IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

2006-CA-00519

MERLEAN MARSHALL, ALPHONZO MARSHALL, and ERIC SHEPARD, INDIVIDUALLY AND ON BEHALF OF ALL WRONGFUL DEATH BENEFICIARIES OF LUCY R. SHEPARD, DECEASED **APPELLANT**

VS.

KANSAS CITY SOUTHERN RAILWAY COMPANY, ERIC W. ROBINSON, THE ESTATE OF ROBERT E. EVERETT, C.L. DUETT and JOHN DOES 1 THROUGH 10 **APPELLEES**

On Appeal from the Circuit Court of Scott County, Mississippi

BRIEF OF APPELLEES

oral argument requested

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case. These representations are made so that the Judges of this Court may evaluate possible disqualification or recusal.

1) Merlean Marshall, Alphonso Marshall, and Eric Shepard-Plaintiffs-Appellants.

2) The Kansas City Southern Railway Company, Defendant-Appellee.

3) Eric W. Robinson-Defendant-Appellee.

4) Robert E. Everett, Deceased, Defendant-Appellee.

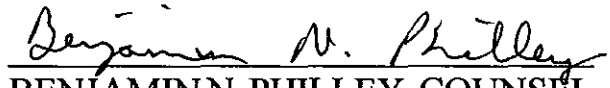
5) C.L. Duett-Defendant, Defendant- Appellee.

6) Herbert Lee, Esquire-Counsel for Plaintiffs-Appellants in the Circuit Court.

7) Edward Blackmon, Esquire-Counsel for Plaintiffs-Appellants in the Circuit Court.

8) James Craig, Esquire-Counsel for Plaintiffs-Appellants on appeal.

9) Charles E. Ross, Esquire, Charles H. Russell, III, Esquire, Benjamin N. Philley, Esquire,-Counsel for Defendants-Appellees.



BENJAMIN N. PHILLEY, COUNSEL OF RECORD FOR DEFENDANT - APPELLEES KANSAS CITY RAILWAY COMPANY, ERIC W. ROBINSON, ROBERT E. EVERETT, DECEASED and C. L. DUETT

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2. Based upon the record of Shepard I[1], whether the dismissal in Shepard I was a voluntary dismissal without prejudice?

3. Whether the Circuit Court was correct in holding that the statute of limitations was not tolled by Miss. Code § 15-1-69 because it is undisputed that Plaintiffs voluntarily dismissed Shepard I without prejudice?

4. Whether Plaintiffs' waived their right to contend in this appeal that Shepard I was dismissed as the result of an "adverse ruling" by failing to raise this issue in response to Defendants' motion for summary judgment in Shepard II, and by taking contrary positions in Shepard I and Shepard II?

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[1] The original lawsuit in this action (hereinafter Shepard I) was removed to the Federal Court of the Southern District of Mississippi after being filed in the State Circuit Court of Scott County on July 20, 1998. The second lawsuit, and the one before this Court now, which was filed in the State Circuit Court of Scott County on August 16, 2004, were filed by the same Plaintiffs and assert the same cause of action relating to the same accident which occurred on July 10, 1998.

5. Whether the Plaintiffs' are estopped from contending that the dismissal of Shepard I constituted an "adverse ruling" when the Order dismissing Shepard I was entered at Plaintiffs' request and never challenged on appeal, when Plaintiffs represented to the Fifth Circuit that the Order dismissing Shepard I was a voluntary dismissal without prejudice, when the Fifth Circuit in Shepard I relied on Plaintiffs' representation that Shepard I was voluntary dismissed by Plaintiffs without prejudice and held that the dismissal in Shepard I was a voluntary dismissal without prejudice, when Plaintiffs did not dispute Defendants' itemization of undisputed facts in support of their summary judgment motion thereby admitting that Plaintiffs' dismissal of Shepard I was a voluntary dismissal without prejudice, and when Plaintiffs' counsel admitted at the summary judgment hearing Shepard I that Plaintiffs' dismissal of Shepard I was a dismissal without prejudice?

6. Whether this Court should adopt an "adverse ruling" exception to tolling the statute of limitations when neither Miss. Code § 15-1-69 nor Mississippi caselaw recognizes this exception?

7. Whether Plaintiffs' waived appellate review of their contention that the statute of limitations was tolled by Miss. Code § 15-1-57 while Shepard

I was pending by failing to raise this issue in response to Defendants' motion for summary judgment in Shepard II?

8. Whether Plaintiffs' claims were tolled by Miss. Code § 15-1-57 when there was no prohibition or injunction against Plaintiffs filing a second action prior to the expiration of the statute of limitations?

II. STATEMENT OF THE CASE

This appeal raises the issue of whether a party who voluntarily dismisses a federal court action without prejudice is afforded the benefit of tolling pursuant to Miss. Code § 15-1-69, especially when Plaintiffs' dismissal was motivated by an attempt to avoid Rule 36 admissions, the Federal District Court's denial of Plaintiffs' motion to remand, and after Plaintiffs observed a jury verdict in favor of Defendants in the companion case that arose out of the same incident.

This appeal also raises the issue of whether the Plaintiffs are estopped from contending that their own voluntary dismissal of Shepard I constituted an "adverse ruling" when the Order dismissing Shepard I was entered at Plaintiffs' request and never challenged on appeal, when Plaintiffs represented to the Fifth Circuit that the Order dismissing Shepard I was a dismissal without prejudice, when Plaintiffs did not dispute Defendants' itemization of undisputed facts in support of their motion for summary judgment thereby admitting that Plaintiffs' dismissal was a dismissal

without prejudice, and when Plaintiffs' counsel admitted to the Circuit Court Judge at the summary judgment hearing in Shepard II that Plaintiffs' dismissal of Shepard I was a voluntary dismissal without prejudice.

Similarly, this appeal raises the issue of whether this Court should adopt an "adverse ruling" exception to tolling the statute of limitations when neither the plain language of Miss. Code § 15-1-69 nor Mississippi law recognizes this exception. Furthermore, given Plaintiffs' brief, this appeal raises the issue of whether this Court should consider Plaintiffs' counsel's statements concerning his recollection of events which allegedly transpired in Shepard I rather than looking to the record in Shepard I.[2]

Additionally, the appeal raises the issue of whether Plaintiffs' waived appellate review of their contention that the statute of limitations was tolled by Miss. Code § 15-1-57 while Shepard I was pending by failing to raise this issue at the summary judgment hearing in Shepard II. Finally, the appeal raises the issue of whether Miss. Code § 15-1-57 tolls Plaintiffs' cause of action while Shepard I was pending in federal court when there was no mandatory legal prohibition preventing Plaintiffs from filing a second state court action.

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[2] *See* Defendants' Motion to Strike filed in conjunction herewith.

I. Course of Proceedings and Disposition in the Court Below

A. Shepard I

The original cause of action (hereinafter referred to as Shepard I) was filed by the wrongful death beneficiaries of Lucy R. Shepard in the Circuit Court of Scott County, Mississippi on July 20, 1998 pursuant to the Mississippi Wrongful Death Act § 11-7-13. (P.R.[3] at 430-40). The accident giving rise to this action occurred on July 10, 1998 at the Cedar Street railroad crossing located in Forest, Scott County, Mississippi. (P.R. at 499). The accident involved Lucy R. Shepard's southbound vehicle which collided with a westbound KCS freight train. Id. Phyllis Body McKee was a passenger in Shepard's vehicle. Id. Defendants Eric W. Robinson, Robert E. Everett, and C.L. Duett (hereinafter "the train crew") were operating the train on the date of the subject accident. Id. Everett was the conductor, and Robinson and Duett were the engineers of the subject train. Id. Both Everett and Lucy Shepard are now deceased. Id.

Plaintiffs' complaint alleged negligence against the railroad and the train crew. (P.R. at 430-40). After Defendants answered the complaint denying Plaintiffs' allegations of negligence, the parties conducted substantial discovery in state court.

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3 P.R. is the abbreviation for Pleadings Record, and R.T. is the abbreviation for Record Transcript.

Id. On May 7, 1999, KCS propounded Rule 36 requests for admissions asking Plaintiffs to admit that they had no evidence supportive of their claims against the individual train crew members (the requests did not address KCS as a corporate defendant).[4] (P.R. at 441). Plaintiffs failed to timely respond to KCS' requests for admissions, thereby admitting the matters addressed in KCS' requests.[5] (P.R. at 441-48); *See also* Miss. R. Civ. P. 36.

