IN THE SUPREME COURT OF MISSISSIPPI

NO. 2006-CA-00519

MERLEAN MARSHALL, ALPHONZO MARSHALL AND ERIC SHEPARD, individually and on behalf of all Wrongful Death Beneficiaries of LUCY SHEPARD, Deceased — APPELLANTS

versus

KANSAS CITY SOUTHERN RAILWAY COMPANY, ERIC W. ROBINSON, THE ESTATE OF ROBERT EVERETT and C.L. DUETT, — APPELLEES

APPEAL FROM THE CIRCUIT COURT
OF SCOTT COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANTS

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ORAL ARGUMENT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

This case presents issues of first impression in Mississippi and oral argument should be granted. MISS. R. APP. P. 34. In essence the railroad argues that, during the time it wrongfully tied up the plaintiffs in procedural snarls in federal court, the statute of limitations expired in state court. That is not and should not be the law.

This case turns on the interpretation of state tolling statutes, Miss. Code Ann. § 11-1-57, -69. The state has tolling statutes but the federal government does not. Mississippi's legislative policy favors tolling even if federal courts do not.

This case is most similar to *Boston v. Hartford Accident and Indemnity Co.*, 822 So.2d 239 (Miss. 2002) and *Norman v. Bucklew*, 684 So.2d 1246 (Miss. 1996). In both cases this court held that time spent in a federal court that ultimately did not have jurisdiction did not count against the state limitations period.

"Matter of form" means "not on the merits." The federal case was not dismissed on the merits. While, as a policy matter, the state has refused to apply the tolling statute where a plaintiff files in the wrong court and then takes a voluntary non-suit, *W.T. Raleigh Co. v. Barnes*, 143 Miss. 597, 109 So. 8 (Miss. 1926), that did not happen in this case. Here the plaintiffs were wrongfully dragged to federal court. Moreover, the removal was a classic "abatement" of the state case.

Moreover, the railroad, which *twice* wrongfully removed this matter to federal court, can hardly be heard to argue that the plaintiff beneficiaries were free to proceed in state court.

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INTRODUCTION

Kansas City Southern Railway Co.'s train ran over a van that Lucy Shepard was driving for Weems Community Health Center. The train hit the van at an intersection the railroad had previously agreed to upgrade. CP 3, 21, 50, 271, 308. The train killed Ms. Shepard and seriously injured passenger, Phyllis Body McKee. See *McKee v. Kansas City Southern Railway Co.*, 358 F.3d 329 (5th Cir. 2004). Independently, McKee and Ms. Shepard's estate, on behalf of all wrongful death beneficiaries, i.e., the Marshalls, sued the railroad and its employees in charge of the train. The railroad asserted diversity jurisdiction and removed both cases, even though all of the employee defendants were Mississippi residents.

In *McKee,* the Fifth Circuit ultimately reversed Judge Henry T. Wingate who had refused to remand either case to state court. The Fifth Circuit held there was no diversity jurisdiction because the complaint sufficiently stated a claim against the non-diverse Mississippi resident employees *Id.*

After the dismissal in issue here, the plaintiff beneficiaries filed this second suit ("Shepard 2") in state court. Despite *McKee*, the railroad then filed another removal notice. Ultimately Judge William Barbour followed *McKee*, held that there is no diversity in this case, and remanded it to state court. *See Marshall v. Kansas City S. Railway*, 372 F. Supp.2d 916, 921-22 (S.D. Miss. 2005) (Barbour, J. remanding after second removal); CP 413-23.

Judge Barbour also said the railroad could not simultaneously claim the federal dismissal was without prejudice and then turn around and say it precluded any further state court claim, *Marshall*, 372 F.Supp.2d at 921-22.

