IN THE SUPREME COURT OF MISSISSIPPI

NO. 2015-IA-01762-SCT

CHRISTOPHER POLLAN

APPELLANT

VS

ANDREW WARTAK, M.D., INDIVIDUALLY AND D/B/A INTERNAL MEDICINE ASSOCIATES; CLAY COUNTY MEDICAL CORPORATION D/B/A NORTH MISSISSIPPI MEDICAL CENTER – WEST POINT; ANGIE TURNAGE, LPN; CHASE LARMOUR, RN; ASHLEY THOMAS, LRP; JANE DOES A-M AND JOHN DOES N-Z

APPELLEES

JOINT BRIEF OF APPELLEES, ANDREW WARTAK, M.D., CLAY COUNTY MEDICAL CORPORATION D/B/A NORTH MISSISSIPPI MEDICAL CENTER – WESTPOINT, ANGIE TURNAGE C.L.P.N.; WILLIAM C. LARMOUR, R.N.; AND ASHLEY THOMAS DAVIS, R.N.

ORAL ARGUMENT NOT REQUESTED

David W. Upchurch, MSB#10558
John M. McIntosh, MSB#103933
Upchurch & Upchurch, P.A.
P.O. Drawer 2529
Tupelo, MS 38803-2529
Phone: (662) 260-6950
Fax: (662) 269-3713
dupchurch@upchurchpa.com
jmcintosh@upchurchpa.com

Attorneys for Appellee Andrew Wartak, M.D.

John G. Wheeler, MSB#8622
Mitchell, McNutt & Sams, P.A.
105 South Front St.
P.O. Box 1720
Tupelo, MS 38802-1720
Phone: (662)842-3871
Fax: (662) 842-8450
jwheeler@mitchellmcnutt.com

Attorneys for the Appellees Clay County Medical Corporation d/b/a North Mississippi Medical Center – West Point; Angie Turnage, C.L.P.N.; William C. Larmour, R.N.; and Ashley Thomas Davis, R.N.

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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. This list is provided in order that the Justices of the Supreme Court may evaluate possible disqualification or recusal.

1. Christopher Pollan, Appellant.

2. Alan D. Lancaster, Esq., Liston Lancaster, PLLC, Counsel for the Appellant.

3. John "Mickey" Montgomery, Esq., Counsel for the Appellant.

4. John S. Moore, Esq., Moore Law Office, PLLC, Counsel for the Appellant.

5. Dolton W. McAlpin, Esq., Counsel for the Appellant.

6. Andrew Wartak, M.D., Appellee.

7. David W. Upchurch, Esq., John M. McIntosh, Esq., Upchurch and Upchurch, P.A., Counsel for the Appellee, Andrew Wartak, M.D.

8. Clay County Medical Corporation d/b/a North Mississippi Medical Center – West Point; Angie Turnage, C.L.P.N.; William C. Larmour, R.N.; and Ashley Thomas Davis, R.N., Appellees

9. John G. Wheeler, Esq., Mitchell, McNutt & Sams, P.A., Counsel for the Appellees, Clay County Medical Corporation d/b/a North Mississippi Medical Center – West Point; Angie Turnage, C.L.P.N.; William C. Larmour, R.N.; and Ashley Thomas Davis, R.N.

10. Honorable James T. Kitchens, Jr., Clay County Circuit Court Judge.

Respectfully submitted, this the 16th day of February, 2017.

ANDREW WARTAK, M.D.

/s/ John M. McIntosh
JOHN M. MCINTOSH

Attorneys for Appellee, Andrew Wartak, M.D.

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II. DID THE TRIAL COURT ABUSE ITS DISCRETION IN FINDING THAT THE APPELLEES DID NOT WAIVE THEIR STATUTE OF LIMITATIONS DEFENSES?

STATEMENT OF THE CASE

I. Nature of the Case[1]

This is a wrongful death action sounding in medical negligence in which the trial court granted partial summary judgment in favor of the Appellees as to the survival claims of the decedent, Shirley Pollan ("Ms. Pollan") – finding that the claims were time barred by the statute of limitations. The instant appeal arises from this award of partial summary judgment and the contemporaneous denial of the Appellant, Christopher Pollan's ("Mr. Pollan"), argument that the Appellees waived their statute of limitations defenses.

II. Procedural History

Mr. Pollan, Ms. Pollan's only child, filed his Complaint on January 10, 2013. R. 12-22. He filed an Amended Complaint on February 19, 2013, in which he alleged that the Appellees corrected Ms. Pollan's critically low sodium level too rapidly during her October 8, 2008 admission to the North Mississippi Medical Center – West Point ("NMMC – West Point") and that, as a result, she sustained neurological deficits secondary to central pontine myelinolysis ("CPM").[2] R. 26-37. Mr. Pollan further alleged that Ms. Pollan's neurological deficits led to her death over two years later on

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[1] Abbreviations for the citations in this Brief are as follows:

- Appeal Record Transcript (R. ___)
- Record Excerpts of Appellant (R.E. __)
- Record Excerpts of Appellees (R.E. Appellees __)

[2] CPM a/k/a osmotic demyelination syndrome is a neurological condition wherein a covering (myelin) that protects nerve cells in the brain stem (pons) is destroyed preventing signals from the nerves being properly transmitted to one another. The condition can be caused by changes in the body's sodium levels.

January 18, 2011. R. 31. The Amended Complaint included survival, estate and wrongful death claims arising from the death of Ms. Pollan. R. 34.

On March 5, 2013, NMMC - West Point, Angie Turnage, C.L.P.N., William C. Larmour, R.N. and Ashley Thomas Davis, R.N. filed their Separate Answer and Defenses to the Amended Complaint. R. 38-95. On March 18, 2013, Andrew Wartak, M.D. ("Dr. Wartak") filed his Answer and Defenses to the Amended Complaint. R. 96-104. Each Appellee asserted that Mr. Pollan's claims were barred, in whole or in part, by the applicable statute of limitations.

Thereafter, the parties engaged in discovery. Written discovery was exchanged and depositions of the parties were taken. R. 3-11. Subpoenas were issued to Ms. Pollan's healthcare providers and entities involved in the investigation of her death. *Id.* Additional records from Ms. Pollan's healthcare providers were obtained via a medical authorization executed by Mr. Pollan. Ultimately, the Appellees obtained records from over twenty (20) of Ms. Pollan's healthcare providers.

On March 6, 2015, following the benefit of discovery, Dr. Wartak filed a Motion for Partial Summary Judgment and Memorandum of Authorities in Support - arguing that the survival claims asserted by Mr. Pollan were time barred by the applicable two year statute of limitations. R.E. Appellees 1-26. On March 6, 2015, NMMC - West Point, Angie Turnage, C.L.P.N., William C. Larmour, R.N. and Ashley Thomas Davis, R.N. joined in Dr. Wartak's motion. R.E. Appellees 27-28. On March 31, 2015, Mr. Pollan filed his response to the motion for partial summary judgment. R. 133-314. On April 20, 2015, Dr. Wartak filed his Rebuttal – arguing that Ms. Pollan was

undoubtedly aware of her cause of action by August 24, 2010, based upon a patient profile filled out prior to an office visit on that date with a neurologist in which Ms. Pollan identified her injuries, the cause of her injuries and their nexus to her healthcare providers. R.E. Appellees 29-38.

On September 16, 2015, the motion for partial summary judgment came on for hearing. R.E. Appellees 50-99. On November 9, 2015, the trial court entered an order granting the motion – finding the survival claims were time barred. R.E. 10-11. In the order, the trial court ruled that the statute of limitations as to the survival claims commenced on August 24, 2010, finding that the patient profile conclusively demonstrated that Ms. Pollan knew she was suffering from a neurological deficiency and "at least suspected" that deficiency was "the result of the procedure performed at [NMMC-West Point]." R.E. 11.

