

**COPY**

**IN THE SUPREME COURT OF MISSISSIPPI  
NO. 2006-CA-00875**

**DOUGLAS LONG, RICHARD LONG, EARL LONG,  
AND THE HEIRS AT LAW OF EDWARD LONG,  
WHO ARE JOYCE LONG, INDIVIDUALLY,  
CRYSTAL LONG, A MINOR, EDWARD LONG, JR.,  
A MINOR, AND CHRISTOPHER LONG, A MINOR,  
WHO ARE ALL REPRESENTED BY THEIR MOTHER  
AND NATURAL GUARDIAN JOYCE LONG; THE HEIRS  
AT LAW OF DAVID LONG WHO ARE JOHN COLBY  
LONG, A MINOR REPRESENTED BY HIS MOTHER  
AND NATURAL GUARDIAN, TERI LONG SCARBOROUGH,  
AND COREY LONG, WHO ARE INDIVIDUALLY  
REPRESENTED BY SEPARATE COUNSEL**

**APPELLANTS**

**FILED**

**NOV - 7 2007**

**OFFICE OF THE CLERK  
SUPREME COURT  
COURT OF APPEALS**

**VS.**

**2006-CA-00875**

**MEMORIAL HOSPITAL AT GULFPORT  
AND THOMAS VAUGHN, M.D. AND  
JOHN DOES 2-5**

**APPELLEES**

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**MOTION FOR REHEARING OF THOMAS VAUGHAN, M.D.**

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**2007-3143**

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**COMES NOW**, Defendant/Appellee, Thomas Vaughan, and pursuant to Mississippi Rule of Appellate Procedure 40, files his Motion for Rehearing as Follows:

### **I. INTRODUCTION**

Pursuant to Mississippi Rule of Appellate Procedure 40, an aggrieved party may seek a rehearing if the Supreme Court has overlooked or misapprehended certain points of law or fact in the opinion of the movant. In the instant matter, the Supreme Court has overlooked or misapprehended the fact the Circuit Court's Order simply did not affect McKinney or her Complaint and therefore, Mississippi Code Ann. ¶15-1-57 provides no authority— either prior to or during the first appeal— to toll or extend the statute of limitations as to McKinney or the McKinney Complaint. At all times relevant to this action, McKinney, in whose shoes the Longs ultimately stand<sup>1</sup>— was never prohibited from properly naming, substituting, or serving Dr. Vaughan, just as this Court has determined that she was never prohibited from properly serving Memorial Hospital. Dr. Vaughan is entitled to the same analysis and findings as Memorial Hospital. This is an outcome determinative point because the Longs' fate turns on what McKinney— not the Longs— was or was not precluded from doing.

### **II. ARGUMENT**

#### **A. The Longs Stand in the Shoes of McKinney.**

This Court correctly notes at paragraphs 16-17 of its opinion that the Longs bound themselves to the McKinney Complaint, stepped into McKinney's shoes as a Plaintiff, and “share the same fate” as McKinney. Although the Longs had filed their own Complaint for wrongful

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<sup>1</sup>

*Long v. Mem'l Hosp. at Gulfport, et al.*, – So.2d –, 2006-CA-00875-SCT (Miss. 2007) at ¶¶ 15-17, 19.

death<sup>2</sup>, its dismissal was final and proper, and the Longs joined into the McKinney action. As acknowledged by this Court, the Long Complaint had no effect on the McKinney Complaint, and the Longs assumed the McKinney Complaint as their own. In so doing, the Longs bound themselves to McKinney's previous actions and inactions and, it follows that McKinney's failures and procedural missteps are likewise binding on the Longs. *Long v. Mem'l Hosp. at Gulfport, et al*, – So.2d –, 2006-CA-00875-SCT (Miss. 2007) at ¶¶ 16, 17. Thus, when examining the statutory remedies that may be available to the Plaintiffs, to toll or extend the statute of limitations, the Court need only consider the remedies, if any, available to McKinney, as the outcome determinative point is that the Longs' fate turns upon what McKinney – not the Longs themselves– was or was not precluded from doing.