Similarly, this Court should prohibit the railroad from wrongfully taking the case to federal court twice and then blaming the plaintiffs for the method they used to get back into state court where the case belonged. The plaintiffs, to use the railroad's terms, have been "fighting to keep the lawsuit alive all the way," Railroad Brief at 19, and this Court should reverse the decision below so they can finally, after nine years, have a chance to fight on the merits in a court that properly has jurisdiction.[1]

STATEMENT OF THE CASE

The Railroad Brief erroneously makes arguments premised on factual and legal premises which are just not true. It gets an opinion by U.S. District Judge Henry T. Wingate backwards, ignores evidence before him, adds a word to the Fifth Circuit opinion that is not found in that opinion, and, while saying the plaintiff beneficiaries were free to go forward in state court, does not mention the second removal which Judge Barbour rejected in an opinion the railroad does not mention.

[1] In this brief, the Brief of Appellant will be cited as "Beneficiaries Brief" and the Brief of Appellee will be cited as "Railroad Brief."

1. The admissions controversy had nothing to do with the dismissal. Federal Judge Henry T. Wingate refused to deem the requests admitted and, in any event, the admissions would not have kept the plaintiff beneficiaries from offering additional evidence at trial.

The railroad's discussion of the request for admissions issue gets Judge Wingate's ruling backwards. Railroad Brief at 6-7. *See Marshall v. Kansas City S. Railway Co.*, No.3:99-cv-433WS, Order Denying Motion To Remand (March 30, 2000). CP 371.

The plaintiff beneficiaries answered certain requests for admissions after 60 days rather than 30. The railroad argued that this precluded the plaintiffs from recovery against the individual, in-state defendants.

Judge Wingate *rejected* that argument, explaining: "[t]his court is *prepared to set aside plaintiffs' admissions established by plaintiffs' failure to respond . . .*" *Id.* at 7. CP at 377 (emphasis added). The court then considered evidence that plaintiff beneficiaries had proffered after the admission incident and held, making the same mistake it made in *McKee,* that the complaint and evidence were inadequate to state a claim against the in-state defendants. *Id.* CP. at 377.

The railroad gets all this backward when it falsely claims that the decision was one "finding that Plaintiffs' admissions defeated Plaintiffs' claims against the train crew. (P.R. at 455-462)." There was no such finding. Not only that, but the district court expressly said it "was prepared" to set the admissions aside. It then considered additional evidence, in part because the admissions only concerned

evidence at the time of removal, not evidence which would be offered later. CP. 377.

Correctly read, Judge Wingate's ruling affirmatively contradicts the railroad's contentions about the plaintiff beneficiaries' intentions. The dismissal in federal court was simply to get the case back into state court where it belonged.

2. Judge Wingate's threat to dismiss the case as res judicata is undisputed in the record, whether or not the Lee Affidavit is considered.

The railroad incorrectly complains about the affidavit describing Judge Wingate's bench comments. Railroad Brief at 26.

But the railroad does not challenge the affidavit's truth. In any event, the affidavit is superfluous because the same evidence is already in the record in the plaintiff beneficiaries' Motion to Dismiss in federal court, CP 467.

ARGUMENT

I. Miss. Code Ann. § 15-1-59 applies and extend the limitations period both because the prior suit was "abated" by removal and because it was dismissed for a "matter of form," i.e., not on the merits.

A. There are no factual issues and, in any event, because the trial court refused to make either findings of fact or conclusions of law, this Court should scrutinize its decision closely.

The only differences between the parties that might be called "factual" are those discussed in the Statement of the Case. Because all of them involve interpretation of prior court decisions, or the reading of an undisputed item in the record, however, they are really questions of law which this Court can review without any deference to the circuit court.

It is also noteworthy that the circuit court refused to make findings of fact and conclusions of law, even though the plaintiff beneficiaries' counsel asked for them. CP 604. The court was not required to make findings in ruling on a summary judgment motion, but its refusal to make findings when requested changes the standard of review. It destroys any presumption of correctness and negates the implied findings doctrine. *Boone v. King*, 835 So.2d 52 (Miss. App. 2003). *See also Tricon Metals & Servs., Inc. v. Topp*, 516 So.2d 236, 239 (Miss. 1987) (failure to make findings can itself be a reversible abuse of discretion).

B. The plaintiff beneficiaries preserved error because they argued in the circuit court that the removal was an "abatement" and that their dismissal was for a "matter of form" because, among other reasons, the case had been wrongfully removed.