On November 25, 2015, Mr. Pollan filed his Petition for Interlocutory Appeal – seeking an appeal of the trial court's grant of partial summary judgment and denial of his argument that the Appellees had waived their statute of limitations defense. On December 11, 2015, the Appellees filed a Joint Answer to the Petition for Interlocutory Appeal. On May 11, 2016, this Court entered an order granting the petition and staying the trial court proceedings pending disposition of the appeal. The instant appeal ensued.

III. Statement of Facts

On October 8, 2008, Ms. Pollan, a fifty-five (55) year old resident of West Point, Mississippi, was brought by a relative to the offices of John Stewart, M.D., an ENT

in Starkville, Mississippi.[3] Dr. Stewart was informed that Ms. Pollan had been "staggering", not thinking clearly and had experienced nausea and vomiting for the past three to four days after taking an oral antibiotic. Dr. Stewart noted that Ms. Pollan was lucid and exhibited no neurologic symptoms. He instructed her to stop the antibiotic, prescribed her a medication to alleviate the nausea and vomiting and documented that he would recheck her in four days.

On the evening of October 8, Ms. Pollan was taken to the emergency department at NMMC-West Point with complaints of dizziness, vomiting and an inability to stand. R.E. Appellees 103. Blood tests revealed she had a critically low sodium level of 97.[4] R.E. Appellees 101. Intravenous ("IV") fluids were begun to correct her low sodium levels and she was admitted to the intensive care unit to the service of Dr. Wartak. R.E. Appellees 102. While in the intensive care unit, Ms. Pollan, per the orders of her treating physicians, continued to receive periodic administration of IV fluids to normalize her sodium.

On October 11, 2008, at the request of Mr. Pollan, Ms. Pollan was transferred to the North Mississippi Medical Center ("NMMC") in Tupelo, Mississippi, where she remained until her discharge on October 14, 2008. R.E. 17. Her diagnoses, upon discharge, included "severe hyponatremia secondary to syndrome of inappropriate antidiuretic hormone with mental status changes."[5] R.E. Appellees 44-46. And it was

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[3] Dr. Stewart had previously treated Ms. Pollan over a period of several years largely for complaints of Meniere's disease, an inner ear disorder which can cause, among other symptoms, vertigo and loss of balance.

[4] A normal sodium level is between 136 and 145.

[5] Syndrome of Inappropriate Antidiuretic Hormone is a condition where the body produces excessive amounts of antidiuretic hormones (hormones which help the kidneys conserve and

noted that "she might be suffering from [CPM]" and that "her mental status changes could certainly be reflected of volume shifts, although it was difficult to say for sure if she did have CPM…" R.E. Appellees 44-45. Ms. Pollan showed no signs of neurological deficits at the time of discharge. R.E. Appellees 45.

After her discharge from NMMC, Ms. Pollan had several inpatient hospital admissions for behavioral and neurological issues – including inpatient hospital admissions to NMMC and Baptist Memorial Hospital – Golden Triangle, Inc. She also saw other healthcare providers for neurological, psychiatric and behavioral complaints. One of those providers was Dr. Clifton Story, Ms. Pollan's primary care physician at the Longest Student Health Center in Starkville, Mississippi. Dr. Story saw Ms. Pollan on August 9, 2010, and documented that visit, in pertinent part, as follows:

> … To summarize, she had been well prior to October 2008, working as a teller at the bank where she worked many years. She had gotten acutely ill, went to the ER and was found to be hyponatremic. During the hospitalization her sodium was corrected quickly. She deteriorated in the hospital, apparently becoming nearly comatose and was transferred to Tupelo at the insistence of her son. She did improve subsequently but has never returned to her normal state of being and is now disabled due to the mental deficits and inability to perform the task required of her to work at the bank. Her only medical diagnosis really has been SIADH and polydipsia and some psychosis initially following the hospitalization. I think it is reasonable to get a second opinion as to SIADH may have been the initial cause of the hyponatremia. However, I think the sodium was corrected quickly and she may have developed central pontine myelinolysis which may have led to her chronic disability that she is now managing.

R.E. Appellees 47-48 (Emphasis added).

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control the amount of water in the body) which causes the body to retain too much water which can dilute substances in the blood, in particular, sodium. Hyponatremia is abnormally low sodium in the blood.

The records for this visit also reflected that Ms. Pollan was talking appropriately, was oriented, "able to articulate well with normal/speech language" and "[had] appropriate memory for current and past events." R.E. 47. Following the visit, at Ms. and Mr. Pollan's request, Dr. Story referred Ms. Pollan to Feiyu Chen, M.D. ("Dr. Chen"), a neurologist at the Semmes Murphy Clinic ("Semmes Murphy") in Memphis, Tennessee. R.E. 23.

Ms. Pollan saw Dr. Chen on August 24, 2010. Prior to this visit, a patient profile, completed by or on behalf of Ms. Pollan, was submitted to Semmes Murphy. The profile included the following description of Ms. Pollan's "chief complaint":

> Fatigue and delirium initially 10/08/08 and discovered had suffered from a critical sodium and potassium drop that led to a coma at the North MS Health (Clay County Medical Center), West Point, MS 10/08/08. Transferred to critical care unit North MS Health Tupelo, MS. Family told best case scenario she was not expected to leave the hospital because of in such severe condition upon arrival from the West Point hospital and that the best case scenario would probably be a vegetative state the rest of her life if she were to be able to leave the hospital. Indicated that they appeared misdiagnosed, brain flooded with IV (liquids) too quickly and then removed too quickly based on the safe levels, it was too rapid of administration trying to increase the levels. Behavioral issues resulted and she was nowhere close to performing a normal life compared to time prior to this disabling condition.

R.E. Appellees 41 (Emphasis added).

The profile also identified Ms. Pollan's self-described deficits, including: "memory loss, fatigue, sleeps all the time, anxious, trouble focusing, unable to perform daily tasks as before, lack of patience and social skills, cannot concentrate, cannot complete

simple tasks or be relied upon to differentiate between important versus non-important tasks, cannot focus enough to complete any detail (sic) paperwork, cannot trust, will take medicine so has to be overseen daily with this, etc." *Id.*

On September 29, 2010, Ms. Pollan was seen by another neurologist, John Brockington, M.D., at the Kirklin Clinic in Birmingham, Alabama. R.E. 26. Following examination, Dr. Brockington charted: "I do think that patient's cognitive impairment is directly due to the effects of the hyponatremia." *Id.*

On October 22, 2010, Ms. Pollan received a home health visit from Gentiva Home Health for a physical therapy assessment. R.E. Appellees 43. The records for this visit reflect that "[t]he patient reports severe sodium depletion in 2008 that was possibly misdiagnosed and treatment that caused deep brain damage based upon report from family members." *Id.*

Ms. Pollan died on January 18, 2011. R. 191. An autopsy was performed on January 24, 2011, by the Mississippi State Medical Examiner's Office. The report of the autopsy was issued on July 11, 2011 and identified the cause of death as "[p]ontine myelynolysis following rapid sodium correction" with a contributing cause of hypertensive cardiovascular disease. R.E. 30.

SUMMARY OF THE ARGUMENT

The discovery rule in a medical negligence action is focused on discovery of negligence, not injury. It tolls the statute of limitations until negligence is known or reasonably should have been known even if it is uncertain whether the conduct in question was legally negligent. Thus, the question presented by this appeal is when Ms. Pollan knew or reasonably should have known of the Appellees' alleged negligence.

