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**

BRIEF OF APPELLANT J. MARTIN TUCKER, M.D.

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

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 disqualification or recusal:

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

THIS the 23rd day of March, 2010.

WHITMAN B. JOHNSON III, MSB #3158
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STATEMENT OF THE ISSUES

Question No. 1: Can a defendant physician be deprived of the substantive venue right granted under MISS. CODE ANN. §11-11-3 (Rev. 2004), which requires a claim against a physician be brought only in the county where there alleged negligence occurred, simply because the plaintiff joined him into a lawsuit that had been pending for several years?

Answer: No. Section 11-11-3 is a mandatory venue statute which states that a suit against a physician "shall" be brought "only" in a specific court. Dr. Tucker was subject to suit only in Rankin County, where the treatment at issue occurred. Consequently, this action (or alternatively the claims against Dr. Tucker) must be transferred to Rankin County, the only proper venue as to Dr. Tucker. *See Adams v. Baptist Mem'l Hosp.-DeSoto, Inc.*, 965 So. 2d 652, 656 (¶22) (Miss. 2007); *Rose v. Bologna*, 942 So. 2d 1287, 1290 (¶9) (Miss. 2006).

Question No. 2: Regardless of the venue issue, should the plaintiffs' claim against Dr. Tucker be dismissed on legal grounds?

Answer: Yes. The Maloufs allege that if Dr. Tucker had provided them appropriate information regarding the risks of anti-seizure medication, they would not have conceived Kimberly Malouf. Consequently, plaintiffs' claims are based on a theory that Kimberly Malouf should not have been born. However, because any life is a benefit over non-existence, Mississippi has yet to recognize such a claim.

The Maloufs' claims are further barred by both the two-year statute of limitations and the seven-year statue of repose found at MISS. CODE. ANN. § 15-1-36. The care at issue occurred in late 1995, but suit was not brought against Dr. Tucker until more than seven (7) years later. The Maloufs were also told by Kimberly's physicians more than two (2) years prior to the time that they sued Dr. Tucker that the anti-seizure medication may have caused Kimberly Malouf's alleged condition.

STATEMENT OF THE CASE

Appellees/Respondents C. Eric Malouf and Kristine K. Malouf, individually and on behalf of Kimberly T. Malouf, a Minor ("the Maloufs"), filed a medical negligence suit on December 31, 2002, against Ruth Fredericks, M.D. [R 91-94]. Although the care at issue (and the service of process) occurred in Rankin County, the Maloufs filed their suit against Dr. Fredericks in the Circuit Court of the First Judicial District of Hinds County, Mississippi.

In their Complaint, the Maloufs alleged that Dr. Fredericks was negligent in monitoring and regulating seizure medication given to Kristine Malouf while she was pregnant with Kimberly Malouf, causing their daughter, Kimberly, to suffer injury. [R. 91-94; R. 323 (page 121, lines 4-13)]. The theory of the Maloufs' case was that Dr. Fredericks prescribed an insufficient amount of seizure medicine to Mrs. Malouf during her pregnancy and that as a result, she suffered seizures during pregnancy which allegedly caused their child to be born with brain damage. [R. 92; R. 345 (page 31, lines 9-22)].

After litigating this action for well over three years, the Maloufs completely changed their theory of the case. On May 5, 2006, they filed an Amended Complaint on grounds that their daughter's alleged injuries were caused not due to insufficient seizure medicine as they originally claimed, but because of the seizure medicine she was prescribed by Dr. Fredericks. [R. 35; R. 383 (page 38, line 18– page 39, line 9)]. In this Amended Complaint filed three and one-half years after their original suit was filed against Dr. Fredericks, the Maloufs also sued Appellant/Petitioner J. Martin Tucker, M.D., as a defendant for the first time. [R. 34-38]. The Maloufs alleged that Dr. Tucker was negligent in failing to provide proper pre-pregnancy counseling, failing to properly warn of the risks of seizure medication, and failing to obtain proper informed consent. [R. 35].

Prior to the suit against Dr. Tucker, the Mississippi venue statute was amended to mandate that "any action against a licensed physician . . . for malpractice, negligence, error, omission, mistake, breach of standard of care or the unauthorized rendering of professional services shall be brought only in the county in which the alleged act or omission occurred." MISS. CODE ANN. § 11-11-3(3) (Rev. 2004) (emphasis added). Because Dr. Tucker's allegedly negligent care occurred in Rankin County, Mississippi, venue is proper as to him only in Rankin County. [R. 280 (page 21, lines 2-7)]. Accordingly, in response to the Maloufs' Amended Complaint, Dr. Tucker filed his Motion for Change of Venue, with Alternative Motion to Dismiss, and Answer to Amended Complaint, which was joined by Dr. Fredericks. [R. 248-252; 253-254]. Dr. Tucker asserted in this motion that venue as to him was proper only in Rankin County and requested that this case be transferred to that county. [R. 248]. In the alternative, Dr. Tucker asked in his motion that the cause of action against him only be severed and transferred, leaving the Maloufs' claims against Dr. Fredericks in the First Judicial District of Hinds County. [R. 248].

Additionally, in this motion, Dr. Tucker asked that the Maloufs' claims be dismissed for failure to state a claim against Dr. Tucker for which relief could be granted and/or because they were barred by the applicable statute of limitations. [R. 249]. A brief was filed in support thereof and a hearing initially noticed, then postponed at the Maloufs' request. [R.E. Apps. 8 and 5].[1] Thereafter, attempts were made to get these various motions heard as reflected by the letters and emails of counsel. [R.E. App. 6 (Ex. 1)].

In an effort to draw the Court's attention to these motions, Dr. Tucker ultimately filed a Supplemental Joint Motion and Brief in Support of Motion for Change of Venue and Alternative

[1] Appendicies attached to the Record Excerpts will be cited as "R.E. App."

Motion for Summary Judgment on February 19, 2009. [R. 76-90]. Because he had not been given a hearing date by the trial court, Dr. Tucker noticed it for hearing as soon as counsel could be heard. [R. 74-75]. Dr. Tucker again urged the trial court in his supplemental motion that a change of venue was required per the current version of § 11-11-3(3). In the alternative, Dr. Tucker sought summary judgment in his favor on the grounds that the Maloufs had failed to state a claim against him on which relief could be granted, that their claims were barred by the applicable statute of limitations, and/or that there was no genuine issue of material fact so that Dr. Tucker was entitled to summary judgment. [R. 76-90].