MISS. CODE ANN. §15-1-57 tolls running of the statute of limitations if either i) the prior case has been "abated," or ii) the dismissal in the prior action was a "matter of form." Satisfaction of either element tolls the statute. Both are not required.

Abatement. In the circuit court the plaintiff beneficiaries, citing Black's LAW DICTIONARY (7th ed. 1999), argued that the removal was an abatement because it was a defeat of a pending action unrelated to its merits. CP 529.

Matter of form – adverse circumstances. Moreover, the estate also argued that the dismissal without prejudice was a "matter of "form" because it was done to

get out of a federal court to which the case had been wrongfully removed and in the face of a threat to dismiss the matter with prejudice. CP 524-529; CP 608-609.

An argument that the dismissal was designed to get back to a court of proper jurisdiction is exactly the same thing as an argument that, because of the removal, the dismissal was under "adverse circumstances." The railroad's claim that the plaintiff beneficiaries did not raise the adversity issue in the circuit court has no merit.

C. The removal "abated" the prior state suit.

Despite its emphasis on what was argued in the circuit court, the railroad wholly fails to rebut the contention that the removal was an "abatement" of the first suit. That is a sufficient basis for reversing the circuit court.

An "abatement" results in the complete dismissal of an action, as opposed to a "stay," which simply holds an action in abeyance. 1 AMERICAN JURISPRUDENCE 2d, *Abatement Survival and Revival* §§3, 20 (1998). For example, in *Brentwood Financial Corp. v. Lamprecht,* 736 S.W.2d 836, 844 (Tex. Ct. App. 1987), the appellate court held that, upon proper filing of notice of removal, "[t]he state court's jurisdiction is then abated and the federal court obtains exclusive jurisdiction pending its review of the removal."

The railroad argues the plain language of the statute should apply. The plaintiff beneficiaries agree. The removal was an "abatement" and that is a sufficient reason to reverse the circuit court's ruling and remand the case for trial.

D. If reached, the federal suit was also dismissed as a "matter of form" under state law.

The effect of the federal proceedings on the Mississippi limitations statutes is a matter of state law, and not federal law. A case is dismissed "as a matter of form" if it was dismissed for a reason other than the merits. Here, the federal court dismissal was to challenge the wrongful jurisdiction of the federal court. That is a dismissal for a "matter of form," whether or not the dismissal was deliberately sought.

The purpose of MISS. CODE ANN. §15-1-57 is to come to the aid of a plaintiff who mistakenly files suit in the wrong jurisdiction. *Hawkins v. Scottish Union & Nat'l Ins. Co.*, 69 So. 710 (Miss. 1915).

If the statute comes to the aid of a plaintiff who makes a mistake, it certainly should come to the aid of plaintiff beneficiaries who made no mistake and have, at all times, sought to go forward in state court, the only court with jurisdiction over this case.

State, not federal, law applies. The interpretation of MISS. CODE ANN. §15-1-57 is purely a matter of state law, even though the dismissal took place in federal court. That is because the claimed basis for federal jurisdiction was diversity, where state law applies. Tolling statutes are considered "substantive" for this purpose. *See Bockweg v. Anderson*, 402 S.E. 2d 627, 629 (N.C. 1991) (state

tolling statute applies because the "effect of a voluntary dismissal taken in a federal court sitting in diversity is determined by the applicable substantive state law."

In *Bockweg,* the North Carolina Supreme Court held that a voluntary dismissal in federal court did not bar the application of a state tolling rule when the case was refiled: "[W]hen a defendant removes a plaintiff from state court to federal court, plaintiff may dismiss in federal court and still take advantage of the North Carolina savings provision". *Bockweg,* 402 So. 2d at 634. This, it said, was consistent with the "great weight of authority" from other states. *Id.* at 631.

