3:10 p.m.

(Appearances noted herein)

REPORTED BY: Kelly D. Brentz, CSR, RPR
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COUNSEL FOR DEFENDANT, RUTH FREDERICKS, M.D.

ALSO PRESENT: Eric Malouf

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COLETTE PARKER, M.D.,
having first been duly sworn, was examined and testified as follows, to-wit:

EXAMINATION BY MR. HAGWOOD:

Q. For the record, please, ma'am, would you state your name?

A. Colette Parker.

Q. And you're a physician?

A. Yes.

Q. Licensed to practice in Mississippi?

A. Yes.

Q. We did not meet until just a minute ago. My name is Carl Hagwood.

A. Yes, sir.

Q. I represent Dr. Ruth Fredericks, who has been sued for medical malpractice. Whit Johnson, who is a lawyer here in Jackson, represents the codefendant in this case, Dr. Martin Tucker. I believe you probably know both of the defendants; is that correct?

A. Yes, sir.

Q. And that knowledge of them is a professional relationship, I take it?

A. Yes.

Q. It's my understanding, Dr. Parker, that you have a specialty, and that is -- you're a pediatric

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neurologist?
A. Yes.
Q. Would you define for the ladies and gentlemen of the jury what your specialty is, please?
A. As a pediatric neurologist, you see children, typically, ages two through 16 to 18, who have any type of neurologic disorders either of the central or peripheral nervous system.
Q. And I take it, just very briefly, that first you went to medical school, then you specialized in neurology and then subspecialized in pediatric neurology?
A. Very close.
Q. Okay.
A. I initially entered into a pediatric residency, then completed a neurology fellowship, and, in fact, in addition, did a three-year neurometabolic fellowship.
Q. The purpose of the deposition here today is to ask you some questions about one of your patients, Kimberly Malouf.
A. Yes.
MR. HAGWOOD: And what I would like to do is have marked, first, as Exhibit 1, the report of the plaintiff's expert, Dr. Patricia Ellison.
(Exhibit 1 marked for identification and attached hereto.)

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Q. (By Mr. Hagwood) I hand this to you, Doctor, not necessarily for you to read it, but simply to give you some background as to why your deposition is being taken.
Dr. Patricia Ellison was designated as an expert witness by Eric and Krista Malouf against Dr. Fredericks, and in her report, which goes on for a number of pages, concluded that Dr. Fredericks breached the standard of care of a minimally competent neurologist by failing to prescribe sufficient Depakote to prevent seizures in Krista Malouf and the failure to do so resulted in brain damage to this infant child that you have seen.
The plaintiffs then hired additional an expert witness -- I hand this to the court reporter --
MR. MALOUF: I'm going to make an objection with regard to the last report. I think we have objected continually throughout these depositions with regard to this expert being withdrawn, but I'm going to continue my objections with regard to any reference to Dr. Ellison.
(Exhibit 2 marked for identification and attached hereto.)
Q. (By Mr. Hagwood) I hand you now what's been marked as Exhibit No. 2. After having Dr. Ellison

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designated in which she opined that Dr. Ruth Fredericks breached the standard of care in not prescribing sufficient Depakote --
MR. MALOUF: Object to the form.
Q. (By Mr. Hagwood) -- to treat seizures --
MR. MALOUF: Same objection.
Q. (By Mr. Hagwood) -- the plaintiffs hired a Dr. John David Sabow, who is a neurologist from Rapid City South, Dakota. That's Exhibit 2. He gave the opinion that Dr. Fredericks was negligent for having prescribed Depakote during the pregnancy.
So I wanted you to be aware that the plaintiffs had one expert who testified that Dr. Fredericks did not prescribe sufficient Depakote --
MR. MALOUF: I'm going -- Carl, I'm going to continue to object. You can ask her whether -- she is a fact witness here. You can ask her with regard to facts, but to give her a synopsis of the case and your opinions of the case is not proper at this position, and the facts you're giving are not accurate.
MR. HAGWOOD: Eric, if you interrupt me one more time --
MR. MALOUF: It will be Mike.
MR. HAGWOOD: Mike, I'm sorry. I'm going to

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get angry. Now, you must do -- follow decorum in this deposition. I will not interrupt. You will not interrupt me. If you have an objection to state, wait until I finish my question. I will let you then state your objection. But you're not going to interfupt me one more time. Thank you.
MR. MALOUF: May I state on the record, are you tendering her as your expert in this matter?
MR. HAGWOOD: She is a fact witness whose deposition I'm taking in connection with the treatment of this child.
MR. MALOUF: Okay. So you're going to ask her questions regarding the facts of this case --
MR. HAGWOOD: I am --
MR. MALOUF: -- regarding the treatment of Kimberly and Krista?
MR. HAGWOOD: That is my intention.
MR. MALOUF: Okay.
Q. (By Mr. Hagwood) So, anyway, Doctor, going back, I wanted you to know why your deposition was being taken.
A. Okay.
Q. And so I am representing Dr. Ruth Fredericks, and the plaintiffs first had an expert witness whose opinion was --