That date, at the latest, was August 24, 2010. By that date, Ms. Pollan knew, who, when, how and by what she had been injured. This is evidenced by the patient profile provided to Semmes Murphy which included the following statements:

- Ms. Pollan had "suffered a critical sodium drop";
- She was admitted to NMMC – West Point on October 8, 2008;
- She "appeared misdiagnosed";
- her "brain was flooded with iv (liquids) too quickly and then removed to quickly based upon the safe levels, it was too rapid administration trying to increase the levels"; and
- "Behavioral issues resulted and she was nowhere close to performing a normal life prior to [the] disabling condition."

R.E. 41.

These statements establish that Ms. Pollan was aware of the Appellees' alleged negligence by August 24, 2010. In fact, the statements in the profile mirror the allegations of the Complaint and Amended Complaint with respect to the correction of Ms. Pollan's sodium levels during her October 8, 2008 admission to NMMC-West Point and resulting neurological deficits. Based upon the profile, the trial court

properly found that Ms. Pollan knew or should have known of her survival claims on August 24, 2010, and properly awarded partial summary judgment as reasonable minds could not differ that as of that date, Ms. Pollan knew or should have known of the Appellees' alleged negligence and failed to file suit within two years.

Mr. Pollan fundamentally misapprehends the discovery rule. He contends that a confirmed diagnosis of CPM was a prerequisite for discovery of the survival claims. A diagnosis, however, is not a *sine qua non*. By August 24, 2010, Ms. Pollan knew of the Appellees' alleged negligence, her injuries and their connection to her healthcare providers. This knowledge sufficed for discovery of her survival claims. Her diagnosis of CPM upon autopsy did not reveal any act, omission or neglect that was not already known or suspected. She believed and had been previously informed by her healthcare providers that her deficits were potentially attributable to the correction of her low sodium during her October 8, 2008 admission to NMMC – West Point.

The Appellees did not waive their affirmative defense of the statute of limitations. This is a complex wrongful death case with statutes of limitation that implicate the discovery rule. Discovery was required to determine the nature of these defenses and for the Appellees to establish that the survival claims were time barred. The trial court recognized this and properly denied Mr. Pollan's arguments as to waiver. The trial court did not abuse its discretion. It applied the correct legal standard and this Court, respectfully, should defer to the trial court's decision.

ARGUMENT

I. Standard of Review

A. Summary Judgment.

The standard of review for a trial court's grant of summary judgment is de novo. *Webb v. Braswell*, 930 So. 2d 387, 395 (Miss. 2006). The same standard governs the application of the statute of limitations. *Sarris v. Smith*, 782 So. 2d 721, 723 (Miss. 2001)("…application of a statute of limitation is a question of law to which a de novo standard also applies.")

Summary judgment is proper under M.R.C.P. 56 if there is no genuine issue of material fact. The moving party bears the burden of demonstrating an absence of a genuine issue of material fact and the evidence must be viewed in a favorable light to the nonmovant. *Duckworth v. Warren*, 10 So. 3d 433, 436 (Miss. 2009). The running of the statute of limitations may be the subject of summary judgment if there exists no genuine issue of material fact concerning whether the statute has run. *MS Comp Choice, SIF v. Clark, Scott & Streetman*, 981 So. 2d 955, 962 (Miss. 2008).

B. Waiver of Affirmative Defense.

The standard of review for the waiver of an affirmative defense is abuse of discretion. *Kinsey v. Pangborn Corp.*, 78 So. 3d 301, 306 (Miss. 2011). Abuse of discretion is "the most deferential standard of review appellate courts employ". *Ashmore v. Mississippi Auth. on Educ. Television*, 148 So. 3d 977, 982 (Miss. 2014), *reh'g denied* (Oct. 30, 2014). If the trial court applies the correct legal standard, this

Court "must affirm the decision" unless there is a firm and definite conviction that the trial court committed clear error. *Id.*

II. The Trial Court Properly Applied the Discovery Rule

A. The Statute of Limitations and the Discovery Rule in a Wrongful Death Action Sounding in Medical Negligence.

This is a wrongful death case sounding in medical negligence. An action for wrongful death is an all-encompassing action that includes different types of claims arising from a tort proximately caused by a death. *Caves v. Yarbrough*, 991 So. 2d 142, 150 (Miss. 2008). These claims include wrongful death claims, estate claims and survival claims. *Id.* Survival claims are those seeking to recover damages that the decedent could have recovered if not for death and concern damages suffered from the time of injury until death. *Garlock Sealing Technologies, LLC v. Pittman*, 2010 WL 4009151 (Miss. Oct. 14, 2010). Recoverable damages for survival claims, the only claims at issue on this appeal, include those for personal injury, property damage, medical expenses and funeral expenses. *Clark Sand Co. v. Kelly*, 60 So. 3d 149, 161 (Miss. 2011).[6]

Since a wrongful death action includes different types of claims, the statutes of limitations as to those claims may differ as to the claim presented. *Empire Abrasive Equip. Corp. v. Morgan*, 87 So. 3d 455, 462 (Miss. 2012).[7] Specifically, the statute of

[6] Wrongful death claims are "those brought to recover damages that one person's death causes to another." *Pittman*, 2010 WL 4009151 at *7. The recoverable damages include claims for loss of consortium, society and companionship. *Clark,* 60 So.3d at 161.

[7] *See Univ. of Mississippi Med. Ctr. v. McGee*, 999 So. 2d 837, 840 (Miss. 2008)("In a suit under the wrongful-death statute, there may be several different kinds of claims, and each kind of claim is subject to its own statute of limitations.")

limitations for a survival claim "begins to run when the decedent could have pursued the claim." *Id.* Wrongful death claims, on the other hand, begin to run upon the death of the decedent. *Id.*

The statute of limitations for a wrongful death action is governed by the underlying tort on which the action is predicated. *Id.*; *See also McGee*, 999 So. 2d at 841. This action sounds in medical negligence. Thus, the applicable statute of limitations is Miss. Code Ann. § 15-1-36 which states that, in an action against a healthcare provider, "no claim in tort may be brought…unless it is filed within two (2) years from the date of the alleged act, omission, or neglect shall or with reasonable diligence might have been first known or discovered."

The discovery rule included in section 15-1-36 applies in "rare cases where the patient is aware of his injury...but does not discover and could not have discovered with reasonable diligence the act or omission which caused the injury." *Holaday v. Moore*, 169 So. 3d 847, 850 (Miss. 2015)(Emphasis added). The discovery rule commences the limitations period "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." *Huss v. Gayden*, 991 So. 2d 162, 165 (Miss. 2008). The focus of the discovery rule is "when a plaintiff, exercising reasonable diligence, should have first discovered the negligence, rather than the injury." *Sutherland v. Estate of Ritter*, 959 So. 2d 1004, 1008 (Miss. 2007)(Emphasis added); *Jackson Clinic For Women, P.A. v. Henley*, 965 So. 2d 643, 649 (Miss. 2007). Stated otherwise, the statute of limitations is only tolled "until a

plaintiff should have reasonably known of some negligent conduct, even if the plaintiff does not know with absolute certainty that the conduct was legally negligent." *Id.*

B. The Trial Court Properly Found that the Statute of Limitations for the Survival Claims Commenced on August 24, 2010.

The trial court properly held that Mr. Pollan's survival claims were time barred pursuant to Miss. Code Ann. § 15-1-36. In its Order granting partial summary judgment, the trial court found, in pertinent part, as follows:

> The Court has reviewed the records submitted by counsel and finds that the discovery rule does apply in the present case. Mrs. Pollan's medical records indicated that on August 24, 2010 she visited the Semmes Murphy Clinic in Memphis, Tennessee. As part of her patient profile under "chief complaint," Mrs. Pollan's profile states, "…brain flooded with (IV) liquids too quickly and then removed too quickly based on the safe levels it was too rapid of administration trying to increase the levels. Behavioral issues resulted and she is nowhere close to performing a normal life compared to time prior to this disabling condition." The profile then goes on to list the behavioral deficiencies Mrs. Pollan experienced.
>
> While it appears that Mrs. Pollan did not know that she suffered specifically from Central Pontine Myelinolysis, this patient profile clearly shows that on August 24, 2010 she (1) knew she was suffering from a neurological deficiency; and (2) she at least suspected that this deficiency was the result of the procedure performed at the North Mississippi Medical Center – West Point. The Court, therefore, finds that based upon the discovery rule, the statute of limitations for Mrs. Pollan's survival claim began to run on that date. As a result, these claims are now time barred.