By not understanding that state law applies, the railroad has filed a brief that contains very little applicable authority. All but one of the cases cited in the Railroad Brief at 15-17 are federal question cases, not diversity cases. *See* n. 3, *infra.* They discuss a "voluntary dismissal" rule which is not found in state law, but instead has been imported into this case based on nothing more than federal precedent and the ultimately irrelevant fact that the dismissal in *W.T. Raleigh Co.* was by stipulation. The state's enactment of a tolling statute indicates an intent to *depart* from the federal common law scheme. Because Mississippi policy favors tolling, the result should be different from that reached in federal question cases, and not the same.

For this reason, the question in this case is how to apply a state statute to prior proceedings in federal court based on an allegation of diversity jurisdiction. That is a question of state, not federal, law.

Time spent in federal court that either does not have or rejects jurisdiction falls within the tolling statute. This Court has repeatedly held that, if a plaintiff files suit in federal court and then is dismissed because that court lacks jurisdiction, the time spent in federal court does not count against the statute of limitations because the dismissal was for a "matter of form." *See Frederick Smith Enter. Co. v. Lucas*, 36 So.2d 812, 814 (1948); *see also Wertz v. Ingalls Shipbuilding Inc.*, 790 So.2d 841 (Miss. 2000); *Lowry v. Int'l Broth. of Boilermakers, Iron Ship Builders and Helpers of America*, 220 F.2d 546 (5th Cir. 1955). It has expressly characterized the dismissal for lack of jurisdiction as one of "form." *Id.*

Both *Boston* and *Norman* confirm this. The railroad claims that in these cases the plaintiffs opposed dismissal of their state claims without prejudice. But nothing in *Boston* says that and in *Norman* the plaintiffs said that, despite their broad notice of appeal, they did not challenge the dismissal of the state claims on appeal[2]. Time spent in a federal court that does not have jurisdiction is treated as a "matter of form" within the meaning of the statute.

The record here shows that the motion for dismissal was designed to challenge the wrongful jurisdiction of the federal court. Whether it was "voluntary" in the federal rules sense has nothing to do with whether the state

[2] See *Norman*, *supra*, 684 So.2d at 1253.

tolling statute applies. The state tolling statute says nothing about whether a dismissal is voluntary or not. While, in *W.T. Raleigh Co.*, the dismissal was stipulated, i.e. voluntary, this court said nothing about voluntariness in giving the reasons for its decision.

There the plaintiff claimed that the first trial court had been about to dismiss the complaint for multifariousness, i.e., stating inconsistent claims in one pleading. *W.T. Raleigh Co.*, 143 Miss. at 597. That would have been a dismissal for a "matter of form." This Court did not reject this argument out-of-hand. Instead, it treated it as valid but said the plaintiff had not made a record that proved that the first pleading was multifarious. It said "it does not appear that the appellant's prior suit was dismissed for that reason." 109 So. at 8. That was because the motion for dismissal "does not appear in the record [of the second suit] and so there was nothing in the record . . . indicating that it was a mere abatement of the action, or that the dismissal was 'for any matter of form.'"[3]

Here, the federal court's lack of jurisdiction has been repeatedly proven and authoritatively decided in the plaintiff beneficiaries' favor. In that sense, *W.T. Raleigh* supports the plaintiffs in this case.

Even if the fact of voluntariness were in issue, an intentional dismissal to defeat a wrongful removal is not "voluntary." The railroad misses the point

[3] *W.T. Raleigh Co.* also relied on *Nevitt v. Bacon*, 32 Miss. 212, 228 (Miss. 1852), but in *Nevitt* there was no comparable savings statute in force in 1852, and *Nevitt* is not a statutory case.

when it emphasizes that the Fifth Circuit held that the dismissal was one under Fed. R. Civ. P. 42(a)(1), i.e., a "voluntary dismissal." If voluntariness is an issue under state law, the question is not whether the plaintiff beneficiaries deliberately sought the dismissal. Rather the issue, as in *W.T. Raleigh Co.*, would turn on why they sought the dismissal.

Here the wrongful removal created an adverse circumstance from which the plaintiff beneficiaries could free themselves by seeking dismissal. Justified self-defense is a complete answer to a claim of assault. As the North Carolina Supreme Court said in *Bockweg, supr*a, the "great weight of authority" holds that tolling statutes still apply when the plaintiff deliberately dismisses a case without prejudice in order to escape the effects of a wrongful removal to federal court.

