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“I’M NOT DEAD YET!”: AN ANALYSIS OF THE RECENT SUPREME COURT OF MISSISSIPPI’S WRONGFUL DEATH JURISPRUDENCE

Patrick J. Schepens*

I. INTRODUCTION

The classic comedy *Monty Python and the Holy Grail*¹ begins with a humorous scene in which a cart driver meanders up and down the streets and alleyways of a Medieval English village collecting the dead bodies of those who succumbed to the bubonic plague. As the cart driver chants “bring out your dead,” he is stopped by a large man carrying a rather frail looking old man over his shoulder.² However, before the frail old man is thrown upon the heap of dead bodies he protests, “I’m not dead yet” in a last ditched effort to avoid being carted off with the other dead bodies.³ The outlandish exchange that occurs in the opening scenes of the movie, when taken in whole, is quite humorous. The idea of passing off a living person as dead is quite absurd and makes for great comedic relief. However, due to a pair of recent Mississippi Supreme Court decisions, the humorous opening scene no longer appears as far fetched as it once did.

These two Mississippi Supreme Court decisions have drastically and detrimentally altered beneficiaries’ rights under the Mississippi wrongful death statute.⁴ The judicial reinterpretation of the wrongful death statute began with *Jenkins v. Pensacola Health Trust Inc.*, wherein the Court retreated from 149 years of contrary precedent, and for the first time held that the time for bringing a wrongful death action is limited by when the underlying injury occurred.⁵ Then, before the ink could dry on the *Jenkins* opinion, the Court handed down its decision in *Cleveland v. Mann*.⁶ In *Cleveland*, the Court relied upon its recent decision in *Jenkins* and disregarded wrongful death beneficiaries’ constitutional rights to open courts by binding the beneficiaries to an arbitration agreement which none of them had neither signed nor seen.⁷

These recent decisions of the Supreme Court of Mississippi are a case study in judicial activism. In *Jenkins* and *Cleveland*, the Mississippi Supreme Court paid no heed to the plain language of the statute, the legislative intent, the canons of statutory construction, and fundamental judicial

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1. MONTY PYTHON AND THE HOLY GRAIL (Python (Monty) Pictures 1974).
2. *Id.*
3. *Id.*
4. MISS. CODE ANN. § 11-7-13 (1972).
5. *Jenkins v. Pensacola Health Trust Inc.*, 933 So. 2d 923, 926 (Miss. 2006).
6. *Cleveland v. Mann*, 942 So. 2d 108 (Miss. 2006).
7. *Id.* at 113.

maxims such as *stare decisis*, not to mention wrongful death beneficiaries' constitutional rights to due process and open courts.⁸ Moreover, there was no crisis or uncertainty in the law prior to the Court's decisions to justify its departure; rather, the law at the time surrounding the wrongful death statute was firm and unchanging. However, and quite unfortunately, the Supreme Court of Mississippi's decisions in *Jenkins* and *Cleveland* have turned a stable area of the law on its head and, in so doing, have called 149 years of prior precedent into question.

II. HISTORY OF THE WRONGFUL DEATH STATUTE IN MISSISSIPPI

The Mississippi wrongful death statute created a new cause of action unknown to the common law.⁹ Prior to the enactment of its wrongful death statute, Mississippi adhered to the common law rule allowing for recovery of damages where injury was negligently inflicted on a person; however, upon the death of the injured person the right to recover died with the person.¹⁰ The maxim *action personalis moritur cum persona* or "a personal action dies with the person" summed up this common law idea.¹¹ In an effort to bring an end to the harsh rule that had developed, the English Parliament enacted in 1846 the Fatal Accidents Act, which is now more commonly known as Lord Campbell's Act.¹² The English Act did away with the harsh common law result.¹³ The new Act created a new cause of action which stated that wherever a wrongful act caused the death of another person, the decedent's executor or administrator could bring an action for the benefit of certain relatives.¹⁴

Soon after Parliament enacted Lord Campbell's Act, jurisdictions in the United States began enacting similar legislation beginning in 1847 with New York.¹⁵ Mississippi joined its sister states ten years later in 1857 when it enacted its first wrongful death statute.¹⁶ Mississippi's first wrongful death statute contained within the act its own limitations provision. The

8. *Id.* at 108; *Jenkins*, 933 So. 2d at 923.

9. *Gentry v. Wallace*, 606 So. 2d 1117, 1120 (Miss. 1992), *overruled in part by Jenkins v. Pensacola Health Trust Inc.*, 933 So. 2d 923 (Miss. 2006).

10. *Gentry*, 606 So. 2d at 1120.

11. *Id.* The common law rule barring recovery where death ensued is thought to have originated with Lord Ellenborough in *Baker v. Bolton*, 170 Eng. Rep. 1033 (1808), wherein he held: "In a civil court, the death of a human being could not be complained of as an injury." See T.A. Smedley, *Wrongful Death-Bases of the Common Law Rules*, 13 VAN. L. REV. 605, 613 (1960). However, as pointed out by Justice Dickinson in his majority opinion in *Long v. McKinney*, 897 So. 2d 160, 179 (Miss. 2004), prior to the *Baker* decision there was English common law precedent for wrongful death claims. For a discussion of the English common law history leading up to *Baker v. Bolton*, see William S. Bailey, *Flawed Justice: Limitation of Parental Remedies for the Loss of Consortium of Adult Children*, 27 SEATTLE U.L. REV. 941, 949-55 (2004).

12. *Gentry*, 606 So. 2d at 1120.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Bussey v. Gulf & S. I. R. Co.*, 31 So. 2d 212, 213 (Miss. 1901); see MISS. CODE ch. 61, art 48 (1857) (which provided "Whenever the death of any person shall be caused by any such 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 . . . the person or corporation, or

final clause of the statute provided, "every such action shall be commenced within one year after the death of such deceased person."¹⁷ The limitations provision contained in the Code of 1857 had the distinction of being clear and simple to apply. The statute clearly stated that upon the death of a person the limitations period began to run. Therefore, the role of the courts was a simple one: if a plaintiff did not bring their action within one year of the decedent's death, the action was not timely and dismissal was appropriate. After the original enactment of the wrongful death statute in 1857, the legislature subsequently amended and added to the statute; however, the one year limitations provision persisted up through the enactment of the Mississippi Code of 1906.¹⁸

In 1908 the Mississippi Legislature again amended the wrongful death statute and eliminated the one year limitations period.¹⁹ At the time of the 1908 amendment, Mississippi was the only state in the Union to entirely eliminate its limitation provision from its wrongful death statute.²⁰ After the legislature removed the limitation provision from the wrongful death statute, the general limitations provision found in section 3097 of the Code of 1906 controlled the timeliness of wrongful death actions.²¹ The pertinent language of importance within section 3097 is the action must be brought "within six years next after the cause of action accrued."²² The questioned of when does the statute of limitations in wrongful death actions begin to run turned on the interpretation of the word "accrued." The Mississippi Supreme Court in 1935 noted that the word "accrue" has a fixed legal meaning; specifically, accrue means "to come into existence as an enforceable claim."²³ Thus, at the time the legislature removed the express one year limitation, the contemporary legal thought was that the statute of limitations began to run when the wrongful death action came into existence as an enforceable claim.

The question, therefore, turned upon the determination of when did the wrongful death action come into existence as an enforceable claim. The Supreme Court of Mississippi answered that question in *Edward Hines Yellow Pine Trustees v. Stewart*.²⁴ Therein, the Court favorably cited a

both, that would have been liable if death had not ensued, and the representatives of such person, shall be liable for the damages, notwithstanding the death.").

17. Miss. CODE ch. 61, art. 48 (1857).

18. See Miss. CODE REV. ch. 8 § 676 (1871); Miss. CODE REV. ch. 58 § 1510 (1880); Miss. CODE ANN. § 663 (1892); Miss. CODE ANN. § 721 (1906).

19. Miss. CODE ch. 167 (1908).

20. *Gulf & S. I. R. Co. v. Bradley*, 69 So. 666, 669 (Miss. 1915).

21. Miss. CODE ANN. § 3097 (1906) ("All actions for which no other period of limitation is prescribed shall be commenced within six years next after the cause of action accrued, and not after."); see *Arender v. Smith County Hosp.*, 431 So. 2d 491, 492 (Miss. 1983) (stating that since 1908 all wrongful death actions have been governed by the six-year statute of limitations found in Miss. CODE ANN. § 15-1-49), *overruled in part* by *Anderson v. R & D Foods, Inc.*, 913 So. 2d 394 (Miss. App. Apr. 26, 2005).

22. Miss. CODE ANN. § 3097 (1906).

23. *Grenada Bank v. Petty*, 164 So. 316, 318 (Miss. 1935); see also *Forman v. Mississippi Publishers Corp.*, 14 So. 2d 344, 346 (Miss. 1943) ("[A] cause of action 'accrues' when it comes into existence as an enforceable claim, that is, when the right to sue becomes vested.").

24. *Edward Hines Yellow Pine Trustees v. Stewart*, 100 So. 12 (Miss. 1924).

United States Supreme Court decision based upon the Federal Employers' Liability Act where it held that upon a person's death "his injury created a new and distinct right of action for the benefit of the dependent relatives named in the statute."²⁵ Furthermore, Chief Justice Ethridge, while dissenting on other grounds, expressly noted that "the right of the [beneficiaries] does not accrue under the statute at all until death results from the injuries."²⁶

As early as 1924, it was clear a wrongful death action accrued, for statute of limitations purposes, upon the death of the decedent. The removal by the legislature of the express one-year limitations provision did not affect the State's wrongful death jurisprudence. Because the Supreme Court of Mississippi continued to adhere to the rule that a wrongful death action accrues upon the person's death, the only effect the 1908 amendment had on wrongful death jurisprudence was to substitute a six year statute of limitations for the previous one year limitations statute.²⁷

A. *Death Acts Versus Survival Acts*

After 1924, ruling courts throughout Mississippi continued to adhere to the rule that a wrongful death action accrued upon a person's death. Therefore, it should come as no surprise that the Supreme Court of Mississippi continued to adhere to the rule that a wrongful death action accrued at the time of the decedent's death. Rather, a simple analysis of the history of the Mississippi wrongful death statute demonstrates that the answer reached was the only appropriate answer.

