IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DOCKET NO. 2008-CA-00382

VERA HARRIS

Plaintiff/Appellant

VERSUS

VONDA G. REEVES-DARBY, M.D. AND GASTROINTESTINAL ASSOCIATES ENDOSCOPY CENTER, LLC D/B/A GI ASSOCIATES AND ENDOSCOPY CENTER

Defendants/Appellees

APPEAL FROM THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI FIRST JUDICIAL DISTRICT

BRIEF OF APPELLEES
(ORAL ARGUMENT REQUESTED)

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IN THE SUPREME COURT OF MISSISSIPPI

VERA HARRIS **APPELLANT**

V. **DOCKET NO. 2008-CA-00382**

VONDA G. REEVES-DARBY, M.D. AND GASTROINTESTINAL ASSOCIATES ENDOSCOPY CENTER, LLC D/B/A GI ASSOCIATES AND ENDOSCOPY CENTER **APPELLEES**

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.

1. Vonda Reeves-Darby, M.D. - Defendant/Appellee
2. Gastrointestinal Associates Endoscopy Center, LLC d/b/a GI Associates and Endoscopy Center - Defendant/Appellee
3. Medical Assurance Company of Mississippi - Insuror of Defendants/Appellees
4. Mildred M. Morris (MSB #3492); Walter T. Johnson (MSB #8712); Joseph G. Baladi (MSB #100286); and Robert H. Pedersen (MSB #4084), Watkins & Eager, PLLC, 400 East Capitol Street, Suite 300, Jackson, MS 39201 - Counsel for Appellees
5. Vera Mae Harris, child of Lula P. Green, Deceased - Plaintiff/Appellant
6. Vera Mae Harris, Executrix of the Estate of Lula P. Green, Deceased - Plaintiff/Appellant
7. Vera G. Harris, child of Lula P. Green, Deceased
8. Wallace Green, child of Lula P. Green, Deceased

9. Ernest Green, child of Lula P. Green, Deceased

10. Willie Mae G. Lofton, child of Lula P. Green, Deceased

11. Lucie G. Washington, child of Lula P. Green, Deceased

12. Sara G. Wright, child of Lula P. Green, Deceased

13. Edmond Green, child of Lula P. Green, Deceased

14. Rubie L. G. Cameron, child of Lula P. Green, Deceased

15. Michael Green, child of Lula P. Green, Deceased

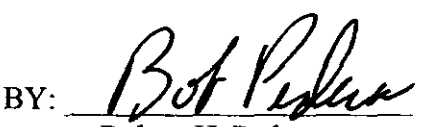
16. Ethel G. Thompson, child of Lula P. Green, Deceased

17. Mamie D. G. Upkins, child of Lula P. Green, Deceased

18. Robert V. Greenlee (MSB #100638); Shane F. Langston, (MSB #1061); Langston & Langston, PLLC, 416 East Amite Street, Jackson, Mississippi 39201 - Attorneys for Plaintiffs/Appellants

Respectfully submitted,

BY: WATKINS & EAGER PLLC

BY: 

Robert H. Pedersen

STATEMENT REGARDING ORAL ARGUMENT

APPELLEES REQUEST ORAL ARGUMENT

This may be the first occasion for the Court to consider the part of Section 15-1-69 that is at issue in this appeal. For that reason, Medical Defendants believe oral argument may be helpful to the Court and to the parties.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. After the death of Plaintiff Lula P. Green, did the trial court correctly construe and apply the one-year limitations in Miss. Code Ann.§ 15-1-69 (Rev. 2003) to Harris' attempt to revive Plaintiff's Lula P. Green's survived medical negligence lawsuit?

2. Does Harris' failure to make her "waiver" arguments to the trial court preclude her from making those waiver arguments to this Court or, alternatively, do Harris "waiver" arguments have any merit?

STATEMENT OF THE CASE

Nature of the Case, Course of the Proceedings and Disposition in the Court Below

This is a medical malpractice action. Plaintiff Vera Harris, individually, and as next friend of her 87 year-old mother, Lula P. Green, filed this action against Defendant Dr. Vonda G. Reeves-Darby and against Defendant Gastrointestinal Associates Endoscopy Center, LLC d/b/a GI Associates & Endoscopy Center, which is the clinic where Dr. Reeves-Darby worked. (collectively referred to as Medical Defendants). Plaintiffs Green and Harris alleged Dr. Reeves-Darby negligently ordered a colonoscopy on Ms. Green and that GI Associates & Endoscopy Center was vicariously liable for the alleged negligence of Dr. Reeves-Darby. (R. 6-10).

While the civil action was pending, Ms. Green died. The parties agree that Ms. Green's death was not caused by the alleged negligence of Dr. Reeves-Darby. (R. 29). Therefore, upon the death of Ms. Green, this case became a "survival action", not a "wrongful death" action.

Approximately 17 months after Ms. Green's death, the Hinds County Chancery Court appointed Vera Harris to be the Executrix of the Estate of Lula P. Green, deceased. (R. 36-37). Harris then filed a motion pursuant to M.R.C.P. 25(a)(1) and asked the trial court to substitute the Executrix as the plaintiff to prosecute the survived medical malpractice action against the

Medical Defendants. (R.32-33).

On the same date that Harris filed her Rule 25(a)(1) motion, Medical Defendants filed a motion to dismiss the medical malpractice action. (R. 29-31). Medical Defendants argued the only party who had standing to prosecute the survived medical negligence civil action did not exist until 17 months after Ms. Green died. Medical Defendants next argued the Executrix was time-barred from reviving and prosecuting the medial negligence action because the attempt to substitute the Executrix and revive the civil action was not made within the one-year period provided by Miss. Code Ann.§ 15-1-69 (Rev. 2003). (R. 29-31, 38-42,80-87).

The trial court treated the motion to dismiss as a motion for summary judgment and granted summary judgment to the Medical Defendants. The trial court ruled the "survival statute", Miss. Code Ann § 91-7-237 (Rev. 2004) prescribed that only Ms. Green's administrator or executor could prosecute her medical negligence action after her death. Next, the Court ruled that Harris' Rule 25(a)(1) motion to substitute was time-barred because it was made after the running of the one-year period provided in § 15-1-69. (R. 173-178).

Statement of the Facts Relevant to the Issues Presented for Review and The Trial Court's Ruling

No dispute exists as to the following material facts:

1. On August 10, 2004, Dr. Reeves-Darby performed a colonoscopy on Lula P. Green. (R. 75).

2. On August 11, 2005, Vera Harris, individually and as next friend of Lula P. Green, filed the Complaint. The Complaint alleges that Dr. Reeves-Darby negligently ordered the colonoscopy on Lula P. Green and that was performed on August 10, 2004, and that GI Associates Endoscopy Center was vicariously liable for the alleged negligence of Dr. Reeves-Darby. (R. 6-10).