After Plaintiffs admitted to having no evidence supportive of their claims against the train crew, Defendants removed Shepard I to federal court based upon federal diversity jurisdiction. (P.R. at 451). On July 23, 1999, Plaintiffs filed a motion to remand, which was denied by United States District Court Judge, Henry T. Wingate, finding that Plaintiffs' admissions defeated Plaintiffs' claims against the

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[4] The train crew and plaintiffs are Mississippi residents. KCS is a foreign corporation.

[5] Rule 36 of the M.R.C.P. is clear in stating that Requests for Admissions not answered within thirty (30) days are admitted. *See* Miss. Rule of Civ. Proc. 36 (stating "the matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter. . . ."). Mississippi caselaw also is clear that the rule is to be strictly interpreted as it is written. *See* DeBlanc v. Stancil, 814 So.2d 796, 799 (Miss. 2006) (citing Education Placement Servs. v. Wilson, 487 So.2d 1316 (Miss. 1986) (holding "Rule 36 is to be enforced according to its terms"). Furthermore, the record is clear that Plaintiffs never filed any type of motion to set aside the admissions made by failing to timely respond. (P.R. at 441-48). This is significant because Plaintiffs rely on the *McKee* case in arguing that Shepard I should have been remanded as Shepard I's facts were the mirror image of *McKee*. However, this is not correct as the Plaintiff in *McKee* never admitted to having no claims against the train crew; and therefore, *McKee* is distinguishable on these grounds.

train crew. (P.R. at 455-62). In its Order denying Plaintiffs' motion to remand, the trial court dismissed the train crew as Defendants. (P.R. at 462). On March 21, 2001, Plaintiffs appealed the District Court's denial of Plaintiffs' motion to remand to the Fifth Circuit Court of Appeals, which the Court dismissed finding that Plaintiffs had no basis for appellate jurisdiction. (P.R. at 463-65).

On February 21, 2003, a jury returned a verdict in favor of KCS in the case of Phyllis Body McKee, who was a passenger in Lucy Shepard's vehicle. (P.R. at 511); *See* McKee v. Kansas City So. Ry. Co, 358 F.3d 329 (5th Cir. 2004)[6]. After observing the McKee verdict and dissatisfied with being in Federal Court after unsuccessfully trying to remand the case, Plaintiffs attempted to avoid their Rule 36 admissions which were never withdrawn or amended by employing a legal "strategy"[7] to move to voluntarily dismiss Shepard I in an attempt to manufacture a final judgment to obtain immediate Fifth Circuit review of the district court's denial of Plaintiffs' Motion to Remand instead of waiting until this issue was ripe for appeal. (P.R. at 466-468). The District Court granted Plaintiffs' motion to dismiss, construing the

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6 The *McKee* jury verdict in favor of KCS was subsequently reversed by the Fifth Circuit on the grounds that the Federal District Court lacked jurisdiction over the *McKee* case. McKee v. Kansas City So. Ry. Co, 358 F.3d 329 (5th Cir. 2004).

7 *See* Marshall v. Kansas City Southern Railway, 378 F.3d 495, 498 (5th Cir. (Miss.) 2004).

motion as one for voluntary dismissal pursuant to Rule 41 of Federal Rules of Civil Procedure.[8] (P.R. at 470-72). Accordingly, the district court entered a Final Judgment dismissing Shepard I pursuant to the Plaintiffs' motion. Id

After the District Court granted Plaintiffs' motion for voluntary dismissal, Plaintiffs attempted to appeal from the order of dismissal challenging the District Court's ruling on Plaintiffs' motion to remand. (P.R. at 473-502). In their appeal to the Fifth Circuit, Plaintiffs never challenged the validity or correctness of the District Court's order dismissing Plaintiffs' claims pursuant to Rule 41. Id. To the exact contrary, Plaintiffs vigorously asserted in their brief to the Fifth Circuit that the district court's dismissal in Shepard I *was in fact a voluntary dismissal without prejudice*, even though the order did not specifically state one way or the other as to

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Plaintiffs argue that Defendants requested the Court to convert the Plaintiffs' voluntary dismissal to a Rule 41 dismissal. However, this is not true. Defendants merely responded to Plaintiffs' motion stating that Defendants did not contest the motion, but suggested to the trial court that the proper rule for dismissal was a Rule 41 dismissal without prejudice since Rule 54(b) was inapplicable to a motion for voluntary dismissal without prejudice as Rule 54(b) only applies to partial dismissals. (P.R. at 471); *See* F.R.C.P. 54(b). Indeed, Rule 54(b), standing alone, provides no basis whatsoever for voluntarily dismissing a case. Specifically, Rule 54(b) provides that "the court may direct entry of a final judgment *as to one or more but fewer than all of the claims or parties* only upon an express determination that there is no just reason for delay. . . ." F.R.C.P. 54(b) (emphasis added). Because Plaintiffs moved to voluntarily dismiss *all of their claims*, Rule 54 was inapplicable as the rule neither applies to voluntary dismissals nor dismissals of all claims. Most importantly, the dismissal order of the district court in Shepard I does not contain the "express determination" requested of Rule 54(b), and Plaintiffs never challenged this order on appeal.

whether the dismissal was with or without prejudice. (P.R. at 473-502)[9].

Significantly, Plaintiffs asserted that "the district court's order of dismissal was without prejudice as Rule 41(a)(2) mandates that dismissals under its provisions are without prejudice unless otherwise specified in the order and the order of dismissal entered by the district court did not specify that the dismissal was with prejudice." (P.R. at 570) (emphasis added). This fact was noted and relied on by the Fifth Circuit in its opinion:

> In their reply brief on appeal, Plaintiffs vigorously assert that their motion "requested entry of final judgment, but not with prejudice." (emphasis added). In reliance on Plaintiffs' representation, the Fifth Circuit held that given (1) Plaintiffs' most recent insistence that the dismissal at issue was without prejudice and (2) the express language in Rule 41(a)(2) that a dismissal under that rule is without prejudice "[u]nless otherwise specified in the order" (which it is not), we are constrained to conclude that the dismissal was, in fact, without prejudice.

(P.R. at pp. 485).

In reliance on Plaintiffs' *"insistence"* that the dismissal of Shepard I was without prejudice, the Fifth Circuit dismissed Plaintiffs' second appeal, holding that the district court's order of dismissal, which was entered pursuant to Plaintiffs' own motion for voluntary dismissal, was a voluntary dismissal *without prejudice.* (P.R. at 473-85). Accordingly, the Fifth Circuit dismissed Plaintiffs' appeal, holding that

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[9] *See also* Marshall, 378 F.3d at 500.

Plaintiffs' voluntary dismissal of Shepard I without prejudice lacked the requisite finality so as to confer the Fifth Circuit with appellate jurisdiction over the matter. (P.R. at 473-502). Plaintiffs did not seek reconsideration of this Fifth Circuit order, did not seek rehearing *en banc*, and did not appeal or seek *certiorari* to the U.S. Supreme Court. Instead, as explained below, they decided to refile in state court as if the voluntary dismissal order without prejudice had never been entered.

B. Shepard II

On August 16, 2004, *over six years after the subject incident*, Plaintiffs filed the present action against Defendants in the Circuit Court of Scott County (hereinafter "Shepard II"). (P.R. at 3). On June 21, 2005, Defendants filed a motion for summary judgment asking the Circuit Court to dismiss Plaintiffs' claims as time barred pursuant to Miss. Code § 15-1-49. (P.R. at 426-29). Notably, Plaintiffs did not dispute any of the undisputed facts relied on by Defendants in support of their motion for summary judgment, thereby admitting (once again) that Plaintiffs voluntary dismissed Shepard I without prejudice. (P.R. at 523-30). Moreover, during the hearing on Defendants' motion for summary judgment, Plaintiffs' counsel, Herbert Lee, Esquire, admitted to the trial court that Plaintiffs' voluntarily dismissed Shepard I without prejudice. (R.T. at 8).

Specifically, at the hearing on Defendants' motion for summary judgment,

Plaintiffs' counsel stated:

> BY THE COURT: And then, in this case, you voluntarily dismissed the Defendant, Kansas City Southern. Did you not?
> BY MR. LEE: **Yes. We did**.
> BY THE COURT: You **voluntarily dismissed Kansas City**.
> BY MR. LEE: **Yes**.