On July 16, 2009, the trial court entered an Order denying Dr. Tucker's Motion for Change of Venue. [R. 229-233]. Additionally, the trial court denied Dr. Tucker's motion for summary judgment. *Id.* Thereafter, Dr. Tucker and Dr. Fredericks separately petitioned this Court for permission to file an interlocutory appeal from this ruling. [R.E. App. 6; R. 218-257]. This Court granted their petitions by Order dated July 28, 2009, and Corrected Order dated July 29, 2009. Accordingly, Dr. Tucker has filed this appeal to respectfully request that this Court not only reverse the July 16, 2009 Order of the trial court denying Dr. Tucker's motion for transfer of venue, but also to render a judgment dismissing Dr. Tucker from this action with prejudice.

STATEMENT OF THE FACTS RELEVANT TO APPEAL

Appellant Dr. Ruth Fredericks, a neurologist, began treating Appellee Kristine Malouf around Thanksgiving in 1994 after Mrs. Malouf suffered a generalized seizure. [R. 276 (page 6, line 18—page 7, line 1)]. When Mrs. Malouf developed an allergic reaction to the initial seizure medication prescribed, Dr. Fredericks prescribed Depakote, which was effective in controlling her seizures. [R. 276 (page 7, lines 2-7, 11-13); R. 303 (page 39, line 21-page 40, line 12); R. 376 (page 9, lines 112-19; page 11, lines 5-8)].

In late 1995, Mrs. Malouf became interested in becoming pregnant. Her OB/GYN at the time did not want her to become pregnant while she was on Depakote. [R. 278 (page 14, lines 6-22; page 15, lines 16-24); R. 309 (page 64, line 10-page 65, line 2); R. 312 (page 75, line 11-page 76, line 3)]. Dr. Fredericks then referred her to Appellant Dr. Tucker, a maternal/fetal specialist, for further discussion regarding pregnancy and her seizure medication. [R. 279, page 19, lines 12-15); R. 311 (page 73, lines 16-24)]. On December 29, 1995, Mr. and Mrs. Malouf met with Dr. Tucker, at which time he discussed the fetal effects of Depakote. [Appendix 1; R. 279 (page 20, line 23—page 21, line 7); R. 308 (page 60, line 17-page 61, line 4); R. 309 (page 65, lines 3-24); R. 310 (page 69, lines 4-7); R. 311 (page 71, line 19-page 72, line 4)]. As documented in his records, Dr. Tucker even provided the Maloufs with pages from a medical textbook regarding Depakote and its possible side effects. [Appendix 1]. Although the Maloufs now deny receiving this information, Mrs. Malouf, in a deposition she gave before suing Dr. Tucker, acknowledged that if the anti-seizure medication had caused injury to her daughter, it was her responsibility. [R. 312, (page75, line 16 - page 76, line 12)].

Mrs. Malouf ultimately decided to become pregnant and discontinued her birth control pills. [R. 282 (page 30, line 17-page 31, line 1); R. 311 (page 73, lines 1-2)]. In August 1996, shortly after

becoming pregnant, Mrs. Malouf suffered various seizures requiring hospitalization and increasing doses of her seizure medicine. [R. 282 (page 32, lines 4-25; page 33, lines 1-25)]. Mrs. Malouf then transferred her neurological care from Dr. Fredericks to Dr. Salil Tiwari, another local neurologist, who continued to increase her doses of Depakote. [R. 283 (page 34, lines 14-17; page 36, lines 12-23); R. 320 (page 109, lines 22-24); R. 321 (page 110, lines 2-3); R. 381 (page 31, line 11–page 32, line 2)].

Mrs. Malouf gave birth to Kimberly Malouf in March 1997. [R. 375 (page 6, line 6)]. Before Kimberly was two years old, Mr. and Mrs. Malouf began noticing developmental problems. [R. 375 (page 6, line 7– page 7, line 19); R. 390 (page 66, lines 16-24)]. They eventually saw Dr. Ronald Burke, a pediatric orthopedist, who specifically discussed with them the possibility that Depakote had caused their child's problems. [Appendix 2]. Another physician, Dr. Collette Parker, also told them that the medicine could have caused their child's condition. [R. 287 (page 52, lines 23-25) through R. 288 (page 53, lines 1-5, 7-13, 21-25; page 54, lines 1-16, 19-24)]. The Maloufs filed suit on their daughter's behalf in December 2002, but against only Dr. Fredericks, alleging that insufficient Depakote administration had resulted in injury to Kimberly Malouf. [R. 91-94]. They joined Dr. Tucker in their suit for the first time three and one-half years later when they decided to claim for the first time that it was the Depakote that caused Kimberly's alleged injury. [R. 34].

SUMMARY OF THE ARGUMENT

In 2004, the Mississippi Legislature amended the venue statute found at §11-11-3 to provide for a specific venue in cases against physicians and other medical care providers. Under the 2004 statute, a physician was subject to suit only in the county where his allegedly negligent care occurred. The legislature enacted this venue provision in order to give individual physicians in this state some confidence that venue against a particular physician would be based on his care and treatment, not on the actions of some other alleged torfeasor. Before the amendment, venue in any particular case was limited only by the ingenuity of a plaintiff's attorney and the number of physicians or health care providers involved in a particular case. With the amendment, the legislature was telling physicians that an individual physician's actions would be judged by jurors in the county only where his allegedly negligent care occurred.

This Court has historically recognized that venue is a substantive right, even for a defendant. In fact, the "right of a defendant to be sued in the venue fixed by statute is too valuable to permit it to be destroyed at the whim or will, or for the convenience, of a plaintiff." *Christian v. McDonald*, 907 So. 2d 286, 291 (¶ 23) (Miss. 2005). In this particular case, venue as to Dr. Tucker is mandatorily set by statute to be Rankin County, where the alleged negligence occurred. Section 11-11-3 (3) says that venue as to a medical care provider "shall" be "only" in the county where the alleged act or omission occurred. As this Court recognized in *Adams v. Baptist Mem'l Hosp.-DeSoto, Inc.*, 965 So. 2d 652, 656 (¶22) (Miss. 2007), Section 11-11-3 (3) is a mandatory venue statute as to physicians and suit against them may only be pursued in the county where the alleged negligence occurred. In fact, as this Court mentioned in *Rose v. Bologna*, 942 So. 2d 1287, 1290 (¶9) (Miss. 2006), where a trial court is not constrained by the requirement in Mississippi's wrongful death statute that there be but one lawsuit for the death of an individual, severance and transfer of

claims against different physicians who provided care in different counties is appropriate. Given the mandatory language of the amended venue statute, the trial court erroneously denied Dr. Tucker's motion to transfer the case, or the claims against him, to Rankin County – the only county where venue as to him was proper.