3. On February 9, 2006, Lula P. Green died from causes not related to the alleged negligently ordered colonoscopy. (R. 29).

4. On July 16, 2007, the Chancery Court of Hinds County issued Letters Testamentary appointing Vera Harris as Executrix of the Estate of Lula P. Green, deceased. (R. 36-37).

5. On July 20, 2007, two motions were filed:

   a. Plaintiff Vera Harris, individually and on behalf of Lula Green, filed a motion under M.R.C.P. 25(a)(1) and asked the Court to substitute Vera Harris, Executrix of the Estate of Lula P. Green, deceased, as the plaintiff in the case. (R. 32-35).

   b. Medical Defendants filed a motion to dismiss which argued Plaintiff Vera Harris, individually, had no standing to prosecute the medical malpractice action after the death of Lula P. Green, and argued that the motion to substitute Ms. Green's Executrix as the plaintiff was time barred because it was not filed within the one-year period in § 15-1-69. (R. 29-31, 38-42,80-87).

Trial Court's Ruling

Based upon the foregoing undisputed material facts, the trial court made these rulings:

- The survival statute, Miss. Code Ann. §91-7-237 (Rev. 2004) gives the plaintiff's executor or administrator standing to prosecute a "personal action" when the plaintiff "'to any personal action shall died before final judgment.'" (R. 175).
- "[I]n her individual capacity, Vera Harris has no legal authority to prosecute a survival action for Ms. Green's medical malpractice claim. Only the administrator or executor of Ms. Green's estate has that authority." (R.176).
- "Section 91-7-237 does not address whether a motion to substitute is timely when it is filed 17 months after the decedent's death." (R.176).

- "The Legislature by this statute [§ 15-1-69] gives a deceased plaintiff's executor or administrator one year from the date of death to commence the new action in the name of the deceased plaintiff's executor or administrator."
- "Under Rule 25(a), the action is 'commenced' by the substitution of the executrix for the deceased plaintiff." (R. 177).
- "The 90-day period [in Rule 25(a)] cannot and does not replace the one-year period enacted by the Legislature in § 15-1-69 which gives all executors or administrators one year from the plaintiff's death to be substituted whether or not a suggestion of death is filed. As with other time periods in the rules of civil procedure, the Court, under M.R.C.P. 6(b), has discretionary authority to extend the 90-day period in Rule 25(a) but the Court has no discretionary authority to extend the time periods enacted by the Legislature in Chapter 1 of Title 15, including the one-year period included in § 15-1-69." (R. 177-178).
- "In this case, the executrix of Mrs. Green's estate waited 17 months after Ms. Green's death before filing a motion for substitution. Having waited more than one year, the Court finds the executrix is time-barred by § 15-1-69 from being substituted for the deceased plaintiff." (R. 178).

SUMMARY OF ARGUMENT

After Ms Green's death, her cause of action for medical negligence survived by operation of Section 91-7-237. Plaintiff Vera Harris waited 17 months to be appointed Executrix of Ms. Green's estate. Harris then moved, under Rule 25(a)(1), to substitute the Executrix and thereby revive Ms. Greens' civil action which had abated when she died. The trial court held the attempt to substitute the Executrix and revive Mr. Green's civil action was time-barred by Section 15-1-

69. The trial court correctly construed and applied Section 15-1-69 and Rule 25(a)(1) to Harris' motion to substitute.

Harris is procedurally barred from arguing the "waiver" issues she raises because she did not present those issues to the trial court. Alternatively, the two waiver issues have no merit. First, Ms. Green died after the Medical Defendants filed their answer so they could not make an affirmative defense in their answer based on an event that they did not know would occur. Second, Medical Defendants were not required to file a pleading after they filed their answer, so they cannot be barred from asserting a limitation defense that arose after they filed their answer.,

ARGUMENT

Introduction

The limitation issue the trial court confronted arose because Harris waited 17 months after the death of her mother to be appointed as the Executrix of the Estate and to ask the trial court to substitute the Executrix as the plaintiff to prosecute Ms. Green's medical negligence action.

Before addressing the limitation issue, we review the trial court's ruling on survival and standing which Harris does not seem to challenge.

Survival of Ms. Green's Medical Negligence Cause of Action

The survival of Ms. Green's medical negligence cause of action after her death is a matter of substantive law. After Ms. Green's death, nothing Harris did brought about the survival of Ms. Green's cause of action. Survival of the claim occurred by operation of Section 91-7-237.

Under the common law, Ms. Green's medical negligence cause of action would have been extinguished at her death, but to modify the common law's harsh result, the Legislature

long ago enacted survival statutes now codified as Miss. Code Ann. § 91-7-233[1] and § 91-7-237[2] (Rev. 2004). *McNeely v. City of Natchez,* 148 Miss. 268, 114 So. 484, 486-487 (1927); *Illinois Central R. Co. v. Pendergrass*, 69 Miss. 425, 12 So. 954, (1891). In both statutes, the Legislature provides for the survival of a "personal action". §91-7-233 (" may commence and prosecute any **personal action**"); § 91-7-237 ("parties to any **personal action**"). A personal action "means an action for recovery of personal property, for breach of contract, or for **injury to person** or property." *In re Estate of Beckley v. Beckley*, 961 So.2d 707, 711 (¶5)(Miss. 2007) (emphasis added). Ms Green's medical negligence cause of action comes within the meaning of "personal action". *See, Powell v. Buchanan*, 245 Miss. 4, 147 So.2d 110, 112-113 (1962)(Tort cause of action for injuries from automobile accident survived under 1942 Code, Section 609 [now § 91-7-233]).

Section 91-7-233 governs survival when the testator or intestate dies before a civil action is commenced, and Section 91-7-237 governs survival when one of the parties dies before judgment is entered in a pending action. *See, Flight Line, Inc. v. Tanksley*, 608 So.2d 1149, 1167 & n.14 (1992)(Noting that Section 91-7-233 applies to "actions not yet commenced at the time of

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[1] § 91-7-233. What actions survive to executor or administrator.

Executors, administrators, and temporary administrators may commence and prosecute any personal action whatever, at law or in equity, which the testator or intestate might have commenced and prosecuted. They shall also be liable to be sued in any court in any personal action which might have been maintained against the deceased

[2] § 91-7-237. Death of party not to abate suit in certain cases.