Dean Prosser instructed in his treatise on torts that there are two different models states have used in creating their respective wrongful death acts.²⁸ The first type of act, modeled after Parliament's Lord Campbell's Act, is commonly referred to as a death act.²⁹ These statutes created a new cause of action upon the decedent's death in favor of the beneficiaries named in the statute.³⁰ On the other hand, a minority of states chose to enact survival acts. Survival acts did not create a new cause of action, rather, a survival action was "the cause of action held by the decedent immediately before or at death, now transferred to his personal representative."³¹ Thus, two competing theories of recovery were created by the states which had an underlying and fundamental difference. Survival acts allowed for the survival of actions which had already "vested" in the decedent, while death acts created a new cause of action. This central difference is important in light of the Mississippi Supreme Court's instruction

25. *Id.* at 13 (citing *American R.R. Co. v. Didricksen*, 227 U.S. 145 (1913)).

26. *Id.* at 15 (Ethridge, C.J., dissenting).

27. MISS. CODE ch. 167 (1908).

28. W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON, & DAVID G. OWEN, PROSSER AND KEETON ON TORTS § 125, at 931 (5th ed. 1984) [hereinafter PROSSER & KEETON].

29. PROSSER & KEETON, § 127 at 946.

30. *Id.*

31. PROSSER & KEETON, § 126 at 942.

that a cause of action accrues, and thus a statute of limitation begins to run, when the right to sue vests.³²

When Mississippi created its first wrongful death statute in 1857, it chose to follow the death act model of Lord Campbell's Act. This is because, prior to the enactment of its first wrongful death statute, Mississippi had in place a statute which already provided for the survival of certain actions. In 1848, the Mississippi Legislature enacted a law which allowed executors, administrators, or collectors to prosecute certain actions "which the testator or intestate might have commenced and prosecuted."³³ However, the 1848 survival act expressly prohibited the survival of certain actions in tort and all torts to the person.³⁴ The wrongful death statute, enacted nine years later, filled the void, but only to the extent that it allowed for recovery for a personal tort which caused death to the decedent.³⁵ To fill this gap, the legislature, contemporaneously with the enactment of the wrongful death statute, enacted a separate provision which allowed executors, administrators, or collectors to "commence and prosecute any personal action whatever . . . which the testator or intestate might have commenced and prosecuted."³⁶ Therefore, after the 1857 enactments, the wrongful death statute created a new cause of action for the statutory beneficiaries to recover whenever another's wrongful act resulted in death to the decedent.³⁷ The survival statute allowed for the survival of any claim, which the decedent did in fact commence or any the decedent might have commenced, to the decedent's executor or administrator which did not proximately cause the decedent's death.³⁸

In 1944, the Mississippi Supreme Court for the first time expressly stated what had been recognized but not yet affirmatively stated: the Mississippi wrongful death statute "is not one of survival but creates a new and independent cause of action."³⁹ Moreover, the Court had previously held the right of action belonged to the beneficiaries under the wrongful death statute.⁴⁰ Following then that the wrongful death statute created a new cause of action that belonged solely to the named beneficiaries, the Supreme Court of Mississippi continued to follow the rule that the statute of

32. *Forman v. Mississippi Publishers Corp.*, 14 So. 2d 344, 346 (Miss. 1943).

33. HUTCHINSON'S MISS. CODE ch. 49, art. 1 § 111 (Miss. 1848).

34. *Id.*

35. MISS. CODE REV. ch. 61, art. 48 (1857).

36. MISS. CODE REV. ch. 61, art. 119 (1857). This statute also contained a clause which allowed for the executor, administrator, or collector to maintain actions which accrue in the course of administration. These two rights remained codified in the same section of the code until 1880. In the Code of 1880 the two actions were separated and remain separated today under the modern enactments. The Code of 1880 § 2078 described the survival of certain actions which is found today in MISS. CODE ANN. § 91-7-233 (1972). While § 2081 of the Code of 1880 described actions which accrue during administration which today is found in MISS. CODE ANN. § 91-7-231 (1972).

37. MISS. CODE REV. ch. 61, art. 48 (1857).

38. MISS. CODE REV. ch. 60, art. 119 (1857).

39. *Hasson Grocery Co. v. Cook*, 17 So. 2d 791, 792 (Miss. 1944); *Hawkins v. Rye*, 101 So. 2d 516, 521 (Miss. 1958); *see also* *Thames v. Mississippi*, 117 F.2d 949, 951 (5th Cir. 1941).

40. *Hawkins*, 101 So. 2d at 521 (quoting *Mississippi Power Co. v. Archibald*, 196 So. 760, 762 (Miss. 1940) ("In other words, it is their right of action.")).

limitations, for wrongful death purposes, accrued and therefore began to run upon the death of the decedent.

B. Medical Malpractice and the Wrongful Death Act: Take One

In 1967, the Mississippi Supreme Court for the first time addressed whether in a wrongful death action based on medical negligence the cause of action accrues on the date of the negligent act or upon the death of the victim.⁴¹ In response to the question presented, a unanimous Court held that since the plaintiff had pled his complaint in the form of a wrongful death action, the limitations period would begin to run from the date of the death.⁴² In support of its decision, the Court quoted the general rule that “the date of death is controlling, even under those statutes which speak only of the accrual of the action.”⁴³ The first time the option of applying a different limitations period to wrongful death actions predicated upon medical negligence presented itself to the Supreme Court of Mississippi, a unanimous Court declined the invitation to do so. Instead, the Court continued to adhere to the rule long since followed that the limitations period in wrongful death actions begins to run upon the date of death.⁴⁴

Just over ten years later, *Partyka v. Yazoo Development Corp.* presented the Mississippi Supreme Court with a factual situation in which a husband and wife were involved in a horrific car accident in which, although they were both killed, the wife survived her husband for roughly thirty minutes.⁴⁵ The Court found that at the moment her husband died she “had a cause of action for his wrongful death.”⁴⁶ In support of this conclusion, the Court favorably cited a factually similar Kansas case which concluded that a cause of action for wrongful death accrued to the survivor.⁴⁷

After holding the cause of action accrued in the wife at the time of her husband’s death, the Court addressed a related issue of whether a person who dies testate can circumvent the statute through one’s testamentary will. The Court rejected this proposition based upon three premises. First, a person cannot devise or bequeath through their will something they do not have.⁴⁸ Second, the court explained that “[t]he wrongful death statute creates, a new and independent cause of action in favor of those named in the statute.”⁴⁹ Finally, since the wrongful death cause of action is created

41. *Smith v. McComb Infirmary Ass’n*, 196 So. 2d 91 (Miss. 1967), *overruled by Williams v. Kilgore*, 618 So. 2d 51 (Miss. 1992).

42. *Smith*, 196 So. 2d at 93.

43. *Id.* (quoting M.C. Dransfield, *Time From Which Statute of Limitations Begins to Run Against Cause of Action for Wrongful Death*, 97 A.L.R.2d 1151, 1153 (1964)).

44. *Id.* (citing *Pickens v. Illinois Cent. R.R. Co.*, 45 So. 868 (Miss. 1908)).

45. *Partyka v. Yazoo Dev. Corp.*, 376 So. 2d 646 (Miss. 1979).

46. *Id.* at 648.

47. *Id.* at 650 (citing *White v. Atchison T. & S. F. R. Co.*, 265 P. 73 (Kan. 1928)).

48. *Id.*

49. *Id.* (citing *Hasson Grocery Co. v. Cook.*, 17 So. 2d 791 (Miss. 1944)).

upon death, it cannot be a part of the estate of the deceased and accordingly cannot be devised or bequeathed.⁵⁰ In so finding, the Mississippi Supreme Court continued to adhere to the principles which had underlined the Court's wrongful death jurisprudence for over one-hundred years.

C. *Medical Malpractice and the Wrongful Death Act: Take Two*

Although the law on the running of the statute of limitations for wrongful death appeared settled, the Mississippi Supreme Court once again addressed the issue in *Gentry v. Wallace*.⁵¹ The *Gentry* court for the second time addressed when the statute of limitations for wrongful death purposes begins to run when the underlying tort was medical malpractice. Once again the Court came to the conclusion that the wrongful death "cause of action does not accrue" and the statute of limitations does not begin to run "until the death of the negligently injured person."⁵²

The Court based its decision in *Gentry* upon history, precedent, and legal construction of the wrongful death statute. The majority analyzed the legal lineage of the wrongful death statute in Mississippi back to the Lord Campbell's Act of Parliament.⁵³ In so doing, the *Gentry* court kept an eye toward its prior jurisprudence concerning when the statute of limitations accrued. The Court implored, "[a] cause of action accrues only when it comes into existence as an enforceable claim; that is, when the right to sue becomes vested."⁵⁴ Based on this premise, the result arrived at by the Court is obvious because "[a] cause of action must exist and be complete before an action can be commenced."⁵⁵ Because the wrongful death statute created a new cause of action in favor of the beneficiaries, the cause of action created cannot vest until the decedent dies. In so finding, the *Gentry* court continued to adhere to the long held rule in Mississippi that the cause of action for wrongful death vests; therefore, the statute of limitations begins to run only upon the death of the injured person.⁵⁶

Four years later, the Supreme Court of Mississippi addressed the issue of the appropriate venue in wrongful death actions in *McMillan v. Puckett*.⁵⁷ In addition to no longer providing a statute of limitations, the wrongful death statute also lacked a venue provision. As such, the general venue provision found in Miss. Code Ann. § 11-11-3 applied to wrongful death

50. *Id.* (citing *Byars v. Austin*, 218 So. 2d 11, 15 (Miss. 1969)).

51. *Gentry v. Wallace*, 606 So. 2d 1117 (Miss. 1992), *overruled by* *Jenkins v. Pensacola Health Trust Inc.*, 933 So. 2d 923 (Miss. 2006).

52. *Gentry*, 606 So. 2d at 1119.

53. *Id.* at 1120.

54. *Id.* at 1121 (citing *Owens-Illinois, Inc. v. Edwards*, 573 So. 2d 704, 706 (Miss. 1990)).

55. *Id.* (citing *Owens*, 573 So. 2d at 706).