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MR. MALOUF: Same objection.
Q. (By Mr. Hagwood) -- that the -- Dr. Fredericks breached the standard of care by not prescribing sufficient Depakote. Then they hired an expert witness who said that she should not have prescribed any Depakote.
A. Okay.
Q. Dr. Martin Tucker, as you know, is a high-risk obstetrician. He was brought into the lawsuit because Dr. Fredericks consulted with Dr. Tucker concerning -- or actually referred Krista Malouf to Dr. Martin Tucker for preconception counseling because she was on Depakote --
MR. MALOUF: Continuing objection to the form and to the narration.
Q. (By Mr. Hagwood) Having set that stage, I wanted you to understand who the players were and why.
Going back, it's my understanding that you have a patient, Kimberly Malouf, the daughter of Eric and Krista Malouf, as your patient; correct?
A. Yes.
Q. We had subpoenaed your records and obtained a copy of them, and I have a series of questions to ask you about what's in your records in your treatment.
(Exhibit 3 marked for identification and attached hereto.)

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Q. (By Mr. Hagwood) Exhibit 3 is a letter that you wrote to Dr. Les Jones, who I understand is the child's pediatrician. If you'll look at that letter, I believe that this is a report to Dr. Les Jones concerning your initial encounter with this child; is that correct?
A. Yes.
Q. At this point in time, according to your letter, which has been marked as Exhibit 3 -- make sure I got the right letter -- yes, that's correct -- the child was 19 months old. Did you need Exhibit 3?
MR. MALOUF: Yeah, 2 as well.
MR. HAGWOOD: Wait one second. I'm sorry, look at this one. I don't know -- we will have to give that back to the court reporter.
Q. (By Mr. Hagwood) This is your initial examination and report to Dr. Les Jones, and she was -- Kimberly was 19 months old at that time; is that correct?
A. Yes.
MR. HAGWOOD: Here you go. I found it, if you will let me have that one back so I can give it to the court reporter.
MR. MALOUF: (Complied.)
Q. (By Mr. Hagwood) Doctor, in this visit, you documented the fact that Kimberly, the young child, at that time was 19 months old and that the history given to

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you by her mother and father was that the pregnancy was complicated by maternal epilepsy, which was treated with Depakote during all trimesters; is that correct?
A. Yes, sir.
Q. And that the seizures were difficult to control and she suffered at least seven events during the first two trimesters; correct?
A. Yes.
Q. Did you have any record as to the number of seizures in the third trimester?
A. No -- I do not recall.
Q. Okay. Very briefly, without reading the letter -- the letter is in evidence -- would you just give us kind of a capsule summary as to what you found in this 19-month-old child so far as her neurological condition is concerned? I should have narrowed that down.
A. Yes, sir. Well, in general, her growth had been good. Her growth parameters, as you see, were all near the 95th percentile. She was alert and interactive, but was mildly developmentally delayed. She -- her gait particularly was slightly delayed or mildly delayed for age.
Q. What was your impression, please?
A. At this point, that there was mild nonspecific

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developmental delay, primarily from a motor standpoint.
Q. On the last page of your report, you commented that if she was not walking well at the next visit, you would consider a further workup, and in particular, possible MRI of the spine in view of her intrauterine exposure to Depakote; is that correct?
A. Yes.
Q. Now, as I understand it, the reason that you would be wanting an MRI of the spine would be to look for neudal (sic) tube defects?
A. Neural tube defects.
Q. Neural tube, I'm sorry, I butchered that pretty good.
A. Yes.
Q. In other words, for us that -- we would use the term probably "spinal bifida" to describe that type of defect; correct?
A. Yes.
Q. I assume at this point in time, you discussed with the parents why you might want an MRI of the spine?
A. I'm sure I did. I have no specific recollection.
Q. Right. But you certainly passed that on to Dr. Les Jones, who is the child's pediatrician?
A. Yes.

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Q. They did inform you that she had taken Depakote -- the mother had taken Depakote during the pregnancy?
A. Yes, that was documented on page 1.
Q. All right. And then so over here on page 3, you're documenting the fact that you might need to take an MRI of the spine to determine if there was a defect in the spine associated with taking Depakote; is that right?
A. Yes.
Q. I hand you now what's been marked as --
MR. HAGWOOD: Can we go off the record for a minute?
(Pause.)
Q. Now, then, did I hand you Exhibit 4?
A. No sir.
(Exhibit 4 marked for identification and attached hereto.)
Q. Exhibit 4 is a letter dated February 8, 1999, which is your second time that you saw Kimberly Malouf, then; correct?
A. Yes.
Q. At this point in time, the child is now 22 months old, and you performed another examination; is that right?
A. Yes.
Q. Very briefly, would you tell us what you found

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at this time insofar as any neurological signs and symptoms are concerned? And take your time and read that, and you can summarize it for us, if you would like.
(Pause.)
A. At this point, her exam was more consistent with a global hypotonia or looseness of her motor examination. She also was exhibiting some delay of language acquisition, and, therefore, we term that a global developmental delay, meaning in regards to both motor and cognitive milestones.
She had made some progression, but there was concern at this point that she was not progressing as we had hoped, and because of that, I referred her for an MRI of the brain.
Q. And the reason to get the MRI of the brain was to determine whether or not there was any -- what I would understand would be pathology for her developmental delay?
A. Correct, any structural abnormalities.
Q. And you made reference in your letter here that you were doing this, in part, because of the mother's use of Depakote during the pregnancy?
A. Yes.
Q. And, again, I assume, once again, that you would have discussed this with the parents?