When either of the parties to any personal action shall die before final judgment, the executor or administrator of such deceased party may prosecute or defend such action, and the court shall render judgment for or against the executor or administrator. If such executor or administrator, having been duly served with a scire facias or summons five days before the meeting of the court, shall neglect or refuse to prosecute or defend the suit, the court may render judgment in the same manner as if such executor or administrator had voluntarily made himself a party to the suit. The executor or administrator who shall become a party shall be entitled to a continuance of the cause until the next term of the court.

plaintiff's death" and implying Section 91-7-237 applies to actions pending at time of plaintiff's death.). Ms. Green died while her civil action was pending so her medical negligence cause of action survived by operation of Section 91-7-237.

The law accomplished the survival of Ms. Green's medical negligence cause of action without any participation by Harris, but the law and court rule require Harris to accomplish certain tasks to revive the civil action that was pending when Ms. Green died.

Standing to Prosecute Ms. Green's Civil Action

First, Harris must find a party who has standing to prosecute the civil action for the survived medical negligence cause of action. Ms. Green's death removed her as a the plaintiff. A deceased plaintiff cannot prosecute a civil action. *See* 1 Am. Jur. 2d Abatement, Survival, and Revival § 44 at 129 (2005) ("Suits and actions must be prosecuted by and against living parties."). Both survival statutes give standing to the deceased person's executor or administrator for the prosecution of the survived cause of action. §91-7-233 ("**Executors, administrators, and temporary administrators** may commence and prosecute any personal action . . .."); § 91-7-237 ("the **executor or administrator of such deceased party may prosecute** or defend such [personal] action , . .. ").

Harris was not appointed Executrix until 17 months after Ms. Green died. During that 17 month hiatus, Harris, individually, had no standing to pursue Ms. Green's survived medical negligence cause of action, and the Executrix, who had standing, did not exist. *See, Delta Health Group, Inc. v. Estate of Estate of Pope*, 995 So.2d 123, 2008 Miss. Lexis. 485 *7 (¶ 13) (Miss. October 2, 2008) ("The fact that Payne subsequently was appointed as administrator does not change the undisputable fact that Payne lacked standing to *commence* the suit"); *Long v. McKinney*, 897 So.2d 160, 174 (¶60)(Miss. 2004)("In the event the litigants wish to pursue a

claim on behalf of the estate of the deceased, such estate must, of course, be opened and administered through the chancery clerk.").

Revival of Ms. Green's Civil Action

Having identified the person with standing to prosecute Ms. Green's civil action, Harris next must revive the civil action.

> "Revival: is the term given to the procedure by which a new party, having a right to prosecute or defend a cause of action which survives the death of an original plaintiff or defendant is substituted for the deceased party and the action is continued in the name of the substituted party. The substitution of a new party to proceed with the prosecution or defense of a claim is the revivor of an action. The death of a party to a legal proceeding, where the cause of action survives, suspends the action as to the decedent until someone is substituted for the decedent as a party.

1 C.J.S., Abatement and Revival §175 at 152 (2005).

Under the Mississippi Rules of Civil Procedure, Rule 25(a)(1) provides the procedural framework for reviving a civil action which involves a cause of action that has survived. M.R.C.P.25, Official Comment; M.R.C.P. 81(f); *See*, 7C Federal Practice and Procedure § 1952 at 655 (2007)("Rule 25 . . . does not provide for the survival of rights or liabilities but merely describes the method by which the original action may proceed if the right of action survives.").

Rule 25(a)(1) reads:

> (a) Death
> (1) If a party dies and the claim is not thereby extinguished, **the court shall, upon motion, order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party** and, together with the notice of hearing, shall be served o n the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of summons. The action shall be dismissed without prejudice as to the deceased party if the motion for substitution is not made within ninety days after the death is suggested upon the record by service of a statement of the fact of the death as herein provided for the service of the motion.

(emphasis added)

The motion to substitute the Executrix is the vehicle to revive the civil action. M.R.C.P. 81(f). Any party or the deceased party's representative can file the motion. If the motion is granted, the former plaintiff, Ms. Green, is replaced with a new plaintiff, the Executrix, and the civil action is revived. The original cause of action for medical negligence is now prosecuted as a survived personal action for medical negligence under the survival statute, Section 91-7-237.

Harris filed a Rule 25(a)(1) motion to substitute. Next, we review the timeliness of that motion.

Harris' Rule 25 Motion to Substitute Executrix Was Untimely Under Section 15-1-69

Having determined that Ms. Green's medical negligence cause of action survived and that Harris, individually, had no standing during the 17 months after Ms. Green's death to prosecute the survived claim, the trial court had to determine whether the request to substitute the Executrix and revive the action was timely. The trial court reviewed M.R.C.P. 25(a)(1) and Miss. Code Ann. § 15-1-69 (Rev. 2003) to make this determination. Both apply when a plaintiff in a pending action dies, but each has different functions. When the Supreme Court promulgated Rule 25(a)(1), it established the procedure for reviving Ms. Green's survived medical negligence claim. When the Legislature enacted Section 15-1-69, it gave Ms. Green's Executrix one year from the date of Ms. Green's death to do so.

The trial court found that by waiting 17 month, Harris' motion for substitution was not timely under Section 15-1-69. We turn to a review of that statute.

Section 15-1-69

Section 15-1-69 reads as follows:

> **§ 15-1-69. Commencement of new action subsequent to abatement or defeat of original action.**

> If in any action, duly commenced within the time allowed, the writ shall be abated, or the action otherwise avoided or defeated, by the death of any party thereto, or for any matter of form, or if, after verdict for the plaintiff, the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed on appeal, the plaintiff may commence a new action for the same cause, at any time within one year after the abatement or other determination of the original suit, or after reversal of the judgment therein, and his executor or administrator may, in case of the plaintiff's death, commence such new action, within the said one year.
>
> **SOURCES: Codes, Hutchinson's 1848, ch. 57, art. 1 (16); 1857, ch. 57, art. 19; 1871, § 2163; 1880, § 2686; 1892, § 2756; Laws, 1906, § 3116; Hemingway's 1917, § 2480; Laws 1930, § 2314; Laws, 1942, § 744.**

Section 15-1-69 uses language from a different era but an analysis of its language reveals the statute applies in three circumstances:

1. "If in any action, duly commenced within the time allowed, the writ[3] shall be abated,[4] or the action otherwise avoided or defeated, by the death of any party thereto"
2. "If in any action, duly commenced within the time allowed, the writ shall be abated, or the action otherwise avoided or defeated,. . . for any matter of form".
3. "[I]f, after verdict for the plaintiff, the judgment shall be arrested,[5] or if a judgment for the plaintiff shall be reversed on appeal".