However, this Court may not even need to reach the venue issue since the plaintiffs' claims against Dr. Tucker are subject to dismissal on various legal grounds. To begin with, the Maloufs' individual claims fail to state a legal claim upon which relief can be granted. According to Mississippi law, parents have no claim for alleged injuries suffered by their child, even though they may claim injury from their personal worry over the child's injury. *Downtown Grill, Inc. v. Connell*, 721 So. 2d 1113, 1121-1122 (¶¶34-35) (Miss. 1998). However, even more to the point is the fact that the Maloufs' claims are based on a theory that Dr. Tucker allegedly failed to provide them with information regarding the risks of the anti-seizure medicine, Depakote, and that if he had done so, they would not have conceived a child. Under this theory, however, Kimberly Malouf would not have been born, such that the Maloufs' claim is what is commonly referred to as a "wrongful life claim," a theory which has never been recognized in the State of Mississippi. Perhaps more importantly, however, is that the Maloufs' claim is directly contrary to the public policy of this State, which encourages and protects life. *See 66 Fed. Credit Union v. Tucker*, 853 So. 2d 104, 113 (¶29) (Miss. 2003).

Finally, even if such claims were cognizable under Mississippi law, they are barred by the statute of limitations and the statute of repose as found in § 15-1-36. The record is clear that the Maloufs knew more than two years before the time they sued Dr. Tucker in May 2006, that Kimberly's alleged condition could be the result of the Depakote that Mrs. Malouf had taken during pregnancy. Records from Dr. Ronald Burke, the pediatric orthopedic physician to whom Kimberly

was taken by her parents in September 1998, show that Dr. Burke specifically referenced in his notes his discussion with the family about the possibility of Depakote- related conditions. [Appendix 2]. Similarly, Mrs. Malouf acknowledged being told by another neurologist, Dr. Collette Parker, that Kimberly's medical issues could have been caused by Depakote. [R. 287 (page 52, lines 23-25) through R. 288 (page 53, lines 1-5, 7-13, 21-25; page 54, lines 1-16, 19-24)]. Consequently, suit against Dr. Tucker was filed well after the two (2) year statute of limitations found at MISS. CODE ANN. § 15-1-36 had run. Additionally, given the fact that Dr. Tucker's care in question occurred in December 1995, and the fact that Kimberly was born in March 1997, the filing of the Maloufs' suit in May 2006 is well beyond the seven (7) year statute of repose, which bars a suit without regard to the time in which discovery of the claim is alleged.

For all of these reasons, Appellant/Petitioner Dr. Tucker asks this Court to dismiss the claims of the Maloufs with prejudice and render a judgment in his favor. If the claims are not dismissed, Appellant/Petitioner Dr. Tucker respectfully requests that this Court reverse the decision of the trial court and transfer this case to Rankin County or, in the alternative, sever and transfer the Maloufs' claims against Dr. Tucker to Rankin County as required by the mandatory venue provisions of Section 11-11-3(3).

ARGUMENT

I. Standard of Review

As to the first issue in this appeal – whether a defendant physician can be deprived of his substantive right to be subject to suit only in the county where the alleged medical negligence occurred as required by MISS. CODE ANN. § 11-11-3 (Rev. 2004) simply because the plaintiff brought suit against him by joining him into a pending lawsuit – there are two possible standards of review – abuse of discretion and *de novo*. Although an abuse of discretion standard normally applies to rulings on motion for change of venue, the mandatory language used in the statute leaves no room for discretion, therefore this Court should apply a *de novo* standard of review because the determination of this issue will require statutory interpretation. *Adams*, 965 So. 2d at 655 (¶11).

With regard to the second issue of this appeal – whether Dr. Tucker is entitled to have the case dismissed either because the Maloufs' claims are not cognizable under Mississippi law or because they are barred by the statutes of limitations and repose found in § 15-1-36, this Court must employ a *de novo* standard of review. Review of a trial court's determination of a motion for summary judgment under MISSISSIPPI RULE OF CIVIL PROCEDURE 56 is *de novo*. *McMillan v. Rodriguez*, 823 So. 2d 1173, 1176-1177 (¶9) (Miss. 2002). Further, questions regarding the statutes of limitations or repose are questions of law which require a *de novo* standard of review. *Sheriff v. Morris*, 767 So. 2d 1062, 1064 (¶10) (Miss. Ct. App. 2006).

II. A defendant physician cannot be deprived of his substantive venue right to be subject to suit only in the county where the alleged medical negligence occurred simply because the plaintiff brought suit against him by joining him into a pending lawsuit.

At the time the Maloufs filed their original lawsuit against only Dr. Fredericks, MISS. CODE ANN. § 11-11-3 (1999) provided that "[c]ivil actions of which the circuit court had original jurisdiction shall be commenced in the county in which the defendant or any of them may be found or in the county where the cause of action may occur or accrue." However, prior to the Maloufs' bringing suit against Dr. Tucker, MISS. CODE ANN. § 11-11-3 was amended to add a subsection specifically designating a mandatory venue for medical negligence cases "notwithstanding" the general venue provisions found elsewhere in the statute. MISS. CODE ANN. § 11-11-3(3) (Rev. 2004). Particularly, the Legislature amended this statute to mandate:

> Notwithstanding subsection (1) of this section, any action against a licensed physician, osteopath, dentist, nurse, nurse-practitioner, physician assistant, psychologist, pharmacist, podiatrist, optometrist, chiropractor, institution for the aged or infirm, hospital or licensed pharmacy, including any legal entity which may be liable for their acts or omissions, for malpractice, negligence, error, omission, mistake, breach of standard of care or the unauthorized rendering of professional services *shall be brought only in the county in which the alleged act or omission occurred.*

Id. (Emphasis added). With the amendment, the Legislature established an exclusive venue statute which provides that any action for malpractice or medical negligence against a doctor "shall be" brought "only"in the county where the alleged malpractice or negligence occurred. MISS. CODE ANN. § 11-11-3(3) (emphasis added). This statute does not give the trial court any discretion in determining venue in medical negligence cases. Move importantly, it gives plaintiffs no right to choose among venues when they file suit against a physician.

In this case, the Maloufs are asserting that Dr. Tucker was negligent in failing to provide proper pre-pregnancy counseling, failing to properly warn of the risks of seizure medication, and

failing to obtain proper informed consent. [R. 35]. All of these allegedly negligent acts occurred in Dr. Tucker's office at 1047 North Flowood Drive in Rankin County, Mississippi. This fact was admitted by Mrs. Malouf in her deposition. [R. 279 (page 20, line 23–25)–R. 280 (page 21, lines 1-7)]. Accordingly, under § 11-11-3(3), venue against Dr. Tucker is proper only in Rankin County.