**B. McKinney was Never Subject to The Circuit Court's Prohibition Orders.**

The Circuit Court of Harrison County did, as stated by this Court, prohibit the Longs from prosecuting their claims under the McKinney Complaint. More specifically, this Court stated in its decision the following:

Participation by the Longs's counsel was prohibited by the circuit court orders, except for a period beginning February 6 and ending March 24, 2003. The Longs offer **no reason why McKinney could not have served Memorial Hospital . . . or requested more time for service . . . .** We find the Longs's argument concerning their inability to act on the McKinney complaint to be without merit. They failed to sue Memorial Hospital themselves.<sup>3</sup> **Since they chose to seek relief from dismissal**

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<sup>2</sup>

The Longs' Complaint, filed the day after the McKinney lawsuit, was properly dismissed by the trial court as it had no effect at the moment of its filing. *Id.* at ¶ 16. "This matter proceeded under the McKinney Complaint with McKinney acting as fiduciary for the Longs' claims." *Id.* Since the Longs "chose to seek relief from dismissal under the McKinney Complaint, they have bound themselves to the choices and inaction of McKinney." *Id.* at ¶ 17. As a consequence, the Longs now must "share the same fate as McKinney." *Id.* at ¶ 17.

<sup>3</sup>

Because the Longs also failed to sue this Defendant, Thomas Vaughan, M.D., there is no injustice in holding them bound by McKinney's similar failure.

**under the McKinney complaint, they have bound themselves to the choices and inaction of McKinney. As a consequence, they share the same fate with respect to Memorial Hospital.**

*Id.* at ¶ 17. (emphasis and footnote added).

However, as clearly explained by this Court above, at no time was McKinney precluded from naming, substituting, or serving Dr. Vaughan within the two year statute of limitations period, or any other Defendant, as she was never subject to the Circuit Court's prohibition order. At all times relevant to this dispute, Ms. McKinney was legally able to pursue her Complaint and claims, unencumbered. In fact, this Court even noted that, with respect to Memorial Hospital, whose dismissal was affirmed by this Court, "[n]o Court Order encumbered McKinney's ability to serve process." *Id.* at ¶ 17. It follows that the same analysis applied by this Court to McKinney's failure to properly to serve Memorial Hospital is equally applicable to her failure to timely name and serve Dr. Vaughan. Just as the Longs are made to stand in McKinney's shoes – and forced to bear the consequences of her actions/inactions with respect to the service of the McKinney Complaint on Memorial Hospital – the Longs, likewise, stood in McKinney's shoes with respect to her failure to amend the Complaint and file a timely action against Dr. Vaughan.

**C. This Court's Order Tolling the Statute of Limitations Applied Solely to the Longs, Who are Bound by McKinney's Failure to Act.**

At the time of the Interlocutory Appeal, this Court was not asked to toll the statute of limitations as to McKinney, and its order did not do so. Nothing in this Court's order prohibited or restrained McKinney from naming and serving Dr. Vaughan, any more than she was prohibited from serving the only defendant she did name, Memorial Hospital.<sup>4</sup> Just as the Longs are bound

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4

Although this Court did stay proceedings in the Circuit Court, nothing prevented McKinney and her lawyers from seeking leave to follow the law that governs the amendment and service of complaints. Other courts have ruled that a stay order does not relieve a litigant of the need to take the steps necessary to satisfy the

by McKinney's inaction with regard to Memorial Hospital, they are likewise bound by her inaction with regard to Dr. Vaughan.

When the interlocutory appeal was filed in the *Long v. McKinney* matter by the Longs, instead of immediately ruling on the Circuit Court's prohibition Order, this Court expedited the appeal and continued the order, but clarified that, while the prohibition order continued, the statute of limitations would be tolled, pending the determination of the appeal. 897 So. 2d 160 (Miss. 2004). This tolling order was the result of a direct request by the Longs via their Motion to Expedite Interlocutory Appeal, in which the Longs asserted their concern that the statute of limitations was going to expire for one or more of the Defendants a year from the date of death, or October 5, 2003. *See, Motion 2003-1946*, a copy of which is attached hereto as Exhibit "A".<sup>5</sup> This Court's order and the relief provided therein was applicable only to the Longs— the requesting party and the only party subject to the Circuit Court's Prohibition Order.

This Court relied upon Miss. Code Ann. §15-1-57 for authority to extend the statute of limitations following the Circuit Court's issuance of the prohibition order against the Longs. In order for the savings clause of Mississippi Code Ann. §15-1-57 to be applicable, the Plaintiff must be "**personally** prohibited or restrained." *White v. White*, 601 So.2d 864, 865 (Miss. 1992) (emphasis added).<sup>6</sup> Thus, Miss. Code Ann. § 15-1-57 came to the aid of only the Longs — the persons who were actually *prevented* from pursuing their claims as a result of the Circuit Court's

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statute of limitations. *See Lender's Service, Inc. v. Dayton Bar Assoc.*, 758 F. Supp. 429, 443-44 (S.D. Ohio 1991).

