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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

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COURT OF APPEALS

APPELLANTS

V.

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

APPELLEES

SUPPLEMENTAL BRIEF
TO THE MISSISSIPPI SUPREME COURT

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**SUPPLEMENTAL BRIEF TO THE
MISSISSIPPI SUPREME COURT**

The Petitioners, Velma Payne, as personal representative of Matthew Smith, Deceased, the wrongful death beneficiaries of Matthew Smith, deceased, and Rhonda Smith Meeks, file this, its Supplemental Brief to its Petition for Writ of *Certiorari*.

I. Introduction

The Circuit Court of Washington County granted summary judgment to Defendants on the grounds that Velma Payne, Administratrix to the Estate of Matthew Smith, was not the proper party to bring suit pursuant to Miss. Code Ann. § 11-7-13. Plaintiffs appealed this decision to the Mississippi Court of Appeals. The Court of Appeals dismissed Plaintiffs' appeal for lack of jurisdiction. This Court granted *certiorari*.

II. Factual and Procedural Timeline

1. On April 25, 2002, Plaintiffs filed their complaint in the Washington county Circuit Clerk's office.
2. July 3, 2003, after Plaintiffs substituted counsel of record, Velma Payne, a/k/a Vivian Payne, was appointed Administratrix of the Estate of Matthew Smith, deceased, by the

Washington County Chancery Court.

3. June 15, 2004, Defendants filed their Motion for Summary Judgment alleging Ms. Payne, as Administratrix of the Estate of Matthew Smith, lacked standing to file suit.

4. September 28, 2004, the Washington County Circuit Court granted Defendants' Motion for Summary Judgment.

5. October 4, 2004, Plaintiffs timely filed its Motion for Reconsideration

6. November 30, 2004, Plaintiffs filed a Supplemental Motion for Reconsideration.

7. March 11, 2005, an Order denying Plaintiffs' Motion for Reconsideration was signed by the Court. At oral argument in front of the Mississippi Court of Appeals, **both** Plaintiffs and Defendants admitted to having never received the Order, nor having knowledge of the Order until receiving the record from the Supreme Court.

8. May 16, 2005, Plaintiffs filed a Motion to Add and Join a Real Party in Interest.

9. May 20, 2005, Defendants filed their Response to Motion to Add and Join a Real Party in Interest.

10. June 9, 2005, the Circuit Judge entered two Orders, one denying Plaintiffs' Motion for Reconsideration and the other denying Plaintiffs' Motion to Add and Join a Real Party in Interest.

11. June 20, 2005, Plaintiffs timely filed its Notice of Appeal.

12. September 4, 2007, the Court of Appeals dismissed Plaintiffs' appeal for lack of Jurisdiction.

13. December 11, 2007, the Court of Appeals denied Plaintiffs' Motion for Rehearing.

14. March 6, 2008, this Court granted *certiorari*.

III. Issues Presented for Review

The issues presented for review mirror those in Plaintiffs' Petition for Writ of *Certiorari* but bear repeating due to the importance of the subject matter.

1. Whether Plaintiffs' appeal was timely filed and is not procedurally barred;
2. Whether this Court has the authority to provide proper relief;
3. Whether Payne had standing to bring this action on behalf of Matthew Smith, deceased, and the wrongful death beneficiaries of Matthew Smith.

IV. Summary of Argument and Authority

With regards to the procedural issue, this case is one of first impression. On the issue of standing, the circuit court's ruling is clearly at odds with Miss Code Ann. § 11-7-13 and a plethora of case law . In the history of Mississippi jurisprudence, there has never been a case of such negligence on the part of a circuit clerk. The circuit clerk's failure to follow the Mississippi Rules of Civil Procedure has crippled the Plaintiffs' rights to due process.

A. PLAINTIFFS' APPEAL, PURSUANT TO M.R.A.P. 4, WAS TIMELY FILED AND IS NOT PROCEDURALLY BARRED

On March 11, 2005, an Order denying Plaintiffs' Motion for Reconsideration was signed by the Court. (CP at 733) Plaintiffs' attorneys did not receive notice of said Order. Likewise, Defendants' attorneys did not receive the Order. The Docket Sheet does not reflect the Clerk's notation of distribution of the Order to the attorneys of record, contrary to the usual and customary procedure to reflect distribution. The case proceeded after the March 11, Order as evidenced by the motions filed on behalf of both parties.

The usual and customary procedure of the Clerk's office, found in Miss. R. Civ. P. 77(d)

and followed by the Clerk, is to mail a copy of a filed Order to the attorneys of record and note same on the Docket Sheet. The Clerk's office failed to follow their duty.

The Court of Appeals based their decision largely on M.R.A.P. 4(h). However, this rule was not designed to provide relief for a scenario similar to the case *sub judice*. That is why this is a case of first impression and this Court should avoid holding the Plaintiffs accountable for the negligence of the Washington County Circuit Clerk's office.

B. THIS COURT HAS AUTHORITY TO GRANT PROPER RELIEF

The false premise underlying the Court of Appeals ruling is its belief that it did not have the authority to provide the Plaintiffs' relief. However, the Mississippi Supreme Court has held that Miss. R. Civ. P.60(b)(6) is "reserved for exceptional and compelling circumstances," such as the facts presented here. *Sartain v. White*, 588 So.2d 204, 212 (Miss. 1991). Moreover, it should only be "applied in cases of extreme hardship not covered under any other subsections." *Hartford Underwriters Insurance Company v. Williams*, 936 So.2d 888, 894 (Miss. 2006)(citing, *Burkett v. Burkett*, 537 So.2d 443, 445 (Miss. 1989)).