The trial court relied upon the first provision which states: "If any action, duly commenced within the time allowed, the writ shall be abated, or the action otherwise avoided or

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[3]There are many types of judicial writs. Generally, a writ issued from a court to accomplish a specific purpose. Black's Law Dictionary 1783-1787 (4th Ed. 1968).

[4]When used in connection with a pending civil action, abatement "is a present suspension of all proceeding in a suit, which prohibits the court and the parties from proceeding in any manner until the case has been ordered reinstated." 1 Am Jur 2d Abatement, Survival, and Revival §1 at 84-85 (2005).

[5] "Arrest of Judgment"means "[t]he act of staying a judgment, or refusing to render judgment in an action at law, . . . after verdict, for some matter intrinsic appearing on the face of the record, which would render the judgment if given, erroneous or reversible." Black's Law Dictionary 141 (4th Ed. 1968).

defeated, by the death of any party thereto, . . and his executor or administrator may, in case of the plaintiff's death, commence such new action, within the said one year."

Harris cites no case where the Court has construed and applied this provision of the statute and the Medical Defendants have found none. Most of the annotated cases listed in the Mississippi Code deal with the question of whether an action was dismissed "for any matter of form" and one case deals with reversal of judgment. See cases annotated under Section 15-1-69.

Finding no cases construing the part of Section 15-1-69 that provides for abatement of the action when a party dies, Medical Defendants begin their analysis by reviewing the plain meaning of the statute.

The statute deals with the abatement of a civil action. It does not deal with the survivability of a cause of action. The difference is explained as follows:

> In considering the matter of the abatement of an action by the death of a party, as well as the survival and revival of the action, there is a clear difference between the action and the cause of action; a cause of action may survive although a particular action based on it is abated by the death of a party.

1 Am Jur2d Abatement, Survival, and Revival § 44 at 129 (2005).

Ms. Green duly commenced her civil action within the time allowed by filing it before the running of the limitations period in Miss. Code Ann. § 15-1-36 (Rev. 2003). Ms. Green's death abated the civil action because it could not be prosecuted until Ms. Green's Executrix revived the civil action by filing a Rule 25(a) motion to substitute. Section 15-1-69 requires the executor or administrator to commence a new action within one year after the abatement of the civil action by Ms. Green's death.

The new action is the revived civil action to prosecute the survived cause of action. By operation of Section 91-7-237, the cause of action survived and the revived civil action replaced Ms. Green's original action. This new survival action is "commenced" by moving under Rule

25(a)(1) to substitute the Executrix for the deceased Ms. Green and to revive the civil action in the name of the Executrix in place of the deceased plaintiff. *See Craig v. Harrison Wagner*, 88 Conn. 100, 103, 89 A. 916, 917 (1914)(At common law the death of sole defendant would abate the action and the plaintiff would have to bring a new action against the executor but by statute revival has replaced the bringing of a new action.); *Glazier v. Heneybuss*, 19 Okla. 316, 318 P. 872 (1907)(same).

Since the appointment of the Executrix and the motion to substitute the Executrix occurred 17 months after the abatement of the civil action by Ms. Green's death, the trial court correctly ruled that the attempt to substitute and revive the civil action was time barred.

The Codification History of Section 15-1-69 Supports This Reading

The "source" citations at the end of Section 15-1-69 show the initial predecessor version of the statute appeared first in the 1848 Hutchinson's Code. All of these predecessor versions of Section 15-1-69 are printed in Addendum 1.

All of the predecessor versions of Section 15-1-69 appeared in the Statute of Limitations part of the codes just as Section 15-1-69 does. The placement in the Limitations part of these Codes indicate that Section 15-1-69 and its predecessor versions are substantive, not procedural statutes.

Rule 25 is a procedural rule. It cannot supercede a substantive limitations statute. M.R.C.P. 2, Official Comment. ("[T]he substantive and remedial principles that applied prior to the advent of these rules are not changed.")

The promulgation of Rule 25 supplanted circuit court statutes §11-7-25, §11-7-27, §11-7-29, and §11-7-31, but these are all procedural statutes which dealt with death of one or several parties, death of the nominal plaintiff, death of defendant after judgment and certain actions not

to abate, respectively. *395-397 So.2d* 201, 205 (West Miss. Cases 1981). In 1991, the Legislature repealed certain procedural statutes that were superceded by or in conflict with the rules of procedure. Sections 11-7-25, 11-7-27 and 11-7-31 were among the repealed statutes. 1991 Miss. Laws Ch. 573, §141.

Section 15-1-69 was not listed among the statutes supplanted by the promulgation of the Mississippi Rules of Civil Procedure, *395-397 So.2d* 201-212 (West Miss. Cases 1981), and it was not listed among the statutes repealed in 1991. 1991 Miss. Laws Ch. 573, §141. The absence of Section 15-1-69 from the list of supplanted statues and repealed statutes indicates Section 15-1-69 is a substantive statute, not a procedural one, and that Rule 25 does not replace Section 15-1-69.

Two changes to the 1857 Code support a reading that Section 15-1-69 gives the executor or administrator one year from the plaintiff's death to revive the civil action. The first change was to Article. 19 of the 1857 Code (now §15-1-69). That change added the language about abatement of a duly commenced action by the death of any party and gave the executor or administrator one year to revive the civil action. The added provision applied to pending actions. The second change was a new provision designated as Article 18 of the 1857 Code (now §15-1-55). This new provision applied when a claimant died before a civil action was commenced. When that occurs and if the cause of action survives, the decedent's administrator has the balance of the limitations period or one year after the date of Letters Testamentary or Administration to commence a civil action. (The current version of Section 15-1-55 gives the executor or administrator one year from death in place of one year from the Letters Testamentary.) A copy of §15-1-55 and its 1857 revision are at Addendum 2.

These two changes to the 1857 Code deal with the death of the claimant before a civil action is filed and the death of a plaintiff after a civil action is filed and each statute establishes a limit on how long the administrator or executor have to act. The Legislature established a one year period for the executor or administrator to revive a survived action if the plaintiff dies while the action is pending (Section 15-1-69), and a one year period or the balance of the limitations period for the executor or administrator to commence a civil action when the person dies before a civil action is commenced (Section 15-1-55).

These two statutes also have a counterpart in one of the survival statutes. The one-year limitation in Section 15-1-55 applies to the revival of personal actions that survive under Section 91-7-233 because both statutes apply to the situation when a civil action has not been filed. The one-year limitations in Section 15-1-69 applies to the revival of personal actions that survive under Section 91-7-237 because both statutes apply to the situation when a civil action is pending.