5

Obviously, the Longs' request was tailored to the Defendant sued under a one year statute of limitations - Memorial Hospital at Gulfport.

<sup>6</sup> *See also Townsend v. Estate of Gilbert*, 616 So.2d 333, 336 (Miss. 1993)(Section 15-1-57 was not applicable simply because a second case brought by a different Plaintiff and involving the same legal issue resulted in a directed verdict); *Grant v. State*, 686 So.2d 1078 (Miss. 1996).

order. As a result, this Court held that, “[a]ccording to the savings measure provided by the statute, the time the **Longs** were prohibited from prosecuting their claims by the orders of this Court and the circuit court is not included in the computation of time allowed to file suit.” *Long v. Mem’l Hosp. at Gulfport, et al.*, – So.2d –, 2006-CA-00875-SCT at ¶ 28 (emphasis added). Thus, since this Court only need consider what McKinney was and was not prohibited from doing, this Order affecting solely the Longs is of no consequence. At all times, McKinney could have sought to amend her Complaint to properly, and timely, name Dr. Vaughan.

**D. In the Alternative, this Court had no Authority to Toll the Statute of Limitations.**

This Court acknowledged that it had no authority to extend or toll the statute of limitations:

We recognize that the courts of this state have no power to extend statutes of limitations beyond their terms. *See Shewbrooks v. A.C. & S., Inc.*, 529 So.2d 557, 564 (Miss.1988). *Nothing in this Court's opinion should be read to support a contrary conclusion. However, the order of this court did restrain the Longs's ability to prosecute their claims, and under those circumstances it is the Legislature and its statute, not this body, which exempts the time from calculation. . .*

*Id.* at ¶ 30. (emphasis added).

Wrongful death claims are statutory claims, and, it follows that legislatures have the authority to enact statutes of limitations. “The establishment of these time boundaries is a legislative prerogative. That body has the right to fix reasonable periods within which an action shall be brought and, within its sound discretion, determine the limitation period.” *Cole v. State*, 608 So.2d 1313, 1317-18 (Miss. 1992)(citations omitted). This Court acknowledged this distinction in its decision, as referenced above, as well as in its Katrina Order, see Exhibit “B.” It is clear that this Court has no authority to extend the statute of limitations absent legislative authority allowing the same. The statute merely recognizes that there may be circumstances in which a litigant is restrained from filing suit, such as would be the case with federal bankruptcy stays, and provides



for tolling in that event.

Here, however, there should be no need for this Court to consider whether it had the authority to toll the statute of limitations for the benefit of the Longs. The fact that is outcome determinative is that this Court did not toll the statute of limitations for the benefit of McKinney, nor did it have the power to do so, and the Longs are bound by McKinney's failure to satisfy the statute of limitations. This Defendant, Dr. Thomas Vaughan, had not been named and absolutely no efforts had been pursued to identify him and to substitute him as a Defendant until the Amended Complaint on July 25, 2005, despite McKinney having the medical records all along. The filing of the Amended Complaint was untimely and barred by the statute of limitations and, as this Court has ruled, the Longs have bound themselves to the choices and inactions of McKinney. Dr. Vaughan is entitled to the same outcome as Memorial Hospital at Gulfport – just as McKinney's failure to serve Memorial bound the Longs, her failure to properly name and timely sue Dr. Vaughan should also bind the Longs. As this Court ruled that the Circuit Court orders did not restrain McKinney from serving Memorial, the same did not – and could not – restrain McKinney from the duty of filing a timely action against Dr. Vaughan.<sup>7</sup>

### **III. CONCLUSION**

In the end, the same analysis that is applicable to this Court's holding with respect to Memorial Hospital is equally applicable to Dr. Vaughan. Mississippi Code Ann. § 15-1-57 simply did not affect McKinney or her Complaint. At all times relevant to this action, McKinney– in

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<sup>7</sup> Just as the Long Plaintiffs may be able to seek redress for McKinney's failure to properly serve the Hospital, see Opinion ¶ 19, so they may be able to seek redress for McKinney's failure to properly and timely amend the Complaint to include Dr. Vaughan.

whose shoes the Longs ultimately stand– was not prohibited from properly naming, substituting, or serving Dr. Vaughan, just as she was not prohibited from properly serving Memorial Hospital. McKinney’s failure to do so was fatal to her claims, which claims she shares with the Longs. Thus, the Amended Complaint functioned as a new, but time barred, action and was properly dismissed by the circuit court.