This case clearly falls under the definition of extreme hardship. In *Hartford*, the Court found exceptional circumstances to permit an appeal out of time because the insurance company did not receive written notice of the entry of judgment per Rule 77(d) and the company was misinformed upon inquiry. Simply put, a clerk should not be allowed to create an injustice by her gross negligence and incompetency.

Furthermore, this Court considers Rule 60(b)(6) to be a "catch-all" provision providing a "grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clauses, or when it is uncertain that one or more of the preceding clauses afford

relief.” *Id.* at 893-94. At this stage, a 60(b)(6) motion may **only** be granted by the Appellate Court. According to the Rule:

Leave to make the motion need not be obtained from the appellate court unless the record has been transmitted to the appellate court and the action remains pending therein. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceedings, or to set aside a judgment for fraud upon the court.

Payne requested of this court in her reply brief, at oral argument and again in her Motion for Rehearing to correct the injustice created by the Circuit Clerk’s office. However, the Court of Appeals did not respond to Payne’s plea and referred to the Clerk’s actions as merely a “shortcoming”. Actually, the “shortcoming” is the tantamount reason for this appeal.

C. PAYNE, AS ADMINISTRATRIX OF THE ESTATE OF MATTHEW SMITH, IS THE PROPER PARTY TO MAINTAIN A WRONGFUL DEATH SUIT

Velma Payne, as personal representative and Administratrix, is entitled to bring a wrongful death suit on behalf of the Estate of Matthew Smith, deceased, and on behalf of the wrongful death beneficiaries. The Supreme Court has stated, “Mississippi’s wrongful death statute specifies certain individuals who may bring an action for wrongful death and certain other individuals who may benefit from the proceeds of the claim.” *Coleman Powermate, Inc. v.*

Rheem Mfg. Co., 880 So. 2d 329, 334 (Miss. 2004) Mississippi’s wrongful death statute states:

[An] action for damages may be brought in the name of the **personal representative of the deceased person** . . . for the benefit of all persons entitled under the law to recover, or by widow for the death of her husband, or by the husband for the death of the wife, or by the parent for the death of a child or unborn quick child, or in the name of a child, or in the name of a child for the death of a parent, or by a brother for the death of a sister, or by a sister for the death of a brother, or by a sister for the death of a sister, or a brother for the death of a brother, **or all parties interested may join in the suit**

Miss. Code Ann. § 11-7-13 (emphasis added).

The Circuit Court’s opinion that Rhonda Smith Meeks, daughter of Matthew Smith, is the only party entitled to bring a wrongful death suit on behalf of the Estate and the wrongful death beneficiaries is misguided. The statute clearly states that a personal representative may bring an action before the court on behalf of the deceased: “[An] action for damages may be brought in the name of the **personal representative of the deceased person . . .**” Miss. Code Ann. § 11-7-13. The Plaintiffs’ complaint is styled verbatim to the language of the statute. (CP at 6) Whether or not Payne is a wrongful death beneficiary does not have an impact on her right as personal representative to bring suit on behalf of the deceased and the wrongful death beneficiaries. *Franklin v. Franklin*, 858 So. 2d 110, 115 (Miss. 2003).

The statute here is crystal clear. A personal representative is entitled to bring suit on behalf of all wrongful death beneficiaries. The Circuit Judge’s opinion only seeks to legislate from the bench. This Court has held that “wrongful death actions are creatures of statute.” *Choctaw Maid Farms v. Hailey*, 822 So. 2d 911, 926 (Miss. 2002)¹. Justice Carlson, in his concurring opinion in *Hailey*, opined that the role of this court is to “determine the legislative intent and constitutionality of acts passed by the Legislature, and if we interpret a statute contrary to the intent or will of the Legislature, that body has the absolute authority to change the statute to suit its will.” *Id.* (citing *Board of Supervisors v. Hattiesburg Coca-cola Bottling Co.*, 448 So. 2d 917, 924 (Miss. 1984). Justice Carlson further held that “until the Mississippi Legislature indicates otherwise, this Court must interpret Miss. Code Ann. § 11-7-13 as written”

¹*Hailey* is a case determining the issue of loss of enjoyment of life as a damage for wrongful death beneficiaries. However Justice Carlson stresses the importance of interpreting Miss. Code Ann. § 11-7-13 as intended by the Legislature.

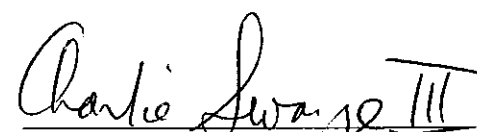
Therefore this Court must rule that Ms. Payne, as Administratrix of the Estate of Matthew Smith, is the proper party to bring suit.

V. Conclusion

For all of the foregoing reasons, this Court should reverse the judgment of the Court of Appeals as well as the judgment of the Circuit Court of Washington County and return this action to the trial court for proper adjudication.

This the 13th day of March, 2008.

Respectfully submitted,



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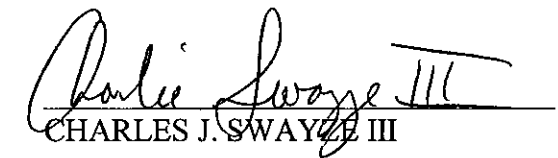
CERTIFICATE OF SERVICE

I, Charles J. Swayze III, hereby certify that I have this day filed this, Appellants' Supplemental Brief to the Mississippi Supreme Court with the Clerk of this Court, and have served a true and correct copy of this Appellants' Supplemental Brief to the Mississippi Supreme Court to the Mississippi Supreme Court, postage prepaid to :

Hon. Ashley Hines
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This the 17 day of March, 2008.


CHARLES J. SWAYZE III