56. *Id.* at 1123. The Supreme Court of Mississippi reiterated its holdings in *Gentry*, 606 So. 2d at 1117, and *Smith v. McComb Infirmary Ass'n*, 196 So. 2d 91 (Miss. 1967), just two years later in *Sweeney v. Preston*, 642 So. 2d 332, 335 (Miss. 1994), wherein the Court sitting en banc, "reaffirmed our recognition that wrongful death and medical negligence are two separate and distinct causes of action." The Court went on to specifically state that "the statute of limitations was triggered by death," and the Court reiterated its holding that "a cause of action does not accrue until an injury occurs." *Id.*

57. *McMillan v. Puckett*, 678 So. 2d 652 (Miss. 1996).

actions.⁵⁸ The pertinent language in § 11-11-3 provided that venue is appropriate “where the cause of action may occur or accrue.”⁵⁹ In interpreting the statute, the Court sought guidance from its wrongful death decisions discussing when such actions accrue for statute of limitations purposes.⁶⁰ In so doing, the Court reiterated its prior holdings that “a cause of action accrues when it comes into existence as an enforceable claim.”⁶¹ Moreover, the Court cautioned that “a cause of action must exist and be complete before an action can be commenced, and when a suit is begun before the cause of action accrues, it will generally be dismissed if proper objection is made.”⁶²

Thus, the Court determined that the appropriate venue in wrongful death actions may be both where the alleged act of negligence occurred and where the death occurred or the action accrued.⁶³ Of particular interest in the *McMillan* decision is Justice Bank’s dissent wherein he stated, “the cause of action ‘accrues’ to the statutory beneficiaries when the death occurs.”⁶⁴ Notably, Justice Bank, although he disagreed with the Court’s interpretation in regards to venue, agreed with the fact that the temporal accrual of wrongful death actions was only upon the date of the injured person’s death, not the date the wrongful act occurred.⁶⁵

Three years after *McMillan*, the Supreme Court refined its interpretation of the applicable statute of limitations with regards to wrongful death in *Thiroux v. Austin*.⁶⁶ The *Thiroux* court, while for the first time acknowledging the lack of an express statute of limitation for the wrongful death statute, held “a wrongful death action, since it is predicated on an underlying tort, is limited by the statute of limitation applicable to the tort resulting in the wrongful death.”⁶⁷ Therefore, after *Thiroux*, the statute of limitations for wrongful death purposes would be one year if the underlying tort was an intentional tort,⁶⁸ two years if the underlying tort was medical malpractice,⁶⁹ or three years for ordinary negligence or other torts not otherwise accounted for.⁷⁰ However, while *Thiroux* changed the applicable limitations period for certain wrongful death actions, nothing in the *Thiroux* opinion changed the underlying rule that for statute of limitations purposes a wrongful death action accrued upon the death of the injured person.

58. MISS. CODE ANN. § 11-11-3 (1972).

59. *McMillan*, 678 So. 2d at 654 (quoting MISS. CODE ANN. § 11-11-3 (1972)).

60. *Id.*

61. *Id.* at 655 (citing *Forman v. Mississippi Publishers, Corp.*, 14 So. 2d 344, 346 (Miss. 1943)).

62. *Id.* (citing *Owens-Illinois, Inc. v. Edwards*, 573 So. 2d 704, 706 (Miss. 1990)).

63. *Id.* at 656. See also *id.* at 653 (“In this, as in any other wrongful death action brought pursuant to Miss. Code Ann. § 11-7-13 (1972), there is no injury, and hence, no cause of action until a death occurs.”).

64. *Id.* at 658 (Banks, J., dissenting).

65. *McMillan*, 678 So. 2d at 658.

66. *Thiroux ex rel. Cruz v. Austin ex rel. Ascenequex*, 749 So. 2d 1040 (Miss. 1999).

67. *Id.* at 1042.

68. MISS. CODE ANN. § 15-1-35 (1972).

69. MISS. CODE ANN. § 15-1-36 (1972).

70. MISS. CODE ANN. § 15-1-49 (1972).

D. A Single Recovery for a Double Wrong

In 2003, the Mississippi Court of Appeals once again addressed the issue of whether a decedent could circumvent distribution set forth in the wrongful death through his will.⁷¹ While continuing to adhere to the rule that a person cannot circumvent the wrongful death statute through his will, the Mississippi Court of Appeals gave an excellent analysis of the fundamentally different purposes behind the wrongful death statute and the survival statute. The Court began with the familiar proposition that the "wrongful death statute creates a new cause of action in favor of the statutory beneficiaries."⁷² Furthermore, the purpose behind the wrongful death statute is to "compensate the statutory wrongful death heirs for their losses resulting from the death."⁷³ This is opposed to a suit for a personal injury where "the damages are intended to compensate the injured person for the injuries sustained."⁷⁴ Thus, the fundamental difference between a personal injury action and a wrongful death action is what the actions are intended to compensate for.

The Court explained that Mississippi's survival statute⁷⁵ allows the administrator or executor of the estate to commence "any personal action which the decedent may have commenced and prosecuted."⁷⁶ Thus, if the decedent had at the time of his or her death a viable claim for a personal injury, which did not proximately cause the death, that claim would survive the person's death and the estate could prosecute the claim. However, the fundamental purpose behind the personal injury action would remain, to compensate the injured person for their injuries suffered.

On the other hand, when the personal injury proximately caused the decedent's death, the action becomes one for wrongful death.⁷⁷ The court of appeals explained that the language of the wrongful death statute encompasses "any damages for personal injuries suffered by the decedent during her lifetime."⁷⁸ Moreover, at the instant in which the wrongful contact results in death, the wrongful death statute encompasses the action for personal injury, and the action for personal injury is no longer actionable under the survival statute.⁷⁹ Thus, the Court instructed that when there is doubt as to whether the wrongful act proximately caused the decedent's death, the proper procedure is to bring both a wrongful death action and a

71. *In re Estate of England*, 846 So. 2d 1060 (Miss. Ct. App. 2003).

72. *Id.* at 1067 (citing *Partyka v. Yazoo Dev. Corp.*, 376 So. 2d 646, 650 (Miss. 1979)).

73. *Id.* at 1066 (citing *Gentry v. Wallace*, 606 So. 2d 1117, 1120 (Miss. 1992)).

74. *Id.*

75. MISS. CODE ANN. § 91-7-233 (1994).

76. *In re Estate of England*, 846 So. 2d at 1067 (citing MISS. CODE ANN. § 91-7-233 (1994)).

77. *Id.*

78. *Id.* at 1068. See *Gatlin v. Methodist Med. Ctr.*, 772 So. 2d 1023, 1030-31 (Miss. 2000) ("This statutory language has been held to include funeral and medical expenses of the decedent, the present net cash value of the life expectancy of the decedent, the loss of companionship of the decedent, the pain and suffering experienced by the deceased between the time of the injury and the subsequent demise, and punitive damages.") (citation omitted).

79. *Id.*

survival action against the tortfeasor.⁸⁰ In a case in which there is doubt as to whether the conduct proximately caused the death, it is for the jury to decide whether the act proximately caused the death.⁸¹ However, if the jury determines the conduct did cause the death, then the survival action is cast aside and damages are awarded under the wrongful death statute.⁸²

The court of appeals decision in *In re Estate of England* was in line with Mississippi Supreme Court precedent which discussed the purposes behind the award of damages in wrongful death actions. The Supreme Court of Mississippi in *Estate of Jones v. Howell* instructed that the purpose of the wrongful death statute is “to compensate the beneficiary for the loss of companionship and society of the deceased, the pain and suffering of the decedent between the time of injury and death, and punitive damages.”⁸³ The idea that the wrongful death statute serves a dual purpose, to compensate for the wrong to the injured person, as well as, to compensate for the wrong to the beneficiaries, is hardly a novel idea in Mississippi. The origins can be traced back to 1924, wherein the Mississippi Supreme Court favorably referenced a United States Supreme Court opinion that explored the dual purposes of the wrongful death statute.⁸⁴ The Mississippi Supreme Court explained that the wrongful death statute serves two purposes, “[o]ne is for the wrong to the injured person and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through death.”⁸⁵ Stated more eloquently, the Mississippi Supreme Court explained, “[o]ne begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong but a single recovery for a double wrong.”⁸⁶ In so stating, the Court made it clear that recovery under the wrongful death statute is not merely for the wrong done to the decedent, but also for the wrong done to the decedent’s beneficiaries.

Most recently in 2004, the Mississippi Supreme Court in *In re Brantley v. Brantley* considered whether Mississippi law recognized a contingent wrongful death claim.⁸⁷ In *Brantley*, Buffy, the daughter of Billy Butler and Lee Brantley, suffered a traumatic illness which left her permanently disabled as a result of alleged medical malpractice.⁸⁸ Brantley, her mother, filed a complaint on behalf of Buffy for her personal injuries and reached a

80. *Id.* at 1069.

81. *Id.*

82. *In re Estate of England*, 846 So. 2d at 1069.

83. *Estate of Jones v. Howell*, 687 So. 2d 1171, 1178 (Miss. 1996) (citing *McGowan v. Estate of Wright*, 524 So. 2d 308, 311 (Miss. 1988)); *see also* 66 Fed. Credit Union v. Tucker, 853 So. 2d 104, 109-10 (Miss. 2003) (“The purposes of the wrongful death statute are to prevent the wrongful termination of life and provide the beneficiary with compensation for the loss of companionship and society of the deceased, the pain and suffering of the deceased between injury and death, and punitive damages.”).

84. *Edward Hines Yellow Pine Trustees v. Stewart*, 100 So. 12, 15 (Miss. 1924) (quoting *St. Louis Iron Mt. & S.R.R. Co. v. Craft*, 237 U.S. 648, 650 (1915)).

85. *Id.* at 14 (quoting *St. Louis Iron Mt.*, 237 U.S. at 650).

86. *Id.*

87. *In re Brantley v. Brantley*, 865 So. 2d 1126, 1128 (Miss. 2004).

88. *Id.*

settlement with Mississippi Baptist Medical Center for \$ 10 million.⁸⁹ The settlement agreement purported to release all claims against the hospital and was to include all claimants and potential claimants.⁹⁰ Brantley petitioned the chancery court to appoint her the conservator of Buffy's estate, and thereafter Brantley filed a petition to settle a doubtful claim.⁹¹ In order to settle the claim, Butler executed a power of attorney which allowed Brantley to sign a release on his behalf. However, prior to signing these documents, Butler was not made aware of the settlement details.⁹² After obtaining the power of attorney, Brantley signed a release on behalf of herself, Butler, Buffy, and the children releasing the defendants.⁹³

Subsequent to signing the release, and apparently upon discovery of the settlement, Butler filed a complaint on behalf of himself and the children asking the chancery court to award the plaintiffs a portion of the settlement "for the past, present and future loss of love, society, companion, [sic] support and services of Buffy Brantley."⁹⁴ In essence, Butler sought on behalf of himself and the children benefits pursuant to the wrongful death statute despite the fact that Buffy was still alive.⁹⁵ The trial court dismissed Butler's complaint on the premise that Mississippi does not recognize a contingent wrongful death claim.⁹⁶

On appeal, the Mississippi Supreme Court correctly denied Butler relief because Buffy was still alive. The court unequivocally held, "Mississippi's wrongful death statute . . . does not recognize 'contingent' wrongful death claims."⁹⁷ The Court explained its finding by stating that to find otherwise would usurp Buffy's right to damages merely because her beneficiaries believed she would die sooner than she naturally would have.⁹⁸ In so finding, the Court once again reiterated its prior precedent and instructed that "[i]mplicit in the codification of the wrongful death action is the notion that a claim sounding in wrongful death comes into being upon the death of the deceased."⁹⁹ The *Brantley* court proceeded to explain that the wrongful death action provides a cause of action to the decedent's survivors, and one cannot qualify as a survivor until they survive someone.¹⁰⁰ In other words, a beneficiary cannot bring a wrongful death action until a death occurs. As recently as 2004, the Supreme Court of Mississippi continued to adhere to the original wrongful death statute of 1857 that states a

89. *Id.*

90. *Id.*

91. *Id.* at 1128-29.