(R.T. at pp. 8) (emphasis added). In reliance on Plaintiffs' admission that Shepard I was voluntary dismissed by Plaintiffs without prejudice, the Circuit Court held that the statute of limitations had expired, and that the statute of limitations was not tolled while Shepard I was pending because Plaintiffs' voluntarily dismissed Shepard I without prejudice. (P.R. at 602). Plaintiffs then filed their Notice of Appeal on March 27, 2006. (P.R. at 670).

III. SUMMARY OF THE ARGUMENT

The trial court was correct in granting Defendants' motion for summary judgment because Plaintiffs' claims in this action are barred by the three (3) year statute of limitations found in Miss. Code § 15-1-49. (P.R. at 426-29). The incident giving rise to this action occurred on July 10, 1998. (P.R. at 3). Plaintiffs filed this action on August 16, 2004, more than six (6) years after the subject incident occurred. (P.R. at 3). Furthermore, the trial court was correct in ruling that the pendency of Shepard I did not toll the statute of limitations because Plaintiffs' voluntarily dismissed that action without prejudice. Mississippi law is clear that a plaintiff who

dismisses a prior action without prejudice does not receive the benefit of tolling. *See* W.T. Raleigh Co. v. Barnes, 109 So. 8 (Miss. 1926).

Moreover, although Plaintiffs now advocate that Shepard I was dismissed as the result of an"adverse ruling" and this Court should adopt an "adverse ruling" exception to Miss. Code § 15-1-69, this contention contradicts the record in Shepard I when the Order dismissing Shepard I was entered at Plaintiffs' request and never challenged on appeal, and when the Plaintiffs represented to the Fifth Circuit that the Order dismissing Shepard I was a dismissal without prejudice. (P.R. at pp. 484-86) Moreover, this contention contradicts Plaintiffs' admissions in Shepard II when Plaintiffs did not dispute Defendants' itemization of undisputed facts in support of its summary judgment motion thereby admitting that Plaintiffs' dismissal was without prejudice, and when Plaintiffs' counsel, Herbert Lee, Esq., admitted to the trial court at the summary judgment hearing that Plaintiffs' dismissal of Shepard I was a voluntary dismissal without prejudice. (P.R. at 523-530) (R.T. at pp. 8). Under these facts and admissions, it is extremely disingenuous for Plaintiffs to now take the exact opposite position that Shepard I was dismissed as the result of an "adverse ruling" by the district court.

Also, Plaintiffs' request for this Court to adopt the "adverse ruling" exception to the savings statute is not supported by the plain language of Miss. Code § 15-1-69

nor Mississippi law. Moreover, it is undisputed that Plaintiffs voluntary dismissal of Shepard I is not an "adverse ruling" as it came at the hands of Plaintiffs. (R.T. at pp. 8).

Additionally, Plaintiffs are precluded from challenging the validity of the District Court's order of dismissal in Shepard I in this Court. Plaintiffs embraced this ruling before the Fifth Circuit, and the Fifth Circuit relied upon Plaintiffs' embracing the ruling. Moreover, it is undisputed that the order of dismissal in Shepard I correctly stated that Shepard I was voluntarily dismissed by Plaintiffs without prejudice. (R.T. at pp. 8). For these reasons, Plaintiffs are barred from collaterally attacking the District Court's Order of Dismissal in this Court under the doctrine of judicial estoppel.

Plaintiffs waived any argument that Miss. Code § 15-1-57 tolled the statute of limitations by failing to raise this issue in the trial court. Notwithstanding Plaintiffs' waiver of this argument, the statute of limitations period was not tolled by Miss. Code § 15-1-57 as Plaintiffs were never prohibited by law from filing another state court action while Shepard I was pending in Federal Court. For this reason, Miss. Code § 15-1-57 did not toll Plaintiffs' claims while the case was pending in federal court.

V. ARGUMENT AND AUTHORITIES

I. Plaintiffs' claims are barred by the applicable statute of limitations.

Plaintiffs' claims are barred by the three year statute of limitations found in Miss. Code § 15-1-49. The following facts are **undisputed** as Plaintiffs did not dispute these facts in response to Defendants' motion for summary judgment:

1) The subject accident occurred on July 10, 1998;

2) The Plaintiffs filed their first action (Shepard I) on July 20, 1998;

3) Plaintiff Eric Shepard was the adult male husband of the decedent and is the father of the decedent's two minor children;

4) Both Eric Shepard and the decedent's minor children were named Plaintiffs in Plaintiffs' first action;

5) Plaintiffs voluntarily dismissed their first action (Shepard I) without prejudice; and

6) On August 16, 2004, Plaintiffs filed the present action in this Court, more than six (6) years after the subject accident occurred.

(P.R. at 426-27) (emphasis added).

Thus, it is undisputed that Plaintiffs' complaint in this case was filed more than six (6) years after the subject accident, and over three (3) years after the statute of limitations expired on Plaintiffs' claims. For these reasons, the trial court correctly ruled that Plaintiffs' complaint was barred by the statute of limitations. *See* Miss.

Code § 15-1-49.

II. Plaintiffs' cause of action was not tolled while Shepard I was pending in Federal court because Plaintiffs voluntarily dismissed that action without prejudice.

Mississippi law is clear that the effect of a voluntary dismissal without prejudice is to put a plaintiff in the same position as if his original suit had never been brought. *See* W.T. Raleigh Co. v. Barnes, 109 So. 8, 9 (Miss. 1926) (*citing* Cole v. Fagan, 66 So. 400 (Miss. 1914) (holding that:

> The dismissal of a suit without prejudice '**does not deprive the defendant of any defense he may be entitled to make to the new suit, nor confer any new right or advantage on the complainant [plaintiff]**, and hence **it will not have the effect of excepting from the period prescribed by the statute of limitations, the time during which that suit was pending.**')

(emphasis added). Like Mississippi, the Fifth Circuit, as well as, the majority of other jurisdictions hold that:

> The **Plaintiff's voluntary dismissal of his earlier suit without prejudice did not toll the statute**. As we held in *LeCompte v. Mr. Chip, Inc.*, the effect of such a dismissal was to put the Plaintiff in the same legal position in which he would have been had he never brought the first suit. **The prescriptive period, therefore, is not tolled by the bringing of an action that is later voluntarily dismissed**.

Taylor v. Bunge Corp., 775 F.2d 617, 619 (5th Cir.1985) (emphasis added); *see also* Basco v. American General Ins. Co., 43 F.3d 964, 965-66 (5th Cir.1994); Ford v. Sharp, 758 F.2d 1018 (5th Cir. 1985); LeCompte v. Mr. Chip, Inc., 528 F.2d 601, 603

(5th Cir.1976); Alvarado v. Maritime Overseas Corp., 528 F.2d 605 (5th Cir.1976); Curtis v. United Transportation Union, 648 F.2d 492, 493-95 (8th Cir.1981); Buerger v. Southwestern Bell Telephone Co., 982 F.Supp. 1253, 1257 (E.D.Tex. 1997); DeLong's Inc. v. Stupp Bros. Bridge & Iron Co., 40 F.R.D. 127, 130-31 (E.D.Mo.1965); Beckner v. Stover, 247 N.E.2d 300, 303 (Ohio 1969); and Wright & Miller, Federal Practice & Procedure § 1056 (1987); Moore, Lucas & Wicker, Moore's Federal Practice ¶ 41.05[2], at 41-66-67; ¶ 41.11[2], at 41-144, 145 (2d ed. 1984).

Since the effect of a plaintiff's voluntary dismissal is to put a plaintiff in the same position he would have been in had the original suit never been filed, the statute of limitations is not tolled during the pendency of a prior suit. Id. Plaintiffs' complaint in this case is time barred as Plaintiffs' complaint was filed over six (6) years after their cause of action accrued (i.e. the date of the accident) and over three (3) years after the three-year statute of limitations expired. *See* Miss. Code § 15-1-49 (P.R.s at 3). In other words, Plaintiffs' voluntary dismissal of Shepard I acts as if the complaint was never filed, and therefore, the statute of limitations was not tolled.

This issue was addressed in Goff v. United States, 659 F.2d 560 (5th Cir. 1981) (Mississippi). In Goff, the plaintiff filed a lawsuit in federal district court within statute of limitations. After the statute of limitations expired, the plaintiff moved to

voluntarily dismiss his suit. The district court granted the plaintiff's motion for voluntary dismissal, and the plaintiff sought to re-file his suit in district court for a second time. In holding that the plaintiff's new suit was barred by the statute of limitations, the Fifth Circuit held:

> It is also well established that the fact that a dismissal of an earlier suit was without prejudice does not authorize the bringing of the suit later outside of an otherwise binding limitations period. . . .Firmly established principles require the holding that the district court was correct in finding that it did not have jurisdiction in this re-filed case because it was filed after the limitations period had expired.

