

**FILED**

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Serial: 149790

**IN THE SUPREME COURT OF MISSISSIPPI**

SUPREME COURT CLERK

**No. 2006-IA-00859-SCT**

**MISSISSIPPI STATE VETERANS  
AFFAIRS BOARD**

*Appellant*

v.

*Appellee*

**BEVERLY PETTIGREW KRAFT,  
PERSONAL REPRESENTATIVE OF  
THE WRONGFUL DEATH  
BENEFICIARIES AND HEIRS AT LAW  
OF BILLY L. PETTIGREW, DECEASED;  
AND INDIVIDUALLY AS THE  
DAUGHTER AND AN HEIR AT LAW OF  
BILLY L. PETTIGREW, DECEASED;  
AND THE ESTATE OF BILLY L.  
PETTIGREW, BY AND THROUGH  
BEVERLY PETTIGREW KRAFT,  
ADMINISTRATRIX OF THE ESTATE**

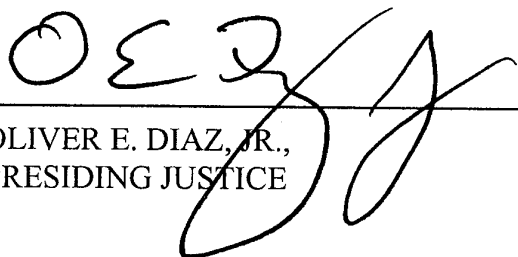
**ORDER**

This order is entered pursuant to the order of this court to dismiss the petition for certiorari as improvidently granted. By majority vote, the undersigned Justice was prohibited from issuing the attached dissent to the above referenced order. The authority to issue a dissent to an order of this court is well established. *See In re Bell*, 2006 Miss. LEXIS 769 (Nov. 9, 2006) (Diaz, J., dissenting) and *Barrett v. State*, 670 So. 2d 20 (Miss. 1996) (Banks, J., dissenting, joined by Lee, C.J.).

The authority to issue a dissent to an order to dismiss a petition for certiorari is likewise well established. *See e.g., Roper v. Weaver*, 127 S. Ct. 2022, 2024, 167 L.Ed.2d 966 (2007) (Scalia, J., dissenting, joined by Thomas & Alito, JJ.).

A majority vote to censor a justice of the court and prohibit the issuance of a dissenting opinion may be unprecedented in the history of American jurisprudence.

SO ORDERED, this the 21st day of August, 2008.



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OLIVER E. DIAZ, JR.,  
PRESIDING JUSTICE

**IN THE SUPREME COURT OF MISSISSIPPI**

**NO. 2006-IA-00859-SCT**

**Mississippi State Veterans Affairs Board**

**v.**

**Beverly Pettigrew Kraft, Personal  
Representative of the Wrongful Death  
Beneficiaries and Heirs at Law of Billy L.  
Pettigrew, Deceased; and Individually as  
the Daughter and an Heir at Law of Billy  
L. Pettigrew, Deceased; and the Estate of  
Billy L. Pettigrew, By and Through  
Beverly Pettigrew Kraft, Administratrix  
of the Estate**

**DIAZ, PRESIDING JUSTICE, DISSENTING:**

This Court granted the Mississippi Veterans Affairs Board's (MSVAB) interlocutory appeal from the denial of its motion for summary judgment. The following issues were before the Court: (1) whether the plaintiff's claims were barred by the statute of limitations; (2) whether the plaintiff failed to include the required certificate of expert consultation; and (3) whether the defendant could be held liable for the actions of its independent contractors. Twenty-five days before the deadline for this Court to render an opinion, the majority of its members have decided to dismiss the case as improvidently granted.

Notwithstanding the other issues which are without merit, I am compelled to address this Court's decisions which hold that the statute of limitations for wrongful death actions begins to run at the time of the injury, not on the date of death. The obvious result is that a

wrongful death action may expire before the decedent does. This judicially created rule is without foundation, and frankly, absurd.

Mississippi's wrongful death statute reads, in pertinent part:

Whenever the death of any person . . . shall be caused by any real, wrongful or negligent act or omission . . . as would, if death had not ensued, have entitled the party injured or damaged thereby to maintain an action and recover damages in respect thereof . . . [t]he action for such damages may be brought in the name of the personal representative of the deceased person or unborn quick child for the benefit of all persons entitled under the law to recover, . . . and there shall be but one (1) suit for the same death which shall ensue for the benefit of all parties concerned . . . in such action the party or parties suing shall recover such damages allowable by law as the jury may determine to be just, taking into consideration all the damages of every kind to the decedent and all damages of every kind to any and all parties interested in the suit.

Miss. Code Ann. § 11-7-13.