R.E. 10-11.

The trial court properly found that, based upon the patient profile, the survival claims began to run on August 24, 2010, and the statute of limitations expired as to those claims prior to the filing of the Complaint on January 10, 2013.[8] R.E. 11. This finding was proper and in accordance with the controlling law of this Court.

As stated previously, the statute of limitations in a medical negligence action commences when the patient: (1) can reasonably be held to have knowledge of the injury; (2) has knowledge of the cause of the injury and (3) knows the relationship between the provider and the injury. The focus is on negligence rather than the injury in determining discovery. An examination of the patient profile establishes that, by August 24, 2010, Ms. Pollan had discovered the survival claim. She was aware of the alleged negligence of the Appellees – stating that she was "misdiagnosed" and that her "brain [was] flooded with IV (liquids) too quickly and then removed too quickly based on the safe levels, it was too rapid of administration trying to increase the levels." R.E. Appellees 41. This awareness alone suffices to establish discovery of her survival claims. The discovery is further solidified by the fact that Ms. Pollan also identified her injuries - stating that treatment she received at NMMC-West Point caused her to have "[b]ehavioral issues" and a "disabling condition."

The application of the discovery rule is "driven" by the facts of the case presented and turns on "what the plaintiff knew and when". *Huss*, 991 So. 2d at 166.

[8] The Complaint was filed on January 10, 2013 - two (2) years, four (4) months and seventeen (17) days after August 24, 2010. R. 12. Mr. Pollan sent pre-suit notice of claim letters to the Appellees dated October 16, 2012. The letters did not toll the statute of limitations for sixty (60) days pursuant to Miss. Code Ann. § 15-1-36(15) as the letters were sent fifty-three (53) days after the expiration of the statute of limitations on August 24, 2012.

Here, the trial court correctly applied the facts of the case to controlling case law and determined that on August 24, 2010, the statute of limitations commenced as to the survival claims because, on that date, Ms. Pollan knew of her injuries, the cause of the injuries and the relationship between those injuries and the care she received at NMMC –West Point on October 8, 2008.[9] The trial court's decision was correct and should be affirmed.

C. The Grant of Partial Summary Judgment is Supported by Prior Decisions of this Court.

The trial court's grant of partial summary judgment comports with prior decisions of this Court. In *Sutherland v. Estate of Ritter*, 959 So. 2d 1004 (Miss. 2007), this Court upheld the trial court's grant of summary judgment and application of the discovery rule in a medical negligence case involving side effects from a medication – finding that the statute of limitations commenced when the plaintiff "knew or suspected" that the medication at issue was causing side effects. *Id.* at 1009. In so finding, the Court noted that, by the plaintiff's own admission, on the date of commencement of the statute, the plaintiff "knew who, when, how and by what he had been injured", i.e., that "[the defendant's] prescribing him [the medication] had caused him to suffer an injury." *Id.* Similarly, in *Henley*, this Court found that the statute of limitations commenced when the plaintiff "believed that some type of negligence had occurred" which occurred when the plaintiff spoke with her sister in

[9] In its order, the trial court cited to this Court's decision in *Holaday v. Moore*, 169 So. 3d 847 (Miss. 2015).

the hospital as "she knew that 'something was wrong'". *Henley*, 965 So. 2d at 643, 650.[10]

These cases directly support the trial court's findings that the statute as to the survival claims commenced on August 24, 2010. On that date, Ms. Pollan believed or at least suspected negligent or wrongful conduct on the part of her healthcare providers during her October 8, 2008 admission to NMMC – West Point, specifically, the "too rapid" administration of IV liquids which caused a disabling condition and behavioral issues. This knowledge sufficed to constitute discovery of the survival claims and to commence the statute of limitations.

D. A Diagnosis was not Required for Discovery of the Survival Claims.

The gravamen of Mr. Pollan's arguments is that a confirmed medical diagnosis of CPM was required for Ms. Pollan to discover the survival claims.[11] He contends that the statute of limitations commenced on July 11, 2011, the date of the report of autopsy which identified the cause of death as CPM. His position and arguments are contrary to controlling case law and unsupported by the record of this case.

Ms. Pollan's diagnosis of CPM is of no consequence to the discovery of her survival claims. The discovery rule in a medical negligence case is focused on

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[10] *Henley* was a medical negligence and wrongful death action seeking damages for the death of an unborn child and damages to the plaintiff, the mother. *Id.* at 643, 647 This Court discussed the commencement of the statute of limitations as to the mother's claims and the discovery rule. *Id.* at 649-650. In so doing, the Court did not expressly identify whether the discovery rule applied but did note that the statute of limitations commenced shortly after surgery which revealed the mother's injuries based upon the above-referenced conversation. *Id.* at 650.

[11] *See e.g.* App. Brief at 14 ("In this case a medical diagnosis is required for the discovery of Ms. Pollan's (sic), not merely a suspicion as to the condition or its causation.")

negligence not injury. *Sutherland*, 959 So. 2d at 1008. The discovery of which does not require a diagnosis. *See e.g. Huss*, 991 So. 2d at 166 (noting that discovery "of negligent conduct [may be gained] through personal observation"). Nor does it require that the plaintiff know exactly why the defendant's actions or inactions caused his or her injuries.[12] Consequently, the focus, in the instant case, is on the date Ms. Pollan knew or reasonably should have known of negligent or wrongful conduct even if she did not know with certainty that the conduct was legally negligent. That date was August 24, 2010.

Although Ms. Pollan's knowledge of wrongful conduct or negligence alone was sufficient to trigger the statute of limitations on August 24, 2010, she also was aware, on that date, of her injuries, i.e., her "behavioral issues" and "disabling condition". R.E. Appellees 41. Her recognition of these injuries did not require a confirmed diagnosis of CPM as she knew, in detail, the injuries she had sustained and the connection between those injuries and the treatment she received at NMMC-West Point.[13] This knowledge of her injuries commenced the limitations period. *See e.g. Sutherland*, 959 So. 2d at 1009-1010 (statute of limitations commenced when the plaintiff knew that a medication caused him to suffer "an injury", that the medication was "causing his troubles" and that the defendant had prescribed the medication.)

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[12] "[The plaintiff] might not have known at the time exactly why [the healthcare defendant's] actions caused his injuries, but such specific knowledge was not necessary to his filing an action." *Robinson v. Singing River Hosp. Sys.*, 732 So. 2d 204, 208 (Miss. 1999).

[13] Her recognition of her injuries is further established by her seeking medical attention for those injuries. *See PPG Architectural Finishes, Inc. v. Lowery*, 909 So. 2d 47, 51 (Miss. 2005)(citing, in a products liability action, to medical negligence decisions examining the discovery rule, in noting that "seeking medical attention side effects or symptoms confirms that [the plaintiff] knew she was injured.")