92. *Id.*

93. *In re Brantley*, 865 So. 2d at 1129.

94. *Id.*

95. *Id.* at 1130.

96. *Id.*

97. *Id.*

98. *Id.*

99. *In re Brantley*, 865 So. 2d at 1131 (quoting *Gentry v. Wallace*, 606 So. 2d 1117, 1120 (Miss. 1992)).

100. *Id.*; see *Gentry*, 606 So. 2d at 1120 ("A cause of action accrues only when it comes into existence as an enforceable claim; that is, when the right to sue becomes vested.").

wrongful death action does not accrue until the date of the injured person's death.

In light of the foregoing 149 years of Mississippi Supreme Court precedent holding a wrongful death action accrued on the death of the decedent, the Court once again addressed the issue of accrual in *Jenkins v. Pensacola Health Trust, Inc.*

III. *JENKINS V. PENSACOLA HEALTH TRUST, INC.*: AN ASSAULT ON STARE DECISIS

In the Spring of 2006, the Supreme Court of Mississippi addressed for the *fourth* time the specific issue of when does the statute of limitations accrue in wrongful death actions, premised upon medical negligence, in *Jenkins v. Pensacola Health Trust, Inc.*¹⁰¹ The *Jenkins* court granted an interlocutory appeal to determine "whether the statute of limitations which has expired on a particular claim of tortious conduct is preempted by the statute of limitations on bringing a wrongful death suit."¹⁰² With only five members participating, the Court proceeded to disregard 149 years of its own precedent and formulate a new rule through a brief opinion that did not so much as reference its numerous contrary decisions.

A. *Facts*

Mildred Woodson was a resident of the Greenbough Nursing Center from December 20, 1997 until she passed away on October 4, 2001.¹⁰³ Upon Mrs. Woodson's death, Mary Jenkins, administratrix for the Woodson estate, filed a complaint against Pensacola Health Trust, Inc. She alleged Mrs. Woodson suffered severe personal injuries which led to her death while she was a resident of the nursing home.¹⁰⁴ In response, the defendant filed a motion for partial summary judgment and asked the Court to dismiss all of the plaintiff's claims which occurred or accrued before December 31, 1999.¹⁰⁵ The defendant's argument was premised on its belief that the statute of limitations for a wrongful death suit did not revive personal injury claims which would have otherwise been time barred had the decedent brought them herself.¹⁰⁶ The trial court agreed with the defendant and dismissed all of the plaintiff's claims which occurred or accrued before December 31, 1999, as well as, all of the plaintiff's claims

101. *Jenkins v. Pensacola Health Trust Inc.*, 933 So. 2d 923, 924 (Miss. 2006).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

which she was unable to prove the specific date of occurrence.¹⁰⁷ Thereafter, the plaintiff requested and was granted an interlocutory appeal to answer the question "whether the statute of limitations for wrongful death is subject to the statute of limitations for the underlying tort."¹⁰⁸

B. The Supreme Court's Analysis

The Mississippi Supreme Court began its discussion by quoting, at length, from its decision in *Gentry v. Wallace*.¹⁰⁹ The Court then stated the rule adopted in *Gentry*: the statute of limitations for wrongful death "begins to run on the date of death, regardless of when the statute of limitations began to run for the underlying tort which led to the death."¹¹⁰ Quite inexplicably, the Court then stated, "[t]he issue was decided differently in *Thiroux v. Austin*."¹¹¹ The Court correctly explained that in *Thiroux* it developed the rule that the statute of limitations, for wrongful death purposes, is determined by the appropriate limitations period for the underlying tort.¹¹²

What the Court did not (or perhaps could not) show or explain was how the issue presented in *Jenkins* or *Gentry* was decided differently in *Thiroux*. The Court referenced two cases from the United States District Courts in Mississippi, purportedly as support for a new rule which was adopted by *Thiroux*.¹¹³ However, neither of the two federal cases cited employed a rule that the statute of limitations in a wrongful death action began to run at any time prior to death. Rather, the federal courts merely cited *Thiroux* for the rule held therein that a wrongful death action is limited by the applicable limitations period for the underlying tort.¹¹⁴ After referencing the two federal district court cases, the Court proceeded to overrule *Gentry* and 149 years of its own precedent to the contrary. In so doing, the Court held "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."¹¹⁵ In the wake of *Jenkins*, it was unclear whether the decision was going to be an anomaly, or if the Court was set upon changing its

107. *Jenkins*, 933 So. 2d at 924-25.

108. *Id.* at 925.

109. *Id.* at 925-26.

110. *Id.* at 926.

111. *Id.*

112. *Id.*

113. See *Wells v. Radiator Specialty Co.*, 413 F. Supp. 2d 778 (S.D. Miss. 2006); *Beck v. Koppers, Inc.*, No. 3:04CV160, 2005 U.S. Dist. LEXIS 26613 (N.D. Miss. Oct. 21, 2005).

114. In fact: the defendant in *Wells* argued, "the three year statute of limitations period of § 15-49-1 runs from the date of the decedent's death because this action was brought as one for wrongful death." *Wells*, 412 F. Supp. 2d at 781. Moreover, the *Beck* court denied a summary judgment motion based on a three year statute of limitation where the victim died five years before the filing of the action and six years after being diagnosed with breast cancer. The *Beck* court adopted the view that the statute of limitations, for wrongful death, does not begin to run until the discovery of both the death and its cause. *Beck*, 2005 U.S. Dist. LEXIS 26613 at *2-4.

115. *Jenkins*, 933 So. 2d at 926.

application of the wrongful death statute. Furthermore, the *Jenkins* decision left judges, attorneys, scholars, and students scratching their heads as to how and why the state's highest court would disregard its very own overwhelming precedent to the contrary, as well as three cases specifically on point which reached conclusions directly opposite to that reached of *Jenkins*.¹¹⁶

IV. BAD LAW MAKES WORSE PRECEDENT

Many are familiar with the oft-used adage "tough facts make bad law;" a corollary to that should be bad law makes worse precedent. Just four months after the Mississippi Supreme Court's decision in *Jenkins*, the Court handed down its decision in *Cleveland v. Mann*, wherein the Court continued upon its unfounded reinterpretation of Mississippi's wrongful death statute.

A. *Facts and Procedural History*

In *Cleveland v. Mann*, John Mann underwent surgery for stomach cancer at the Central Mississippi Medical Center.¹¹⁷ Prior to his surgery, Mann's physician, Dr. Kenneth Cleveland, presented Mann with a physician-patient arbitration agreement, which he signed nineteen days before undergoing surgery.¹¹⁸ Sadly, after his third surgery, Mann died on August 27, 2003.¹¹⁹ Thereafter, John and Mark Mann, the wrongful death beneficiaries, filed a complaint against Dr. Cleveland and others wherein they alleged Mann died as a result of medical malpractice.¹²⁰ In response, the defendants filed a motion to compel arbitration, and in support of their motion, the defendants pointed to language in the arbitration agreement which purported to bind Mann's "heirs-at-law or personal representatives."¹²¹ After denying the defendant's motion to compel arbitration, the defendants appealed and the Mississippi Supreme Court considered "whether the arbitration agreement is binding on Mann's wrongful death beneficiaries."¹²²

B. *Analysis*

The *Cleveland* court relied upon two cases which did not involve wrongful death claims but did bind heirs to arbitration agreements signed by the decedents and held the arbitration agreement bound the wrongful

116. *Sweeney v. Preston*, 642 So. 2d 332 (Miss. 1994); *Gentry v. Wallace*, 606 So. 2d 1117 (Miss. 1992); *Smith v. McComb Infirmary Ass'n*, 196 So. 2d 91 (Miss. 1967).

117. *Cleveland v. Mann*, 942 So. 2d 108, 111 (Miss. 2006).

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 112.

death beneficiaries of Mann.¹²³ The Court then elaborated on three points in which the majority disagreed with the dissent's opinion.

First, the majority objected to the dissent's premise that a "wrongful death action belongs solely to the heirs of the deceased."¹²⁴ In response to the dissent's statement, the majority pointed to the language in the statute which states the plaintiff in a wrongful death action must pursue "all the damages of every kind to the decedent and all damages to every kind to any and all parties interested in the suit."¹²⁵ The Court proceeded to point out the parties interested in the suit may include "the estate of the decedent, an insurance company exercising its right of subrogation, and any other parties claiming a right of recovery."¹²⁶ While the majority was correct in its assertion that the plaintiff in a wrongful death action must pursue the damages of all interested parties, the dissent's statement that the wrongful death action belongs to the heirs of the deceased was and is correct.¹²⁷ The majority confused the dissent's premise to whom the cause of action belongs with who is entitled to recover under the statute. Moreover, as the Mississippi Supreme Court recently pointed out in *In re Brantley v. Brantley*, a person who is injured but not yet deceased may not bring a contingent wrongful death action, because "[o]ur wrongful death statute provides a cause of actions [sic] to the *survivors* of those who die as a result of wrongful conduct."¹²⁸

Second, the majority contested the dissent's assertion that a "wrongful death is different from other torts because it cannot arise until after death."¹²⁹ In an attempt to refute the dissent's position, the majority merely pointed out that a wrongful death action is not a tort, but a cause of action based on an underlying tort which causes the decedent's death.¹³⁰ While the majority is correct that a wrongful death action is not a tort but rather a cause of action, the majority missed the entire crux of the dissent's argument. The Supreme Court of Mississippi had unequivocally held for over one hundred years that a wrongful death cause of action is a new action that accrues in favor of the statutory beneficiaries upon the decedent's death.¹³¹ The essence of the dissent's argument is that a wrongful

123. *Cleveland*, 942 So. 2d at 112. See *Terminix Int'l, Inc. v. Rice*, 904 So. 2d 1051 (Miss. 2004) (wife bound by arbitration agreement signed by deceased husband for termite services); *Smith Barney, Inc. v. Henry*, 775 So. 2d 722 (Miss. 2001) (arbitration agreement bound suit for breach of fiduciary duty, negligence, and conspiracy).