In summary, the codification history of Section 15-1-69 and Section 15-1-55 demonstrate the Legislature established a time limit for the commencement of survived personal actions when the claimant dies before a civil action is filed and a time limit for the revival of civil actions when the plaintiff dies after commencement of a civil action.

Other Jurisdictions Have Time Limitations On Revival

Other jurisdictions' ruling are not binding on this Court but may be persuasive.

The Kentucky Court of Appeals in *Mitchell v. Money*, 602 S.W.2d 687, 688 (Ky. Ct. App. 1980) when ruling on a limitations similar to Section 15-1-69, held that " the limitation provided for within any revivor statute is mandatory and not discretionary, thereby preventing a party or the court from extending such time". The Kentucky Supreme Court in *Hammons v. Tremco,*

Inc., 887 S.W.2d 336 (Ky. 1994) held that the motion to substitute must be made during the period provided for in statute and, because it is statutory, is not subject to enlargement. *Accord*, *Daniel v. Fourth & Market, Inc.*, 445 S.W.2d 699 (Ky. 1968) ("A personal representative does not automatically succeed to the decedent's rights and status as a litigant...but is permitted by the statutes to raise it from limbo and become a party" and this revival of the action is subject to the statutory limitation period not subject to enlargement).

The Nebraska Supreme Court in *Fox v. Nick,* 265 Neb. 986, 660 N.W. 2d 881, (2003) held that the death of a party to a legal proceeding suspends the action until someone is substituted for decedent and the substituted party is the revivor of the action and if the action is not revived in the manner and time provided by statute, then the action has no effect.

The Iowa Supreme Court in *Brown v. Roberts*, 205 N.W.2d 746 (Iowa 1973) applied a one year statute of limitations provided for in a statutory scheme for substituting the proper party and held that a failure to undertake proceedings to maintain the action within the time prescribed by statute is fatal and the suit is subject to dismissal.

The Missouri Court of Appeals in *Gardner v. Mercantile Bank of Memphis,* 764 S.W.2d 166 (Mo. Ct. App. 1989) held that a statute imposing a time restriction on the revival of an action is a statute of limitation and a motion to substitute 18 months after the first publication of letters of administration of the estate is time-barred.

The Oregon appellate court in *Mendez v. Walker*, 272 Ore. 602, 538 P.2d 939 (1975) held that when substituting a proposed plaintiff for the decedent in a case where death occurred before final judgment, the proposed plaintiff must comply with the statutes of limitations provided for in the statutory scheme for revival.

These ruling support the trial court's reading and application of Section 15-1-69.

Response to Appellant's Other Arguments on the Merits of the Trial Court's Ruling

The Medical Defendants respond to arguments Harris made that have not been addressed in the argument made above.

The one-year limitations in Section 15-1-69 serves the purpose of preventing situations such as occurred here. For reasons not explained in the record, Harris waited 17 months before having Ms. Green's Executrix appointed. During the time, no one had standing to prosecute Ms. Green's survived cause of action for medical negligence.

Harris misreads this Court's decisions applying the "matter of form" provision of Section 15-1-69. That part of Section 15-1-69 is not involved in this case.

The civil action that is revived by the decedent's executor or administrator, is a different action from the one initially brought by the decedent. The initial action was brought by the decedent. The revived action is brought by the executor or administrator. The original action was a common law tort action. The revived action is brought by operation of the survival statute. At common law, the survived action was brought as a separate new action. The revival procedure created by statute or court rule has replaced the need for a separate new action. The new survival action is now commenced by the filing of the Rule 25 motion to substitute.

Section 15-1-69 operates to grant the executor or administrator an additional year to revive the civil action that abated with the death of the plaintiff. The granting of the additional year fits within the remedial nature the Court has attributed to the statute.

The revivor function of a Rule 25(a)(1) motion to substitute is the equivalent of the commencement of the new survival action. M.R.C.P. 81(f).

The relate back rule of M.R.C.P 15(c) does not apply for two reasons. Rule 25(a)(1) is

the governing provision for substituting an executor or administrator for a deceased plaintiff. Harris did not amend the complaint so the relate back rule is not implicated here.

Harris' argument about the application of Section 91-7-237 confuses the survival of Ms. Green's cause of action for medical negligence with the revival of Ms. Green's civil action which abated when she died. The Medical Defendants acknowledge that Ms. Green's cause of action for medical negligence survived by operation of Section 91-7-237. The trial court's ruling acknowledges that Ms. Green's medical negligence cause of action survived by operation of Section 91-7-237. Harris' failure to timely revive Ms. Green's civil action is the reason the trial court dismissed the cause of action.

The trial court found that Harris did not do what Rule 25(a)(1) and Section 15-1-69 require to revive Ms. Green's civil action. Although Section 15-1-69 gave Harris a year to revive Ms. Green's civil action by filing a Rule 25 (a)(1) motion to substitute, she did not do so. She did not have the Executrix appointed and did not file a Rule 25(a)(1) motion until 17 months after Ms. Green's death. By that time, Harris' attempt to revive Ms. Green's civil action was time-barred.

Rule 25(a)(1) does not require that death be suggested on the record. The 90-day period that begins to run when death is suggested on the record does not replace or supercede the one year provided in Section 15-1-69 for reviving an action. The 90-day period in rule 25(a0(1) and the one-year period in Section 15-1-69 have different purposes.

The 90-day period that begins to run after death is suggested on the record may be extended and modified by the court. M.R.C.P. 6(b). Its purpose is to ensure timely compliance with the Court's rules.

The one year period in Section 15-1-69 was set by the Legislature and cannot be changed by the court. Its purpose is to ensure timely revival of an action abated by the death of the plaintiff. Timely revival of the civil action ensures the party prosecuting the action has standing to do so. An action prosecuted by a person without standing is a nullity and has no *res judicata* effect. *See, Tolliver ex rel. Wrongful Death Beneficiaries of Green v. Mladineo,* 987 So.2d 989, 995 (¶ 36) (Miss .App. 2007). ("This lack of standing " 'robs the court of jurisdiction to hear the case.' " . . . [and] any ruling on such a case is void ab initio.").

M.R.C.P. 17 does not apply. Rule 25(a)(1) governs substitution for a deceased party. Rule 25 deals with the situation when there is no party because of death. This is not a case where the real party is missing from the civil action. Rule 17 deals with the situation when there is a party who is not the real party in interest. Even if Rule 17 were the correct procedural vehicle for reviving Ms. Green's civil action, Rule 17's procedure would still have to be applied in the context of Section 15-1-69 because Rule 17 does not supercede Section 15-1-69. The trial court dismissed the claim because the substitution was not made within the one year period prescribed by Section 15-1-69. Even if the substitution should have occurred under Rule 17, as Harris's argument assumes, the attempt to substitute is time-barred because it is attempted after the one-year period set in Section 15-1-69.