The cases on which the railroad mistakenly relies are not cases that were removed on grounds of diversity. In none of them was the question of voluntariness in the face of a wrongful removal raised. So they do not speak to this point.

Plaintiffs were dragged to federal court involuntarily and have been fighting for nine years to get to trial in the state court that has proper jurisdiction. As a result, this is a *Boston* and *Norman* case, not a *W.T. Raleigh Co.* case.[4]

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[4] The railroad cites dictum in *Gray v. Mariner Health Central*, 2006 WL 2632211 (S.D. Miss. 2006) a diversity case which applies state law and says that a previous voluntary dismissal of a case the plaintiff filed in federal court was not one of form. *Id* at *2. But the case went on to hold that the filing of the suit nevertheless *did toll the limitations statute. Id.* at 2 n.1. In its dictum, the federal district court relied on two statements by this Court. In *Lee v. Thompson*, 859

Contrary to the railroad's contentions, the cases cited from other jurisdictions, particularly Ohio, support application of the tolling statute. *See, e.g., Cero Realty Corp. v. American Manufacturers Mut. Ins. Co.*, 167 N.E.2d 774 (Ohio 1960). As established in the plaintiffs' opening brief, Beneficiaries Brief at 15-19, a number of cases from other jurisdictions support this result. The railroad's distinctions are so meritless as not to deserve comment, with one exception.

With great enthusiasm, the railroad relies on *Beckner v. Stover*, 247 N.E.2d 300, 303 (Ohio 1969) which it wrongly says has overruled *Cero*. Railroad Brief at 33. But it plainly did not do that. It limited *Cero*, but not in a way relevant here.

In *Beckner*, the plaintiff sought dismissal at trial after a court which had jurisdiction declined to allow the recall of a witness and refused to admit certain evidence. *Id.* at 303. The Ohio Supreme Court said that *Cero* applies where the adverse rulings in the first court will prevent a trial on the full merits of the plaintiff's original claim. *Id.* at 38-39. That was not the case in *Beckner*. See *Id.*

So.2d 981, 990 n.8 (Miss. 2003) this Court said the plaintiff had neither argued the savings statute in the trial court nor briefed it on appeal. It took this as a concession that the statute did not apply to the plaintiff's prior dismissal of a suit it had filed in federal district court. The *Gray* court also relied on *Owens v. Mai,* 891 So.2d 220, 223 (Miss. 2005). There, this Court said that when a plaintiff filed in state court but failed to serve process within 120 days, the subsequent dismissal of the case was not "a matter of form" within the meaning of the savings statute. The Court said that a contrary result would allow abusive use of complaints and would violate the rule that, when service is not made within 120 days, the statute of limitations begins running again. *Id.* at 223-224).

at 39 (plaintiff in *Cero* had to "tailor[ ] critical elements of its petition to fit the views of the trial court").

Here, the plaintiff beneficiaries never had a chance in federal court to obtain a trial on their original complaint in a court that had jurisdiction. The federal court had wrongfully dismissed claims against the individual railroad employees and so improperly "tailor[ed] critical elements of" the plaintiff estate's case. As a result, *Cero* squarely supports the proper application of state law in this case.

D. If estoppel is considered, it is the railroad, who failed to inform the Fifth Circuit of its statute of limitations argument, who should be estopped from making that argument now.

Judge Barbour rejected the railroad's argument that the plaintiff beneficiaries were somehow estopped by the federal proceedings from going forward in state court. His decision, in this same case, precludes any repetition of that claim in the state courts. It is now the law of this case.