The report of autopsy and diagnosis of CPM only provided her family with a name for the injuries of which she and Mr. Pollan were previously aware and had attributed to the correction of her sodium level at NMMC- West Point.

The Court of Appeals decision in *Waldrup v. Eads*, 180 So. 3d 820 (Miss. Ct. App. 2015) is instructive on Mr. Pollan's argument that a diagnosis is required to trigger the limitations period. *Eads* involved a wrongful death action sounding in medical negligence in which a family brought an action against a nurse practitioner and a physician following the death of their mother from sepsis while a nursing home resident. *Id.* at 821-822. Prior to her death, the family was unaware their mother had sepsis - a diagnosis which was first revealed in a report of autopsy issued four (4) months after their mother's death. *Id.* at 822. Although unaware of a diagnosis of sepsis, the family knew, prior to her death, that their mother's stomach was swollen, that she complained of constant pain and constipation and, furthermore, were "already concerned prior to [her] death that the nurses would not call for an ambulance to take [their mother] to the hospital." *Id.* at 822, 824. After their mother's death, the family requested to speak to the coroner and insisted that an autopsy be performed as the death was "mysterious". *Id.* The coroner documented on the autopsy-request form that the family was concerned with the care provided to the decedent. *Id.* After suit was filed, the defendants moved to dismiss and in the alternative for summary judgment on the grounds that the suit was time barred – arguing that the statute commenced on the date of death. *Id.* The trial court granted the motion. *Id.* On appeal, the family argued that the statute commenced on the date

of autopsy as "…[they] could not have reasonably discovered [the defendant's] alleged medical negligence until [they] learned…[of] [their] mother's official cause of death." *Id.* at 828. The Court of Appeals rejected this argument and affirmed the trial court, relying in large part on this Court's decision in *Sutherland*, finding: "the undisputed evidence shows [the family] suspected [the defendant] had committed medical negligence the day their mother died. And the autopsy report revealed nothing about [the defendant's] involvement in their mother's care they had not already known. So the statute of limitations was not tolled by the pending autopsy report." *Id.* at 822 (Emphasis added). As to the autopsy report, the Court found that "the autopsy report confirmed [the plaintiff's] suspicions that [the defendant's] negligence played a part in her mother's death. Yet it did not reveal any act, omission, or neglect by [the defendant] that would not have been otherwise known or suspected." *Id.* at 827-28. *Eads* is directly applicable to the instant matter. Ms. Pollan was aware of the Appellees' alleged negligence and the autopsy did not reveal any act, omission or neglect by them that was not already known or suspected.

1. Mr. Pollan Fails to Offer Controlling Precedent that a Diagnosis was a Prerequisite for Discovery of the Survival Claims.

Mr. Pollan cites to several decisions of this Court for the proposition that a diagnosis was needed for the statute to commence as to the survival claims and that Ms. Pollan was entitled to rely upon what her physicians informed her regarding her conditions. None support his arguments.

Mr. Pollan cites to a single decision, *Schiro v. American Tobacco Company*, 611 So. 2d 962 (Miss. 1992), in support of his contention that a medical diagnosis was

required for the discovery of the survival claims. *Schiro* is inapposite both factually and as a matter of law. *Schiro* was a negligence action for injuries sustained as a result of cigarette smoking in which this Court reversed a grant of summary judgment based upon the expiration of the statute of limitations – finding that the statute of limitations commenced on the date that the plaintiff was diagnosed with a cancerous mass. *Id.* at 962, 965. *Schiro* is of no precedential value to the instant appeal as it is not a medical negligence action.[14] The discovery rule in medical negligence cases differs from those present in non-medical negligence cases in that it is focused on the discovery of the negligence or wrongful conduct, not on the injury. *See e.g. Caves*, 991 So. 2d at 155 ("…comparing the discovery rules in the medical-malpractice statute and the "catch-all" statute, we have one which focuses on discovery of the date of the wrongful conduct, and another which focuses on the date of discovery of the injury or disease.")(Emphasis added).[15]

Mr. Pollan cites to *Neglen v. Breazeale*, 945 So. 2d 988, 990 (Miss. 2006), *Parham v. Moore*, 552 So. 2d 121, 122 (Miss. 1989), and *Pittman v. Hodges*, 462 So. 2d 330, 332 (Miss. 1984) for the proposition that Ms. Pollan was entitled to rely upon her physicians opinions that she did not have CPM. All are factually distinct from this case. All involved surgical procedures where, following the procedure, the plaintiff was provided information by the surgeons which prevented discovery of the claims. *Neglen*, 945 So. 2d at 991 (plaintiff was not given information concerning the

[14] *Schiro* involved the catch all statute of limitations codified at Miss Code Ann. § 15-1-49.
[15] *See also Angle v. Koppers, Inc.*, 42 So. 3d 1, 6 (Miss. 2010)(noting that "medical-malpractice cases…are governed by a different statute of limitations and a different discovery rule" than those under the catch all statute).

surgery in question and relied upon the surgeons' assurances that the complications that arose were ordinary risks accompanying any surgery); *Parham*, 552 So. 2d at 124 (plaintiff was told it would take 18 months for the healing process to be completed and the defendant "failed to offer any proof to support his position that [the plaintiff] could have discovered that her leg would be permanently partially paralyzed prior to the end of the recuperative period."); *Hodges*, 462 So.2d at 333 (defendant physician informed the plaintiff that numbness would take up to a year to resolve and only thereafter could the plaintiff have known or discovered the claim). In contrast, this case does not involve information from healthcare providers which prevented discovery of the claim. Ms. Pollan was aware of and believed that her neurological injuries were related to the correction of her sodium during her admission on October 8, 2008, which belief was bolstered by her treating physicians.[16]

2. Discovery of the Survival Claims did not Require an Expert Opinion.

Mr. Pollan argues that, without a confirmed diagnosis of CPM, Ms. Pollan could not have secured a certificate of expert consultation as required by Miss. Code.

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[16] Ms. Pollan's records reveal multiple instances where she was informed she might have CPM. At the time of her discharge from the North Mississippi Medical Center in Tupelo on October 14, 2008, it was noted that "she might be suffering from CPM". R.E. Appellees 44-45. Thereafter, her primary care provider informed her during an office visit on August 9, 2010, where she was noted to be alert, articulate and had an appropriate memory, that "…I think the sodium was corrected quickly and she may have developed [CPM] which may have led to her chronic disability that she is now managing." R.E. Appellees 47-48. Following that visit on September 29, 2010, Ms. Pollan was informed by Dr. Brockington that "I do think that patient's cognitive impairment is directly due to the effects of the hyponatremia." R.E. 26-27. Ms. Pollan's medical records also document that her knowledge of her injuries and belief as to their cause. These records include the August 24, 2010 patient profile and a home health record on October 22, 2010, which documented that "[t]he patient reports severe sodium depletion in 2008 that was possible misdiagnosed and treatment that caused deep brain damage based upon report from family members." R.E. Appellees 49.

Ann. § 11-1-58 prior to filing suit and thus any suit that potentially would have been filed would have been frivolous. This argument is misplaced and has been rejected by this Court and the Court of Appeals. *See Henley*, 965 So. 2d at 650 (rejecting the plaintiff's argument that expert testimony was required in order to discover the claim and finding that her suspicions regarding potential negligent conduct started "the clock running"); *Gray v. Univ. of Mississippi Sch. of Med.*, 996 So. 2d 75, 80 (Miss. Ct. App. 2008)(denying arguments that an expert consultation was necessary to commence the statute of limitations as the plaintiff "knew of the acts of negligence" prior to any consultation).[17] The discovery rule does not require the procurement of an expert opinion in order for the statute of limitations to commence but rather requires discovery of negligent or wrongful conduct. Therefore, Ms. Pollan did not require an expert opinion in order to discover her survival claim. Her suspicions of potentially negligent conduct were sufficient.