Because this statute does not contain a statute of limitations, this Court has held that a wrongful death action "is limited by the statute of limitation applicable to the tort resulting in the wrongful death." *Thiroux v. Austin*, 749 So.2d 1040, 1042 (Miss. 1999). For example, if the wrongful death were caused by an assault, the one-year statute of limitations in Section 15-1-49 would govern. *Id.*

In the present case, the parties agree that the one-year statute of limitations provided in Mississippi Code Section 11-46-11 is the applicable time period. However, the parties disagree as to when this limitations period began to run. The MSVAB argues that the statute of limitations for the plaintiff's wrongful death claim began to run, at the latest, on the date of decedent's transfer to the hospital (August 8, 2001) and not the date of his death (October 4, 2001). It contends that the one-year statute of limitations under the Mississippi Tort

Claims Act expired on August 8, 2002, two months before Beverly Kraft served her notice of claim letter. Kraft counters that the statute of limitations for wrongful death cannot begin to run until death.

The MSVAB's argument rests on *Jenkins v. Pensacola Health Trust, Inc.*, 933 So. 2d 923, 926 (Miss. 2006), which held that a wrongful death claim begins to run on the date of the wrongful act or acts which lead to the wrongful death. *Jenkins* specifically overruled *Gentry v. Wallace*, 606 So. 2d 1117 (Miss. 1992), which held that the limitations period for a wrongful death action begins to run on the date of death or when the heirs knew or should reasonably have known about the negligence which caused the death. *Jenkins* was written by Justice Dickinson and joined by Chief Justice Smith, Presiding Justice Waller, and Justices Easley and Carlson. Presiding Justice Cobb, and Justices Diaz, Graves, and Randolph did not participate in the opinion. 933 So. 2d 923.

Kraft argues that *Jenkins* was wrongly decided because the cases on which the opinion relies do not support its holding. I absolutely agree. While *Jenkins* was correct in holding that “the statute of limitations on bringing a wrongful death claim *is subject to, and limited by*, the statute of limitations associated with the claims of specific wrongful acts which allegedly led to the wrongful death,” none of the cases it cites support the proposition that the statute of limitations *begins to run* at the time of the wrongful acts. *Id.* at 926 (emphasis supplied).

The opinion first notes that *Gentry* held the statute of limitations begins to run on the date of death, but states that “the issue was decided differently in *Thiroux v. Austin*, 749 So.

2d 1040 (Miss. 1999).” *Id.* As Kraft points out in her brief, this is an inaccurate statement. In *Thiroux*, the Court simply held that because the wrongful death statute does not contain a statute of limitations, the limitations period is *governed* by that of the underlying tort. 749 So. 2d at 1042. It did not hold, as *Jenkins* erroneously concluded, that the statute of limitations *begins to run* at the time of the underlying tort. Thus, contrary to *Jenkins*’ assertion, the holdings in *Thiroux* and *Gentry* were consistent and there was no need to overrule *Gentry*.

The *Jenkins* opinion also relied on *Lee v. Thomspson*, 859 So. 2d 981 (Miss. 2003), *Wells v. Radiator Specialty Co.*, 413 F. Supp.2d 778 (S.D. Miss. 2006), and *Beck v. Koppers, Inc.*, 2005 U.S. Dist. LEXIS 26613 (N.D. Miss 2005). Yet again, these opinions do not hold that the statute of limitations for wrongful death actions begins to run on the date of the wrongful act. In *Lee*, the death and the underlying tort occurred on the same date, so there was no question as to when the limitations period began to run. 859 So. 2d at 982-83. This Court simply held that because the underlying tort was murder, the one-year limitations period for intentional torts would apply. *Id.* at 990.

As for the federal cases, *Wells* and *Beck*, the district courts were examining the issue of the discovery rule as it applied to latent injury or disease. *Wells*, 413 F. Supp.2d 778; *Beck*, 2005 U.S. Dist. LEXIS 26613. Neither case stands for the proposition that the statute of limitations for wrongful death begins to run on the date of the alleged wrongful conduct. *Jenkins* reliance on these cases is even more peculiar in light of the fact that each came to opposite conclusions – *Wells* held that the statute of limitations begins to run on the date of

discovery of the injury, while *Beck* held that the statute of limitations begins to run on the date of discovery of the injury *and* its cause. *Wells*, 413 F. Supp.2d at 782-83 (interpreting *Owens-Illinois, Inc. v. Edwards*, 573 So. 2d 704 (Miss. 1990)); *Beck*, 2005 U.S. Dist. LEXIS 26613 at \*4 (interpreting same).

Moreover, on the same day that *Jenkins* was decided, this Court issued *Prolit v. Hathorn*, 928 So. 2d 169 (Miss. 2006), which unmistakably found that the statute of limitations for a wrongful death action began to run on the date of death and not from the date of injury. In *Prolit*, the patient was injured on May 2, 2002, but did not die until May 18, 2002. *Id.* at 170. This Court plainly stated “[h]ere, the statute of limitations began to run on May 18, 2002.” *Id.* at 175.