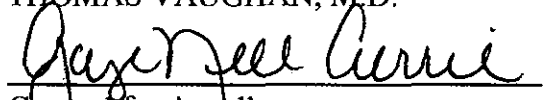



WHEREFORE, PREMISES CONSIDERED, Appellee, Dr. Thomas Vaughan, respectfully requests this Honorable Court to reconsider its October 11, 2007 decision reversing the Circuit Court of Harrison County’s grant of summary judgment in his favor.

Dated this the 7<sup>th</sup> day of November, 2007.

Respectfully submitted,

THOMAS VAUGHAN, M.D.

BY:

  
Counsel for Appellee  
GAYE NELL CURRIE (MSB # )  
LYNDA C. CARTER (MSB # )  
NICOLE HUFFMAN (MSB # )

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**CERTIFICATE OF SERVICE**

I, Gaye Nell Currie, do hereby certify that I have this day caused to be mailed, by United States Mail, first-class, postage pre-paid, a true and correct copy of the foregoing pleading to all counsel of record as follows:

Honorable Judge Jerry O. Terry  
Circuit Court Judge  
Post Office Box 1461  
Gulfport, Mississippi 39502

William B. Weatherly  
Attorney at Law  
Merlin Law Group  
PO Box 4077  
Gulfport, Mississippi 39502

Patricia Simpson  
Franke, Rainey & Salloum  
PO Drawer 460  
Gulfport, Mississippi 39502

Lori McKinney, *pro se, via certified mail*  
4268 Popps Ferry Rd.  
D'Iberville, Mississippi 39540

Dated this the 7<sup>th</sup> day of November, 2007.

  
\_\_\_\_\_  
GAYE NELL CURRIE

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI  
NO. 2003-M-849

**COPY**

LORI MCKINNEY, Individually and on Behalf  
of all Wrongful Death Beneficiaries of  
HUEY P. LONG, Deceased

**FILED**

JUN 20 2003

PETITIONERS/PLAINTIFFS

VERSUS

OFFICE OF THE CLERK  
SUPREME COURT  
COURT OF APPEALS

MEMORIAL HOSPITAL AT GULFPORT and  
JOHN DOES 1-5

RESPONDENTS/DEFENDANTS

In Re: Petition for Permission to Appeal From Interlocutory Order  
Of The Circuit Court, Honorable Jerry O. Terry, Circuit Judge  
In *Lori McKinney, Individual and on Behalf of all Wrongful Death  
Beneficiaries of Huey P. Long, Deceased v. Memorial  
Hospital at Gulfport and John Does 1-5*  
No. 2401-CI-2002-597 and Douglas Long, Edward Long, Richard Long,  
and Earl Long v. John Does 1 - 5, No. 2401-CI-2002-599  
..... On The Docket Of The Circuit Court, Harrison County

**MOTION TO EXPEDITE INTERLOCUTORY APPEAL**

COMES NOW, Plaintiffs, Douglas Long, Edward Long, Richard Long and Earl Long, by  
and through heir attorney, William B. Weatherly, and moves this Court for to Expedite  
Interlocutory Appeal and in support would set forth the following:

I.

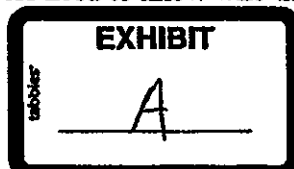
Petition for Interlocutory Appeal was filed on April 18, 2003.

II.

Response to Petition for Interlocutory Appeal was filed on May 1, 2003.

III.

The statute of limitations for one or more defendants will run one year from the date of  
the death which was October 5, 2002. This appeal should be decided on an expedited basis, given  
the fact that all parties and lawyers need to know who their respective counsel is to be.

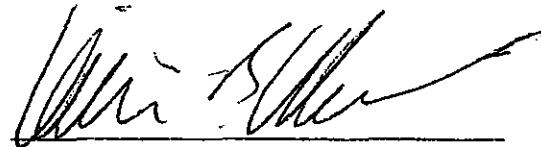


MOTION# 2003-1946

RESPECTFULLY SUBMITTED, this the 18 day of June, 2003.