The plaintiffs are not estopped. Judge Barbour found it patently unjust for the railroad to argue that a federal dismissal "without prejudice" meant that the second suit was barred. He said:

> Defendants argue that the claims against the non-diverse Defendants in this case are barred because the claims were already asserted and dismissed in Shephard 1. This argument is not well taken. Defendants succeeded in having the Shepard 1 appeal to the Fifth Circuit dismissed because Judge Wingate's dismissal of that case at the trial court level was found to be <u>without prejudice</u>. Defendants now seek to convert that same trial court dismissal of Shepard 1 into a final adjudication which

> bars the reassertion of Plaintiffs' claims against the non-diverse Defendants in this suit, Shepard 2.
>
> If Defendants' argument on this issue were correct, then the appeal process would be denied to Plaintiffs. That is, on the one hand Plaintiffs' appeal in Shepherd 1 was denied for lack of jurisdiction because Judge Wingate's order was not "final," or "with prejudice." On the other hand, if this Court and the Fifth Circuit were to agree with Defendants' current argument, then the merits of Plaintiffs' claims against the non-diverse Defendants in Shephard 2 could not be considered by the Fifth Circuit on appeal because the issues and claims have already been finally adjudicated. Therein lies the logical (and legal) flaw in Defendants' argument.

Id. 372 F.Supp. at 921-22; CP 423-24. (emphasis the court's). Judge Barbour's opinion binds the railroad here. It forecloses the argument found in pages 28-31 of the Railroad Brief, which does not mention his ruling.

The railroad is estopped. If any estoppel is to be drawn from the proceedings in the Fifth Circuit, it should be the estoppel of the railroad to prevent it from arguing that the dismissal in federal court was in fact "with prejudice" because of the statute of limitations. See 24 AM.JUR. 2d *Dismissal* § 2 (1998) (without prejudice means there is no prejudice to refilling).

If the railroad had told the Fifth Circuit that it believed the statute of limitations would bar further proceedings in the case, the Fifth Circuit would never have held that the dismissal was without prejudice. If limitations bar further proceedings, the Fifth Circuit rule is that the trial court dismissal, even if it says

"without prejudice," is in fact a dismissal "with" prejudice that can be appealed. A case the railroad cites confirms this:

> Because the statute of limitations would, under [the defendant's] reading, bar most of the [plaintiff's] claim, this court would have to construe the dismissal as a dismissal with prejudice. [If the dismissal had been with prejudice the plaintiff] could have secured a reversal had he appealed.

Sharp v. Ford, 758 F.2d 1018, 1024 (5th Cir. 1985).

Instead the railroad lay behind a log. It held its statute of limitations argument in its back pocket; thus the Fifth Circuit dismissed the appeal on the ground the district court order was "without prejudice." That form of dismissal was wholly inconsistent with the limitations argument the railroad now makes. If any party is guilty of "trickery," it is the railroad, not the plaintiff beneficiaries. See Railroad Brief at 9.

It is the railroad who took a prior inconsistent position, prevailed, and should not now be heard to change its position. The authorities cited in the Railroad Brief at 29 stand for the proposition that, in those circumstances, estoppel should apply against the railroad, not against the plaintiff beneficiaries.

II. If reached, the limitations period was also tolled by Section 15-1-67 because the railroad used the prohibitions of removal law to keep the plaintiff beneficiaries from proceeding in state court.

A. The question is a pure issue of law involving a substantial right and so the plain error doctrine allows an appellate court to consider it despite the failure to raise it in the trial court.

The plaintiff beneficiaries squarely addressed the MISS. CODE ANN. § 15-1-67 in their opening brief. This Court has the discretion whether or not to consider it. It is not a question of the Court's power. In fact, the Court can use the "plain error" doctrine to entertain an issue that was neither raised below nor raised in an appellant's initial brief. See MISS. R. APP. P. 28(a)(3); *Public Employees Retirement System v. Dishmon*, 797 So.2d 888, 896-97 (Miss. 2001). Here, the appellant's brief squarely raised the issue.

While the railroad objects to the plaintiff beneficiaries' argument, it does not contend that the failure to raise the issue below has in any way prejudiced the railroad. Railroad Brief at 37. The railroad does not claim that, if the issue had been presented below, it would have offered different evidence or a different pleading. In fact, it offers a response on the merits in its brief. Railroad Brief at 38-46.