For these reasons, *Jenkins* was wrongly decided and this Court’s holding in *Gentry* should be reinstated. As *Gentry* stated, “it is elementary that the ‘right to sue’ did not and could not have vested until [the decedent] died. Our wrongful death statute provides a cause of action to the survivors of those who die as a result of wrongful conduct. A person cannot qualify as a ‘survivor’ until he survives someone.” 606 So. 2d at 1121.<sup>1</sup> To hold otherwise would mean that the statute of limitations for a wrongful death action could expire before death. Such a result is unfair, illogical, and contrary to the vast majority of jurisdictions which hold that the limitations period cannot begin to run until death. *See* M.C. Dransfield, Annotation, *Time from which Statute of Limitations Begins to Run Against Cause of Action*

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<sup>1</sup>Indeed, the original wrongful death statute provided a statute of limitations of “one year after the death of such deceased person.” *Long v. McKinney*, 897 So. 2d 160, app. A (Miss. 2004) (quoting Chapter 61, art. 48 of the 1857 Mississippi Code).

*for Wrongful Death*, 97 A.L.R. 2d 1151 (“The great majority of the cases have taken the view that the date of death is controlling.”).<sup>2</sup>

In addition, as recently as November 2007, this Court relied on *Gentry* for the proposition that “in a wrongful death case the cause of action does not accrue *until the death* of the negligently injured person.” *Bullock v. Lott*, 964 So. 2d 1119, 1126 (Miss. 2007) (internal quotations and citations omitted). *Bullock* remarked in a footnote that *Gentry* had

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<sup>2</sup> See e.g., *James v. Phoenix Gen. Hosp.*, 744 P.2d 695, 705 (Ariz. 1987) (“The wrongful death cause of action can accrue *only at the death* of the party injured”) (citations omitted) (emphasis supplied); *Horwich v. Superior Court*, 980 P.2d 927, 935 (Cal. 1999) (“a wrongful death action has its own statute of limitations, which runs *from the date of death* rather than any antecedent injury”) (emphasis supplied) (citations omitted); *Rauschenberger v. Radetsky*, 745 P.2d 640, 643 (Colo. 1987) (“wrongful death claim must be filed within two years from the date the alleged negligence resulting in death is discovered, or in the exercise of reasonable diligence should have been discovered, or within one year from such death, whichever event is later”); *Fulton County Adm'r v. Sullivan*, 753 So. 2d 549, 552 (Fla. 1999) (“a cause of action for wrongful death accrues *on the date of death*”) (emphasis supplied) (internal citations omitted); *Miles v. Ashland Chem. Co.*, 261 Ga. 726, 727-728 (Ga. 1991) (“an action for wrongful death ‘accrues’ to the heirs *at death*”) (emphasis supplied) (internal citations omitted); *Chapman v. Cardiac Pacemakers*, 105 Idaho 785, 786-787 (Idaho 1983) (“the law is clear that a cause of action for wrongful death accrues *on the death of the injured party*, and not before”) (emphasis supplied) (citations omitted); *Farmers Bank & Trust Co. v. Rice*, 674 S.W.2d 510, 512 (Ky. 1984) (“the statute of limitations for wrongful death actions runs *from the death* of the decedent, even though there was no viable action for personal injury or medical negligence or malpractice at the time of death”) (emphasis supplied); *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 352 (Tex. 1990) (“*the time of death* should be taken as the point from which limitation should begin to run”) (Tex. 1990); *Atchison v. Great W. Malting Co.*, 766 P.3d 662, 665 (Wash. 2007) (“wrongful death actions clearly accrue *at the time of death*) (emphasis supplied).

Other jurisdictions distinguish between “survival” claims ( those damages the decedent could have recovered from the time of the injury) and “wrongful death” claims (those damages the beneficiaries may recover for their own injuries), with each claim having its own statute of limitations. See e.g., *Pastierik v. Duquesne Light Co.*, 514 Pa. 517, 520 (Pa. 1987).



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been overruled, and the case was being cited for the distinction between “accrue” and “occur.” However, it would be inconsistent to hold that a wrongful death action accrues for statute of limitations purposes when the injury occurs, but accrues for venue purposes upon death. In *Burgess v. Lucky*, 674 So. 2d 506, 511-12 (Miss. 1996), another case relied upon by *Bullock*, this Court specifically refused to accept such a distinction.<sup>3</sup>

For these reasons, the Court must reinstate *Gentry*. This case would provide that opportunity, but the Court has refused.

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<sup>3</sup>In *Burgess*, the Court was asked to apply the general venue statute, which, at the time, provided that a wrongful death action may be brought “in the county where the cause of action may occur or accrue.” 674 So. 2d at 508. Applying a Missouri court’s line of reasoning, the Court stated that “Lucky’s cause of action did not accrue for statute of limitations purposes until Mr. Lucky’s death in Simpson County, but it accrued for venue purposes in Forrest County, the place where the underlying negligence and injuries occurred.” *Id.* at 511. The Court went on to say that “[w]hile this is a viable alternative to the venue issue, it is not consistent with this Court’s ruling in *Flight Line*.” *Id.* at 512 (referencing *Flight Line, Inc. v. Tanksley*, 608 So. 2d 1149 (Miss. 1992)).