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A. I assume so, yes.
Q. You would have discussed what was in your letter with them and what your findings were; correct?
A. Yes.
Q. And you would assume, even though this has now been – gosh, it was 1999?
A. Ten years ago.
Q. Some -- several years ago?
A. Yes.
Q. And you're relying upon your memory, but in the ordinary course of events, you would have discussed Depakote and its relationship to possible involvement with the child's developmental delay?
A. Yes.
Q. Okay.
(Exhibit 5 marked for identification and attached hereto.)
Q. Now, the next exhibit I have is Exhibit 5, which is a letter dated April 8th of 1999, to whom it may concern; correct?
A. Yes.
Q. This particular letter documents that an MRI was performed and revealed periventricular leukomalacia; correct?
A. Yes.

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Q. Or to help me with my inability to pronounce some of the terms, PVL?
A. Yes.
Q. Is that acceptable?
A. Yes.
(Exhibit 6 marked for identification and attached hereto.)
Q. And I would like to stop for just a moment because I have marked as the next exhibit -- as Exhibit 6, the actual MRI report, and would you explain to the ladies and gentlemen of the jury what Exhibit 6 is?
A. Exhibit 6 is the MRI interpretation -- MRI brain interpretation by Dr. Dhillon, who was our neuroradiologist at the time.
Q. And he concluded that this child had periventricular leukomalacia or PVL?
A. Yes.
Q. And would you explain to us, please, now referring back to Exhibit 5, which is your letter of April 8th of 1999, that this was felt -- this condition was felt secondary to an intrauterine insult; correct?
A. Yes.
Q. Now, it is my understanding, Dr. Parker, that this condition, this PVL, has to do with a condition that's going to sound foreign to the ladies and gentlemen

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of the jury, but I'm sure you can explain it to us. A -- it has to do with --

MR. MALOUF: Objection --

Q. (By Mr. Hagwood) -- migration of cells --

MR. MALOUF: I'm going to object to leading. You can ask her to explain, but I'm not going to have you explain it to her.

MR. HAGWOOD: Okay.

Q. (By Mr. Hagwood) It has to do with a defect in the migration of cells during the gestational period; is that a fair summary? If not explain, it to me.

A. Periventricular leukomalacia, let's look at the words, first of all. "Periventricular" just means around the ventricles. "Leukomalacia" means abnormality of the white matter. And the white matter are those cells that are surrounded by myelin. Now, when you have leukomalacia, you have an abnormality of that white matter.

Q. All right. And the -- as I understand it, this is a condition that would develop intrauterine after a certain period of time. What period of time might that be?

A. Well, it will develop in the -- let me start over.

Q. Sure.

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A. Whenever you see a scan at one point in time that shows an abnormality, it is very obvious that the insult or the malformation was present before that scan was obtained.

Q. Uh-huh.

A. It's sometimes very difficult to put a definitive time on that. And please restate your question.

Q. All right.

A. I'm sorry.

Q. I was trying to speed things along. It's my understanding that this PVL condition is thought to develop at a time when the brain of the infant is being developed in the womb; is that correct?

A. Yes, it is correct. Now, can periventricular leukomalacia occur from a postnatal insult? The answer to that is yes as well.

Q. Yes, ma'am. That was the next question I was going to ask.

MR. MALOUF: I'm going --

A. So it can either be intrauterine or postnatal.

Q. (By Mr. Hagwood) Right.

MR. MALOUF: I'm going to stick to my objection to the continuing leading. You can ask her questions, but for you to continue to lead this witness is improper.

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Q. (By Mr. Hagwood) So let's go back for just a moment. If the insult occurs in utero; correct? Let's make that assumption.

A. Okay.

Q. It occurs in utero. It's only going to occur at a point in time when these cells have matured and start the process of developing; is that correct?

A. That's correct.

Q. And that occurs at what time?

A. It would be towards the middle to latter part of pregnancy.

Q. Right. That was my point. And that would --

A. Okay.

Q. -- be like at the 26th week forward; is that a fair?

A. I think that's fair.

Q. Okay. So if it occurred in utero, it would have occurred from the point in time from the 26th week of gestation to the end of pregnancy?

A. Or 20-something.

Q. Right. And also you said it could have occurred, for example -- and that 20-something week would be commonly referred to as the third trimester?

A. Well, middle of the second on to the end.

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Q. To the end, all right. Now, you also mentioned that it could have, for example, happened at birth --

A. Yes.

Q. -- correct? And, for example, if the child has meconium staining and has a hypoxic event at birth, that could cause this?

A. A hypoxic event can result in --

Q. Right. And one of those evidences of a hypoxic event occurring at birth can result from meconium inhalation; correct?

A. From meconium, yes, aspiration.

Q. Aspiration?

A. Yes, sir.

Q. Okay. Then you also said it could occur after birth, and, for example, it has been reported in instances involving premature births, for example, and children are on ventilators and on oxygen support; correct?

A. Yes.

Q. All right. Now, in this particular case --

MR. MALOUF: I'm going to state my continuing objection to eliciting expert testimony from a fact witness.