This is borne out by this Court's precedent, specifically its decision in *Adams v. Baptist Mem'l Hosp.-DeSoto, Inc.*, 965 So. 2d 652, 656 (¶¶19-22) (Miss. 2007). In this case involving claims against both a medical provider and a non-medical defendant, the Court held that the mandatory venue portion of § 11-11-3 for medical providers trumped the general venue portion of the statute, requiring venue to be situated in the county where the allegedly negligent medical treatment was rendered. *Adams*, 965 So. 2d at 653 (¶¶19-22). The complaint in *Adams* was filed against a casino, a hospital, and various doctors for the wrongful death of a patron, who died shortly after receiving treatment at the hospital as a result of injuries suffered during a fall in a casino. *Adams*, 965 So. 2d at 653 (¶1). After her death, the patron's husband filed a wrongful death suit against the casino, the hospital, and various doctors in Tunica County, Mississippi, where the casino was located. *Id.* at 653 (¶3). Pursuant to MISS. CODE ANN. § 11-11-3(3), the medical defendants sought transfer of the case to DeSoto County, where the medical care at issue was rendered. *Id.* at 654 (¶4). The trial court severed the plaintiff's claims, retaining the plaintiff's claims against the casino in Tunica County and transferring the plaintiff's against the medical defendants to DeSoto County. *Id.* at 654 (¶7). The plaintiff appealed and argued that severance was not allowed under Mississippi's Wrongful Death Statute, which allows only one suit to be filed for any one death. The Mississippi Supreme Court agreed that severance was not proper because of the wrongful death statute's prohibition against multiple suits. *Id.* at 654 (¶¶7, 10).

However, the Supreme Court also held that although only one action could be maintained, that action had to be maintained in the county were the alleged medical negligence occurred under § 11-11-3(3). The Court held that despite the casino's "joinder as a defendant, the only proper venue for a suit against medical providers is the county in which the alleged act or omission occurred." *Adams*, 965 So. 2d at 656 (¶22) (emphasis added). In accordance with that holding, the Court remanded the case and instructed the trial court to transfer the entire case to DeSoto County, the only county where venue was proper for the medical defendants. *Id.* at 658 (¶30). Because venue for the medical defendants was mandatory in DeSoto County under § 11-11-3(3), the fact that venue may have been proper as to the non-medical defendant in Tunica County was irrelevant.

Dr. Malouf and Dr. Fredericks are the only two defendants in this case. The Maloufs have admitted that Dr. Tucker's allegedly negligent treatment was provided in Rankin County. [R. 279 (page 20, line 23–25)–R. 280 (page 21, lines 1-7)]. Even if venue was proper as to Dr. Fredericks under the earlier version of MISS. CODE ANN. § 11-11-3, which allowed a suit to be filed in a county where "the defendant . . . may be found,"[2] once suit was brought against Dr. Tucker and he was joined in this suit, the only venue that was proper under the venue statute as interpreted in *Adams* was Rankin County. This is especially true since the venue provision applicable to Dr. Tucker says it applies "notwithstanding" the provision of subsection 1, which is the section under which venue is allegedly proper against Dr. Fredericks. *See Adams*, 965 So. 2d at 658 (¶28). The trial court erred by failing to transfer venue of this case, or at least the claims against Dr. Tucker, to Rankin County.

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[2]Dr. Fredericks has provided a sworn affidavit in this case attesting to the fact that she was served at her office, which is located at 1020 River Oaks Drive, Flowood, Mississippi, in Rankin County. [R.72]. Rankin County is where Dr. Fredericks was found and served despite the fact that suit was filed in Hinds County.

Further, this Court's opinion in the case of *Rose v. Bologna*, 942 So. 2d 1287 (Miss. 2006), a case involving venue among multiple medical defendants, indicates that transfer of this case, or at least the Maloufs' claims against Dr. Tucker, to Rankin County is proper. The plaintiff in *Rose* filed a wrongful death suit against various medical professionals in the Second Judicial District of Bolivar County, Mississippi. *Rose*, 942 So. 2d at 1287 (¶1). Two of the doctor defendants filed separate motions to sever and transfer the claims against them to the venues where they had allegedly provided the negligent treatment under MISS. CODE ANN. § 11-11-3(3). *Id.* The trial court granted these motions and transferred the claims against these doctors to the individual county where venue would be proper as to that defendant. *Id.* This Court held on appeal that severance was improper because a wrongful death action could not be severed into separate cases. *Id.* at 1289 (¶8).

However, this Court suggested that its holding would have been different had *Rose* not been a wrongful death action. "But for the fact that [*Rose*] is a wrongful death claim, the trial court might very well have been correct in transferring venue." *Rose*, 942 So. 2d at1290 (¶9). Further, while the case *sub judice* involves multiple healthcare providers like *Rose*, this action is not a wrongful death claim. Consequently, if the trial court in the case at hand decided not to transfer the entire case to Rankin County (as this Court in *Adams* said was required when venue is proper against a specific defendant only in a specific county), the appropriate course of action for the trial court would have been to sever the Maloufs' claim against Dr. Tucker and transfer it to Rankin County, where Dr. Tucker's care occurred. Thus, under venue law established by this Court's precedent, the trial court's decision to deny Dr. Tucker's motion for change of venue, whether of the entire case or just the claims against him, was erroneous.

Moreover, when interpreting statutes, this Court also gives weight to legislative intent. As a "'general rule [] in construing statutes[,] this Court will not only interpret the words used, but will

consider the purpose and policy which the legislature had in view of enacting the law. The Court will then give effect to the intent of the legislature.'" *State ex rel. Hood v. Madison County ex rel. Madison County Bd. of Supervisors*, 873 So. 2d 85, 88 (¶12) (Miss. 2004). Before the legislature mandated venue in medical malpractice suits by revising § 11-11-3, it was not uncommon for a physician to find himself being subject to suit in a county with little, if any, connection to the medical services he had provided.[3] The Mississippi Legislature recognized that a physician's lack of certainty as to where he was subject to suit made this State a less desirable location for physicians to practice medicine. As a result, the Legislature amended the venue statute to provide an exclusive venue provision for medical care providers and to bring consistency to this area of the law. No longer is the location of a suit governed by the ingenuity of an attorney who can make vague claims against a peripheral party in what he considers a favorable county. Instead, under the revised venue statute, a physician can be sued only where the allegedly negligent act occurred.