In these circumstances, when the issue is a pure question of law and the relevant facts are already presented, the Court may consider the issue for the first time on appeal under the plain error doctrine. See, e.g., 4 C.J.S. *Appeal & Error* § 207 (2003) ("It has been held that a question of law concerning which the necessary facts have been presented may be raised the first time on appeal . . .").

This is particularly true when a substantial right is involved. See *State Highway Commission of Mississippi v. Hyman*, 592 So.2d 952, 957 (Miss. 1991) (citing to Miss. R. Evid. 103) ("The plain error doctrine reflects a policy to

administer the law fairly and justly."); *Tower Loans of Mississippi, Inc. v. Jones*, 749 So.2d 189, 192 (Miss. 1999).

A "substantial right" is involved when a party will be prohibited from a trial on the merits if the issue is not considered. See 4 C.J.S. *Appeal & Error* § 207 (2003) ("[A] question which affects the right of recovery or the right to maintain an action may be raised for the first time on appeal.") (emphasis added). In more detail:

> Where the consideration of a claim sought to be raised for the first time on appeal is necessary to a proper determination of a case, or is required in the interests of justice, or the record shows that certain facts existed that were necessarily decisive of the action, or where the determination of a question would be decisive of the entire controversy on its merits, such matters may be considered although first raised on appeal.

4 C.J.S. *Appeal & Error* § 207 (2003). *See also* 5 Am.Jur.2d *Appellate Review* § 771 (1998) ("In civil cases . . . 'plain errors' have been described as those errors that seriously affect the fairness, integrity, or public reputation of judicial proceedings"). Fairness balances in favor of the plaintiff beneficiaries.

While this Court can reverse and remand based on § 15-1-59, alone if it does not do that it should apply the plain error doctrine and consider MISS. CODE ANN. § 15-1-67.

B. The railroad refused to let the plaintiff beneficiaries proceed in state court, and so cannot now be heard to claim the contrary.

The railroad's response on this issue focuses on a hypothetical set of facts. The railroad suggests the estate – with its claims wrongfully removed by the railroad to federal court – should have immediately filed a second lawsuit for the same claims in state court. It says that such a suit, if filed, might not have been enjoined by the federal court. Railroad Brief at 38-44. But this argument deserves the very epithet that the railroad directs at the plaintiff beneficiaries. It is a "purely hypothetical scenario based totally on speculation and conjecture." Railroad Brief at 44.

What actually happened in this case should control here. The railroad removed the case which meant the plaintiff beneficiaries were "to proceed no further unless and until the case is remanded." 28 USC § 1446(2)(d). The railroad simply cannot be heard to claim that the estate could have proceeded in state court where:

* The railroad wrongfully removed the case in 1998.

* The railroad opposed the motion to remand and twice defeated appeals that were designed to obtain a remand to state court.

* Even after the Fifth Circuit in *McKee* held that the federal district court had no jurisdiction over a virtually identical complaint, the railroad wrongfully removed this newly filed "second case" in 2004. *See Marshall v. Kansas City S. Railway Co.*, 372 F. Supp.2d 916 (S.D. Miss. 2005). C.P. 413. The

railroad's claim there was no "second case" just ignores the facts. Railroad Brief at 44.

Whatever the result might be on different facts, on these facts the railroad not only used federal prohibitions to keep the estate from proceeding in state court, but its methods of doing so were wrongful. There is every reason to apply MISS. CODE ANN. § 15-1-57 to this situation, and no reason not to do so.

CONCLUSION

A jury should hear the merits of this case. For nine years, the railroad's procedural maneuvering prolonged this matter in a quagmire of wrongful removals and dilatory motions. This is a state claim that should be tried in a state court. The federal courts never had jurisdiction. For all the years this case was trapped in the federal system, the state's statute of limitations was tolled. Consequently, the estate timely filed its second complaint and should be allowed to proceed on the merits in the Circuit Court of Scott County, Mississippi.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I, James W. Craig, attorney for the appellants, hereby certify that I have this day caused to be mailed by United States Mail, postage prepaid, a true and correct copy of the above and foregoing Reply Brief of Appellants to:

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THIS the 11th day of April, 2007.

JAMES W. CRAIG