Id. at 563 (*citing* Hall v. Kroger Bakery, 520 F.2d 1204 (6th Cir. 1975); Columbia v. Douglas Aircraft, 509 F.2d 1027 (9th Cir. 1975))(emphasis added). Just like plaintiff in Goff, Plaintiffs' voluntary dismissal of Shepard I without prejudice does not authorize the bringing of this time barred suit; and therefore, the Circuit Court correctly dismissed Plaintiffs' claims.

Plaintiffs' reliance on Norman v. Bucklew, 684 So.2d 1246 (Miss. 1996) and Boston v. Hartford Acc. & Indem. Co., 822 So.2d 239 (Miss. 2002) for the contention that the statute of limitations period is tolled merely because of the pendency of Shepard I is utterly without merit. The rule in Norman and Boston applies only when *a federal court involuntarily dismisses* a plaintiff's state law claims without prejudice *after determining not to exercise jurisdiction over the case* following the dismissal

of the plaintiff's claims arising under federal law. Norman v. Bucklew, 684 So.2d 1246 (Miss. 1996); Boston v. Hartford Acc. & Indem. Co., 822 So.2d 239 (Miss. 2002). Boston and Norman have no application whatsoever when *a plaintiff engages in procedural trickery and voluntarily dismisses his own action* in an attempt to circumvent Rule 36 admissions, and the District Court's denial of the Plaintiffs' motion to remand.

In both Norman and Boston, the plaintiffs filed complaints in federal court alleging claims arising under federal and state law. Norman, 684 So.2d at 1246; *see also* Boston, 822 So.2d at 239. Because the Boston and Norman Plaintiffs alleged claims arising under federal law and state law, the federal district courts had federal question jurisdiction over the plaintiffs' federal claims pursuant to 28 U.S.C. § 1331, and supplemental/pendent jurisdiction over the plaintiff's state law claims pursuant to 28 U.S.C. § 1367. Norman, 684 So.2d at 1246; *see also* Boston, 822 So.2d at 239. After the district courts determined, over Plaintiffs' objection, that the plaintiffs' federal law claims should be dismissed, the district courts entered orders dismissing the plaintiffs' federal law claims with prejudice, and dismissing the plaintiffs' state law claims without prejudice, declining to exercise their discretion to retain jurisdiction over the state law claims. Norman, 684 So.2d at 1246; *see also* Boston, 822 So.2d at 239. Most significantly, the plaintiffs did not ask the court to dismiss

their state law claims.

When the Norman and Boston Plaintiffs re-filed their complaints in Mississippi state courts, the defendants raised the statute of limitations as a defense to the state law claims. Norman, 684 So.2d at 1246; *see also* Boston, 822 So.2d at 239. In rejecting the Defendant's argument that the plaintiffs claims were barred by the statute of limitations, the Mississippi Supreme Court held that "the three year statute of limitations was tolled when the federal court's pendent jurisdiction was sought to be invoked by Norman." Norman, 684 So.2d at 1256 (emphasis added). Most importantly, the Norman plaintiffs were fighting to keep the lawsuit alive all along the way. They did not voluntary dismiss their lawsuit as a form of trickery.

It is only in these narrow circumstances that the pendency of a prior federal court action tolls the statute of limitations on a state law claim. Norman, 684 So.2d at 1246; *see also* Boston, 822 So.2d at 239. Stated differently, the rule in Boston and Norman applies only when a federal court has pendent/supplemental jurisdiction over a plaintiff's federal and state law claims pursuant to 28 U.S.C. §§ 1331 and 1367, and the federal court later involuntarily dismisses the plaintiff's federal causes of action with prejudice, and dismisses the plaintiff's state law causes of actions without prejudice, refusing to exercise its discretion to retain jurisdiction over the matter. Norman, 684 So.2d at 1246; *see also* Boston, 822 So.2d at 239. Such is not the case

here.

In this case, which is governed by Barnes and Goff, the federal district court had jurisdiction over Shepard I pursuant to 28 U.S.C. § 1332 (diversity jurisdiction) after denying Plaintiffs' motion to remand. Dissatisfied with the District Court's ruling on Plaintiffs' motion to remand, and in an attempt to avoid their Rule 36 admissions (which were never withdrawn or amended), Plaintiffs (not the District Court) employed a "strategy" to dismiss their own case without prejudice. *See* Marshall, 378 F.3d at 498. The dismissal of Plaintiffs' prior federal court action did not occur because the District Court declined to exercise pendent jurisdiction over Plaintiffs' state law claims. Indeed, pendent/supplemental jurisdiction was not even an issue in Shepard I. (P.R. at 473-86). The dismissal of Shepard I came at the hands of Plaintiffs and not the district court. For this reason alone, Boston and Norman have no application whatsoever to the present case.

Another critical distinction between this case and Boston and Norman is that the dismissals in Boston and Norman were ***involuntary dismissals entered by the Court***. The dismissal of Shepard I was the result of ***Plaintiffs' own voluntary dismissal*** entered pursuant to the Plaintiffs' own motion because they were dissatisfied with the district court's ruling on Plaintiffs' motion to remand and because Plaintiffs were attempting to avoid Rule 36 admissions. (P.R. at 466-68).

Because the Plaintiffs voluntarily dismissed Shepard I, Boston and Norman do not apply, and the statute of limitations was not tolled while the Plaintiffs' prior federal court action was pending.

III. Plaintiffs' claims are not saved by Miss. Code § 15-1-69 because voluntary dismissals without prejudice are not dismissals as a "matter of form."

Plaintiffs' argument that the statute of limitations is tolled by Miss. Code § 15-1-69 fails. Miss. Code § 15-1-69 provides:

> If in any action, duly commenced within the time allowed, the writ *shall* be abated, or the action otherwise avoided or defeated, by the death of any party thereto, or for any matter of form, . . . the plaintiff may commence a new action for the same cause, at any time within one year after the abatement or other determination of the original suit, or after reversal of the judgment therein. . . .

Miss. Code § 15-1-69 (emphasis added).

Plaintiffs argue that Miss. Code § 15-1-69 saves their lawsuit because their own dismissal of Shepard I was a "matter of form" and was sufficient to invoke the statutory language of Miss. Code § 15-1-69. Plaintiffs are wrong. Pursuant to Mississippi law, dismissals as a "matter of form" within the meaning of Miss. Code § 15-1-69 include only procedural dismissals by courts for lack of subject matter jurisdiction, lack of personal jurisdiction, and for other procedural defects such as dismissals for improper service and venue. *See* Gray v. Mariner Health Central, Inc.,

2006 WL 2632211 (N.D. Miss); Lowry v. International Broth. of Boilermakers, Iron Ship Builders and Helpers of America, 220 F.2d 546(5th Cir. 1955)(Miss.); Wertz v. Ingalls Shipbuilding Inc., 790 So.2d 841 (Miss. 2000); Deposit Guar. Nat. Bank v. Roberts, 483 So.2d 348 (Miss. 1986); Frederick Smith Enterprise Co. v. Lucas, 36 So.2d 812 (Miss. 1948); Hawkins v. Scottish Union & National Ins. Co., 69 So. 710 (Miss. 1915). Miss Code § 15-1-69 does not apply when a plaintiff voluntarily dismisses his case on the merits because he was dissatisfied with a ruling on the remand issue and is trying to circumvent Rule 36 admissions. Simply put, a voluntary dismissal without prejudice does not constitute a dismissal as a "matter of form." This Court has addressed this issue and has squarely rejected the argument that voluntary dismissals without prejudice are dismissals as a "matter of form" within the meaning of Miss. Code § 15-1-69. *See* W.T. Raleigh Co. v. Barnes, 109 So. 8 (Miss. 1926).

In Barnes, the plaintiff initiated a suit prior to the running of the statute of limitations, but later voluntarily dismissed that suit without prejudice. Id. at 9. After dismissing his first suit, plaintiff initiated another suit one year after the statute of limitations expired. Id. The defendant filed a motion to dismiss the plaintiffs second suit on the grounds that it was barred by the statute of limitations. Id. Plaintiff argued that his second suit was "saved" from the statute of limitations because the dismissal of the plaintiff's first suit without prejudice constituted a dismissal as a

"matter of form" pursuant to Mississippi's savings statute (now codified at Miss. Code § 15-1-69). Id.