Further, venue is not a "mere technicality." *Office of Governor Div. of Medicaid v. Johnson*, 950 So. 2d 1033, 1035 (¶5) (Miss. Ct. App. 2006) (quoting *Moore v. Bell Chevrolet-Pontiac-Buick-GMC, LLC*, 864 So. 2d 939, 945 (Miss. 2004)). Proper venue is a valuable right for a defendant – a fact which this Court has recognized. *Capital City Ins. Co. v. G. B. "Boots" Smith Corp.*, 889 So. 2d 505, 515 (¶32) (Miss. 2004); *See also Baptist Mem'l Hosp.-DeSoto, Inc. v. Bailey*, 919 So. 2d 1, 3 (¶9) (Miss. 2005). Indeed, "[t]he right of a defendant to be sued in the venue fixed by statute is too valuable to permit it to be destroyed at the whim or will, or for the convenience, of a plaintiff.

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[3]*See Austin v. Wells*, 919 So. 2d 961, 969 (¶21) (Miss. 2006) (venue transfer ordered where plaintiff joined hospital as co-defendant solely to obtain venue against non-local physician in that county); *Janssen Pharmaceutica, Inc. v. Armond*, 866 So. 2d 1092, 1095 (¶7) (Miss. 2004) (plaintiff in mass tort drug case attempted to join multiple cases against drug company and various doctors in purportedly plaintiff-friendly venue).

. . ." *Christian*, 907 So. 2d at 291 (¶23) (quoting *Nicholson v. Gulf, Mobile & Northern R. Co.*, 172 So. 306, 308-09 (1937)). For this reason, objections to venue must be honored. *Park on Lakeland Drive, Inc. v. Spence*, 941 So. 2d 203, 207 (¶10) (Miss. 2006).

Finally, as Section 11-11-3(3) is an exclusive venue statute, it is jurisdictional in nature and cannot be waived. *National Heritage Realty, Inc. v. Estate of Boles*, 947 So. 2d 238, 249 (¶36) (Miss. 2006); *Slaughter v. Slaughter*, 869 So. 2d 386, 391 (¶10) (Miss. 2004). Trial courts are given no discretion in determining venue under this provision. As a result, this legislative change which gave medical care providers, such as Dr. Tucker, the substantive right to be sued only in the county where the allegedly negligent care took place must be honored. Venue for the Maloufs' claim against Dr. Tucker was mandated by the Legislature in MISS. CODE ANN. § 11-11-3(3). Dr. Tucker has a substantive right to be sued only in the county where his allegedly negligent care took place–Rankin County. The trial court's ruling has erroneously deprived Dr. Tucker of this substantive right. As a result, Dr. Tucker respectfully requests that this Court reverse the decision of the trial court and transfer this case to Rankin County.

III. The plaintiffs' suit against Dr. Tucker is barred by the statute of limitations and statute of repose found in MISS. CODE ANN. § 15-1-36 and by their failure to state a claim for which relief may be granted.

A. The plaintiffs have failed to state a claim on which relief can be granted under Mississippi law

The Maloufs' claims should have been dismissed by the trial court because they have failed to state a claim against Dr. Tucker for which relief may be granted. Accordingly, the trial court's decision denying Dr. Tucker's motion for summary judgment was erroneous. In this case, the Maloufs are in essence making a "wrongful life" claim, which is not recognized by Mississippi law. Mr. Malouf testified in both of his depositions that if they had been properly informed of the risks of Depakote,[4] they would not have conceived Kimberly at that time. In his initial deposition, he stated:

> A. And I can tell you one thing's for sure: Had he mentioned any other risks or any other problems with this drug, I can tell you 100 percent certainty, we would not have gotten pregnant at that time.

[R. 341 (page 16, line 5-9)].

> A. . . . had they told us that it may cause these problems, it would have never – we would have postponed pregnancy.

[R. 342 (page 20, lines 5-8)].

Then in his second deposition, Mr. Malouf said:

> Q. . . . And at what point would you have been convinced to not let your wife get pregnant?

[4] In making this argument, Dr. Tucker does not concede that the Maloufs are correct in their position that they were not informed about the possible fetal affects of anti-seizure medication. The records and testimony discussed later in this brief establish they were. However, for the sole purpose of determining the legal viability of their claims under Rule 12 or Rule 56, their allegations must be taken as true.

A. It wouldn't have taken – it wouldn't have taken anything hardly. I mean, any – if you would have told me one facial defect that – I've heard about so many risks now with Depakote, you know, with hearts, brain – any – any of that stuff – and it – it just wouldn't have happened.

Q. . . . Even though there is an underlying risk in the population for birth defects?

A. I was willing to accept the – general public risk of birth defects, but – and, of course, I've got no choice but to accept that. I was not willing to take an elevated risk of birth defects to my child or risks specific to seizures or risk specific to seizure medication. I was not willing to take that risk.

Q. . . . you're telling me any increase in risks, you would not have been willing to accept?

A. I – I'd say pretty – pretty much no. And – and – and I can tell you for – for certain – and – because I remember at least asking – you know, bringing up facial defects or – and I may have even brought up retardation to somebody. And – and, you know those – had I been told of specific risks known to be caused by Depakote, I – we would not have gotten pregnant on Depakote.

[R. 381 (page 29, line 7–page 30, line 8)].

Q. . . . if she'd advised you of the risk, you wouldn't have had this child?

A. We would not have gotten pregnant at that time . . . .

[R. 395 (page 86, lines 9-11)].

Mrs. Malouf testified similarly:

Q. . . . Do I understand you to say that y'all were not willing to accept any increased risk over and above that of the general population for the birth of your – for – for you to get pregnant?

A. At the time, no. I – it was not necessary to get pregnant right then.

[R. 284 (page 40, lines 21-25) through R. 285 (page 41, lines 1-2)].

This is the exact essence of a "wrongful life" claim. No Mississippi authority establishes wrongful life as a valid claim. In fact, the Mississippi Supreme court has recognized that "[t]he public and social policy of this state is to protect life," not to grant damages to a living person on the basis she should not exist. *66 Fed. Credit Union,* 853 So. 2d at 113 (¶29). Additionally, the Supreme Court of Mississippi has specifically stated that parents have no claim for damage to their child, or even from their personal worry over their child's alleged injury. *Downtown Grill, Inc.*, 721 So. 2d at 1122 (¶35). Therefore, as a matter of public policy and law, Mr. and Mrs. Maloufs' claims are such that relief cannot be granted and, therefore, should be dismissed.

B. The plaintiffs' claims are barred by either or both of the statute of limitations and the statue of repose.

Moreover, the Maloufs' claims against Dr. Tucker are barred by both the applicable statute of repose and statute of limitation. Specifically, MISSISSIPPI CODE ANNOTATED § 15-1-36(2) specifically states that "in no event" can an action in tort accruing after July 1, 1998, be filed against a medical provider be filed more than seven (7) years after the "alleged act, omission or neglect occurred." This portion of Section 15-1-36(2) is a statute of repose which runs from the date the alleged act or omission occurred. *Russell v. Williford*, 907 So. 2d 362, 366 (¶19) (Miss. Ct. App. 2005).