Methodist Hospital v. Richardson, 909 So.2d 1066 (Miss. 2005)(Richardson II) is distinguishable and does not control this case. That action began as a wrongful death claim brought by Linda Richardson on behalf of all wrongful death beneficiaries. That case did not involve revival of a civil action after the death of the plaintiff. Section 15-1-69 was not involved in that case. Rule 25(a)(1) was not involved in that case.

Richardson II began as a wrongful death action filed by a wrongful death beneficiary which made wrongful death claims and survival claims. As interpreted by the Court, the Wrongful Death Statute permits the wrongful death beneficiary to make both types of claims. *Long v. McKinney*, 897 So.2d 160, 174 (¶57)(Miss. 2004). On the first appeal, the wrongful death claims were dismissed. The case was remanded for further proceedings. Upon remand, the trial court dismissed the wrongful death claims leaving only the survival claims. The wrongful death beneficiary then opened an estate and moved to file an amended complaint which added the administrator and alleged the survival claims. The Court held that under Rule 17 the administrator of the estate was correctly substituted because the administrator was the real party in interest and the wrongful death beneficiaries could not advance survival claims unless without wrongful death claims. This is a good example of how Rule 17 works. When the civil action was filed, the Wrongful Death Statute gave the wrongful death beneficiary the right to assert wrongful death claims and survival claims. After the wrongful death claims were dismissed, the wrongful death beneficiary no longer could pursue the survival claim and the administrator of the estate became the real party in interest. Therefore, substitution under Rule 17 was appropriate.

Richardson II had a plaintiff still in the case; it just was not the plaintiff who had the real interest in pursuing the survival claim. In this case, there was no plaintiff because Ms. Green had died. Rule 17 applies best to the facts in Richardson. Rule 25 fits best with the facts in this case. But regardless of which rule is used, Section 15-1-69 still applies. No motion to substitute under Rule 17 or under Rule 25 was made within the one year period so any attempt to substitute is time barred.

Necaise v. Sacks, 841 So.2d 1098 (Miss. 2003) is also distinguishable and not controlling. After Plaintiff Freeman died, Ms. Necaise was appointed Executrix, Ms. Necaise did file a Rule

25 motion to substitute which the trial court granted and Ms. Necaise did file a motion to file an amended complaint which the trial court granted. All of these proceedings occurred within one year of Plaintiff Freeman's death. The Court based its ruling on Richardson II. As shown above, Richardson II does not control this litigation.

Response to Harris' Waiver Argument

Harris did not argue to the trial court that the Medical Defendants "(1) failed to raise the affirmative defense in its statute of limitations in its Answer and (2) actively and extensively participated in the litigation process of this action for over 5 months after the alleged time-bar occurred." (R. 71-74, 92-96, 164-166). The Court usually does "not consider issues raised for the first time on appeal." *Jones v. Fluor Daniel Servs. Corp.*, 959 So.2d 1044, 1048 (¶15) (Miss. 2007). The Court has also held that "[f]ailure to raise an issue in a trial court causes operation of a procedural bar on appeal." *Birrages v. Illinois Central R.R.*, 950 So.2d 188, 194 (¶18) (Miss. App. 2006). And, "this Court has stated, time and again, an issue not raised before the lower court is deemed waived and is procedurally barred." *Gale v. Thomas*, 759 So.2d 1150, 1159 (¶ 40) (Miss. 1999). For these reasons, the Court should decline to consider Harris' waiver issues.

Alternatively, Medical Defendants respond to both of Harris' waiver arguments.

Harris is wrong when she argues the Medial Defendants waived raising the one-year limitations period in Section 15-1-69 because they did not assert it in their answer. Obviously, at the time Medical Defendants filed their answer on October 5, 2005, they did not know Ms. Green was going to die on February 9, 2006, and they did not know Harris would wait 17 months before having the Executrix appointed and before seeking to have the civil action revived by the filing of a Rule 25 motion. If Medical Defendants had this knowledge, they would have affirmatively plead that the attempt to revive Ms. Green's civil action was time-barred by Section

15-1-69. Medical Defendants must plead only those affirmative defenses about which it knows or should know. A waiver requires that the party know what is being waived. *Channel v. Loyacono*, 954 So.2d 415, 425 (¶ 36)(Miss. 2007)("Waiver is voluntary surrender or relinquishment of some known right, benefit or advantage; estoppel is the inhibition to assert it.")(quoting *Sentinel Indus. Contracting Corp. v. Kimmins Indus. Serv. Corp.*, 743 So.2d 954, 964 (Miss.1999)).

Harris has not shown that the Medical Defendants could have known that she would not timely revive Ms. Green's civil action so Medical Defendants have not waived their right to raise the untimeliness under Section 15-1-69 of Harris's motion to substitute.

Medical Defendants raised the limitations issue in its motion. This Court has held a statute of limitations can be raised for the first time at summary judgment if sufficient time is given to the plaintiff to respond. B*ennett v. Madakasira,* 821 So.2d 794, 802 (¶¶ 29, 30)(Miss. 2002). Harris does not allege that she did not have time to respond to the motion to dismiss.

The Medical Defendants participation in the litigation does not constitute a waiver of their right to affirmatively assert that Harris is time-barred by Section 15-1-69 from having the Executrix substituted as plaintiff.

A defendant must assert affirmative defenses "[i]n a pleading to a preceding pleading . . .." M.R.C.P. 8(c). When the Medical Defendants prepared and filed their answer in October, 2005, Ms. Green was still alive and there was no basis for affirmatively pleading a limitations defense based on Section 15-1-69. After Ms. Green's death, plaintiff filed no pleading to which Medical Defendants were required to respond until Harris filed the motion to substitute on July 20, 2007, and on that same date Medical Defendants filed their motion to dismiss and raised the limitations defense. In *Chimento v. Fuller*, 965 So.2d 668, 677 (¶ 36)(Miss. 2007), the Court

distinguished that case from *MS Credit Center, Inc. v. Horton,* 926 So.2d 167, 180 (Miss.2006) and held there was no waiver of the statute of limitations defense because the plaintiff had not filed a pleading to which defendant had to respond.