In addressing the parties positions, this Court rejected the plaintiff's argument and held that the plaintiff's voluntary dismissal without prejudice did not constitute a dismissal as a matter of form within the meaning of Mississippi's savings statute. Id. Therefore, this Court held that Plaintiff's second suit was time-barred. Id. Specifically, the Court held:

> The dismissal of a suit without prejudice 'does not deprive the defendant of any defense he may be entitled to make to the new suit, nor confer any new right or advantage on the complainant [plaintiff], and hence it will not have the effect of excepting from the period prescribed by the statute of limitations, the time during which that suit was pending.'

Id. at 9 (*citing* Cole v. Fagan, 66 So. 400 (Miss. 1914))(emphasis added).

In this case, in an attempt to avoid their Rule 36 admissions and dissatisfied with the district court's ruling on Plaintiffs' motion to remand in Shepard I, Plaintiffs voluntarily dismissed their own case without prejudice. (P.R. at 473-502). As the trial court properly held, such a dismissal is clearly not a dismissal as a "matter of form" pursuant to Miss. Code § 15-1-69. (R.T. at pp. 13); *see* W.T. Raleigh Co. v. Barnes, 109 So. at 8.

As previously set forth, "the effect of a voluntary dismissal is to put the Plaintiff in the same legal position in which he would have been had he never brought

the first suit." Taylor, 775 F.2d at 619. Applying this rule to this case, Shepard I should be treated as if it were never filed. Because Plaintiffs' complaint in this action was filed on August 16, 2004, Plaintiffs missed the statute of limitations by over three (3) years as the subject accident occurred on July 10, 1998. (P.R. at 3). Therefore, Miss. Code § 15-1-69 does not save the Plaintiffs' untimely filed action as a voluntary dismissal is not as a "matter of form."

IV. Plaintiffs' dismissal of Shepard I was not an "adverse ruling."

A. Plaintiffs waived any contention that Shepard I was dismissed as the result of an "adverse ruling" by failing to raise this issue in response to Defendants' motion for summary judgment.

By failing to raise their contention that Shepard I was dismissed due to an "adverse ruling" in responding to Defendants' motion for summary judgment, Plaintiffs waived their right to raise this issue for the first time on appeal. *See* Weiner v. Meredith, 943 So.2d 692, 694 (Miss. 2006) (holding "it is well established that this Court *does 'not entertain arguments made for the first time on appeal. . . .'*") (citing Chantey Music Publ'g. Inc. v. Malabo, Inc., 915 So.2d 1052, 160 (Miss. 2005) (emphasis added); Provident Life and Accident Ins. Co. v. Goel, 274 F.3d 984, 992 (5th Cir. (Miss.) 2001) (holding "we are 'limited to the summary judgment record and the plaintiffs may not advance on appeal new theories or raise new issues not properly before the district court to obtain reversal of the summary judgment'") (quoting Little

v. Liquid Air Corp., 37 F.3d 1069, 1071 n.1 (5th Cir. 1994)) (emphasis added); Baxter v. Minnesota Mining and Manuf., 98 Fed.Appx. 301, 301 (5th Cir. (Tex.) 2004) (holding "same").

B. In determining whether Plaintiffs' voluntary dismissal of Shepard I was the result of an "adverse ruling", this Court should look solely to the record in Shepard I.

Notwithstanding Plaintiffs waiver of their "adverse ruling" exception, Plaintiffs' argument that the dismissal of Shepard I was an "adverse ruling" is contrary to the Record in Shepard I, Plaintiffs' representations to the Fifth Circuit in Shepard I, and Plaintiffs' representations to the Circuit Court in Shepard II. (P.R. at pp. 485) (R.T. at pp. 8). Pursuant to Mississippi law, in determining whether Plaintiffs' voluntary dismissal of Shepard I was anything other than a voluntary dismissal without prejudice pursuant to Rule 41, this Court should look no further than the federal court record as it existed in Shepard I. *See* Caldwell v. Caldwell, 823 So.2d 1216, 1222 (Miss. 2002) (holding "this Court can act only on the basis of the contents of the official record. . . . It may not act upon statements in briefs or arguments of counsel which are not reflected by the record"); *See also* Weiner v. Meredith, 943 So.2d 692,696 (Miss. 2006) (holding a *"case must be decided on the facts contained in the record and* ***not on assertions in the briefs****"*) (emphasis added); *See also* Chantey Music Publ'g. Inc. v. Malabo Inc., 915 So.2d 1052, 1060 (Miss.

2005) (same); Alexander v. Hancock, 164 So. 772, 773 (Miss. 1935) (same); *see also* Defendants' Motion to Strike.

When this court looks to the record in Shepard I, the Court will see that Plaintiffs made the same allegations as they make in this case, which is that the district court and KCS had "previously opined that the jury's verdict in McKee and the final judgment entered pursuant to that verdict [were] binding upon the Plaintiff and [KCS] herein." (P.R. at pp 481). However, the Fifth Circuit recognized the fallacies in Plaintiffs' argument, and held that "***the record is devoid of any ruling, opinion or statement by the district court to this effect. KCS never filed any supplemental pleading asserting the affirmative defense of res judicata or issue preclusion***." (P.R. at pp 481) (emphasis added).

Furthermore, although the record in Shepard I clearly shows that there is no ruling, opinion or statement made by the District Court that the *McKee* verdict was controlling over this case, Plaintiffs' attempt to manufacture a "record" to support their argument that Shepard I was dismissed as a result of an adverse ruling by citing to statements made by Plaintiffs' counsel, Herbert Lee, Esq. during the summary judgment hearing in Shepard II. In other words, in the Brief for the Appellant, the "record cites" Plaintiffs rely on in this case to support their argument that Plaintiffs' voluntary dismissal was the result of an "adverse ruling" are Mr. Lee's

statements/arguments made during the summary judgment hearing before the circuit court in Shepard II concerning Mr. Lee's recollection of events that allegedly occurred in Shepard I. However, as recognized by the Fifth Circuit, the record in Shepard I is devoid of anything supportive of Mr. Lee's recollection of hearsay statements. (P.R. at pp 481). Therefore, this Court should only look to the record in Shepard I and disregard Plaintiffs' "record cites" to Mr. Lee's statements at the summary judgment hearing. Weiner, 943 So.2d at 692; *see also* Defendants' Motion to Strike.

If this Court were to accept Plaintiffs' counsel's statements made during summary judgment hearing in this case concerning what the District Court Judge in Shepard I allegedly said instead of looking to the federal court record itself, it would allow litigants to create a "new record" by simply dismissing and re-filing a case. Simply put, parties could rely on their own counsel's statements as record authority to flip flop through the litigation process until they receive a favorable ruling. Thus, as a matter of public policy and as a matter of law, this Court should only look to the federal court record as it existed in Shepard I regarding events that transpired in Shepard I and should disregard Plaintiffs' counsel's statements made in the trial court during the summary judgment hearing in this case as these statements are nowhere to be found in the federal court record in Shepard I. (P.R. at pp 481); *See* Weiner, 943

So.2d 696. The record in Shepard I and Plaintiffs' counsel's representation to the Fifth Circuit and the Circuit Court establish that Plaintiffs got exactly what they requested, which was a voluntary dismissal without prejudice.

C. Plaintiffs are judicially estopped from challenging the validity of the district court's order of dismissal in this Court as the record in Shepard I establishes that Shepard I was not dismissed as the result of an adverse ruling.

Although Plaintiffs now claim that their voluntary dismissal of Shepard I was the result of an "adverse ruling," this contention not only contradicts the record in Shepard I, it contradicts the following representations made by Plaintiffs to the Fifth Circuit in Shepard I and the trial court in Shepard II:

- Plaintiffs insisted to the Fifth Circuit Court of Appeals that the Plaintiffs' motion to dismiss Shepard I was meant to be a voluntary dismissal without prejudice (P.R. at pp. 485);
- The order of dismissal in Shepard I was silent which equals a dismissal without prejudice (P.R. at pp. 484-86);
- The order of dismissal in Shepard I was never appealed or challenged by Plaintiffs;
- Plaintiffs did not dispute that the order of dismissal in Shepard I was a voluntary dismissal without prejudice in responding to Defendants' undisputed facts in their Motion for Summary Judgment in Shepard II (P.R. at 523-530); and
- Plaintiffs represented to the trial court during the summary judgment hearing that Shepard I was, in fact, voluntary dismissed by Plaintiffs without prejudice (R.T. at pp. 8).