124. *Cleveland*, 947 So. 2d at 118.

125. MISS. CODE ANN. § 11-7-13 (1972).

126. *Cleveland*, 942 So. 2d at 118.

127. See MISS. CODE ANN. § 11-7-13 (1972) (wherein the statute lists the order of persons who may bring a suit for wrongful death no where in the statute is an insurance company entitled to bring a wrongful death action on its own accord).

128. *In re Brantley v. Brantley*, 865 So. 2d 1126, 1131 (Miss. 2004) (quoting *Gentry v. Wallace*, 606 So. 2d 1117, 1120 (Miss. 1992)) (emphasis in the original).

129. *Cleveland*, 942 So. 2d at 118.

130. *Id.*

131. E.g., *In re Brantley*, 865 So. 2d at 1131; *McMillan v. Puckett*, 678 So. 2d 652, 654 (Miss. 1996); *Sweeney v. Preston*, 642 So. 2d 332, 335 (Miss. 1994); *Gentry v. Wallace*, 606 So. 2d 1117, 1120 (Miss. 1992); *Partyka v. Yazoo Dev. Corp.*, 376 So. 2d 646, 650 (Miss. 1979); *Byars v. Austin*, 218 So. 2d 11, 15

death action does not arise until after death, and as such, a living person does not have the right, ability, or standing to agree to arbitrate that which he or she does not have.¹³²

Finally, the majority attempted to interpret the language of the wrongful death statute in such a way that would mandate the wrongful death beneficiaries arbitrate their claim. The Court quoted the following from the wrongful death statute:

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, . . . the person . . . that would have been liable if death had not ensued, . . . shall be liable for damages.¹³³

The Court interpreted the language to mean that a wrongful death beneficiary can only bring claims which the decedent could have brought in the event the decedent survived.¹³⁴ From that premise, the majority instructed that the converse was also true, and descendants could not bring claims which the decedent could not have brought in the event he or she survived.¹³⁵ In support of its proposition, the majority cited its recent decision in *Jenkins* and made clear the fact that *Jenkins* was not to be an anomaly, but rather a new direction that this Court will take toward limiting wrongful death beneficiaries' rights. The Court thereafter held, "[b]ecause Mann agreed to arbitrate, he could not have brought this claim for medical malpractice even if death had not ensued Therefore, since Mann could not have brought this claim, neither can [the] plaintiffs."¹³⁶

The underlying problem with the Court's opinion in *Cleveland* is its observation that the statutory beneficiaries cannot bring claims which the decedent could not have brought had he or she survived. However, as pointed out by the same Court in *Brantley*, a victim of a personal injury which *may* result in death cannot bring a contingent wrongful death claim.¹³⁷ Likewise, the Court previously explained in *Partyka* that a person cannot circumvent the wrongful death statute through his will because a

(Miss. 1969); *Smith v. McComb Infirmary Ass'n*, 196 So. 2d 91, 93 (Miss. 1967); *Hawkins v. Rye*, 101 So. 2d 516, 521 (Miss. 1958); *Hasson Grocery Co. v. Cook*, 17 So. 2d 791, 792 (Miss. 1944); *Mississippi Power Co. v. Archibald*, 196 So. 760, 762 (Miss. 1940); *Edward Hines Yellow Pine Trustees v. Stewart*, 100 So. 12, 14 (Miss. 1924); *Pickens v. Illinois Cent. R.R. Co.*, 45 So. 868 (Miss. 1908); *Foster v. Yazoo & M.V.R. Co.*, 18 So. 380, 381 (Miss. 1895); *see also In re Estate of England*, 846 So. 2d 1060, 1066 (Miss. App. 2003).

132. *See Partyka v. Yazoo Dev. Corp.*, 376 So. 2d 646, 650 (Miss. 1979) (living person cannot circumvent wrongful death statute's distribution provision through his or her will).

133. MISS. CODE ANN. § 11-7-13 (1972).

134. *Cleveland*, 942 So. 2d at 118.

135. *Id.* at 119.

136. *Id.* at 119.

137. *In re Brantley*, 865 So. 2d at 1130.

person cannot bequeath what he does not have.¹³⁸ Thus, since the wrongful death statute creates a new cause of action in favor of the named beneficiaries, "[t]he cause of action thereby created is not a part of the estate of the deceased (intestate)."¹³⁹ Taking the majority's rule to its fullest extent, since the decedent cannot bring contingent wrongful death claims during his lifetime, a wrongful death beneficiary could never bring a wrongful death claim.

Furthermore, the Mississippi Constitution declares that "[a]ll courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay."¹⁴⁰ By requiring the wrongful death beneficiaries to arbitrate their wrongful death action, the *Cleveland* court has denied the beneficiaries their constitutional right to open courts. The Mississippi Supreme Court has unequivocally held that the wrongful death action is a new cause of action which accrues at death in favor of the named statutory beneficiaries.¹⁴¹ Moreover, the Court has recognized that an injured person, prior to their death, has no interest or ability to assert a wrongful death claim.¹⁴² Therefore, it is quite preposterous to bind the wrongful death beneficiaries to an arbitration agreement which they have never seen nor signed. Furthermore, it is poor public policy to allow a person's constitutional right to open and accessible courts to be easily waived by individuals with no right to assert the claim which they are agreeing to arbitrate. The Court's decision in *Cleveland* cited *Jenkins* as its sole support for the new direction the present court is taking toward limiting the statutory rights of wrongful death, and in so doing has further frustrated those beneficiaries' statutory rights.

V. FROM BAD PRECEDENT TO WORSE LAW

Most recently, the Mississippi Court of Appeals has further befuddled the application of the statute of limitations in wrongful death actions in *May v. Pulmosan Safety Equipment, Corp.*¹⁴³ In *May*, the court of appeals was faced with an appeal from the circuit court's grant of summary judgment, finding plaintiff's claims for wrongful death to be time barred by the applicable statute of limitations.¹⁴⁴ The court of appeals in *May* addressed the question "when does a claim for wrongful death accrue?"¹⁴⁵ While looking to the Mississippi Supreme Court's decision in *Jenkins* for guidance, the court of appeals held, "[t]he wrongful death claim accrues when

138. *Partyka*, 376 So. 2d at 650.

139. *Id.*

140. MISS. CONST. of 1890 art. 3, § 24.

141. *In re Brantley*, 865 So. 2d at 1131; *McMillan v. Puckett*, 678 So. 2d 652, 654 (Miss. 1996); *Sweeney v. Preston*, 642 So. 2d 332, 335 (Miss. 1994).

142. *Brantley*, 865 So. 2d at 1132.

143. *May v. Pulmosan Safety Equip. Corp.*, 948 So. 2d 403 (Miss. App. 2007).

144. *Id.*

145. *Id.* at 485.

the claim for the underlying wrongful conduct accrues."¹⁴⁶ In so stating, the court of appeals drove the final nail in the coffin, expanded the Mississippi Supreme Court's decision in *Jenkins*, and continued to disregard over one-hundred years of Mississippi Supreme Court precedent to the contrary.¹⁴⁷

The court of appeals overlooked the fact that the *Jenkins* decision did not state that a wrongful death action accrued when the claim for the underlying tort accrued. Rather, the *Jenkins* decision merely held "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."¹⁴⁸ However, in a response to the special concurrence written by Judge Chandler, the majority opined that the precise thing the Supreme Court of Mississippi did when it overruled *Gentry* was to alter the rule that a wrongful death action accrues prior to the death of the injured person.¹⁴⁹

In a special concurrence joined by four other judges, Judge Chandler agreed that in the wake of *Jenkins* the plaintiff's claims were time barred but wrote separately to address language in the majority opinion which was "imprecise and potentially confusing."¹⁵⁰ Specifically, Judge Chandler disagreed with the majority's proposition that the Mississippi Supreme Court's decision in *Jenkins* stood for the point that "the wrongful death claim accrues when the claim for the underlying wrongful conduct accrues."¹⁵¹ Judge Chandler quoted the relevant portions of the *Jenkins* opinion referenced by the majority in order to illustrate the absence of any language by the Supreme Court that purportedly changed the time at which a wrongful death claim accrues.¹⁵²

The concurrence shed light on the numerous problems and issues which may result in light of the majority's opinion. The concurrence pointed out that "a cause of action accrues when it comes into existence as an enforceable claim, that is, when the right to sue becomes vested."¹⁵³

146. *Id.* at 486.

147. *E.g.*, *In re Brantley*, 865 So. 2d at 1131; *McMillan v. Puckett*, 678 So. 2d 652, 654 (Miss. 1996); *Sweeney v. Preston*, 642 So. 2d 332, 335 (Miss. 1994); *Gentry v. Wallace*, 606 So. 2d 1117, 1120 (Miss. 1992); *Partyka v. Yazoo Dev. Corp.*, 376 So. 2d 646, 650 (Miss. 1979); *Byars v. Austin*, 218 So. 2d 11, 15 (Miss. 1969); *Smith v. McComb Infirmary Ass'n*, 196 So. 2d 91, 93 (Miss. 1967); *Hawkins v. Rye*, 101 So. 2d 516, 521 (Miss. 1958); *Hasson Grocery Co. v. Cook*, 17 So. 2d 791, 792 (Miss. 1944); *Mississippi Power Co. v. Archibald*, 196 So. 760, 762 (Miss. 1940); *Edward Hines Yellow Pine Trustees v. Stewart*, 100 So. 12, 14 (Miss. 1924); *Pickens v. Illinois Cent. R.R. Co.*, 45 So. 868 (Miss. 1908); *Foster v. Yazoo & M.V.R. Co.*, 18 So. 380, 381 (Miss. 1895); *see also In re Estate of England*, 846 So. 2d 1060, 1066 (Miss. App. 2003).

148. *Jenkins v. Pensacola Health Trust, Inc.*, 933 So. 2d 923, 926 (Miss. 2006).

149. *May*, 948 So. 2d at 486.

150. *Id.* (Chandler, J., concurring). Judge Chandler's concurrence was joined by Chief Judge King, and Judges Lee, Myers and Irving.