Q. (By Mr. Hagwood) I go back now to your Exhibit 5 in which you -- in the letter of April 8th of 1999, you

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stated that the MRI has revealed periventricular leukomalacia felt to be secondary to an intrauterine insult?
A. Yes.
Q. And that was your opinion at that time; correct?
A. Yes.
Q. And just so that we are on the same page here, an intrauterine insult would have occurred during gestation when the infant was in the mother's womb?
A. Correct.
Q. Okay. In connection with PVL, the -- as I understand it, the most common cause would be some sort of hypoxic event or interference with the blood flow during this period of time in the 20-something week forward is that --
A. Yes.
Q. If it's an intrauterine insult?
A. (Nodded.)
Q. Is that correct?
A. Correct.
Q. And is that what you felt occurred in this case?
A. I felt at this point, that perhaps had happened. I do want to state that periventricular

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leukomalacia can be a nonspecific finding.
Q. Okay.
A. At times, we see this and are not able to explain what causes it.
Q. Okay.
A. With the history I had at this time and physical findings, that was my impression.
Q. Okay. And, once again, the cause -- the most common cause, as I mentioned earlier, as I understand it is --
A. Hypoxic ischemic event.
Q. Hypoxic ischemic event.
(Exhibit 7 marked for identification and attached hereto.)
Q. And going now to Exhibit 7, which is the next letter, this is a letter of April 26, 1999. If you would take a moment to read that, I'm just going to ask you to give us what the status of the child was as of this date.
(Pause.)
A. At this point, she has -- I believe during these two visits, she had been enrolled in early intervention services and had responded. Her gait had improved, partly from stabilization in ankle AFOs, which are ankle braces. She was more interactive during our visit, but still was a bit behind, and I don't mention

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tone. So my general impression would still be that of mild developmental delay --
Q. Okay.
A. -- with continued improvement.
Q. Next -- I'm just going through all of your reports, Doctor.
A. Thank you.
(Exhibit 8 marked for identification and attached hereto.)
Q. I have as Exhibit 8 the next report that is generated by you. Once again, this is a letter, to whom it may concern, documenting the fact that at this point in time, she continues to have the diagnosis of PVL and that she's having development -- global developmental delay; is that accurate?
A. Correct.
Q. Okay.
(Exhibit 9 marked for identification and attached hereto.)
Q. The next report I have, Doctor, is marked as Exhibit 9, which is a report of September 27, 1999, and take just a moment, if you would, and I'm going to ask you some very basic questions about this letter.
(Pause.)
A. Okay.

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Q. Just so, Doctor, you will know, going back to the conversations that you had with the parents in this case, we took the deposition of the mother, Krista Malouf. And in her deposition --
MR. MALOUF: I'm going to object.
Q. (By Mr. Hagwood) -- I asked her the question --
MR. MALOUF: Stop, Carl --
MR. HAGWOOD: Don't interrupt me, Mike. Okay? Don't interrupt me. I'm going to ask my question and then you can state your objection.
Q. (By Mr. Hagwood) I took the deposition of Krista Malouf, Doctor, and in the deposition --
MR. MALOUF: Note my objection now to form.
Q. (By Mr. Hagwood) -- I asked her about what conversations you had had with her concerning this condition, PVL, or periventricular leukomalacia. I asked her that question.
And in the deposition, I wanted you to be aware of the fact -- and I want to see if this is consistent with your memory of what you told the mother.
MR. MALOUF: I'm going to object before you state that, Carl. Why don't you ask her what her memory is before you tell her what it should be?
MR. HAGWOOD: Okay. No, I will take the

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deposition the way I would like.
MR. MALOUF: I'm going to have a continuing objection.
MR. HAGWOOD: And you can object.
Q. (By Mr. Hagwood) I asked the mother, Krista Malouf, as to what she knew about the condition and who she learned it from, and I asked her the question, and the mother said that, "It was hypoxic brain injury is what I was told." I questioned, "Who told you that?" Answer, "Her neurologist, Dr. Colette Parker."
So I wanted you to be aware of the fact that the mother's memory of what you told her was it was hypoxic brain injury. Would that be consistent with your discussions with her?
A. I have no specific recollection of these conversations. I must go on the medical records that are available today to review.
Q. All right. Going back now to your letter of September 27th, what -- very briefly, would you tell us what the condition of Kimberly was at this time?
A. She was continuing to improve. There still is some mild delay and still some mild hypotonia.
Q. And just for the ladies and gentlemen of the jury, the hypotonia, would you define that for us, please?