Under these facts and admissions, it is extremely disingenuous for Plaintiffs to now take the completely opposite position that Shepard I was dismissed as the result of an "adverse ruling" by the District Court. Thus, even to the extent that this Court is willing to recognize Plaintiffs' advocated "adverse ruling" exception, this exception does not apply to this case because Plaintiffs voluntary dismissal of Shepard I was not an "adverse ruling." Simply put, by dismissing Shepard I without prejudice, Plaintiffs received exactly what they requested, i.e. a dismissal without prejudice.

Moreover, Plaintiffs' attempt to challenge the validity of the Order of Dismissal of Shepard I in this Court is barred under the Doctrine of Judicial Estoppel. *See* In re Estate of Richardson, 905 So.2d 620, 628 (Miss.App. 2004) (*rev'd on other grounds)* (citing Docking v. Allred, 849 So.2d 151, 155 (Miss. 2003) ("judicial estoppel precludes a party from asserting a position, benefitting from that position, and then, when it becomes more convenient or profitable, retreating from that position later in litigation"). Not only are Plaintiffs estopped from collaterally attacking the order of dismissal, pursuant to Mississippi law, this Court should presume the order of dismissal entered in Shepard I is in fact correct as the order was never challenged by Plaintiffs in Shepard I. *See* Minor v. City of Indianola, 909 So.2d 146, 147 (Miss. Ct. App. 2005) (holding orders of the courts are "entitled to a

presumption of correctness"); *See also* Branch v. State, 347 So.2d 957, 958 (Miss. 1977).

Pursuant to Mississippi law, Plaintiffs cannot now take the position that their voluntary dismissal was the result of an "adverse ruling" by the district court when it is undisputed that the dismissal of Shepard I was a voluntary dismissal without prejudice which came at the hands of the Plaintiffs. (P.R. at 473-502) (R.T. at pp. 8). Again, Plaintiffs have consistently maintained (until now) that Shepard I was a voluntary dismissal without prejudice, and Plaintiffs never challenged or appealed the order of dismissal in Shepard I. (P.R. at 473-502).

Notwithstanding that Plaintiffs have consistently maintained that their dismissal of Shepard I was a voluntary dismissal without prejudice, if Plaintiffs believed that Shepard I was dismissed as a result of an "adverse ruling," Plaintiffs should have challenged this ruling when they appealed to the Fifth Circuit. A litigant should not be allowed to collaterally attack another court's order as being incorrect when the litigant had the procedural option to seek to change the order in the first court, but did not. This is especially the case when the order was entered at the litigants own request. Consequently, based upon Plaintiffs' representations and admissions, Plaintiffs are judicially estopped from taking the inconsistent position that the dismissal of Shepard I was an "adverse ruling."

Furthermore, sound public policy prevents the tactics Plaintiffs are advancing in this case. When Federal or State trial court enters an order, and a party appeals from that order and embraces the order on appeal, that party should not be allowed to collaterally attack the validity of that order in a subsequent lawsuit. This is especially the case when, like herein, the order was sought by the party itself. Simply put, if Plaintiffs believed that the District Court's order of dismissal was an "adverse ruling" as Plaintiffs now contend, then Plaintiffs should have argued their point in their appeal to the Fifth Circuit. Instead, Plaintiffs actually embraced the District Court's order of dismissal as a voluntary dismissal without prejudice when it suited their strategical goals. (P.R. at pp. 485). Now Plaintiffs contend that the District Court's ruling was an adverse ruling. Such cannot be reconciled with Plaintiffs' representations to the Fifth Circuit or Plaintiffs' admissions in this case.

D. Plaintiffs' argument that an "adverse ruling" exception tolls the statute of limitations in this case is not supported by Miss. Code § 15-1-69 or Mississippi caselaw.

Not only did Plaintiffs not receive an adverse ruling by voluntary dismissing Shepard I without prejudice. Plaintiffs argument that this Court should adopt an "adverse ruling" exception to Miss. Code § 15-1-69 fails as the plain language of Miss. Code § 15-1-69 does not contain any "adverse ruling" exception. As stated, Miss. Code § 15-1-69 provides that "if in any action, duly commenced within the time

allowed, the writ shall be abated, or the action otherwise avoided or defeated . . .for any matter of form . . . the plaintiff may commence a new action for the same cause, at any time within one year after the abatement." Miss. Code § 15-1-69 (emphasis added).

As can be seen from the plain language of the statute, Miss. Code § 15-1-69 does not mention, reference or address the "adverse ruling" exception which Plaintiffs advocate. Additionally, Mississippi caselaw interpreting Miss. Code § 15-1-69 does not recognize Plaintiffs' "adverse ruling" exception. There is simply no authority to support Plaintiffs' position. For this reason, this Court should not adopt an exception when such authority is lacking and especially where there was no "adverse ruling." *See* Speetjens v. Malabo Inc., 929 So.2d 303 (Miss. 2006) (holding "where a statute is clear and unambiguous, no further statutory construction is necessary and the statute should be given its plain meaning")(emphasis added); *See also* Bruce v. First Federal Savings and Loan Assoc. of Monroe, Inc., 837 F.2d 712, (5th Cir. 1988) (same); Pegram v. Bailey, 694 So.2d 664, 670 (Miss. 1997) (same); Ladner v. Necaise, 771 So.2d 353, 356 (Miss. 2000) (same); Coleman v. State, 2006 WL 3513407 at 3 (Miss.) (same).

Moreover, the cases upon which Plaintiffs rely in support of their "adverse ruling" exception argument are from foreign jurisdictions and do not support

Plaintiffs' arguments. For example, Plaintiffs rely heavily on the Ohio case of Cero Realty Corp. v. American MFRS. Mut. Ins. Co. to support their argument that a voluntary dismissal without prejudice after an adverse ruling tolls the statute of limitations. 167 N.E.2d 774 (Ohio 1960). However, the Cero case is distinguishable from the subject case because the plaintiff's case in Cero was dismissed as a result of the court granting *two demurrers* (i.e. motions to dismiss on the pleadings) on grounds of misjoinder of parties over Plaintiffs' objection as opposed to being dismissed voluntarily by Plaintiffs to circumvent Rule 36 admissions and to expedite an appeal of the trial court's ruling on remand. (P.R. at pp. 481); Id. at 775.

Furthermore, the different nature of the instant case is shown by the case of Beckner v. Stover, ***decided by the Ohio Supreme Court (i.e. the same court that decided Cero) nine (9) years after Cero, which Plaintiffs failed to disclose***[10]. Beckner held that Cero was not applicable to the situation of a plaintiff who voluntarily dismisses his case without prejudice. *See* Beckner v. Stover, 247 N.E.2d 300, 303 (Ohio 1969). Specifically, the Beckner court held that plaintiff's voluntary

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Plaintiffs rely on the Cero case to support their argument that the statute of limitations was tolled after Plaintiffs' voluntary dismissed their case. However, the Becker case, which Plaintiffs failed to disclose although the case is more analogous to the subject case than Cero, was decided nine (9) years after Cero and holds that the laws in Ohio follow the rule in Raleigh v. Barnes, which is when a party voluntary dismisses his own case without prejudice, he does not receive the benefit of tolling.

dismissal without prejudice after the trial court denied plaintiff's request to recall witnesses and to introduce further evidence was not a "failure otherwise than upon merits" within the meaning of the statute permitting new action after expiration of limitations; and therefore, plaintiff's new action was barred by the statute of limitations. Id. Thus, the Beckner court confirms that, contrary to Plaintiffs' interpretation of Cero, the laws of Ohio are exactly like Mississippi's law regarding voluntary dismissals as shown in the Raleigh decision.

