

IN THE SUPREME COURT OF MISSISSIPPI
CASE NO. 2005-CA-01586

VELMA PAYNE AS PERSONAL REPRESENTATIVE
OF MATTHEW SMITH, DECEASED AND ON BEHALF
OF THE WRONGFUL DEATH BENEFICIARIES
OF MATTHEW SMITH, DECEASED AND RHONDA
SMITH MEEKS

Appellant

VS.

MAGNOLIA HEALTHCARE, INC. D/B/A
ARNOLD AVENUE NURSING HOME,
FOUNDATION HEALTH SERVICES, INC.,
AND DIANE OLTREMARI

Appellees

**APPELLEES' SUPPLEMENTAL BRIEF TO
THE MISSISSIPPI SUPREME COURT**

Michael A. Heilman (MSB No. [REDACTED])
Patricia J. Kennedy (MSB No. [REDACTED])
HEILMAN KENNEDY GRAHAM, P.A.
111 East Capitol Street, Suite 250
Jackson, Mississippi 39201
Post Office Drawer 24417
Jackson, Mississippi 39225-4417
Telephone: (601) 914-1025
Facsimile: (601) 960-4200
Attorneys for Defendants/Appellees

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I. STATEMENT OF THE ISSUES

1.1 Whether the Court of Appeal's unanimous decision to dismiss this appeal for lack of jurisdiction should be upheld.

1.2 Whether the trial court erred in granting summary judgment in finding that Payne was not the proper party to bring the underlying action.

II. INTRODUCTION AND FACTS

2.1 This case was filed in the Circuit Court of Washington County Mississippi by Velma Payne, as the "personal representative" of Mr. Matthew Smith (hereinafter "Payne" or "Plaintiff") on or about April 26, 2002. (R. 6-12)¹ At the time the Complaint was filed Payne was not a court appointed personal representative. Payne did not become the Administrator of the Estate until July 7, 2003, over a year after the Complaint was filed. (R.E. 1-2) In the Complaint, Payne asserted a wrongful death action against Magnolia Healthcare, Inc. D/B/A Arnold Avenue Nursing Home, Foundation Health Services, Inc., and Diane Oltremari (hereinafter collectively referred to as "Magnolia" or "Defendants") for the alleged negligent care received by Mr. Smith while a resident at Arnold Avenue Nursing Home in Greenville, Mississippi. (R. 6-12) Payne did not bring suit on behalf of the estate but only sought to recover wrongful death benefits.

2.2 Although heatedly disputed by Payne before the trial court, it is now undisputed that Matthew Smith was survived by a daughter, Rhonda Smith. This reluctant admission that Rhonda Smith is the only rightful wrongful death beneficiary came only after the Circuit Court and the Chancery Court had made rulings as to that fact. Payne fought

¹ References herein are made to the Record (R. __) and Record Excerpts (R.E. __).

diligently to deny that Rhonda Smith was in fact the wrongful death beneficiary of Matthew Smith by trying to claim she was dead and/or unfindable. Fortuitously, Payne was able to find Rhonda Smith alive and well and desiring to become involved in this lawsuit after the Court's refused to deny her existence as urged by Payne.² Therefore, it is now undisputed that Rhonda Smith is the sole statutory wrongful death beneficiary of Matthew Smith.

2.3 On or about June 15, 2004, Magnolia filed a Motion for Summary Judgment, or in the Alternative Motion to Dismiss (the "Motion"). In the Motion, Magnolia requested dismissal of Payne's Complaint because Matthew Smith was survived by a daughter (Rhonda Smith) and Payne (Matthew Smith's sister) was not the real party in interest.

2.4 On September 28, 2004, the trial court issued its opinion granting Magnolia's Motion for Summary Judgment because Rhonda Smith was a necessary party and the proper statutory beneficiary to bring and maintain the wrongful death action. The trial court also entered Final Judgment in favor of Magnolia on September 28, 2004.

2.5 On October 7, 2004, Payne filed a Motion for Reconsideration asking the trial court to vacate the summary judgment. The trial court denied the Motion for Reconsideration on March 11, 2005. On May 16, 2005, Rhonda Smith Meeks (Rhonda Smith) filed a Motion to Add and Join a Real Party in Interest pursuant to Miss. R. Civ. P. 17 on the basis she was the daughter and only heir of Matthew Smith.