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A. It's decreased tone, and the best word to describe hypotonia would be floppiness or extra looseness.
Q. In her movements?
A. In movements, correct.
(Exhibit 10 marked for identification and attached hereto.)
Q. The next report is Exhibit 10, which is a letter dated March 13th of 2000. And Kimberly is now three years old, and in this, you note that she's made great strides over the last several months.
Would you very briefly look at this and give us a synopsis of what her condition was on this date?
A. Yes. Again, continued improvement. I was pleased with her progress at this point, albeit noting still some mild delays.
Q. All right.
(Exhibit 11 marked for identification and attached hereto.)
Q. Next is Exhibit 11, which is your letter of September 11th of 2000. Take just a moment and I'm going to ask you how this child was on this date.
(Pause.)
A. Again, she does seem to be responding to her intervention services. She was more interactive. Her

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gait was stable. She was -- had progressed to walking upstairs with alternating feet. She was able to move quickly, was not running but was galloping at this point.
Q. And that would be an improvement over the prior visit?
A. Yes.
Q. Okay.
A. And her gait was also steadier here.
(Exhibit 12 marked for identification and attached hereto.)
Q. Then the next visit, which has been marked as Exhibit 12, is that of June 11 of 2001. Take just a moment and, once again, I'm going to ask you kind of to summarize what that tells us.
(Pause.)
A. Again, there had been some improvement, particularly in regards to speech. I was now able to understand most of her spoken language. Still, there was a decrease in tone, but primarily in the trunk area, and that should be "axially" instead of "axillarly."
Q. That's quite all right.
A. She had improved in regards to fine motor skills as well as documented by drawing certain figures in my office.
Q. Does this document continued improvement --

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A. Yes.
Q. -- in this child?
A. Yes.
(Exhibit 13 marked for identification and attached hereto.)
Q. Next, Doctor, I hand you -- I believe this to be your last report. It's Exhibit 13. Take just a moment to look at that and I have a couple of questions to ask.
(Pause.)
A. Okay.
Q. First of all, Doctor is this the last time you have seen the child? This is the last record I have anyway.
A. Yes.
Q. Okay.
A. This is our last visit.
Q. Had you asked the parents to return the infant -- or this young child to you after this visit or do you remember?
A. I did not. She was, at this point, in a very appropriate school setting and appeared to be doing well. And if I recall correctly, I believe I said, "Please call me if there are any factors that arise for which you feel I might be helpful."

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Q. Had she shown continued progress since the prior visit of June 11, 2001?
A. Sure. Of course, that had been five and a half years ago and there had been, of course, improvement and progression since that time.
Q. All right. Doctor, if you return to the last -- second page of your letter, down under the plan, you mentioned here that you had a plan.
Would you explain to us what your plan was and whether or not there was any referral here of the mother to a geneticist?
A. Okay. I did not refer the family to a geneticist. I do work with one very closely that I know well, and I did go back and check my records. I did speak with one of our geneticists in regards to my concern of the -- in reviewing fetal valproate syndrome or intrauterine exposure to valproic acid, I had ran across one reference that suggested there may be an increase incidence of fetal and subsequent neonatal problems if the mother had an MTHFR mutation --
Q. Okay.
A. -- the methylenetetrahydrofolate reductase gene. And I spoke with our geneticist in regards to Kimberly's case, and he did not recommend further evaluation unless there had been difficulty with

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recurrent miscarriages or with recurrent -- other recurrent episodes suggestive of a hypocoagulable state such as recurrent DTVs, deep venous thrombosis, pulmonary emboli, et cetera.
And I do have documentation that I spoke with Ms. Malouf after speaking with our geneticist and asked her if there was any family history of that, hypocoagulable states, and she reported that there was not in the family of which she was aware on her side, and he did not recommend any further evaluation at this point. There was no need for further genetic eval. as Ms. Malouf had already had her tubes tied.
Q. All right.
A. So there was not a question about further pregnancies.
Q. But had there been a question of further pregnancies, that might have been something worth considering?
A. Sure. But we want to be practical.
Q. All right. If you will give me just one second, I may be through, but I want to talk to my partner here for a second.
(Pause.)
Q. Dr. Parker, the ultimate memory test; I know that this -- your examination of this child goes back now

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a number of years ago.
A. Yes, sir.
Q. I have asked you to look at these reports, which you have done for us. In going through these reports and examining these records, do you have any specific recollection of conversations with these parents about this child's condition, and if so, would you share those with us?
A. I must admit that I do not have any recollection of specific conversations. I am relying on the medical records --
Q. All right. That's fair.
A. -- for my memory.
Q. Right. Well, sometimes, for whatever reason, we do have recollections. The reason I was asking, if you did, I wanted you to share it with us. If you're relying upon the records, that is fine, too. I just wanted to know the basis for your testimony here today, and you have given that to us.
MR. HAGWOOD: At this point, I have no further questions and I appreciate this, and Mr. Malouf may have some.
MR. MALOUF: Yeah, we're going to have a few questions. Can you give me about two or three minutes to go over my notes?

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MR. HAGWOOD: Sure.
(Pause.)
EXAMINATION BY MR. MALOUF:
Q. Dr. Parker, I'm Mike Malouf, Jr., and I represent the plaintiffs in this action. Throughout going through your notes, I noticed several times you have stated in there that Kimberly was continuing to improve. I guess you will admit that Kimberly has undergone a substantial amount of rehabilitation?
A. Yes.
Q. And can you explain some of the type of rehabilitation that you recall?
A. Sure. Early on, I mostly recall -- I would have to review my notes, but somewhere around a year and a half to two, we did begin multidisciplinary early intervention services. That would include, if I remember correctly, physical therapy, occupational therapy and speech therapy.
Q. And --
A. And that was continued for several years until she -- and then, ultimately, she entered into Magnolia Speech School, which is a private school in this city that addresses primarily global language disorders.
Q. Okay. And the last time I believe you have seen Kimberly was in 2007?