E. Ms. Pollan's Suspicions of Negligent Conduct Triggered the Statute of Limitations on August 24, 2010.

Mr. Pollan argues that the trial court erred in finding that the statute of limitations commenced "at a time when Ms. Pollan only suspected that she had a condition caused by treatment in West Point rather than from the time when the condition was actually diagnosed and the causation was discovered at autopsy" - asserting that "the facts and law do not support" that a patient's suspicions are

[17] *See also Eads*, 180 So. 3d at 827 (Miss. Ct. App. 2015)(Noting that "...the statute is not automatically tolled while waiting on an autopsy report, medical records, or expert opinion" and that the focus is rather on when the plaintiff "having exercised reasonable diligence, should have discovered [the defendant] had been medically negligent.")(Emphasis added).

sufficient to commence the statute of limitations. Br. at 8, 15. Contrary to his assertions, a plaintiff's suspicion of negligent conduct is sufficient to satisfy the discovery rule and commence the statute of limitations. *See Henley*, 965 So. 2d at 650("[t]his Court [has] made [it] clear…that the plaintiff's own suspicions regarding possible negligent conduct starts the clock running."); *Sutherland*, 959 So. 2d at 1009 ("[the plaintiff's] own suspicions and actions thereon together with the passage of time from when [the plaintiff] first recognized the effects from [the medication] …were enough to satisfy the statutory requirement of discovery of the alleged medical negligence.")(Emphasis added).

Ms. Pollan's suspicions concerning her injuries and their relation to the correction of her sodium at NMMC-West Point sufficed to commence the statute of limitations. Moreover, Mr. Pollan's admissions in his brief and Petition for Interlocutory Appeal concerning Ms. Pollan's suspicions underscore the proper ruling by the trial court that the statute of limitations commenced on August 24, 2010. This is most clearly evidenced by the following statement: "[i]t is obvious that Ms. Pollan knew something was seriously wrong with her…[and] [s]he may have "suspected" that she suffered from central pontine myelinolysis caused by the rapid correction of her sodium level in the hospital…" See Pet. at 13. (Emphasis added). By admitting that Ms. Pollan knew something was wrong with her and that she suspected she suffered from CPM related to the rapid correction of her sodium at NMMC – West Point, Mr. Pollan has admitted that Ms. Pollan discovered her survival claims, at the latest, on August 24, 2010. This Court has previously held

that analogous language commenced the statute of limitations, i.e., the plaintiff knew "something was real wrong." *Henley*, 965 So. 2d at 650.

III. No Genuine issue of Material Fact Exists as to Whether the Survival Claims are Time Barred

The determination of whether the statute of limitations has run is a question of law. *Stringer v. Trapp*, 30 So. 3d 339, 341 (Miss. 2010). The determination of whether the statute of limitations is tolled by the discovery rule turns on the "factual determination of 'what the plaintiff knew and when.'" *Id.* at 342. "Occasionally the question of whether the suit is barred by the statute of limitations is a question of fact for the jury; however, as with other putative fact questions, the question may be taken away from the jury if reasonable minds could not differ as to the conclusion." *Id.*[18] The running of the statute of limitations is the proper subject of summary judgment if no genuine issue of material fact exists. *MS Comp Choice, SIF*, *981* So. 2d at 962.

In the instant case, reasonable minds could not differ that on August 24, 2010, Ms. Pollan had knowledge of her injuries, the cause of the injuries and the relationship between her healthcare providers and those injuries. The patient profile leaves no question that on August 24, 2010, Ms. Pollan knew she had suffered neurological deficits and a disabling condition and knew or suspected that it occurred from the correction of her low sodium during her October 8, 2008 admission to NMMC – West Point. Lacking a genuine issue of material fact regarding Ms. Pollan's discovery of her survival claims on that date, the trial court properly granted partial

[18] Quoting *Smith v. Sanders*, 485 So. 2d 1051, 1053 (Miss. 1986).

summary judgment. *Huss*, 991 So. 2d at 167("an individual may not take shelter in the "discovery rule" when reasonable minds could not differ that the plaintiff possessed sufficient information to bring a claim.").

Mr. Pollan argues that there is a genuine issue of material fact over the date of discovery of the survival claims and that the question of the discovery date should be submitted to the jury as the parties and the trial court all chose different dates for the commencement of the statute of limitations. There was not, as Ms. Pollan asserts, a conflict between the trial court and the Appellees as to the date of commencement. The Appellees asserted, as is often the case where the discovery rule is implicated, that the medical records evidenced multiple dates which sufficed to commence the statute of limitations as to the survival claims. One of those dates was August 24, 2010, the date of the patient profile and the date on which the trial court found there was no genuine issue of material fact that Ms. Pollan had discovered this claim.[19]

A. Mr. Pollan offers Insufficient Support for his Arguments that a Genuine Issue of Material Fact Exists.

Mr. Pollan cites to several decisions of this Court and the Court of Appeals for the position that a genuine issue of material fact exists as to the date of the discovery of the survival claims. He relies upon non-medical negligence cases and a single medical negligence case that is factually inapposite. The non-medical cases are of no

[19] Per Mr. Pollan's argument, summary judgment in the context of the discovery rule would never be warranted as, in the event the parties were to take opposing positions on the date of commencement of the statute of limitations, – a virtual certainty – a genuine issue of material fact would automatically be created which would remove the possibility of summary judgment.

precedential value.[20] As discussed *supra*, the statute of limitations and discovery rule for medical negligence actions are unique and are focused on negligence rather than the injury.

The sole medical negligence case cited by Mr. Pollan is *Winfield v. Brandon HMA, Inc.*, 100 So. 3d 974, 977 (Miss. Ct. App. 2012). *Winfield* concerned a piece of catheter left in the patient following a surgical procedure. *Id.*at 976. The medical records documented that the patient was informed of the catheter remnant following the procedure. *Id.* The defendants moved for summary judgment - arguing that the statute of limitations commenced on the date of the surgical procedure. *Id.* at 977. The plaintiff executed an affidavit averring that he had no knowledge of the catheter being left in and offered deposition testimony that he had never had any discussions concerning the residual catheter and that, after the surgery, he did not remember anything due to being "out of it". *Id.* at 977, 979. The trial court granted the motion for summary judgment - finding that the plaintiff knew of the catheter remnant on the date of the procedure. *Id.* The Court of Appeals reversed - finding that a genuine issue of material fact existed based upon the plaintiff's affidavit and his deposition testimony. *Id.* at 979.

Winfield differs from the instant case for several reasons. First, *Winfield*, concerned an affidavit and sworn testimony by the plaintiff that he received no

[20] The non-medical negligence cases cited are: *Phillips 66 Co. v. Lofton*, 94 So. 3d 1051, 1056 (Miss. 2012); *Ridgway Lane & Assocs., Inc. v. Watson*, 189 So. 3d 626, 628 (Miss. 2016), *reh'g denied* (May 12, 2016) and *Mississippi Valley Silica Co., Inc. v. Barnett*, 2016 WL 4444981 (Miss. Ct. App. Aug. 23, 2016). Of note, *Barnett*, at the time of the filing of this brief, is currently pending before the Court of Appeals on a Motion for Rehearing.

information concerning the catheter remnant. No such equivalent is present in this case.[21] Second, the partial summary judgment in this case was based, not upon a medical record generated by healthcare personnel, but rather upon a document that was executed by or on behalf of Ms. Pollan which sets forth, in detail, information which forms the allegations of negligence in the instant matter. Third, unlike *Winfield*, which concerned a single entry in the medical record, the medical records of Ms. Pollan include several references to CPM, the rate of correction of her sodium and her injuries as set forth in her Complaint. Finally, Mr. Pollan, unlike the plaintiff in *Winfield*, does not deny that Ms. Pollan was aware of her injuries or their relation to the correction of her sodium levels at NMMC – West Point on October 8, 2008.