2.6 On June 5, 2005, the trial court denied Rhonda Smith's Motion and held that Rhonda Smith was the wrongful death beneficiary but that the claim was barred because she failed to pursue the claim for almost five (5) years after the death of Matthew Smith and further that she could not "join" a case which had been dismissed. The trial court also issued

² The Appellee's Brief in the underlying appeal lays out the facts surrounding and giving rise to this appeal and the Appellee will not burden this Court by reiterating them in this Supplemental Brief.

a duplicative order which denied Payne's Motion for Reconsideration finding there was no basis under Miss. R. Civ. P. 59 or 60 to reverse the final Judgment entered in favor of Magnolia.

2.7 Payne filed a Notice of Appeal on June 20, 2005. The Notice of Appeal was untimely filed seventy (70) days after the trial court denied Payne's Motion for Reconsideration.

2.8 On September 4, 2007, this Court handed down an Opinion, holding that the Appellant's had not timely filed their Notice of Appeal and therefore, this Court was without jurisdiction to hear the appeal and as such the appeal was dismissed.

2.9 Appellants have now moved to have this Court re-hear their same argument regarding the lateness of their Notice of Appeal. However, given that the Appellant had previously put forth all arguments on this issue and the honorable Court of Appeals having fully considered all arguments before its ruling, the ruling of the Court of Appeals should be upheld.

III. ARGUMENT

A. PAYNE'S APPEAL IS PROCEDURALLY BARRED FOR FAILURE TO TIMELY FILE A NOTICE OF APPEAL PURSUANT TO M.R.C.P. 4

3.1 The appeal of this matter was properly dismissed because Payne failed to file a timely Notice of Appeal as required by Rule 4 of the Mississippi Rules of Appellate Procedure. As stated in Rule 4, a Notice of Appeal shall be filed with the trial court within thirty days after the entry of judgment or Order appealed from. As demonstrated by the record in this case, Payne filed a timely Motion for Reconsideration of the trial court's grant of summary judgment in this case. However, the trial court ruled on this motion and entered an Order denying the Motion for Reconsideration on March 11, 2005. At this point there

were no other post-trial motions pending before the trial court. Payne failed to file a Notice of Appeal within thirty days of the entry of the Order wherein the trial court denied Payne's Motion for Reconsideration. Instead, Payne filed a Notice of Appeal on June 20, 2005, which was over seventy (70) days after the trial court denied Payne's Motion for Reconsideration.

3.2 As stated in Smith v. Parkerson Lumber, Inc., "the timely filing of a Notice of Appeal is jurisdictional and . . . the notice must, under M.R.A.P. 4(a), be filed within thirty days following entry of judgment . . . [or] if certain post-trial motions are timely filed the time runs from the entry of the Order disposing of those motions." 890 So. 2d 832, 834 (Miss. 2003). This Court has further explained that a judgment is effective under the Mississippi Rules of Civil Procedure when entered on the Court's docket. Id.

3.3 Smith is applicable to this case where a review of the Court's docket in the subject case reveals that the Order was entered on the Court's docket and this was the date that the judgment became effective. (R.E. 48) The Appellant had thirty days to vest this appellate court with jurisdiction. Yet, they failed to do this simple task as their filing was grossly overdue. In fact, in the Appellant's Motion for Rehearing, they readily admit that they failed to comply with Rule 4. (See Appellant's Motion for Rehearing, p. 11). Accordingly, the Notice of Appeal which was filed by Payne on or about June 20, 2005, was untimely and this Court's decision to dismiss the appeal for lack of jurisdiction was proper.