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A. Yes, sir.
Q. Okay. And she continued to progress somewhat?
A. Yes.
Q. Okay. I just want to make sure the jury does not understand that you're saying that at that time, she was 100 percent well or equal with her peers at that time?
A. Right. There still were some impairments as reflected in the WISC-IV that I had the opportunity to review that did reflect a full-scale IQ of 74, which is considered borderline below average.
Q. Okay. And does that type of IQ place limitations on a person such as Kimberly in the work force or in society?
A. Well, an IQ of 74, again, plus or minus a few points is definitely in the borderline range, and it is definitely compatible with employment in the future, and -- state your question one more time.
Q. Were you able to observe her socially?
A. I was. Again, relying on my notes, she was a bit shy and anxious, and as not terribly unusual for a shy and anxious child, left the doctor's office, which can be scary, a few times to go to the rest room.
But in general, did have fair eye contact; I do not recall her language interactions.

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Q. And when we were going through some of your notes, I believe -- one of the exhibits, we had talked about an intrauterine insult related to PVL, and at that time, you said you based it on the history. Was that history primarily dealing with the seizures that she had had -- numerous seizures in her first and second trimester?
A. Well, if I may say, it was just due to all the history --
Q. Okay.
A. -- that I received, including both the history of maternal epilepsy and -- well, primarily the history of maternal epilepsy.
Q. Did you understand that they had had several seizures during the pregnancy that they were concerned about?
A. Yes.
Q. Okay. Did they express some of their concerns about Dr. Fredericks' treatment at that time?
A. I do not recall specific -- I do not recall specifically that being brought up.
Q. Okay. And I see in your last report, there was a mention of Dr. Superneau's report?
A. Yes.
Q. And I think he identified fetal valproate

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syndrome?
A. Yes.
Q. Do you agree with that assessment?
A. Yes.
Q. And that diagnosis had not been made prior to --
A. Right.
Q. -- Dr. Superneau's --
A. Correct.
Q. -- report?
A. And I do want to say that fetal valproate syndrome is a clinical diagnosis. We often refer to many of these disorders as fetal anticonvulsant syndromes, inferring there are several minor dysmorphic features associated with developmental delays that are associated with the history of intrauterine exposure to many anticonvulsants. These dysmorphic features are often very mild and subtle and so often are not picked up early in childhood, and then only with growth, as the dysmorphisms become more obvious, is the diagnosis made.
Q. And that's the reason why Dr. Superneau was able to identify it?
A. Right.
Q. As well as being related to valproic acid?
A. Right.

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Q. And it states in here that you had run across an article regarding the mutation of the maternal gene, and I think you testified earlier you are not seeking at this time for any type of genetic testing or any type of further investigation regarding that?
A. No, I, to be honest, did not know the significance of that association, and then just sought more information from our geneticist who did not feel like it warranted further eval.
MR. MALOUF: That's all I have. Thank you.
FURTHER EXAMINATION BY MR. HAGWOOD:
Q. Doctor, a follow-up question or two. In response to a question that Mr. Malouf asked you, he asked you about a syndrome called fetal valproate syndrome; correct?
A. Yes.
Q. As I understand, it fetal valproate syndrome is a term that's only recently come into use in connection with women who take Depakote during pregnancy and their children are exposed to valproic acid; is that correct?
A. Yes, it was originally described in the mid-'80s.
Q. Okay.
A. Questions were originally raised at that point about the association of intrauterine exposure to many

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anti-epileptic drugs, in particular, Depakote --
Q. Right.
A. -- or valproic acid.
Q. But as I understood the term, "fetal valproic acid syndrome" --
A. Yes.
Q. -- that only came recently --
A. Yes.
Q. -- into use?
A. Correct, correct.
Q. Okay. And then you said that many neurologists -- you didn't use that term, but -- let me restate my question.
A. Yes.
Q. Also used another term to describe these children in general, and would you tell us that again?
A. Fetal anticonvulsant syndrome.
Q. And would you explain to the jury what you mean by that?
A. Many of the medications used to treat epilepsy that occurs in pregnancy or seizures in pregnancy have been associated with dysmorphism --
Q. Right.
A. -- and you're either a lumper or a splitter, if you will. Very often individuals will, in speaking about

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anticonvulsants in general, particularly many of our other anticonvulsants such as phenytoin, phenobarbital, valproic acid, will refer to that as one.
Q. Right. I think I understood, but would you explain that a little bit further for us?
A. For many years, we have questioned the relationship between intrauterine exposure to anti-epileptics or anticonvulsants, antiseizure medications, and the effect they may have on the fetus and subsequent neonate.
Q. Okay.
A. And we know that there are associations between certain medications and mild dysmorphisms or abnormal features.
Now, we also know that there is a lot of literature available preceding 1940, when we did not have anti-epileptics, looking at mothers who were epileptics and their neonates, and there is an increased risk already of dysmorphism, even without anticonvulsants.
Q. Right. In other words, those studies indicate that --
A. So --
Q. -- mothers who are simply epileptics have --
A. Yes.
Q. -- babies that have these same symptoms?