IV. The Trial Court did not Abuse its Discretion in Finding the Appellees did not Waive their Statute of Limitations Defense

A defendant's failure to timely and reasonably raise and pursue the enforcement of an affirmative defense coupled with active participation in the litigation, will ordinarily serve as a waiver. *Hutzel v. City of Jackson*, 33 So. 3d 1116, 1120 (Miss. 2010)(Quoting *MS Credit Center, Inc. v. Horton*, 926 So.2d 167, 181 (Miss. 2006)).[22] In order to find waiver, there must be a "substantial and unreasonable delay in pursuing the right plus active participation in the litigation…"

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[21] Mr. Pollan executed an affidavit in connection with his response to the Motion for Partial Summary Judgment. R.E. 28-29. The affidavit merely addresses Mr. Pollan's knowledge of his mother's condition and of his understanding of her knowledge of the underlying events of this lawsuit. The affidavit does not establish a genuine issue of material fact as Mr. Pollan's knowledge is not material to Ms. Pollan's discovery of her survival claims. The material facts to discovery concern Ms. Pollan's knowledge.

[22]"To pursue an affirmative defense or other such rights, a party need only assert it in a pleading, bring it to the court's attention by motion, and request a hearing." *Horton*, 926 So. 2d at 181.

Pittman, 2010 WL 4009151, at *9. There is no minimum period of time which constitutes unreasonable delay, rather, such determinations should be made by the trial court on a case by case basis. *See Horton*, 926 So.2d at 181 ("[w]e decline today to set a minimum number of days which will constitute unreasonable delay in every case, but rather we defer such findings for the trial court on a case by case basis."). In determining the level of participation in the litigation, the different context of cases must be taken into account. *Empire Abrasive Equip. Corp.*, 87 So. 3d at 460.

A. Extensive Discovery was Required for the Appellees to Assert Their Statute of Limitations Defense.

Mr. Pollan erroneously asserts that the Appellees waived their defenses of the statute of limitations – arguing that they delayed in pursuing the defense and that there was no unusual circumstances which would warrant the delay. Contrary to his assertions, this case did present unusual circumstances. This is a complex wrongful death action sounding in medical negligence involving multiple statutes of limitations implicating the discovery rule – the application of which is a fact-intensive process. *Huss*, 991 So. 2d at 166. Determining when the respective statutes of limitations commenced required obtaining relevant medical records, written discovery and deposition testimony.

This Court has found on multiple occasions that affirmative defenses which require discovery in order to determine the nature of the defenses are not waived by participation in the litigation in order to make such a determination. *See e.g. Empire Abrasive Equip. Corp. v*, 461 ("discovery [was] necessary for the defendants to determine the nature of their defense."); *Doe v. Rankin Cty. Sch. Dist.*, 189 So. 3d

616, 620 (Miss. 2015)("[t]his case necessitated thorough discovery of a sensitive nature, which it took reasonable time to conduct.")[23] Here, the Appellees needed the benefit of discovery to obtain sufficient information to pursue their affirmative defense of the statute of limitations. This required time to conduct such discovery and to research and prepare the motion for partial summary judgment. The necessity of time is particularly underscored by the fact that, as parties asserting the statute of limitations as an affirmative defense, the Appellees had the burden of proof to establish that the survival claims were time barred, which required the procurement of sufficient factual matter to make a determination of when the statute commenced and expired. *Blessitt v. King's Daughters Hosp. of Yazoo Cnty., Inc.*, 18 So. 3d 878, 881 (Miss. Ct. App. 2009)("It is the law in Mississippi that the plea of statute of limitations is an affirmative defense for which the party asserting it has the burden of proof.")[24] The record of this case evidences that the Appellees diligently sought and obtained information and then researched and prepared their motion – filing it only when they had a good faith basis to do so.

Mr. Pollan argues that the discovery conducted by the Appellees was not necessary to pursue the statute of limitations defense – specifically, that the facts relied upon by the Appellees in their factual history of their motion for partial

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[23] *See also Univ. of Mississippi Med. Ctr. v. Hampton*, 2016 WL 5914215, at *4 (Miss. Ct. App. Oct. 11, 2016)("… some participation in litigation may be reasonable or necessary to uncover the facts needed to successfully bring the defense to the court's attention for adjudication…).

[24] In addition, under M.R.C.P. 11, counsel was required to certify with his signature that good grounds existed to support the motion and in order to do so he required a sufficient factual basis to file the motion.

summary judgment are similar to those facts set forth in the Complaint and Amended Complaint. His argument is misplaced and unsupported by the record. The motion for partial summary judgment contains three pages of factual background related to the commencement of the statute of limitations, a determination that was made based upon relevant medical records and the deposition testimony of Mr. Pollan. R.E. Appellees 5-8. This factual recitation was elaborated upon in the rebuttal in support of the motion, which again cited to relevant medical records. R.E. Appellees 32-33. The discovery conducted was a prerequisite to bringing the motion before the trial court in good faith and the usage of that discovery is readily apparent from the motion, the rebuttal and the trial court's order. Per his arguments, Mr. Pollan would have had the Appellees blindly file their motion shortly after the filing of the Complaint and Amended Complaint, relying solely upon his allegations and without the necessary factual support.

The waiver of an affirmative defense is a case by case, discretionary determination to be made by the trial court based upon the facts and circumstances of the case presented. Waiver applies "where the material facts and circumstances are undisputed or clearly established." *Pittman*, 2010 WL 4009151, at *8. Here, the facts and circumstances presented do not demonstrate that waiver occurred. This was not a case implicating affirmative defenses which required no factual development. The facts and circumstances surrounding the statute of limitations, prior to the benefit of discovery, were not undisputed or clearly established. Only with the benefit of discovery could the Appellees conclusively establish that the survival claims were

time barred. This is evidenced by the fact that the trial court relied upon a particular record obtained through discovery in ruling on the motion.

B. Mr. Pollan cites Inapposite Precedent in Support of his Argument of Waiver.

In support of his arguments that the Appellees have waived the statute of limitations, Mr. Pollan cites to two decisions of this Court: *MS Credit Ctr., Inc. v. Horton*, 926 So. 2d 167, 173 (Miss. 2006) and *Meadows v. Blake*, 36 So. 3d 1225, 1226 (Miss. 2010). Both are distinguishable. *Horton* involved an arbitration provision and *Meadows* involved a failure to comply with the certificate of expert consultation pursuant to Miss Code Ann. § 11-1-58 - affirmative defenses that did not require discovery. *Horton*, 926 So. 2d at 179-180. *Meadows*, 36 So. 3d at 1232. In *Empire Abrasive Equip. Corp.*, 87 So. 3d at 460, this Court noted that the different context of cases must be taken into account when addressing potential waiver of a statute of limitations defense - stating that, "[t]his case is easily distinguishable from the arbitration provision at issue in *Horton,* since the defendants in *Horton* knew, or should have known, early in the proceedings, about the existence of the contract with Horton containing the arbitration provision." This Court further noted that "[t]he requirements for meeting the substantial participation test in a suit like that at issue here will be far greater than those in a suit similar to the one described in *Horton.*" *Id.* Likewise, in *Doe v. Rankin Cty. Sch. Dist.*, 189 So. 3d 616, 620 (Miss. 2015) this Court found that an affirmative defense of discretionary-function immunity was not waived as "[u]nlike…*Horton*…which involved waiver of a defendant's right to compel arbitration and did not require discovery for determining so, discovery here is

necessary for determining whether [the defendant] enjoys the right to discretionary-function immunity." *Empire Abrasive Equip. Corp.* and *Rankin* are instructive and controlling upon the instant case and support the trial court's finding that the Appellees did not waive their affirmative defense of the statute of limitations. In the instant case, as in those cases, the Appellees needed discovery in order to determine their statute of limitations defenses.