Similarly, Roberts v. General Motors Corp., in which Plaintiffs rely, is also distinguishable from this case as the plaintiff in Roberts voluntarily dismissed his complaint after the court granted a partial summary judgment on plaintiff's claims and after the trial court on record advised plaintiff that he should accept a voluntary nonsuit on the remaining claim while he pursued an appeal of the summary judgment. 673 A.2d 779, 781 (N.H. 1996) (emphasis added). Another distinction is New Hampshire's liberal stance on "matters of form" and its interpretation of the statute of limitations itself by finding it "is to insure that defendants receive timely *notice* of actions against them." Id. at 782.[11] Mississippi law is distinguishable because the courts in our State have held that "the primary purpose of statutory time limitations

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This distinguishing factor also applies to the Henley v. Cobb case in which Plaintiffs rely as the court in Henley held that "a closer reading of our cases reveals that notice to the party affected is the true test of the statute's applicability." 916 S.W.2d 915, 917 (Tenn. 1996).

is to compel the exercise of a right of action within a reasonable time." *See* Lee v. Thompson, 859 So.2d 981, 987 (Miss. 2003) (emphasis added). Allowing a plaintiff to voluntary dismiss their action because they are dissattisfied with a court's ruling then refile the exact action after the statute of limitations expired is in direct conflict with the Mississippi court's interpretation of the purpose of the statute of limitations. Id. Therefore, because of these distinguishing facts, the Roberts decision does not apply to Plaintiffs' voluntary dismissal without prejudice of this case.

Moreover, the Gutierrez v. Verger is not applicable to this case because in Gutierrez, plaintiff, proceeding *pro se*, had two similar complaints pending when the parties and the trial judge all agreed at a status conference that plaintiff would voluntarily dismiss one of the complaints and proceed with the remaining complaint. 499 F.Supp. 1040, 1045 (S.D.NY. 1980). Neither the trial court nor the plaintiff, who was then still appearing before the trial court *pro se*, had any knowledge that dismissal of the first complaint instead of the second might create a statute of limitations problem. Id. Therefore, although the court recognized that the statute of limitations is not usually tolled by bringing an action that is later voluntarily dismissed, the court allowed plaintiff to maintain his second action and found that "it is persuaded that a different result is called for here on the basis of factors ***unique*** to the present case." Id. at 1050. These unique factors in which the court relied in

Gutierrez are not present in the subject case, and therefore, the Gutierrez ruling is inapplicable.

Plaintiffs' reliance on the Frazier v. East Tennessee Baptist Hospital, Inc., 55 S.W.3d 925 (TN 2001) is equally flawed as the plaintiff in Frazier voluntarily dismissed his complaint against one defendant, but maintained the complaint against the remaining defendants. Id. at 927-28. The plaintiff was allowed to amend the complaint after the statute of limitations had expired to resurrect the dismissed claims. Id. In allowing the amendment, the court noted that Tennessee statutory law specifically provides that a plaintiff can voluntary dismiss their complaint without prejudice twice and still be allowed to rejoin the original defendants within a year from the court's entrance of the order of dismissal, which is distinguishable from the present case because Mississippi does not have a statute similar to Tennessee's voluntary dismissal statute. The Frazier case is also distinguishable because Plaintiffs voluntary dismissed all of their claims against *all* Defendants in Shepard I, and therefore, Plaintiffs could not have merely filed a motion to amend in this case.

Therefore, the cases cited by Plaintiffs in support of their "adverse ruling" exception are distinguishable from this case. Furthermore, the plain language of Miss. Code § 15-1-69 does not support the "adverse ruling" exception which Plaintiffs advocate. Even if the statutory language supported this exception, there was

simply no "adverse ruling" in Shepard I as Plaintiffs voluntarily dismissed their own case without prejudice, and Plaintiffs have consistently represented to the Fifth Circuit and to the Circuit Court that they got exactly what they requested. Consequently, Plaintiffs are not allowed the benefit of the one year tolling provision in Miss. Code § 15-1-69 as the statute does not mention an "adverse ruling" exception, and Plaintiffs' voluntary dismissal does not fall within the confines of Miss. Code § 15-1-69. *See supra.*

V. The statute of limitations period is not tolled by Miss. Code § 15-1-57.

A. Plaintiff failed to assert Miss. Code § 15-1-57 in the Circuit Court so they cannot now assert it on appeal.

On appeal, Plaintiffs assert Miss. Code § 15-1-57 as a basis for tolling. However, Plaintiffs did not assert this argument at the trial court. (P.R. at pp. 523-29). Thus, Plaintiffs' argument as to Miss. Code § 15-1-57 should be summarily dismissed because Plaintiffs have waived any argument that the statute of limitations was tolled by Miss. Code § 15-1-57 while Shepard I was pending in federal court because Plaintiffs failed to raise this issue in the trial court. (P.R. at pp. 523-30); *See* Weiner, 943 So.2d at 694; Goel, 274 F.3d at 992; Baxter, 98 Fed.Appx. at 301.

B. Miss. Code § 15-1-57 does not apply to this case because Plaintiffs were never prohibited from filing a second action in State Court.

Notwithstanding Plaintiffs' waiver of this argument by failing to raise it in response to Defendants' summary judgment motion, Plaintiffs' argument that Miss. Code § 15-1-57 tolled the statute of limitations in this case is without merit as Plaintiffs were never prohibited from filing a second State court action.[12] Miss. Code § 15-1-57 provides:

> When any person shall be prohibited by law, or restrained or enjoined by the order, decree, or process of any court in this state from commencing or prosecuting any action or remedy, the time during which such person shall be so prohibited, enjoined or restrained, shall not be computed as any part of the period of time limited by this chapter for the commencement of such action.

Miss. Code § 15-1-57 (emphasis added). Plaintiffs rely on Miss. Code § 15-1-57 in conjunction with 28 United States Code § 1446 to argue that the statute of limitations was tolled because Plaintiffs were prohibited by law from filing a state court action while Shepard I was pending in federal court.[13] However, Plaintiffs argument is

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Although it is unclear exactly how Plaintiffs believe Miss Code § 15-1-57 in conjunction with 28 U.S.C. § 1446 tolls the statute of limitations, based on the cases in which Plaintiffs rely, it appears Plaintiffs are contending that 28 U.S.C. § 1651, which is an exception to the Federal Anti-Injunction Statute 28 U.S.C. § 2283, empowers the Federal courts to enjoin state court proceedings once a case is removed pursuant to 28 U.S.C. § 1446.

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Incredibly, Plaintiffs cite to 28 United States Code § **1446(e)** to support their argument that Plaintiffs were prohibited from filing a second action in State court while Shepard I was pending

flawed because nowhere in 28 United States Code § 1446 does it provide that a plaintiff is prohibited by law or is automatically enjoined from filing a new action in state court once a previously filed action is removed.

28 U.S.C. § 1446 merely provides:

> Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court [in which the lawsuit was originally filed and from which the lawsuit was removed] shall proceed no further unless and until the case is remanded.

28 United States Code § 1446(2)(d) (emphasis added). 28 U.S.C. § 1446 does not prohibit the filing of another state court action but merely divests a state court of jurisdiction over a lawsuit once that lawsuit is removed to federal court. *See* Sanghi v. Sanghi, 759 So.2d 1250, 1254 (Miss. App. 2000) (holding "[a] petition to remove to federal court halts the state proceedings as soon as the steps necessary to remove are completed." Once removed, "the state court ha[d] no further authority to act [in the same case]. . .until such time as the case [was] remanded.") (*citing* 14A Wright & Miller, Federal Practice and Procedure, § 3737 at 550-51; and 28 U.S.C. § 1446

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in Federal court. However, 28 U.S.C. § 1446(e) has no application whatsoever to the facts in this case. It appears that Plaintiffs incorrectly cite to 28 U.S.C. § 1446(e) when citing the language of 28 U.S.C. § 1446(2)(d), which is the section of the statute referencing the stay of State court proceedings once a case is removed to federal court. 28 U.S.C. § 1446(e) was changed to 28 U.S.C. § 1446(2)(d) in 1988. *See* Fulford v. Transport Serv. Co., 412 F.3d 609, 612 (5th Cir. 2005). Regardless, neither statute prohibited Plaintiffs from filing a State court action while Shepard I was pending in Federal Court.

(Supp.1999)); *See also* 28 U.S.C. § 1446(d) ("Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further [with the case that has been removed] unless and until the case is remanded.")); *See also* Ardoin v. Stine Lumbar Co., 885 So.2d. 43, (3rd Cir. 2004) (holding "courts are divested of jurisdiction once the requirements of the federal removal statute have been met").

Furthermore, neither 28 U.S.C. § 1651 nor 28 U.S.C. § 2283 requires a Federal Court enjoin a second state court action. 28 U.S.C. § 1651 provides:

> The Supreme Court and all courts establish by Act of Congress ***may*** issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 1651 (emphasis added). 28 U.S.C. § 2283 provides that:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary to aid of its jurisdiction, or to protect or effectuate its judgements.[14]

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The statutory notes in 28 U.S.C. § 2283 provides that "the phrase 'in aid of its jurisdiction' was added to conform to section 1651 of this title and to make clear the recognized power of the Federal courts to stay proceedings in State cases removed to the district courts."