> *Horton* is distinguishable from the facts of this case. In *Horton*, the plaintiff filed a complaint and the defendants had an opportunity to respond by filing an answer and affirmative defenses. *Id. See E. Miss. State Hosp. v. Adams,* 947 So.2d 887, 891 (Miss.2007) (Defendants had the opportunity to answer and assert defenses to plaintiff's complaint and participated in litigation, but waited more than two years to bring the motion to dismiss). Here, Mills filed no pleadings with the chancery court to which Chimento could respond until more than ten months after the trial.

Chimento v. Fuller, 965 So.2d at 677.

For the foregoing reasons, Harris' waiver arguments have no merit.

CONCLUSION

The trial court correctly held that Harris was time-barred by Section 15-1-69 from substituting executrix as the plaintiff and reviving Ms. Green's claim because Harris had waited more than one year to do so.

The Medical defendants did not waive their right to assert the limitations period in Section 15-1-69.

For these reason, the Medical Defendants ask the Court to deny the appeal and affirm the trial court's grant of summary judgment dismissing the Complaint filed herein.

This the 23rd day of January, 2009.

Respectfully submitted,

VONDA G. REEVES-DARBY, M.D. AND GASTROINTESTINAL ASSOCIATES AND ENDOSCOPY CENTER, LLC D/B/A GI ASSOCIATES AND ENDOSCOPY CENTER

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CERTIFICATE OF SERVICE

I, Robert H. Pedersen, do hereby certify that I have this day served, by United States Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellees on:

Robert V. Greenlee, Esq.
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Honorable W. Swan Yerger
Hinds County Circuit Judge
P. O. Box 327
Jackson, MS 39205

This th **23rd** day of January, 2009.

ROBERT H. PEDERSEN

CERTIFICATE OF MAILING (by hand delivery)

I, Robert H. Pedersen, do hereby certify that I have this day hand-delivered to the Clerk an original and three (3) copies of the Brief of Appellees in Docket No. 20007-CA-00000, on the **23rd** day of January, 2009.

DATED this the **23rd** day of January, 2009.

ROBERT H. PEDERSEN

ADDENDUM 1 - CODIFICATION HISTORY OF § 15-1-69

SECTION 15-1-69 (1972 Code)

§ 15-1-69. Commencement of new action subsequent to abatement or defeat of original action.

If in any action, duly commenced within the time allowed, the writ shall be abated, or the action otherwise avoided or defeated, by the death of any party thereto, or for any matter of form, or if, after verdict for the plaintiff, the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed on appeal, the plaintiff may commence a new action for the same cause, at any time within one year after the abatement or other determination of the original suit, or after reversal of the judgment therein, and his executor or administrator may, in case of the plaintiff's death, commence such new action, within the said one year.

At the end of § 15-1-69, the following codes are listed as the "source" of § 15-1-69:

1848 Hutchinson's Code, Chapter 57, Article 1 (14)

1857 Code, Chapter 57, Article 19

1871 Code, §S 2163

1880 Code, § 2686

1892 Code, § 2756

1906 Code, § 3316

1917 Hemingway's Code, § 2480

1930 Code, § 2314

1942 Code, § 744

Each of those "sources" is printed below.

1848 Hutchinson's Code, Predecessor Version of § 15-1-69

14. *Removal of Action, after Arrest or Reversal of Judgment within One Year.* If in any of the said actions specified in any of the preceding sections of this act, judgment be given for the plaintiff, and the same be reversed by writ of error; or if a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, then the said plaintiff, his or her heirs, executors or administrators, as the case shall require, may commence a new action within one year after such judgment reversed, or given against the plaintiff, and not after.

1857 Code, Predecessor Version of § 15-1-69

ART. 19. If, in any action duly commenced within the time allowed, the writ shall be abated, or the action otherwise avoided, or defeated, by the death or marriage of any party thereto, or for any matter of form, or if after verdict for the plaintiff, the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed on appeal or writ of error, the plaintiff may commence a new action for the same cause, at any time within one year after the abatement, or other determination of the original suit, or after reversal of the judgment therein; and if the cause of action does by law survive, his executor or administrator may, in case of his death, commence such new action within the the same one year.

1871 Code, Predecessor Version of § 15-1-69

§ 2163. If in any action, duly commenced within the time allowed, the writ shall be abated, or the action otherwise avoided or defeated, by the death or marriage of any party thereto, or for any matter of form, or if, after the verdict for the plaintiff, the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed, on appeal or writ of error, the plaintiff may commence a new action for the same cause, at any time within one year after the abatement, or other determination of the original suit, or after reversal of the judgment therein; and if the cause of action does, by law, survive, his executor or administrator may, in case of his death, commence such new action, within the said one year.

1880 Code, Predecessor Version of § 15-1-69

New Action after Abatement, Reversal, Etc.

§ 2686.* If in any action, duly commenced within the time allowed, the writ shall be abated, or the action otherwise avoided or defeated, by the death of any party thereto, or for any matter of form, of if, after verdict for the plaintiff, the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed, on appeal, the plaintiff may commence a new action for the same cause, at any time within one year after the abatement, or other determination of the original suit, or after reversal of the judgment therein; and his executor or administrator may, in case of his death, commence such new action, within the said one year.

1892 Code, Predecessor Version of § 15-1-69

2756. (2686). **New action after abatement, reversal, etc**. - If in any action, duly commenced within the time allowed, the writ shall be abated, or the action otherwise avoided or defeated, by the death of any party thereto, or for any matter of form, or if, after verdict for the plaintiff, the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed on appeal, the plaintiff may commence a new action for the same cause at any time within one year after the abatement or other determination of the original suit, or after reversal of the judgment therein; and his executor or administrator may, in case of his death, commence such new action, within the said one year.

1906 Code, Predecessor Version of § 15-1-69

3116. (2756) **New action after abatement, reversal, etc.** - If in any action, duly commenced within the time allowed, the writ shall be abated, or the action otherwise avoided or defeated, by the death of any party thereto, or for any matter of form, or if, after verdict for the plaintiff, the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed on appeal, the plaintiff may commence a new action for the same cause at any time within one year after the abatement or other determination of the original suit, or after reversal of the judgment therein; and his executor or administrator may, in case of his death, commence such new action, within the said one year.

1917 Hemingway's Code, Predecessor Version of § 15-1-69

2480. (3116) **New action after abatement, reversal.** - If in any action, duly commenced within the time allowed, the writ shall be abated, or the action otherwise avoided or defeated, by the death of any party thereto, or for any matter of form, or if, after verdict for the plaintiff, the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed on appeal, the plaintiff may commence a new action for the same cause at any time within one year after the abatement or other determination of the original suit, or after reversal of the judgment therein; and his executor or administrator may, in case of his death, commence such new action, within the said one year.