C. The Trial Court did not Abuse its Discretion in Denying the Waiver Arguments.

Whether a defense is timely pursued is a discretionary determination left to the trial court and one that must be made on a case by case basis considering the individual facts and circumstances of each case. *Holland v. Peoples Bank & Trust Co.*, 3 So. 3d 94, 105 (Miss. 2008). In examining the decision of the trial court, this Court employs an abuse of discretion standard of review under which this Court must affirm the trial court if it applied the correct legal standard and there is no "definite and firm conviction that the [trial] court…committed clear error." *Ashmore*, 148 So. 3d at 982. This Court defers to the trial court on determinations of waiver of an affirmative defense. *Horton*, 926 So. 2d at 181 ("We defer such findings for the trial court on a case by case basis."); *Fredericks v. Malouf*, 82 So. 3d 579, 581 (Miss. 2012)("This Court defers to the trial court's findings regarding waiver…")

Mr. Pollan argues that the trial court erred by failing to consider or rule upon his arguments concerning waiver of the statute of limitations. The hearing transcript evidences otherwise. At the outset of the hearing the trial court indicated that he had read the motion for partial summary judgment and the related filings. R.E. Appellees

62:10-11("…I've read the information that's been sent to me"). Thereafter, Mr. Pollan's counsel fully advanced his arguments concerning waiver and the trial court ruled upon the same:

> **Counsel:** The other reason that their motion should be denied, Your Honor, is that they have actively contrary to Mr. Upchurch's position in his paper that was joined in by Mr. Wheeler, they have both actively participate (sic) in the litigation process for over two years. The docket itself shows that almost a hundred injuries (sic) of activity. Depositions, records and the whole nine yards. But every fact, Your Honor, that they rely on to support their claim that the statute had run was in the original filed complaint. And on the case authority and the Court's discretion, the Court can say that they waived that statute by actively pursuing these cases. The deposition of the nurses had nothing to do with what Ms. Pollan knew or didn't know. Or the deposition of Dr. War--
>
> **Trial Court:** Mr. Lancaster, I've been on the bench 13 years now going on. I don't think I've routinely dismissed things upon the filing of a lawsuit. I think my history has been to let these things develop and then -- you know, out of fairness to both sides. So I will tell you off the bat, I'm not inclined to say that that I'm not going to let somebody claim the statute of limitations when I think it's to everbody's benefit to be able to engage in some sort of discovery and try to figure out what really happened. So, I'm not inclined to do that. Because then if I send that message then, every time y'all file a lawsuit, they're going to rush right in and say, Judge, statute of limitations, let's dismiss this thing. Then I'm having to guess totally blind. And I don't think that's a good thing. So, I would move along from that argument. Because that is not one that is going to carry the day with me. Maybe with the Supreme Court, but we (sic) me, not so much.
>
> **Counsel:** Your Honor, it's totally in the Court's discretion of that.
>
> **Trial Court:** Sure.
>
> **Counsel:** And the Supreme Court is not going to overrule that decision. I feel very confident about that.

R.E. Appellees 81:26-29; 82:1-29; 83:1-14.

As evidenced by the above, the trial court did not, as Mr. Pollan asserts, decline to hear or fail to consider or rule upon this argument. The trial court clearly addressed and denied the argument. Mr. Pollan's counsel recognized as much – stating the denial of the argument would not be overruled and that it was within the trial court's discretion to deny the same. The trial court acted well within its discretion and properly denied the argument. This Court has previously affirmed the denial of an argument of waiver based upon analogous circumstances. *See Empire Abrasive Equip. Corp.*, 87 So. 3d at 461.[25]

The trial court properly made a discretionary determination based upon the individual facts and circumstances of this case. This determination should be upheld by this Court as the trial court properly applied the correct legal standard and the record of this case evidences no error. No abuse of discretion occurred and the trial court's denial of the argument of waiver, respectfully, should be affirmed.

CONCLUSION

For the foregoing reasons, the Appellees respectfully request this Court to affirm the trial court's grant of partial summary judgment on Mr. Pollan's survival

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[25] In *Empire Abrasive Equip. Corp.* this Court stated as follows:

> Significantly, from the questions and comments posed by the trial judge at the hearing, it was obvious that he was very familiar with the record in this case, including the procedural history. After the trial judge heard counsels' arguments on the motion for summary judgment, he commenced his bench ruling as follows:
>
> > Okay. All right. First of all, the Court specifically finds that there's been no waiver by the defendants of an affirmative defense in this matter. That's one of the positions argued by the plaintiffs. I want to make that clear at the outset.

Empire Abrasive Equip. Corp., 87 So. 3d at 461.

claims and affirm the trial court's finding that the Appellees did not waive their statute of limitation defenses.

RESPECTFULLY SUBMITTED, this the 16th day of February, 2017.

ANDREW WARTAK, M.D.

By: /s/ John M. McIntosh
DAVID W. UPCHURCH, MSB #10558
JOHN M. MCINTOSH, MSB #103933

UPCHURCH & UPCHURCH, P.A.
P.O. Box 2529
Tupelo, MS 38803-2529
Phone: (662) 260-6950
Fax: (662) 269-3713

Attorneys for the Appellee,
Andrew Wartak, M.D.

CLAY COUNTY MEDICAL CORPORATION D/B/A/ NORTH MISSISSIPPI MEDICAL CENTER-WEST POINT, ANGIE TURNAGE, C.L.P.N., WILLIAM C. LARMOUR, R.N. AND ASHLEY THOMAS DAVIS, R.N.

By: /s/ John G. Wheeler
JOHN G. WHEELER, MSB # 8622

MITCHELL, MCNUTT & SAMS, P.A.
105 South Front Street
P.O. Box 7120
Tupelo, MS 38802-7120
Phone: (662)842-3871
Fax: (662) 842-8450

Attorneys for the Appellees,

Clay County Medical Corporation d/b/a North Mississippi Medical Center-West Point; Angie Turnage, C.L.P.N.; William C. Larmour, R.N.; and Ashley Thomas Davis, R.N.

CERTIFICATE OF SERVICE

I, John M. McIntosh, one of the attorneys for the Appellee, Andrew Wartak, M.D., do hereby certify that I have this day filed the above and foregoing pleading or other paper with the Clerk of the Court using the appellate e-filing system, which sent notification of such filing to the following:

Alan D. Lancaster, Esq.
Liston Lancaster, PLLC
P.O. Box 645
Winona, MS 38967

John "Mickey" Montgomery, Esq.
P.O. Box 891
Starkville, MS 39760

John S. Moore, Esq.
Moore Law Office, PLLC
P.O. Box 924
Starkville, MS 39760

Dolton W. McAlpin, Esq.
P.O. Box 867
Starkville, MS
39760-0867

Further, I hereby certify that I have mailed by United States Mail the document to the following non-MEC participant:

Honorable James T. Kitchens, Jr.
P.O. Box 1387
Columbus, MS 39703-1387

DATED this the 16th day of February, 2017.

/s/ John M. McIntosh
JOHN M. MCINTOSH