The evidence in this case shows that Dr. Tucker met with Mr. and Mrs. Malouf on December 29, 1995, and discussed the fetal effects of Depakote with them at that time. [Appendix 1; R. 279 (page 20, line 23—page 21, line 7); R. 308 (page 60, line 17-page 61, line 4); R. 309 (page 65, lines 3-24); R. 310 (page 69, lines 4-7); R. 311 (page 71, line 19-page 72, line 4)]. This allegedly negligent pre-pregnancy counseling occurred more than ten years prior to the date they filed suit

against Dr. Tucker in this action. Further, before Kimberly Malouf turned two years old,[5] Mr. and Mrs. Malouf began noticing developmental problems. [R. 375 (page 6, line 7– page 7, line 19); R. 390 (page 66, lines 16-24)]. This led them to see Dr. Ronald Burke, a pediatric orthopedist, who specifically discussed with them the possibility that Depakote had caused their child's problems in September 1998. [Appendix 2]. Despite this, the Maloufs waited more than seven years after hearing this information to file suit against Dr. Tucker on May 5, 2006. Regardless of whether one starts the running of the statute of repose at the time of the allegedly negligent pre-pregnancy counseling or at the time the Maloufs became aware of Kimberly's developmental delays, Section 15-1-36(2) establishes a clear bar to the claims of Mr. and Mrs. Malouf in this action.

Further, the Maloufs' claims are also barred under the general two-year statute of limitations found in MISSISSIPPI CODE ANNOTATED § 15-1-36(2), which provides that "[N]o claim in tort may be brought against a licensed physician . . . unless it is filed within two (2) years from the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered." In determining whether or not the statute of limitations has expired, the focus is on when the plaintiff discovered an actionable injury or should have discovered it by exercising reasonable diligence. If a plaintiff neglects to file his complaint within two years of the date he becomes aware of or discovers his alleged injury, its cause, and the person allegedly responsible, his claim is barred. *Powe v. Byrd*, 892 So. 2d 223, 227 (¶16) (Miss. 2004); *Joiner v. Phillips*, 953 So. 2d 1123, 1126 (¶6) (Miss. 2007); *Sutherland v. Estate of Ritter*, 959 So. 2d 1004, 1009 (¶¶16-17) (Miss. 2007); *Jackson Clinic for Women v. Henley*, 965 So. 2d 643, 650 (¶15) (Miss. 2007) ("[T]he plaintiff's own suspicions regarding possible negligent conduct starts the clock running.")

[5]Kimberly Malouf was born in March 1997. [R. 375 (page 6, line 6)].

The Maloufs' claims against Dr. Tucker are barred by the statute of limitations because the evidence in this case clearly demonstrates that the Maloufs had knowledge of their daughter's injury (developmental delay), its alleged cause (Depakote), and one of the persons allegedly responsible (Dr. Tucker) more than two years before they filed suit.

The testimony provided by the Maloufs in this case show that they had knowledge of their daughter's injury more than two years prior to filing suit against Dr. Tucker, which is the first factor to consider in determining when the statute of limitations began to run. Specifically, Mr. Malouf testified as follows:

> Q. Okay. When did y'all first come to believe that there were – there were any type of physical or mental or developmental problems with your daughter, Kimberly?
>
> A. Well, I was a – of course, it was our first, and I was never involved with raising children. And so I – I guess – there's so many different ways to answer it. But we didn't really become aware of – of a problem until we – we got closer to age two, and she wasn't – wasn't walking, wasn't – wasn't trying to stand up, couldn't – couldn't do – couldn't do anything of that sort. Before that, we had the other little things. Well, she should be able to crawl or do this, and those were slow, but people told us don't worry. Some kids just do it slower than others.
>
> But – so when we got to almost age two, and you know, her legs – she couldn't – she couldn't – you can tell me how detailed you want me to get. But we ended up going – Dr. Jones was the pediatrician, and he said, "Well, let's go – you go see the orthopedic" – and I'm not sure if it was Burke[6] or Purvis at the time. We saw the orthopedist, and he did the x-rays. And he said the physical equipment was there, and so it was not that.

[6]Dr. Ronald Burke, a pediatric orthopedist, saw Kimberly on September 4, 1998. [Appendix 2].

And then we went on to the neurologist and – actually, I think the neurologist[7] may have been involved somewhere – don't have the exact dates. But then we did the MRI, and the MRI revealed the brain damage, and its just kind of been slowly – since that time – find out more and more things that are – that are wrong with –

Q. All right.

A. – Kimberly.

Q. And the MRI – you said the MRI revealed brain damage. Was the MRI done before Kimberly was two?

A. It was real close. I – I – I've – I've confused myself. I don't know if it was right before two or right after two.

Q. Okay.

A. I want to say right before, but I could be wrong.

[R. 375 (page 6, line 7–page 7, line 19)].

Later in his deposition, Mr. Malouf further testified:

Q. . . . . Clearly by age 17 months – going back to the letter that Dr. Burke wrote to Dr. Leslie Jones – you and your wife realized that there were problems – developmental problems with your daughter?

* * *

A. Correct.

[R. 390 (page 66, lines16-20, 24)].

From this testimony, it is clear that the Maloufs knew their daughter had a developmental delay, i.e., had knowledge of her alleged injury, more than two years prior to filing suit against Dr. Tucker. Further, this fact is supported by the undisputed medical record of Dr. Ronald Burke dated September 4, 1998, stating an impression of "mild developmental delay." [Appendix 2].

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[7] The pediatric neurologist was Dr. Collette Parker at University Medical Center. See page 23 and 24 of this brief for Mrs. Malouf's description of her discuss with Dr. Parker.

The Maloufs also had knowledge of the cause of their daughter's injury, which is the second factor to consider in determining when the statute of limitations began to run, more than two years before they filed suit against Dr. Tucker. This is evidenced by that same undisputed medical record of Dr. Burke dated September 4, 1998, in which he stated that "[t]he possibility of problem related to the mother's seizures during pregnancy or the Depakote itself was discussed." [Appendix 2]. (Emphasis added).