28 U.S.C. § 2283 (emphasis added). Thus, 28 U.S.C. § 1651 merely empowers the Federal courts to enjoin state court proceedings once a case is removed as long as it is "in aid in its jurisdiction." Also, a motion to enjoin must be filed, which never happened here. *See* Sandpiper Village Condominium Assoc., Inc. v. Louisiana-Pacific Corp., 428 F.3d 831, 841 (9th Cir. 2005) (holding that the "All Writs Act [28 U.S.C. § 1651] is limited by the Anti-Injunction Act, which prevents federal court from enjoining the 'proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgement'") (quoting 28 U.S.C. § 2283).

More importantly, Federal courts are not required to enjoin the subsequently filed state court action. *See* 28 U.S.C. § 1651. Unlike the mandatory language of Miss. Code § 15-1-57 which provides "when any person *shall be* prohibited by law", there is no mandatory language in either 28 U.S.C. § 2283 or 28 U.S.C. § 1651 requiring the Federal court to enjoin a state court action. Significantly, 28 U.S.C. § 1651, which is the backbone of the Federal court's authority to enjoin State actions, merely provides that "all courts . . . *may* issue all writs necessary. . . ," which is a discretionary standard. 28 U.S.C. § 1651; *See* Pitalo v. GPCH-GP, Inc., 933 So.2d 927, 929 (Miss. 2006) (holding "Simply put 'shall' is mandatory, while 'may' is discretionary"); Franklin v. Franklin, 858 So.2d 110, 115 (Miss. 2003) (holding "a

basic tenet of statutory construction is that 'shall' is mandatory and 'may' is discretionary) (emphasis added). Therefore, because 28 U.S.C. § 1651 in conjunction with 28 U.S.C. § 2283 is purely discretionary, at no time during the federal court proceeding in Shepard I were Plaintiffs "prohibited by law" or automatically "restrained or enjoined by order" from filing a second State court action.

Specifically, just because the Federal court *could have* enjoined a second state court action, Plaintiffs should not receive the benefit of the tolling provision as defined by Miss. Code § 15-1-57. Simply put, Plaintiffs were never prohibited by law from filing a second state court action as only in cases of "great clearness" will Federal Courts enjoin State court actions. *See* Brown v. Seaboard Coast Line Railroad Company, 309 F.Supp. 48 (D.C.Ga. 1969) (holding "it is, however, true that the remedy of injunction against a party in a state court should only be utilized by this court in cases of *great clearness*, where it is obvious that there is an attempt to defeat the constitutional jurisdiction resulting from the removal") (emphasis added). For this reason, Miss. Code § 15-1-57 does not apply to this case.

Moreover, the cases in which Plaintiffs rely show that certain criteria must be established before a federal court can enjoin a State court action. Specifically, as held in Frith v. Bazon-Flexible Flyer, Inc., a case in which Plaintiffs heavily rely, the Fifth Circuit Court of Appeals *reversed* a district court's order enjoining the plaintiff's

state court proceedings holding that before a district court may enjoin a subsequently filed state court action, the district court must *first determine* whether the "second suit was not brought in an attempt to subvert the purpose of the removal statute and was not aimed at defeating federal jurisdiction." 512 F.2d 899, 900 (5th Cir. (Miss.) 1975) (emphasis added); *See also* Lou v. Belzberg, 834 F.2d 730, 740 (9th Cir. 1987) (holding the preliminary injunction was not authorized by section 1446(e) because the district court made no finding that the second state court action was fraudulent or an attempt to subvert the purpose of the removal statute); Kansas Public Employees Retirement System v. Reamer & Kroger Assoc. Inc., 77 F.3d 1063, 1069 (8th Cir. 1995) (same). The Fifth Circuit also held that "where no fraud is found, the second action brought in state court should not be enjoined." Id. (emphasis added). *See* Sandpiper, 428 F.3d at 841.

Not only did the Frith court enact a test that must be satisfied before a Federal court may enjoin a State court action, the Fifth Circuit in Frith held that the test was not met and vacated the injunction enjoining plaintiff from prosecuting his state court action. Id. Therefore, as held in Frith and Brown, a Federal court may enjoin a State action only in cases where it is clear that the plaintiffs filed the action to defeat federal jurisdiction. In this case, Plaintiffs were never prohibited from filing a second

State court action and Miss. Code § 15-1-57 does not toll the statute of limitations for Plaintiffs' time barred claims.

C. Plaintiffs' argument that Plaintiffs were prohibited from filing a second State court action is without merit as it is purely a hypothetical scenario based totally on speculation and conjecture.

Based on the standard set forth in Frith and Brown, a finding that Plaintiffs were barred from filing another suit and should receive the benefit of the tolling provision in Miss. Code § 15-1-57 is too speculative a ruling as Plaintiffs never filed a second State court action, Defendants never moved to enjoin any such action, and such action was not enjoined. In other words, for this Court to find that Plaintiffs were in fact prohibited or enjoined from filing a second state court action, this Court must *assume*:

- Plaintiffs filed a second state court action, which it is undisputed that they did not;
- That Defendants moved to enjoin that action;
- That the district court found in great clearness that the second suit was not filed in an attempt to subvert the purpose of the removal statute and/or was not fraudulently aimed at defeating federal jurisdiction
- That the district court exercised its discretion and enjoined the action; and
- That the appellate court affirmed the ruling.

See Frith, 512 F.2d at 900.

These findings are too abstract and speculative for this Court to base its ruling. *See* Lange v. City of Batesville, 832 So.2d. 1236, 1240 (Miss. Ct. App. 2002) (holding "as an appellate court we may not use our power of review for the purpose of settling abstract or academic questions"); Allred v. Webb, 641 So.2d 1218, 1219 (Miss. 1994) (same). By asserting Miss. Code § 15-1-57 as a basis for tolling, Plaintiffs are asking the Court to pile conjecture on top of conjecture and rule based upon an abstract, hypothetical situation that never existed. For this reason, Miss. Code § 15-1-57 is inapplicable to the facts in this case as there was no mandatory prohibition precluding Plaintiff from filing a second State court action, and any contention to the contrary is pure speculation.

D. Even assuming Plaintiffs had filed a second State court action which was stayed, the action would have only been stayed pending a ruling by the federal court on the remand issue.

Moreover, assuming the Plaintiffs filed a State court action, which was ultimately stayed by the Federal court, the action would have been stayed pending a ruling by the federal court on the remand issues. Only then would Miss. Code § 15-1-57 been applicable to this case. Simply put, if Plaintiffs would have filed the second State court action, and the Federal Court would have enjoined the State court from proceeding in the case, the case would have remained on the docket until the

stay was lifted thereby resulting in a timely filed action. Plaintiffs would have not put themselves in the position that they currently are in, which is pursuing time barred claims.

However, instead of taking these protective measures, Plaintiffs employed a legal "strategy" to circumvent Rule 36 admissions and the District Court's ruling denying Plaintiffs' motion to remand, and to expedite an appeal to the Fifth Circuit Court of Appeals, which backfired. (P.R. at 485). Furthermore, Plaintiffs' "strategy" deprived Defendants from having this matter finally adjudicated in the Fifth Circuit. Thus, Defendants should not be prejudiced further for Plaintiffs' lack of legal diligence in taking proper measures to hedge themselves against an unfavorable ruling in Shepard I. For this reason as well, Miss. Code § 15-1-57 is inapplicable to the facts in this case.

IV. CONCLUSION

The trial court was correct in granting Defendants' motion for summary judgment. Plaintiffs' claims in this action are barred by the three (3) year statute of limitations found in Miss. Code § 15-1-49 as Plaintiffs filed this action more than six (6) years after the subject incident occurred. Furthermore, the trial court was correct in ruling that the pendency of Shepard I did not toll the statute of limitations because Plaintiffs voluntarily dismissed that action without prejudice. Moreover, neither

Miss. Code § 15-1-49 nor Miss. Code § 15-1-57 provides an avenue to toll the statute of limitations on Plaintiffs' claims as Plaintiffs' voluntary dismissal of Shepard I does not fall within the confines of these statutes. For these reasons, this Court should affirm the trial court's dismissal of Plaintiffs' claims as time barred.

Respectfully submitted,

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THIS, the 21st day of February, 2007.

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