151. *Id.*

152. *Id.*

153. *Id.* (quoting *Gentry v. Wallace*, 606 So. 2d 1117, 1121 (Miss. 1992)); *see Owens-Illinois, Inc. v. Edwards*, 573 So. 2d 704, 706 (Miss. 1990); *see also Forman v. Mississippi Publishers Corp.*, 14 So. 2d 344, 346 (Miss. 1943) ("Citation from neither judicial decision nor lexicon is needed to support the view

Thus, under the majority's conclusion that a claim for wrongful death accrues when the claim for the underlying conduct accrues, a claim for wrongful death would "vest" upon the occurrence of the wrongful conduct, and accordingly, a person who had not yet died would be entitled to bring a claim for wrongful death. However, the Supreme Court of Mississippi expressly rejected that proposition in *Brantley*, wherein the Court held the wrongful death statute does not recognize "contingent wrongful death claims."¹⁵⁴

The *May* opinion is illustrative of the shaky ground on which the Mississippi Supreme Court based its *Jenkins* decision. If the court of appeals decision in *May* stands, it will necessarily call into question numerous decisions over the last one-hundred years which relied on the holding that a wrongful death accrued upon the injured person's death. If the current law remains that a wrongful death action vests at the same time the underlying wrongful conduct accrued, then victims will necessarily have to be able to plead contingent wrongful death claims in the event the wrongful conduct causes their premature death. Furthermore, if a living victim has a cause of action that has vested the rationale prohibiting them from assigning their claims prior to their death through testamentary acts will no longer remain valid.¹⁵⁵ Through its unnecessary and ill-conceived tinkering with the wrongful death statute, the Mississippi Supreme Court has called into question all of its decisions of the last 149 years which relied on the holding that a wrongful death action accrues at the time of death.

VI. A STEP IN THE WRONG DIRECTION

The recent abrupt change in the Court's wrongful death jurisprudence came as a surprise to many practitioners throughout Mississippi. In fact, the Court's brief opinion in *Jenkins* overruled an overwhelming amount of precedent to the contrary. However, the most troubling aspect of the Court's opinion is its inability to be reconciled with the plain language of the wrongful death statute and the history of the statute. Furthermore, the Court's opinion failed to recognize, address, and give *stare decisis* effect to the overwhelming contrary supreme court precedent that undoubtedly leaves members of both the bench and bar questioning the precedential value of the Court's prior opinions.

that a cause of action 'accrues' when it comes into existence as an enforceable claim, that is, when the right to sue becomes vested.").

154. *In re Brantley v. Brantley*, 865 So. 2d 1126, 1130 (Miss. 2004).

155. *See In re England v. England*, 846 So. 2d 1060, 1070 (Miss. Ct. App. 2003); *see also Partyka v. Yazoo Dev. Corp.*, 376 So. 2d 646, 647 (Miss. 1979) (where the supreme court rejected an attempt to bypass the mandatory distribution provisions found in the wrongful death statute on the ground the wrongful death statute creates a new action in favor of the beneficiaries and one cannot bequeath or devise what they do not have).

A. *The Plain Language of the Statute Mandates a Different Answer*

Where a statute is clear and unambiguous it is inappropriate for the court to add or take away anything from the statute.¹⁵⁶ In fact, the Mississippi Supreme Court has long cautioned that adding or subtracting from such a statute would be a judicial encroachment upon the inherent and exclusive power of the legislature.¹⁵⁷ The Mississippi wrongful death statute is codified in section 11-7-13 of the Mississippi Code and is titled “[a]ctions for injuries producing death.” The language and consequently the title of the statute is profoundly clear and unambiguous; therefore, the Court must give heed to the legislature’s declarations.

The opening clause of the wrongful death statute states, “[w]henever the *death* of any person or of any unborn quick child.”¹⁵⁸ Therefore, a plain reading of the wrongful death statute provides that an action may be brought under section 11-7-13 only after death. The anomalous result reached in the Court’s decision in *Jenkins* pays no heed to the clear intent of the legislature. Rather, *Jenkins* has muddied the water to the extent that the time for filing a wrongful death action may abate, before the claim comes into existence, a result that is profoundly absurd, and possibly unconstitutional.

The wrongful death statute contains within it a paragraph which states the damages which are recoverable in an action for wrongful death. Listed among the damages recoverable, the Mississippi Legislature expressly included, “funeral, medical or other related expenses.”¹⁵⁹ Once again, the *Jenkins* court failed to heed the express language of the statute in its attempt to rewrite the wrongful death statute from the bench. One can only wonder how a person could recover funeral expenses when they are still alive and have yet to incur these expenses.

Moreover, the final paragraph of the wrongful death statute, which provides for the manner of distribution for any wrongful death recovery begins, “[d]amages for the injury *and death*.”¹⁶⁰ By separately accounting for the distribution of the resultant damages for both the injury and death, it is clear from the plain language that the legislature enacted section 11-7-13 as a new and separate cause of action. This new action, by the plain language of the statute, comes into existence only upon the death of the injured person. That much can be determined giving the statute its plain and ordinary meaning. The resounding theme of the wrongful death statute is its dependency upon an injury which wrongfully causes a person’s

156. *Bayer Corp. v. Reed*, 932 So. 2d 786, 789 (Miss. 2006).

157. *Hamner v. Yazoo Delta Lumber Co.*, 56 So. 466, 490 (Miss. 1911); *see also id.* (“Whenever the judiciary shall undertake to violate these rules—indeed, we may say maxims—then it is guilty of usurpation in its most obnoxious form; and the courts dare not do this lest they destroy their own usefulness and power.”).

158. MISS. CODE ANN. § 11-7-13 (1972) (emphasis added).

159. *Id.*

160. *Id.* (emphasis added).

premature death to come into existence.¹⁶¹ The wrongful death statute is clear and unambiguous. Accordingly, there is no need to resort to canons of statutory construction.¹⁶² However, even if the court was not certain by a plain reading of the statute the effect to give the statute, a resort to the history of the statute would have cleared any uncertainties.

B. History Demands a Different Conclusion: Canons of Statutory Construction

Justice Dickinson, in his majority decisions penned in *Jenkins* and *Cleveland*, chose to hang his hat on the following language contained in section 11-7-13 of the Mississippi Code:

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, . . . the person . . . that would have been liable if death had not ensued, . . . shall be liable for damages.¹⁶³

By selectively quoting portions of the wrongful death statute, Justice Dickinson was able to find support for his holding that beneficiaries could not bring a wrongful death action where the statute of limitations would have prevented a claim for the underlying injury.¹⁶⁴ However, Justice Dickinson's explanation ignores the first six words of the statute which read "[w]henever the *death* of any person."¹⁶⁵ It is understood that a statute of limitation cannot abate a cause of action before it comes into existence, yet that is precisely what the court's decision in *Jenkins* did. A plain reading of the wrongful death statute demonstrates that it vests and hence accrues only upon the death of a person. As such, the Court should have given the statute its plain and ordinary meaning.

However, had the Court deemed it necessary to delve into the canons of statutory construction, "one of the cardinal rules of construction is to ascertain the conditions of affairs at the time of its enactment, the evil to be avoided, and the necessary effect produced by the statute."¹⁶⁶ Therefore, the proper place to look to interpret the wrongful death statute is the history from whence it came.

The Mississippi wrongful death statute was a legislative effort to fix the common law result which made a person liable for inflicting a scratch on a

161. In fact, the word "death" can be found in the wrongful death statute twenty-seven times, while the word "deceased" may be found in the statute fifteen times.

162. *Mississippi Power Co. v. Jones*, 369 So. 2d 1381, 1388 (Miss. 1979).

163. *Cleveland v. Mann*, 942 So. 2d 108, 118 (Miss. 2006) (quoting Miss. Code Ann. § 11-7-13 (1972)) (emphasis in original).

164. *Id.*

165. MISS. CODE ANN. § 11-7-13 (1972) (emphasis added).

166. *Hamner v. Yazoo Delta Lumber Co.*, 56 So. 466, 490 (Miss. 1911).

victim but imposed no liability to the person who inflicted death upon a victim. The Mississippi Legislature enacted the first such statute in 1857.¹⁶⁷ Interestingly, the initial wrongful death statute contained the familiar language relied on so heavily by Justice Dickinson that entitled a person to bring an action where he or she would be so entitled is death had not ensued.¹⁶⁸ However, quite contrary to the holding reached by Justice Dickinson and the majority, the original wrongful death statute contained its own limitations provision which expressly stated the action must be brought within one year of the death of the deceased individual.¹⁶⁹ Furthermore, the specific language relied upon by Justice Dickinson and the majority has persisted in every amendment to the wrongful death statute since its original passage in 1857 to the present date. Coincidentally, the one year limitations provision persisted in the statute from its original enactment in 1857 until the legislature removed the limitations provision in 1906.¹⁷⁰ Thus for first fifty years after the codification of the wrongful death statute, the result reached by the majority in *Jenkins* was simply impossible.

At the time of the passage of the first wrongful death statute, the evil sought to be avoided by the legislature was the anomalous result of the common law, wherein a person who injured but did not kill a person was more culpable than the person whose injury resulted in death. To combat that evil the Mississippi Legislature enacted its first wrongful death statute which allowed the named statutory beneficiaries to commence an action for the damages caused to both the decedent, as well as, the beneficiaries. At the same time, the legislature sought to preserve certain defenses available to a defendant to a wrongful death action by limiting recovery against defendants who would have been "liable for damages if death had not ensued."¹⁷¹

However, because the legislature's original enactment expressly declared a one year limitation period beginning from the date of the decedent's death, it is clear the language relied upon by Justice Dickinson was not meant to time bar actions. Rather, as Dean Prosser explains, the language originally found in Lord Campbell's Act "intended at least to prevent recovery for death where the decedent could never at any time have maintained an action, as, for example, where there was simply no tortious conduct toward him."¹⁷² Dean Prosser went on to explain the general agreement that the language can be employed to deny recovery on the grounds of contributory negligence, assumption of risk, valid consent to the defendant's conduct, fellow-servant rule, self-defense, or defense of property.¹⁷³ In fact Dean Prosser, in speaking on the defense of the statute of

167. MISS. CODE ch. 61, art. 48 (1857).

168. *Id.*

169. *Id.*

170. MISS. CODE § 676 (1871); MISS. CODE § 1510 (1880); MISS. CODE ANN. § 663 (1892); MISS. CODE ANN. § 721 (1906).

171. MISS. CODE ANN. § 11-7-13 (1972).

172. PROSSER & KEETON, *supra* n.22, § 127, at 954.

173. *Id.* at 954-55.

limitations, explained the vast majority of courts have held the statute runs only upon the death of the victim, and only a few courts have held the limitations statute begins to run from the time of injury and consequently may be time barred before ever accruing.¹⁷⁴

The legislative redrafting of the wrongful death statute undertaken by the Mississippi Supreme Court goes against not only the plain meaning of the statute, but it is also contrary to the history and purpose behind enactment of the statute. The legislature enacted the wrongful death statute in 1857 in an effort to end the harsh common law rule which left those most harmed by wrongdoers without any remedy or relief. For 149 years the statute, while undergoing some minor changes, was effectively unchanged and contained much of its original language.