1930 Code, Predecessor Version of § 15-1-69

2314. New action after abatement, reversal. - If in any action, duly commenced within the time allowed, the writ shall be abated, or the action otherwise avoided or defeated, by the death of any party thereto, or for any matter of form, or if, after verdict for the plaintiff, the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed on appeal, the plaintiff may commence a new action for the same cause at any time within one year after the abatement or other determination of the original suit, or after reversal of the judgment therein; and his executor or administrator may, in case of his death, commence such new action, within the said one year.

1942 Code, Predecessor Version of § 15-1-69

§ 744. New action after abatement, reversal.

If in any action, duly commenced within the time allowed, the writ shall be abated, or the action otherwise avoided or defeated, by the death of any party thereto, or for any matter of form, or if, after verdict for the plaintiff, the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed on appeal, the plaintiff may commence a new action for the same cause at any time within one year after the abatement or other determination of the original suit, or after reversal of the judgment therein; and his executor or administrator may, in case of his death, commence such new action, within the said one year.

ADDENDUM 2--SECTION 15-1-55

olds v. Wilkinson, 119 Miss. 590, 81 So. 278 (1919).

Remaindermen are not barred from securing cancellation of deed to the land under wrongful sale during life of life tenant. Clark v. Foster, 110 Miss. 543, 70 So. 583 (1916).

The statute [Code 1942, § 727] begins to run against one to whom land is conveyed in trust for others from the time adverse possession is taken under claim of ownership, and when he is barred the beneficiaries he represents are barred. Nelson v. Ratliff, 72 Miss. 656, 18 So. 487 (1895).

This provision does not apply to ordinary cases where the right is that of minors, to be asserted by the guardian in their names. Weir v. Monahan, 67 Miss. 434, 7 So. 291 (1890).

Where a husband lends his wife's money as his own, the borrower not knowing it was hers until the debt was barred as to him, it is also barred as to her. Perry v. Ellis, 62 Miss. 711 (1885).

RESEARCH REFERENCES

ALR. Time of existence of mental incompetency which will prevent or suspend running of statute of limitations. 41 A.L.R.2d 726.

Appointment of guardian for incompetent or for infant as affecting running of statute of limitations against ward. 86 A.L.R.2d 965.

Fiduciary or confidential relationship as affecting estoppel to plead statute of limitations. 45 A.L.R.3d 630.

When statute of limitations commences to run on right of partnership accounting. 44 A.L.R.4th 678.

Medical malpractice statutes of limitation minority provisions. 71 A.L.R.5th 307.

Am Jur. 31 Am. Jur. 2d, Executors and Administrators §§ 702 et seq.

CJS. 54 C.J.S., Limitations of Actions § 21.

§ 15-1-55. Effect of death of party before bar is complete.

If a person entitled to bring any of the personal actions herein mentioned, or liable to any such action, shall die before the expiration of the time herein limited therefor, such action may be commenced by or against the executor or administrator of the deceased person, after the expiration of said time, and within one year after the death of such person.

SOURCES: Codes, 1857, ch. 57, art. 18; 1871, § 2162; 1880, § 2683; 1892, § 2753; Laws, 1906, § 3113; Hemingway's 1917, § 2477; Laws, 1930, § 2298; Laws, 1942, § 728.

Cross References — Actions for injuries producing death, see § 11-7-13.

Time allowed to commence malpractice action on behalf of deceased person who died under disability, see § 15-1-36.

Effect of death of party to suit, see §§ 91-7-237 et seq.

JUDICIAL DECISIONS

1. In general.

Miss. Code Annotated § 15-1-59 does not place maximum durational limit on savings provision of § 15-1-7, as had Mississippi Legislature intended for savings clause in § 15-1-7 to have maximum duration it would have included such limit in § 15-1-7, as Legislature has in other statutes of limitations provisions, and further, § 15-1-59 is not statute of limitations. Talbert v. Henderson, 688 F. Supp. 250 (S.D. Miss. 1987).

When a decedent dies in the last year in which a suit may be brought for his injury

1857 CODE VERSION OF 15-1-55

it has accrued, shall be absent from, and reside out of the State, the time of his absence shall not be taken as any part of the time limited for the commencement of the action.

ART. 14. If any person, liable to any of the actions mentioned in this section, shall fraudulently conceal the cause of such action from the knowledge of the person entitled thereto, the cause of such action shall be deemed to have first accrued at, and not before the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered.

ART. 15. No judgment or decree, rendered in any court held within this State, shall be a lien on the property of the defendant therein, for a longer period than seven years from the rendition thereof, but the time during which the execution of such judgment or decree shall be stayed or enjoined, by supersedeas, injunction, or other process, shall not be computed as any part of the said period of seven years.

ART. 16. Bills of review in chancery shall be filed within two years next after the date of the final decree in the cause, and not after; saving to persons under any disability as hereinbefore mentioned, the like period of two years after the removal of such disability.

ART. 17. Writs of error and appeals shall be sued out, or granted, within three years next after the rendition of the judgment or decree complained of, and not after; saving to persons under disability as aforesaid, the like period after such disability shall be removed.

ART. 18. If any person entitled to bring any of the actions hereinbefore mentioned, or liable to any such action, shall die before the expiration of the time herein limited therefor, and if the cause of action does by law survive, such action may be commenced by or against the executor or administrator of the deceased person, after the expiration of said time, and within one year after the date of letters testamentary, or of administration. 15-1-55

ART. 19. If, in any action duly commenced within the time allowed, the writ shall be abated, or the action otherwise avoided, or defeated, by the death or marriage of any party thereto, or for any matter of form, or if after verdict for the plaintiff, the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed on appeal or writ of error, the plaintiff may commence a new action for the same cause, at any time within one year after the abatement, or other determination of the original suit, or after reversal of the judgment therein; and if the cause of action does by law survive, his executor or administrator may, in case of his death, commence such new action within the said one year. 15-1-69

ART. 20. In all actions of debt or assumpsit, brought to recover the balance due upon a mutual and open current account, the cause of action shall be deemed to have accrued at the time of the true date of the last item proved in such account: and in all other actions upon open accounts, the period of limitation shall commence to run against the several items thereof, from the dates at which the same respectively became due and payable.

ART. 21. In actions of debt, assumpsit, or on the case, founded upon any contract, no acknowledgment or promise shall be evidence of a new or continuing contract, whereby to take any case out of the operation of the provisions of this act, or to deprive any party of the benefit thereof, unless such acknowledgment or promise be made, or contained,