B. THE APPELLANT CAN SHOW NO COMPELLING REASON UNDER M.R.C.P. 60 WHEREIN THEY ARE ALLEVIATED FROM THEIR OBLIGATION TO BE DILIGENT AND THEREFORE THIS COURT'S RULING SHOULD STAND

3.4 The Appellant argues that pursuant to Rule 60(a) of the Mississippi Rules of Civil Procedure that once the record had been transmitted to the clerk of the Supreme Court

only the appellate court could grant a Motion to Vacate the Order granting Summary Judgment. Appellant makes this argument despite the fact that said Motion was filed in March 2005, 70 days prior to the Appellant's Notice of Appeal. However, the Appellant continually attempts to avoid that fact that until the issue of this March Order was raised by the Appellees in their brief, the Appellant made no attempt to correct their untimely Notice of Appeal. During that entire period of time, Appellant wholly failed to take any corrective measures whatsoever. By July of 2006 the Washington County Circuit Clerk had transmitted the complete record to the Supreme Court Clerk (R. E. at 56). In fact, in August of 2006, the Appellant moved to correct the record and add additional documents to the record. These actions clearly show that by August of 2006 they had carefully reviewed the record. It is unbelievable that the Appellant did not at that time know of the March 2005 Order. Despite Appellant's actions, she did nothing to correct her mistake. She did not move under Rule 4 to have the Order corrected by the Trial Court, nor did she move under Rule 60 to have the Appellate Court vacate the Order. Should this Court now consider fixing the Appellant's mistake when she herself made no move to correct it until her hand was called by the Appellee?

3.5 The Appellant also attempts to argue Rule 60(b) in her Motion for Re-Hearing; however, this was not an argument made by her during her appeal and therefore should not be considered at this point. However, even under Rule 60(b), this Court's decision to abide by the clearly stated Mississippi Rules of Civil Procedure should stand. Appellees acknowledge that Rule 60(b) provides for a Court to allow a judgment to be vacated for "any reason justifying relief..."; however the Appellant has not given this Court a "reason" to justify this extraordinary relief. In the cases cited by the Appellant, for the first time in their

Motion for Re-hearing, the courts hold that Rule 60(b)(6) should only be applied in “**cases of extreme hardship...**” Hartford Underwriters Insurance Company v. Williams, 936 So. 2d 888, 894 (Miss.2006). The Appellant then attempts to argue that since the clerk never sent the March Order out they should not be held to it. A quick glance at Hartford illustrates that it is not applicable to the facts of this case. In the subject case, unlike in Hartford, the clerk actually entered the March Order in the docket. (R.E. at 27). Anyone who called the clerk or looked at the docket themselves would have easily ascertained the entry of the Order. And further, the Appellant had the trial record certified to the clerk of the Supreme Court for over **eight months** before they moved for relief from the March Order in their Reply Brief. Perhaps this matter would be more compelling if, upon finding the March Order, the Appellant had notified the Court and moved for relief, however they choose to ignore it and move forward on their appeal. This level of willful blindness cannot now be a “compelling reason” pursuant to the Hartford case and Rule 60(b) for this Court to vacate the valid and binding March Order and allow the Appellant to circumvent the well established rules for timely filing a notice of appeal. The Appellant’s argument opens this court to a slew of duplicitous litigation, wastes judicial resources, and encourages dilatory and gross practices.

C. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT

3.6 Once again, the Appellee’s arguments are laid out fully in their underlying brief, however a short overview and synopsis of those arguments is as follows. Payne was neither the Administratrix of the Estate of Matthew Smith nor was she a wrongful death beneficiary, and as such the trial court’s grant of Summary Judgment in favor of the Defendants was proper as Payne lacked standing to bring the underlying action. Under Mississippi law, interpretation of Miss. Code Ann. § 11-7-13 is much simpler than appellant

insists. A wrongful death suit can only be brought by the personal representative of the deceased person or the wrongful death beneficiaries. Long v. McKinney, 897 So. 2d 160, 174 (Miss. 2004). The Long court made clear that this “personal representative” must be the approved representative of the estate appointed by the Chancery Court prior to the suit being filed. Id. When the instant case was filed, Payne was not the personal representative of the estate of Matthew Smith. This is undisputed. Accordingly, she had no right to bring this suit.

3.7 As stated, a wrongful death case may also be brought by a wrongful death beneficiary as defined in the statute. In the instant case, it is undisputed that Payne has never been and will never be a wrongful death beneficiary of Matthew Smith.