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A. That have many of the same symptoms. And it's extremely hard to draw a one-to-one corollary between what medication is given and what happens in the neonate.
Q. Right. In other words, a woman who takes Depakote or another anticonvulsant medication may have a child with these syndromes and you cannot differentiate whether it's the medicine or the epilepsy that causes it?
A. Exactly right.
Q. Okay. Now, in -- this baby was conceived in the spring of 1995 -- do I have the right year? I think I do -- 1995. Does this document, if you will take a quick look at that, fairly document what was known, generally speaking, about taking Depakote and other anticonvulsants -- just take a brief look at it -- at that point in time?
MR. MALOUF: Object to the form and also object to improper redirect.
(Pause.)
A. In a very brief --
Q. (By Mr. Hagwood) Certainly.
A. -- view, yes.
Q. Right. That's a textbook article that Dr. Martin Tucker has testified under oath that he gave the Maloufs prior to their conceiving this infant, and that was the reason I wanted to show it to you as to

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whether or not that, in looking at that briefly in your examination, documents what was known about --
A. Right.
Q. -- these drugs at that time?
A. Right, right. Okay.
Q. Okay.
MR. HAGWOOD: Let's mark that as the next exhibit to this deposition, please. It's not been premarked.
(Exhibit 14 marked for identification and attached hereto.)
MR. HAGWOOD: Thank you, Doctor. I don't have any more questions. This will be off the record.
(A discussion was held off the record.)
MR. MALOUF: One follow-up question.
FURTHER EXAMINATION BY MR. MALOUF:
Q. Have you read that article before?
A. I have not that specific one.
Q. Okay. And you have not read it now. You just briefly looked?
A. Right.
Q. That's all I have.
MR. HAGWOOD: Thank you, Doctor.
THE REPORTER: Mr. Malouf, do you want a copy

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of this?
MR. MALOUF: Not at this time.
(Deposition concluded at 4:05 p.m.)

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CERTIFICATE OF COURT REPORTER

I, Kelly D. Brentz, Court Reporter and Notary Public in and for the County of Madison, State of Mississippi, do hereby certify that the foregoing 41 pages, and including this page, contain a true and accurate transcription of the testimony of Colette Parker, M.D., as taken by me in the aforementioned matter at the time and place heretofore stated, by stenotype and later reduced to typewritten form under my supervision by means of computer-aided transcription.

I further certify that under the authority vested in me by the State of Mississippi that the witness was placed under oath by me to truthfully answer all questions in this matter.

I further certify that I am not in the employ of or related to any counsel or party in this matter and have no interest, monetary or otherwise, in the final outcome of this proceeding.

Witness my signature and seal this the 9th day of February 2009.

KELLY D. BRENTZ, CSR #1518

My Commission Expires: February 1, 2011

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2009-M-00615

IN RE: RUTH FREDERICKS, M.D.

TRIAL COURT'S RESPONSE TO WRIT OF MANDAMUS

This matter is before the Court as the result of a Writ of Mandamus filed by Defendant Ruth Fredericks, M.D. seeking extraordinary relief from the Mississippi Supreme Court to mandate the trial court's ruling on a Motion for Transfer of Venue filed by Martin Tucker, M.D. While Dr. Fredericks joined Defendant Martin Tucker in the venue motion, she merely adopted Dr. Tucker's assertion. Defendant Tucker did not timely scheduled or noticed the 2006 motion for hearing before the trial court for nearly three (3) years. By order, the Mississippi Supreme Court seeks the trial court's response to Defendant Frederick's Writ of Mandamus which for a second time in two (2) months seeks to stay the trial set for August 10, 2009. The Court responds as follows:

Preliminarily, the undersigned trial judge responds that there has been no intentional "refusal" by the trial court to rule on Defendant Martin Tucker's Motion for Transfer of Venue as alluded to by the Defendant Ruth Fredericks. Secondly, Defendant Martin Tucker, M.D. who initially filed the venue motion in 2006 has not initiated nor joined in this Writ of Mandamus. Moreover, it is undisputed that Defendant Fredericks' office and St. Dominic Hospital where prescribed treatment was provided are in Hinds County, and Dr. Ruth Fredericks lives in Hinds County. Thus, it is questionable whether Defendant Fredericks may pursue the herein Writ by piggy back or on behalf of Defendant Tucker.

While trial judges attempt to timely resolve matters properly brought to its attention by motion, from time to time there are a number of matters that preclude a court's ruling on a party's motion after it is filed. In the case before this Honorable Court Defendants Tucker and Fredericks' failure to properly seek a hearing on their 2006 venue motion and never advising the court of the pendency of the venue motion for nearly three(3) years. The only record of an attempt at renewing the abandoned motion came February 19, 2009, after the time for dispositive motions had lapsed (see Amended Scheduling 1Order - Exhibit 2) and only two (2) weeks before a scheduled April 6, 2009 trial date (See composite Exhibit 4).

The undersigned trial judge is obliged to have the opportunity to accurately state the facts which preceded the filing of Defendant Frederick's Writ of Mandamus.

This is a medical malpractice case which was filed on December 31, 2002 against Dr. Ruth Fredericks and John Does 1-10. In a nut shell, Plaintiffs claimed that Dr. Ruth Fredericks, prior to Plaintiff Kristine Malouf becoming pregnant, negligently prescribed seizure medication that eventually resulted in Plaintiffs Kristine and Eric Malouf's daughter

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1 Contrary to Defendant Fredericks' contentions, Section 11-11-3, Miss. Code Ann. (1972), as it existed for cases filed in 2002, is applicable to this case. See Austin vs. Well, 919 So.2d. 961, 964 (Miss. 2006); Wayne General Hospital vs. Hayes, 868 So.2d 997 (Miss.2004). (proper venue is determined when the lawsuit is originally filed.)