However, the Mississippi Supreme Court's opinion in *Jenkins* changed the once stable landscape of its wrongful death jurisprudence and turned the clock back in Mississippi to the harsh common law rule in some cases. In effect, *Jenkins* has left the people of Mississippi with three classes of victims. The first are those who suffered an injury, but their injury does not result in death. These people are able to recover for the injuries they sustained as they have been throughout common law history. Second, are those victims who suffered an injury and subsequently die within the one, two, or three year statute of limitations period. The beneficiaries of this second group, due to the kindness and thoughtfulness of the victim to die quickly enough, are able to recover under the wrongful death statute for the full extent of their own and the decedent's damages. The final group are the unfortunates. These are the beneficiaries of a person who was injured but did not die within the applicable one, two, or three year limitations period. Because of the failure of the decedent to die promptly, the beneficiaries in the third group are unable to recover the full extent of damages done to both themselves as well as the decedent.

Thus, the *Jenkins*, opinion has effectively frustrated the intent of the legislature and has provided safe harbor to a specific class of tortfeasors. Specifically, tortfeasors whose actions, omissions, or products cause slow deaths, comas, or other periods of agony, pain, suffering, and delay prior to death will be able to escape liability entirely. Simply put, the supposed "fix" the majority engineered in *Jenkins* will do nothing to ensure manufacturers, physicians, drivers, or any other potential tortfeasors act in a safe and responsible manner. Rather, the result of *Jenkins* offers potential tortfeasors incentives to make sure that if their actions do cause someone to die, to make sure the death happens slowly, so that the only legal means the decedent's beneficiaries have to hold the tortfeasor accountable will be time-barred.

174. *Id.* at 956.

C. A Complete Disregard to Stare Decisis

In an appendix to the decision in *Long v. McKinney*,¹⁷⁵ Justice Dickinson set out to provide a brief history on the wrongful death statute in Mississippi. In his opinion, Justice Dickinson traced the wrongful death statute back to Lord Ellenborough's decision in *Baker v. Bolton*, wherein Lord Ellenborough held the death of a human being was not an injury compensable at law.¹⁷⁶ In so holding, many historians accused Lord Ellenborough of "turning deaf ears and blind eyes to English history."¹⁷⁷ In essence, Lord Ellenborough wrongly decided *Baker* because of his failure to pay heed and respect to the English common law at the time of *Baker*, in other words, his failure to give stare decisis effect to the prior law.¹⁷⁸ Sadly, and even more disappointing because of its acknowledgement of Lord Ellenborough's failure, the Mississippi Supreme Court has also chosen to turn a deaf ear and a blind eye to Mississippi history and precedent in its decision in *Jenkins*.

The judicial principle of stare decisis is not a principle unknown to the Supreme Court of Mississippi. In fact, in the 1991 decision of *State ex rel. Moore v. Molpus*, the Court discussed at length the principle of stare decisis when asked to overturn a prior decision of the Court, and at the same time seventy years of precedent to the contrary.¹⁷⁹ The Court began its discussion of stare decisis and cautioned "that long established legal interpretations ought not lightly be disturbed."¹⁸⁰ Stare decisis draws its power from the idea that "when a majority of the Court speaks, it speaks as the voice of the State, and is binding in effect until and unless overruled."¹⁸¹

Thus, the proper question for the Court to ask is: when is the doctrine of stare decisis not offended by overruling a prior decision? In other words, when is it appropriate for the Court to overrule a prior decision? In answering that question, the Supreme Court of Mississippi has long since held that mere error is insufficient grounds to overrule a prior decision.¹⁸² In addition to error in its previous decision, a party asking the Court to overrule its prior precedent must show the decision to be "pernicious,"¹⁸³ "impractical,"¹⁸⁴ or "mischievous in its effect, and resulting in detriment to

175. *Long v. McKinney*, 897 So. 2d 160, 162-169 (Miss. 2004).

176. *Id.* at 179.

177. *Id.*

178. In fact, Dean Prosser described Lord Ellenborough as "not the English judge most distinguished by a reputation for common sense." WILLIAM L. PROSSER & JOHN W. WADE, *CASES AND MATERIALS ON TORTS*, 1088 (5th ed. 1971).

179. *State ex rel. Moore v. Molpus*, 578 So. 2d 624 (Miss. 1991).

180. *Id.* at 634.

181. *Childress v. State*, 195 So. 583, 584 (Miss. 1940).

182. *Id.*

183. *Stone v. Reichman-Crosby Co.*, 43 So. 2d 184, 190 (Miss. 1949).

184. *Robinson v. State*, 434 So. 2d 206, 210 (Miss. 1983) (Hawkins, J., concurring).

the public."¹⁸⁵ The Court looks for error in its prior decision, but in addition it looks for "public or widespread disadvantage"¹⁸⁶ or "evils attendant upon a continuation of the old rule."¹⁸⁷

Applying the proper review standard in *Jenkins*, the Court should not have just looked for error or disagreement with its prior decision in *Gentry*. Rather, the Court should have taken an additional step and looked for something more, something pernicious, impractical, or mischievous in effect which resulted in detriment to the public. Instead, the Court in one sentence simply stated, "[r]ecognizing that, in *Thiroux*, we should have specifically overruled *Gentry*, we do so now."¹⁸⁸ What the Court did not answer in *Jenkins* or *Thiroux* was why should they have overruled *Gentry*? Applying the rule that the statute of limitations for wrongful death actions accrues at death was not impractical, pernicious, and surely it did not produce an effect which resulted in a detriment to the public. In fact, the rule was quite the opposite; it was an easy to apply black letter rule which had persisted for 149 years.

Stare decisis has a counterpart, which was likewise offended by the *Jenkins* decision, that is, the people of this state "have a need to have their law settled so that they might rely upon it."¹⁸⁹ Prior to *Jenkins*, the people of Mississippi had a rule of law whose origins could be traced back 149 years to the original enactment of the wrongful death statute. In interpreting this rule, the Supreme Court of Mississippi decided numerous cases that call the validity of the *Jenkins* decision into question. On the other hand, one can ask, what have the people of Mississippi gained by the new rule adopted by the Court? It is obvious now, and it will undoubtedly become even more evident, that the *Jenkins* decision will not clarify a hotly disputed question of statutory interpretation. Rather, ancillary litigation will undoubtedly arise in new cases in which the precise date on which the limitations period began to run is uncertain and contested, whereas previously the answer was clear, the limitations period began on the date the victim died. This new rule will create unnecessary ancillary litigation that will delay court proceedings without addressing the merits of the claim. In fact, contrary to *Jenkins*, the Supreme Court of Mississippi had previously held on three separate occasions the exact opposite; however, the *Jenkins* opinion only specifically overrules one of them.¹⁹⁰ The *Jenkins* decision has left the people of Mississippi in the precarious position of wondering how

185. *Childress*, 195 So. at 584.

186. *State ex rel. Moore v. Molpus*, 578 So. 2d 624, 635 (Miss. 1991).

187. *Tideway Oil Programs, Inc. v. Serio*, 431 So. 2d 454, 467 (Miss. 1983).

188. *Jenkins v. Pensacola Health Trust, Inc.*, 933 So. 2d 923, 926 (Miss 2006). The *Jenkins* opinion is eerily similar to Lord Ellenborough's reported opinion in *Baker v. Bolton* in that both opinions were, "very brief, and the controversial rule of law was laid down without either sustaining reasoning or supporting authority." T.A. Smedley, *Wrongful Death-Bases of the Common Law Rules*, 13 VAN. L. REV. 605, 614-15 (1960).

189. *Moore*, 578 So. 2d at 637.

190. See *Sweeney v. Preston*, 642 So. 2d 332 (Miss. 1994); *Gentry v. Wallace*, 606 So. 2d 1117 (Miss. 1992); *Smith v. McComb Infirmary Ass'n*, 196 So. 2d 91 (Miss. 1967).

they can mold their behavior in accordance with the law of the state when the highest court of the state has shown little deference to its own opinions.

One of the most troubling aspects of the *Jenkins* decision is that the result cannot even be reconciled with prior decisions of the same Justices. Just two years prior to *Jenkins*, Justices Waller, Dickinson, Carlson, and Chief Justice Smith all joined in an opinion authored by Justice Carlson wherein they quoted *Gentry* as holding, “[i]mplicit in the codification of [the] wrongful death action is the notion that a claim sounding in wrongful death comes into being upon the death of the deceased.”¹⁹¹ Only through a complete disregard to the judicial principle of stare decisis can the opinion of Justices Waller, Dickinson, Carlson, and Chief Justice Smith in *Brantley* be reconciled with their own decision just two years later that the statute of limitations for wrongful death actions is determined by the date of the underlying tort. One can only ponder how a Supreme Court Justice can find something to be “implicit” and then a mere two years later hold the precise opposite. This leaves one to wonder not what stare decisis effect is given by the Mississippi Supreme Court to its prior precedent, but rather, does the Court continue to adhere to stare decisis at all when the Justices will not even give their *own* decision’s precedential effect?

At one time the Supreme Court of Mississippi explained that the principle of stare decisis was of primary importance because stare decisis fosters respect for the law in “that people cling to the idea that their cases should be decided the same no matter who the judge may be.”¹⁹² This is especially true in a state which has an elected judiciary. The people of Mississippi are left with no concept as to what the law truly is if each newly elected judge embarks upon a crusade to overrule or reverse the decisions of his or her predecessor. More importantly, legal thought will stagnate if newly elected judges merely embark to revisit and reverse the court’s numerous prior decisions in an attempt to overtly politicize the Court.

The Court made another observation which is relevant in wake of the *Jenkins* opinion, “[p]rincipled consistency and respect for precedent promote acceptance. They reflect a consensus about law. They contribute to the notion that law binds judges as well as litigants, and not just when we agree. Good judges know this and will change legal interpretations only for the most persuasive reasons.”¹⁹³ The people of Mississippi need and deserve to know that the Supreme Court Justices they have elected are bound to follow the law just as every citizen and visitor to Mississippi. Furthermore, the government of Mississippi has established an appropriate outlet for the changing and amending of laws and that forum is the legislature, not the courts. The law of Mississippi concerning when an action for wrongful death accrues had been settled for almost 150 years. All that,

191. *In re Brantley*, 865 So. 2d at 1131 (quoting *Gentry*, 606 So. 2d at 1120).