Further, the Maloufs' knowledge is shown in Mrs. Malouf's admission in her deposition testimony, in which she stated:

> Q. – you've been told now at – on several visits that your child has a – what Dr. Parker – as I understood you to say, it was a brain injury, correct?
>
> A. Correct.
>
> Q. And – and a natural reaction to that would be to ask why and what caused it. Did you ask those questions?
>
> A. I did.
>
> Q. And when you – when you asked Dr. Parker why and what caused it, tell me as best you can what she told you.
>
> A. She told us that it could have been the seizures, and it could have been the medicine.
>
> Q. And the medicine would –
>
> A. She –
>
> Q. – be Depakote?
>
> A. She was not specific.
>
> Q. . . . she told you it could have been the seizures or the Depakote?
>
> A. Correct.

Q. Okay. And that would have been true all the way through the – all the visits?

A. Correct.

[R. 287 (page 52, lines 23-25) through R. 288 (page 53, lines 1-5, 7-13, 21-25; page 54, lines 1-16, 19-24)].

This testimony clearly shows that the Maloufs were aware that Depakote was possibly the cause of their daughter's developmental delay as early as 1998 (if not earlier) and certainly by the time Kimberly was two years old – more than seven years before they filed suit against Dr. Tucker.

The third and final factor for determining when the statute of limitations began to run is when the plaintiff had knowledge of the person allegedly responsible. The evidence in this case clearly shows that the Maloufs had the requisite knowledge more than two years before they filed suit. The Maloufs met with Dr. Tucker on December 29, 1995, specifically to learn about the potential effects of Mrs. Malouf's seizure disorder and medication on a possible pregnancy, and during this meeting, the fetal effects of Depakote were discussed. [Appendix 1; R. 279 (page 20, line 23—page 21, line 7); R. 308 (page 60, line 17-page 61, line 4); R. 309 (page 65, lines 3-24); R. 310 (page 69, lines 4-7); R. 311 (page 71, line 19-page 72, line 4)]. The Maloufs do not dispute that they met with Dr. Tucker on this date and were obviously aware of his involvement in their pre-pregnancy counseling more than ten years prior to filing suit against him. As the Maloufs specifically sought Dr. Tucker's counsel regarding the potential fetal effects of Depakote in 1995, once they became aware that their daughter's injuries were possibly caused by Depakote, they also became aware of Dr. Tucker's alleged negligence. Based on their testimony, the Maloufs obviously gained this knowledge more than two years prior to filing suit.

This case is controlled by the case of *Rawson v. Jones*, 816 So. 2d 367 (Miss. 2001), in which the Supreme Court reversed and rendered a jury verdict for the plaintiff on grounds that the claim against the defendants was barred by the statute of limitations. The plaintiff had added Dr. Rawson and The Newborn Group to a suit through an amended complaint three years after the alleged incident of malpractice. Dr. Rawson and The Newborn Group moved for summary judgment based on the statute of limitations, which was denied by the lower court. *Rawson*, 816 So. 2d at 368 (¶3). After discovery and a lengthy trial resulted in a verdict for the plaintiff, the Mississippi Supreme Court reversed and rendered this decision. *Id.* at 371 (¶12). The plaintiff argued unsuccessfully that the statute did not begin to run on her claim until she obtained a medical opinion faulting Dr. Rawson. *Id.* at 370 (¶10). The Court noted that the plaintiff knew from day one that Dr. Rawson had treated her son, but chose not to sue him when she filed suit against the other doctors and entities involved in his care. *Id.* The Court held that the plaintiff had all of the information she needed to be able to institute an action against Dr. Rawson prior to the expiration of the statute of limitations, including knowledge of Dr. Rawson's involvement in her child's care, but failed to do so. *Id.* at 370 (¶9).

As in *Rawson*, the Maloufs had all of the information they needed to file suit against Dr. Tucker within the statute of limitations. However, despite the fact that the Maloufs had knowledge of their daughter's alleged injury (developmental delay), its possible cause (Depakote), and a person allegedly responsible (Dr. Tucker), they waited more than seven years to file suit against him on May 5, 2006. As a result, the statute of limitations for the Maloufs' claims expired prior to their filing suit, and their claims against Dr. Tucker are barred by the statute of limitations found in MISS. CODE ANN. § 15-1-36.

Additionally, any claims made on behalf of Kimberly Malouf, a minor, are also barred by the statute of limitations. Under Mississippi law, the statute of limitations begins running as to a minor when she turns age six if the minor has a parent. MISS. CODE ANN. § 15-1-36(3). Since Kimberly Malouf has parents, the statute of limitations as to her began running six years after her birth on March 20, 1997. Therefore, her claims were barred when she turned eight years of age on March 20, 2005. Since suit was not filed against Dr. Tucker by the Maloufs on her behalf until May 5, 2006, her claims are barred.

Summary judgment was proper in this case because the Maloufs clearly filed their complaint against Dr. Tucker *after* the expiration of the statute of limitations and the statute of repose and have asserted a claim for which relief may not be granted. The lower court's decision denying Dr. Tucker's motion for summary judgment is erroneous because no genuine issue of material fact exists to dispute that the Maloufs became aware of their daughter's injury, its cause, or the person allegedly responsible and failed to file suit against Dr. Tucker within the time limitations of the applicable statute of limitations and statute of repose. It is also erroneous because Mississippi statutory and case law do not support a claim for "wrongful life," which is essentially the claim being made by the Maloufs. For these reasons, the trial court's decision is reversible error.

CONCLUSION

The trial court committed reversible error by denying Dr. Tucker's motion for change of venue, or in the alternative, motion for summary judgment. First, venue for the Maloufs' claims against Dr. Tucker was mandated by the Legislature in MISS. CODE ANN. § 11-11-3(3) (Rev. 2004). Dr. Tucker has a substantive right to be sued only in the county where his allegedly negligent care took place, which was Rankin County. The trial court's ruling denying his motion to transfer venue has erroneously deprived Dr. Tucker of this substantive right. Unless this Court reverses the trial

court's decision, Dr. Tucker will be deprived of a valuable venue right specifically established by the Legislature.

Second, both Mississippi statutory and case law mandated the dismissal of the Maloufs' claims against Dr. Tucker because their claims were barred by both the statute of repose and statute of limitations found in MISS. CODE ANN. § 15-1-36. The evidence in this case shows that the Maloufs were clearly aware of their daughter's injury, its cause, or the person allegedly responsible more than seven years prior to filing suit against Dr. Tucker, and they presented no genuine issue of material fact to rebut this knowledge. Moreover, the Maloufs are essentially asserting a "wrongful life" claim which is not recognized by the laws or courts of this state, and therefore, they are not entitled to relief. Accordingly, the trial court's decision denying Dr. Tucker's motion for summary judgment was erroneous and should be reversed.

Appellant/Petitioner Dr. Tucker respectfully requests that this Court reverse the decision of the trial court and transfer this case to Rankin County or, in the alternative, sever and transfer the Maloufs' claims against Dr. Tucker only to Rankin County. Moreover, Dr. Tucker asks this Court to dismiss the claims of the Maloufs with prejudice and render a judgment in his favor.