In 2002, Section 11-11-3, Miss. Code Ann. (1972) provided: "Civil action of which the circuit court has jurisdiction shall be commenced in the county where the defendant resides or where the alleged act or omission occurred or where the event that caused the injury occurred...."

Plaintiffs Malouf's suit was filed December 31, 2002, prior to the effective date for the January 1, 2003 and January 1, 2004 amendments to Section 11-11-3, Miss. Ann. Code (1972) that state that medical malpractice actions "shall be brought only in the county in which the alleged act or omission occurred."

Kimberly being born with a developmental disability. Active discovery was conducted for nearly three (3) years. Dr. Fredericks never filed a Motion to Transfer Venue during the nearly three (3) year period.

On May 5, 2006, Plaintiffs amended their complaint to add Plaintiffs' obstetrician, Dr. Martin Tucker, M.D. as a Defendant. Plaintiffs allege that Dr. Tucker negligently provided pre-pregnancy counseling, failed to obtain informed consent and failed to warn of the complications and effects of the seizure medication. Plaintiffs allege that such failures proximately cause or contributed of the Plaintiffs' child being born with a developmental disability.

On May 23, 2006, Dr. Fredrick filed an interlocutory appeal from the trial court's denial of a motion for summary judgment. The Supreme Court dismissed the appeal on June 16, 2006. This was the first of three (3) interim appeals that have been before the Supreme Court in this case, without the parties ever raising the issue of venue. In all fairness, it should be noted that Dr. Tucker was not privy to the first appeal because he had only been a Defendant in the case some two (2) weeks.

After service of the amended complaint against him, Dr. Martin Tucker filed a Motion to Transfer Venue from Hinds to Rankin County on June 5, 2006. Dr. Tucker's Transfer of Venue motion was joined by Dr. Fredericks. The general practice in 2002 required that after a defendant filed a motion he would obtain a hearing date from the court administrator and give notice of the same to all parties in the action. The undersigned judge has no independent recollection of a hearing on the matter.

Needless to say, neither Defendant Tucker nor Defendant Fredericks ever communicated with the court about a hearing on the Motion for Transfer of Venue until some three(3) years later on February 20, 2009, barely two(2) weeks before the parties' April 6, 2009 trial date. Various motions were heard by the trial court, discovery and depositions were conducted by the parties and at least three (3) trial dates were set over the next three (3) years (Exhibit 5 – Case Docket).

Unfortunately, Defendant's April 6, 2009 trial date was preempted by the court's ongoing criminal cases. Due to the age of the herein case, the Court immediately referred the case to mediation (as it customarily does when a case is bumped) and rescheduled the case for a new trial date on August 10, 2009, in case mediation failed. Defendants objected to mediation and the trial court decided to set aside its Order of Mediation.

On April 17, 2009 Defendants filed a second appeal to the Supreme Court by way of a Writ of Mandamus on April 17, 2009, seeking to stay the August 10, 2009 trial date. The Supreme Court dismissed the Writ, paving the way to trial. No issue of improper venue was raised by the Defendants in their April 2009 Writ of Mandamus to the Supreme Court.

The trial court began and completed a six (6) week civil term on June 12, 2009, unaware of any urgency regarding a hearing on Defendants' attempt at renewal of their 2006 Transfer of Venue motion. On July 2, 2009, Defendant Frederick filed the herein Writ of Mandamus and Stay of trial alleging that the trial court refused to rule on their motion.

Suffice it to say that the parties have appeared, noticed hearings and come before the trial court on many matters since Defendants Tucker filed their 2006 Motion for Transfer of Venue. Each Defendant had ample opportunity to schedule and notice the Motion for Transfer

of Venue along with other discovery matters (see attached Case Docket - Exhibit 5). Their failure to do so left this court with the impression that venue was not a pressing matter, especially in light of Rule 82(b) and (c) which provide that "when several claims or parties have been properly joined, the suit may be brought in any county in which any one of the claims could properly have been brought ... without regard to whether that county would be a proper venue for the independent action on such claims or against such parties".

Inasmuch as no genuine effort was made to schedule, notice or renew the 2006 venue motion until after the dispositive motion deadline in 2009, the court presumed the 2006 venue motion to be abandoned and that Defendants' participation in litigation for three(3) years after the motion was filed waived any genuine claim of improper venue.

Nonetheless, simultaneously with the undersigned's response herein, the trial court hereby advises the court that it is filing its ruling on Defendant Martin Tucker's Motion for Transfer of Venue (joined by Defendant Ruth Fredericks, M.D.)(Exhibit 6).

Accordingly, the Writ and Request for Stay of the August 10, 2009 trial date seems moot and the herein Writ for Mandamus should be dismissed.

Respectfully Submitted this the 16th day of July 2009.

Tomie Green

CIRCUIT JUDGE

The trial court by its signature above hereby certifies that it has provided a copy of this response to all counsel of record.