3.8 As this Court will see, Payne was made the personal representative of the estate after suit was filed. Assuming, *arguendo*, that Payne thereby cured the representative party deficiency that existed when this case was filed the suit was still properly dismissed. Both Miss. Code Ann. § 11-7-13, and case law, mandate that “. . . those bringing the action, together with their counsel, have a duty to identify the beneficiaries, and they should do so early in the proceedings.” Long, 897 So. 2d at 176. The Long court further held that “. . . in no event should such notice be sent later than thirty days following the filing of the Complaint.” Id. This stands to reason as indeed a wrongful death action only accrues to wrongful death beneficiaries, only they are able to *maintain* this action. Estate of Jones v. Howell, 687 So. 2d 1171 (Miss. 1997) (child of decedent was proper party to wrongful death action and only child could maintain wrongful death action).

3.9 In the instant case, the record is full of what appears to be confusing and misleading facts which will be discussed below, but there are only three outcome

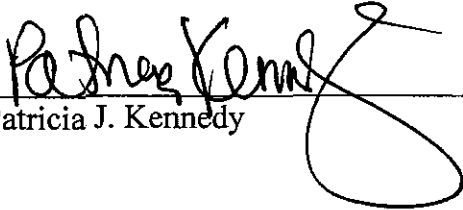
determinative facts. The first is that Payne was not the personal representative of the estate of Matthew Smith when the suit was filed. Second, even if it is assumed that Payne cured the personal representative problem by later being appointed over a year after the suit was filed, which is not admitted, Payne failed to give timely notice of this wrongful death action to Rhonda Smith who was the only wrongful death beneficiary of Matthew Smith. Indeed notice was not given to Rhonda Smith until more than eight months after the trial court had entered a Final Judgment of Dismissal in this case. Being that Payne is not and will never be a wrongful death beneficiary of Matthew Smith, nor was she the court appointed representative of the estate, Payne had no standing to bring this action. Accordingly, this case was properly dismissed by the trial court.

IV. CONCLUSION

4.1 This Court's decision correctly applies the Mississippi Rules of Civil Procedure which bar appeals that are not filed timely. The Appellant has not presented a compelling reason for this court to vacate the March 2005 order under M.R.C.P. 60(b). Further the Court of Appeals has previously heard all arguments and considered all law presented at the time of the appeal and found, *unanimously*, that this appeal should be dismissed for lack of jurisdiction for failure to timely file a notice of appeal. This well reasoned decision by the Court of Appeals should stand. Further, notwithstanding the dismissal of this appeal due to lack of jurisdiction, the trial court's grant of summary judgment in the underlying action was proper and should be enforced.

This the 17th day of March, 2008.

MAGNOLIA HEALTHCARE, INC. D/B/A
ARNOLD AVENUE NURSING HOME,
FOUNDATION HEALTH SERVICES, INC.
AND DIANE OLTREMARI

By: 
Patricia J. Kennedy

CERTIFICATE OF SERVICE

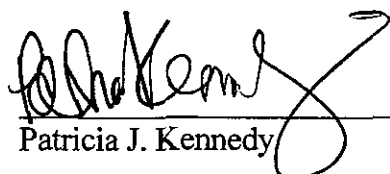
This is to certify that I have this day delivered a true and correct copy of the above and foregoing document via U.S. Mail, postage prepaid to the following counsel of record:

Charles Gibson III, Esquire
Gigi Gibson, Esquire
Gibson Law Firm
Post Office Box 3493
Jackson, Mississippi 39207-3493

Charles J. Swayze, Jr., Esquire
Alison P. Pittman, Esquire
Whittington, Brock & Swayze
Post Office Box 941
Greenwood, Mississippi 38935-0941

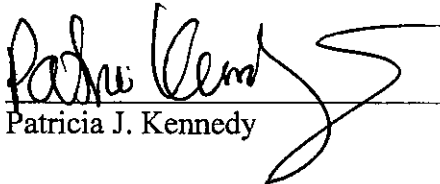
Honorable Ashley Hines
Circuit Court Judge
Post Office Box 1315
Greenville, Mississippi 38702-1315

This 17th day of March, 2008.


Patricia J. Kennedy

CERTIFICATE OF FILING

I certify that I have deposited the original and ten (10) copies of the Supplemental Brief of Magnolia Healthcare, Inc. d/b/a Arnold Avenue Nursing Home, Foundation Health Services, Inc. and Diane Oltremari via hand delivery to the Clerk of the Mississippi Supreme Court on the 17th day of March, 2008.



Patricia J. Kennedy