192. *Moore*, 578 So. 2d at 638.

193. *Id.* at 638-39.

however, is now lost. Most troubling, the *Jenkins* decision leaves the people of Mississippi with no confidence that their Supreme Court will adhere to, or even respect, its own precedent.

D. Due Process

The Fourteenth Amendment provides in relevant part that no person shall be deprived of "life, liberty, or property, without due process of law."¹⁹⁴ The United States Supreme Court has affirmatively held "that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause."¹⁹⁵ The Court has instructed that because a cause of action is a species of property, "the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged."¹⁹⁶ The Court in *Logan v. Zimmerman* went on to put it as plain as possible and cautioned other states that "[a] State may not, finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement."¹⁹⁷ In addition, the *Logan* Court advised that states, consistent with Due Process, may enact statutes of limitation,¹⁹⁸ however, the Fourteenth Amendment requires "an opportunity . . . granted at a meaningful time and in a meaningful manner . . . for [a] hearing appropriate to the nature of the case."¹⁹⁹

In light of the relevant United States Supreme Court precedent, the *Jenkins* decision raises very serious constitutional concerns. Notably, the Mississippi Supreme Court has routinely held the wrongful death statute creates a new cause of action in favor of the statutorily named beneficiaries.²⁰⁰ By enacting the Mississippi wrongful death statute in 1857, the people of Mississippi, through the legislature, created a cause of action to benefit the beneficiaries of individuals whose lives had been cut short through the wrongful acts or omissions of others. The wrongful death cause of action was not a cause of action which could be asserted by an injured person who merely anticipated his life may or may not be prematurely cut short.²⁰¹ Rather, the wrongful death act allowed the beneficiaries to be compensated for the double wrong committed by a tortfeasor, both against the decedent and the beneficiaries.²⁰² Therefore, pursuant to United States Supreme Court precedent, the statutory wrongful death beneficiaries have a cause of action which is protected by the Fourteenth

194. U.S. CONST. amend. XIV.

195. *Tulsa Professional Collection Serv. Inc. v. Pope*, 485 U.S. 478, 485 (1988) *see also* *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982).

196. *Logan*, 455 U.S. at 433.

197. *Id.*

198. *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314-16 (1945).

199. *Logan*, 455 U.S. at 437 (citations omitted) (emphasis in original).

200. *In re Brantley*, 865 So. 2d at 1131; *Gentry*, 606 So. 2d at 1120; *Partyka*, 376 So. 2d at 650; *Hasson Grocery Co.*, 17 So. 2d at 791.

201. *See In re Brantley*, 865 So. 2d at 1127.

202. *Edward Hines Yellow Pine Trustees v. Stewart*, 100 So. 2d 12, 14 (Miss. 1924).

Amendment; accordingly, states must afford those beneficiaries due process.²⁰³

The Mississippi Supreme Court has consistently held a cause of action does not accrue until it vests or comes into existence as an enforceable claim.²⁰⁴ Furthermore, if a suit is commenced before the accrual of a cause of action, the Court must, on appropriate objection, dismiss the cause.²⁰⁵ In fact, the *Forman* court found the idea that a cause of action accrues when it comes into existence as an enforceable claim to be so engrained in judicial teachings that “[c]itation to neither judicial decision nor lexicon is needed to support the view.”²⁰⁶ Because the Mississippi Supreme Court continues to adhere to the view that a cause of action must accrue before a person may commence the action, the decision reached in *Jenkins* will never be able to comport with fundamental ideals of due process.

In the wake of *Jenkins*, there undoubtedly will be instances in which a victim has been wrongfully injured yet does not die within the one, two, or three-year limitations period. The beneficiaries of this group of individuals will never be able to receive the compensation to which the Legislature has deemed them entitled, because they are not allowed an opportunity to be heard. While on the other hand, beneficiaries of individuals who were wrongfully injured who subsequently died within the one, two, or three year limitations period will have the opportunity to receive full compensation under the law. What is most obnoxious to the current state of law is the inequitable and unconstitutional result was not the product of poorly drafted legislation, but rather the result of judicial activism²⁰⁷ by the Supreme Court of Mississippi.

The days of *Baker v. Bolton* have resurfaced in modern Mississippi. The Legislature in 1857 gave the people of this state a cause of action in favor of certain statutory beneficiaries when another person’s wrongful acts or omissions proximately caused the wronged person to die. For almost 150 years the Supreme Court of Mississippi supported the rights given by the legislature to the people of Mississippi. In the course of the past 150 years, a body of wrongful death jurisprudence has slowly and carefully

203. See *Martinez v. California*, 444 U.S. 277, 282 (1980) (“Arguably, the cause of action for wrongful death that the State has created is a species of ‘property’ protected by the Due Process Clause.”).

204. *McMillan v. Puckett*, 678 So. 2d 652, 655 (Miss. 1996); *Forman v. Mississippi Publishers Corp.*, 14 So. 2d 344, 346 (Miss. 1943).

205. *Owens-Illinois, Inc. v. Edwards*, 573 So. 2d 704, 706 (Miss. 1990); *Eudlid-Miss. v. Western Cas. & Sur. Co.*, 163 So. 2d 676 (Miss. 1964).

206. *Forman v. Mississippi Publishers Corp.*, 14 So. 2d 344, 346 (Miss. 1943).

207. Professor Arthur Hellman points out in his writings that there is no widely accepted label for a judge, or a court, which is predisposed to overrule its own precedent. Professor Hellman explained that a court with a predisposition to overrule its own precedent differs from a court which routinely strikes down legislative acts as unconstitutional and accordingly should be given a different label. Professor Hellman posits that a court, which finds legislative acts to be unconstitutional, is engaged in judicial activism while a court, which routinely overrules its own precedent, is engaged in judicial radicalism. However, for the purposes of this article the author uses the more common phrase of judicial activism. See Arthur D. Hellman, *Judicial Activism: The Good, the Bad, and the Ugly*, 21 Miss. C. L. Rev. 253, 257 (2002).

evolved in this state according to the underlying principle that a wrongful death action accrued upon the person's death. However, now an activist court has carved out a niche in its wrongful death jurisprudence for a specific group of wrongful death beneficiaries. For the beneficiaries of victims who do not die within the applicable one, two, or three-year limitations period, the Supreme Court has effectively recognized that they have a cause of action, but the Court is now refusing to give them an ability to assert their claim and an opportunity to be heard. In some instances, the Court, post-*Jenkins*, is stating that a beneficiary's right to sue for wrongful death is time barred even before coming into existence.²⁰⁸

The post-*Jenkins* rule adopted by the Court is the epitome of judicial denial of due process rights, rights the Legislature has given the people, yet the Court is now refusing to enforce. In so doing, a specific group of Mississippians have been cast aside by their Supreme Court and are being told they have a right, yet they can never enforce that right.²⁰⁹ A popular reason why the British Parliament adopted the Lord Campbell's Act in 1846 was that as a result of Lord Ellenborough's folly, it became more costly for a tortfeasor to scratch a man than to kill him. In addition to setting poor public policy, it made little sense that a person should escape all liability for imposing the most harm possible upon a person. However, in the wake of *Jenkins*, the rule in Mississippi has made it more costly to kill a man instantly than to kill him slowly as a result of repeated exposure to negligent acts, harmful products, or a lingering coma.

VII. CONCLUSION

The Supreme Court of Mississippi's decision in *Jenkins v. Pensacola Health Trust Inc.*, has effectively turned the clock back for some wrongful death beneficiaries in Mississippi to the harsh rule that developed following Lord Ellenborough's opinion in *Baker v. Bolton*. If *Jenkins* is allowed to stand, a specific group of wrongful death beneficiaries will be left without a means to enforce the remedy which the Legislature has provided for them.

Fortunately, however, all is not lost. Subsequent to Lord Ellenborough's poorly reasoned decision, the British Parliament remedied the harsh rule that developed through the enactment of Lord Campbell's Act. The founders of this nation and this state wisely established three separate but equal branches of government and bestowed upon each branch distinct

208. Another anomalous result of the rule articulated in *Jenkins* is victims who are injured and who may succumb to their injuries after a prolonged period are forced to commence their suit before they know the full extent of their damages. Furthermore, in light of the court's decision in *Brantley* the injured person who believes their injuries may result in a premature death is barred from asserting a contingent wrongful death claim.

209. "The argument for allowing the claim is that the wrongful death action creates a new cause of action in favor of the survivors, and that the survivors or their representatives could not bring the action until death occurred, so that the statute of limitations should begin to run at death, not sooner. For this reason . . . a good many courts who are not constrained by specific statutory commands have held that the wrongful death suit may be maintained even after the personal injury action on which it is based has expired." DAN B. DOBBS, *THE LAW OF TORTS*, 818 (2000).

powers. While the Mississippi Supreme Court has spoken in *Jenkins*, the Court's say is not necessarily final. For the first fifty years after the original enactment of the wrongful death statute in Mississippi, the statute explicitly provided for a one-year limitations provision which accrued upon the death of the injured person. In the wake of *Jenkins*, the Mississippi Legislature should affirmatively take the necessary steps to amend the wrongful death statute, and in so doing the Legislature should provide the statute with its own limitations period, be it one, two, or three years, but mandate that the limitations period begins to run upon the death of the injured person. By amending the statute, the legislature will assure the people of Mississippi that *Jenkins* was an anomaly, and it will restore certainty and predictability to an area of the law where it is desperately needed.

The dye has been cast, and the ball is now in the Legislature's court. Should the Legislature fail to act, unnecessary and ancillary litigation will arise in cases in which the date upon which the injury accrued is uncertain. Furthermore, as a result of the *Jenkins* and *Cleveland* decisions, the validity of many of the Supreme Court's decisions which relied upon the holding that wrongful death actions accrued upon death in favor of the named statutory beneficiaries is left to question. Specifically, it is now uncertain as to how a claim for wrongful death may be preserved in the event the injured person does not die within the one, two, or three-year limitations period. Additionally, in light of *Cleveland*, the issues of whether a person may circumvent the wrongful death statute through his testamentary will or pre-nuptial agreement have arisen anew. In order to squelch the uncertainty which *Jenkins* and *Cleveland* have brought to this area of the law, it is imperative that the Legislature take action to ensure that all wrongful death beneficiaries will be able to enforce the rights which the Legislature has bestowed upon them.