DOUGLAS LONG, EDWARD P. LONG,  
RICHARD LONG, AND EARL LONG,  
INDIVIDUALLY, AS WRONGFUL DEATH  
BENEFICIARIES OF HUEY P. LONG,  
DECEASED

BY:



WILLIAM B. WEATHERLY

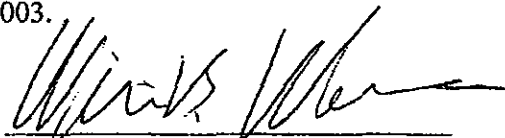
MSB No. [REDACTED]

**CERTIFICATE OF SERVICE**

I, William B. Weatherly, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing document to:

Alben N. Hopkins, Esq.  
Hopkins, Barvie & Hopkins, PLLC  
Post Office Box 1510  
Gulfport, MS 39502

SO CERTIFIED, this the 18 day of June, 2003.



WILLIAM B. WEATHERLY

MSB No. [REDACTED]

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**FILED**

**SUPREME COURT OF MISSISSIPPI  
NO. 2005-AD-00001**

**SEP 06 2005**

**SUPREME COURT CLERK**

**IN RE: EMERGENCY PROCEDURES RELATED TO HURRICANE KATRINA'S  
DISRUPTION OF JUDICIAL PROCESSES**

**EMERGENCY ADMINISTRATIVE ORDER**

On August 29, 2005, Mississippi was struck by hurricane Katrina, a catastrophe of historic proportions. In many counties, the courts and agencies and offices supporting the operation of courts cannot function normally. For that reason, the Supreme Court and the Chief Justice in his capacity as chief administrative officer of all courts in the state find that certain emergency actions as set forth hereinafter are required.

All deadlines applicable under the Mississippi Rules of Appellate Procedure or notices of the Clerk of the appellate courts are amended as set forth in this order for emergency extensions and procedures. Notices of deadlines issued by the Clerk of the Supreme Court and the Court of Appeals shall continue to show deadlines applicable under the rules; however, the deadlines under such rules or stated in the notices of the Clerk or orders are modified as follows.

**IT IS THEREFORE ORDERED:**

**Appellate Courts--Second (Southern) Supreme Court District.** For all cases on appeal to the Supreme Court or the Court of Appeals (appellate courts) from trial courts located in the Second (Southern) Supreme Court District as defined in, Miss. Code Ann. Section 9-3-1 (Rev.2002), all deadlines falling on or after August 29, 2005, through October 31, 2005, are extended for 90 days from the due dates set by rules, clerk's notices and orders.

**Appellate Courts--Oral Arguments.** For appeals from trial courts located in the Second (Southern) Supreme Court District, all oral arguments heretofore set which have not been held are cancelled and shall be rescheduled by the appellate courts respectively.

**Emergency Action by the Trial Courts.** To prevent injustice due to the unusual circumstances caused by hurricane Katrina, as to trial court proceedings in courts located in the Second (Southern) Supreme Court District, (a) the trial courts are hereby authorized to exercise their sound discretion in extending deadlines, rescheduling hearings and trials and any other matters by case specific actions or by general orders; (b) the provisions of M.R.A.P. 2(c) prohibiting extensions of time for taking appeals are suspended through December 1, 2005; and (c) the prohibitions in M.R.C.P. 6(b) against extending the time for

**EXHIBIT**

B

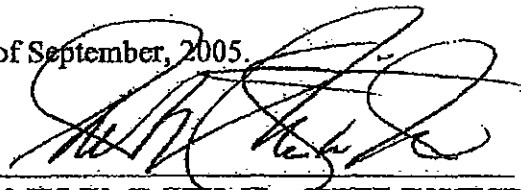
taking any action under M.R.C.P. 50(b), 52(b), 59(b), 59(c), 59(e), and 60(b) are suspended through December 1, 2005. General orders by the trial courts shall be forwarded to the Supreme Court for publication.

**Statutes of Limitations.** The Court lacking the authority to extend statutes of limitations, anything to the contrary in this order notwithstanding, no extension granted or authorized herein shall extend beyond the limitations of action set by statute.

**Publication of Orders.** This order and all general orders filed with the Supreme Court shall be published on the Court's web site, at <http://www.mssc.state.ms.us/Body.htm> and otherwise as may be convenient and effective.

This order may be amended, extended or otherwise modified as circumstances dictate. In circumstances where the Supreme Court finds cases require immediate emergency action, the extensions provided for herein may be revoked or vacated.

SO ORDERED, this the 6<sup>th</sup> day of September, 2005.

  
JAMES W. SMITH, JR., CHIEF JUSTICE,  
FOR THE COURT

DIAZ, J., NOT PARTICIPATING.