RESPECTFULLY SUBMITTED, this the 23rd day of March, 2010.

J. MARTIN TUCKER, M.D.

By: _____
WHITMAN B. JOHNSON III, MS
KRISTI D. KENNEDY, MSB

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day caused to be mailed, via United States Mail, postage prepaid, a true and correct copy of the foregoing document to:

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Honorable Tomie T. Green
Hinds County Circuit Court Judge
Post Office Box 327
Jackson, MS 39205

SO CERTIFIED this the 23rd day of March, 2010.

WHITMAN B. JOHNSON III, MSB[redacted]
KRISTI D. KENNEDY, MSB[redacted]

APPENDICES

Appendix 1	Office Note of J. Martin Tucker, M.D.
Appendix 2	Office Note of Dr. Ronald Burke

JACKSON OB-GYN ASSOCIATES, P.A., Drs. Roy B. Kellum, Joel G. Payne, Jr. Earl T. Stubblefield, & James Martin Tucker

PATIENT Krista Malouf D.O.B. 10 5 71 MARITAL STATUS: S M W D

HUSBAND'S NAME Eric Malouf S.S. No. [redacted]

ADDRESS 51 Northtowne Dr 10 J Jackson, MS. 39211 PHONE 956-2614

PATIENT'S EMPLOYER Shippers Express PHONE 948-4251

HUSBAND'S EMPLOYER Malouf & Malouf PHONE 948-4320

NEAREST LIVING RELATIVE Larry Kerr (father)

ADDRESS OF RELATIVE 6211 Mossline Dr JAckson, MS. PHONE 956-3597

REFERRED BY Dr. Ruth Fredricks & Dr Karon Hicks TODAY'S DATE 12-29-95

P.I. 24 y/o G0P0 - desires ... [illegible] : pregnancy - desires management of vestibular adenitis.

[illegible] vestibular adenitis [illegible]

[illegible] Depakote ; Loestrin 1.5 /30 -

12-29-95 [illegible] menarche ? / monthly / 3-4 [illegible]

MENSES: (LMP ~ 12-19-95) (LoEstrin 1.5/30) PAP 6/95 - "abnormal" -

she was advised to repeat : 3 mos -

OB RECORD ROS - [illegible]

PE. [illegible] - NT - Pelvic Ex [illegible] - [illegible] sensitive to [illegible].

P.H. [illegible]

[illegible]: 1) vestibular adenitis - recurrent c) Seizure disorder - on Depakote -

Pl. :) 3) abnormal PAP: [illegible]

→) [illegible] pregnancy - [illegible] congenital anomalies - particularly - OSD - NTD's

) [illegible] vestibular adenitis

) [illegible]

) Drugs: pregnancy + lactation Page 868 → 873

ph 1/29/96 Requests trial of Testosterone Propionate 2% in white petroleum jelly - 30gm - Apply to affected area bid. X6 wks then every 3-4 days

4/2/96 Desires to conceive - advised to continue OCP's until she sees Dr Fredericks on 4/19/96 - to discuss continuance of Depakote

5-1-96 (LMP ~ 3wks ago) [illegible] - diarrhea for the last several days - vestibular adenitis is much better. [illegible] [illegible] started when she started Vits + Folate -

[illegible] - NT - [illegible]

Pelvis [illegible] - [illegible]

Pl. :) [illegible] 48-72 hrs [illegible]

LABORATORY: 12/29/95 wt. 139 Bp 120/60 A/S. 0 WBC 5.2 Hgb 13.4 [illegible]

12/29/95 pap - normal (inflam). 5-1-96 wt - 134 WBC - 7.8, Hgb - 14.5

✓ [illegible]) [illegible] vitamins [illegible]

PEDIATRIC ORTHOPAEDIC SPECIALISTS OF MISSISSIPPI, P.A.
SUITE 204 MEDICAL ARTS EAST
1190 NORTH STATE STREET
JACKSON, MISSISSIPPI 39202-2413

Ronald G. Burke, M.D.
John M. Purvis, M.D.

TELEPHONE
(601) 353-806
1-800-684-POSM (7676) (MS
FAX: (601) 353-8155

NO:	136347-1	DATE:	9-4-98
NAME:	Kimberly Taylor Malouf 401 Ashridge Place Ridgeland, MS 39157	AGE: REF:	17 months Leslie Jones, M. D. 297 Highway 51 Ridgeland, MS 39157
RESP:	Eric Malouf - father		

C. C.: Problem with walking and strange movement of the left leg

P. I.: This is a 17 month old white female who was born term weighing 7 pounds, 12 ounces via spontaneous vaginal delivery and no history of breech position. The mother was on Depakote for seizure disorder and states that she had several seizures during the pregnancy, but no other complications. They noticed when she first began to crawl and take steps, she would tend to drag her left leg, but currently she seems to be moving it as well as the right, especially when she crawls. She began to sit up late at 9 months and did not crawl until 11 months and is not currently independently walking. She can cruise on furniture. She does initiate steps when holding her hands. The parents have noted that she has always been in the 100 percentile or greater for her size and weight.

P. E.: On physical exam, she is a well developed white female. Her neck is supple. Her spine is straight and supple with no hairy patches or dimples. The upper extremities have a full range of motion with normal appearing tone. The abdomen is soft with no hepatosplenomegaly. The hips have wide symmetric abduction with negative Galeazzi sign. The remainder of her lower extremities have a normal range of motion, normal appearing tone. She has 2+ deep tendon reflexes throughout her lower extremities with no ankle clonus. There are no fixed contractures about the lower extremities noted. When she walks with assistance, she has a somewhat broad based externally rotated gait.

X-RAYS: AP and lateral spine films show no evidence of congenital anomalies or other bony abnormalities.

IMPRESSION: Mild developmental delay

RECOMMENDATION: I explained to the parents that she appeared to be making progression and there is no history of regression in her milestones, although she was somewhat late. The x-rays show

FILE: [signature]
DATE: 9/16

NO: 136347-1 cc: Leslie Jones, M. D.

NAME: Kimberly Malouf

9-4-98: CONTINUED

no congenital anomalies to explain the high risk for a tethered cord or diastematomyelia which could cause delayed walking. The possibility of problem related to the mother's seizures during pregnancy or the Depakote itself was discussed. I told the parents that I would send a letter to Dr. Jones, but that if she was not walking fairly well independently at 18 months, I think that it would be reasonable to have her see the neurologist.

R. Burke MD

Ronald G. Burke, M. D.

RGB:rl