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**

VS. — **2006-CA-00875**

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

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Miss. R. App. 28(a)(1), the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Lori McKinney, Appellant, pro se
2. Douglas Long, Appellant
3. Richard Long, Appellant
4. Earl Long, Appellant
5. Joyce Long, Appellant

6. Crystal Long, Appellant

7. Edward Long, Jr., Appellant

8. Christopher Long, Appellant

9. John Colby Long, Appellant

10. Teri Long Scarborough, Appellant

11. Corey Long, Appellant

12. William B. Weatherly, Counsel for the Long Appellants

13. Patricia Simpson, Esq. Counsel for Appellee Memorial Hospital at Gulfport

14. Lynda C. Carter, Counsel for Appellee Vaughn

15. Nicole Huffman, Counsel for Appellee Vaughn

16. Gaye Nell Currie, Counsel for Appellee Vaughn

17. Thomas Vaughn, M.D., Appellee

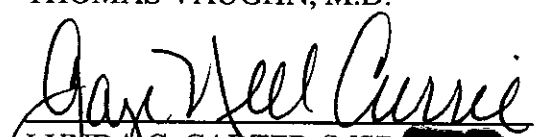
18. Memorial Hospital at Gulfport, Appellee

19. Honorable Jerry O. Terry, Circuit Judge Harrison County

SO CERTIFIED this the 6th day of April, 2007.

Respectfully submitted,

THOMAS VAUGHN, M.D.

BY: 

LYNDA C. CARTER (MSB [redacted]
GAYE NELL CURRIE, (MSB [redacted]
Counsel for Appellee

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STATEMENT OF THE ISSUES

1. Did the trial court abuse its discretion in dismissing the original Complaint and finding that no good cause existed for plaintiffs' failure to serve process within 120-days of filing the initial Complaint pursuant to Rule 4(h)?

2. Did the trial court err in finding that all claims against Dr. Vaughn were barred by the applicable statute of limitations as the Amended Complaint was a new filing outside the limitations period and did not relate back to the filing of the original Complaint?

STATEMENT OF THE CASE

Contrary to the assertions contained in Brief of Appellant, this appeal is not a re-visitation of the events at issue in the appeal and the Court's ruling in Long v. McKinney, 897 So. 2d 160 (Miss. 2004). Rather, the instant case on appeal concerns the repeated failure of Plaintiffs to follow the Mississippi Rules of Civil Procedure and the applicable laws of the State of Mississippi. As noted by the trial court, "any and all delays in this action proceeding normally lies in the failure of the Plaintiffs to follow the Rules of the Court and the alleged defendants should not be penalized by the loss of their affirmative defenses." (R. 218). Plaintiffs did not request summons be issued of the original complaint and service made until over three years after its filing. Therefore, the trial court properly dismissed the original Complaint. Plaintiffs then filed an Amended Complaint, after the statutory limitations period had expired, naming for the first time Dr. Vaughn as a defendant. Therefore, the trial court properly held that the Amended Complaint was as a new action filed outside the statutory period. The trial court's did not abuse its discretion in dismissing the original Complaint and did not err in dismissing the Amended Complaint. Therefore, its rulings should be affirmed

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

Dr. Vaughn was the anesthesiologist who assisted in a surgical procedure on Huey P. Long

on October 5, 2002, at Memorial Hospital at Gulfport. (R. 133). Unfortunately, three days after surgery, Mr. Long passed away due to his underlying medical conditions. Unbeknownst to Dr. Vaughn, Mr. Long's daughter, Lori McKinney, hired counsel and on behalf of herself and the wrongful death beneficiaries of Huey P. Long [1], filed a wrongful death lawsuit a mere nine days after his death, alleging that Mr. Long's death was the result of medical malpractice (hereinafter referred to as the "Complaint"). (R. 37-48). Memorial Hospital at Gulfport[2] was the only named defendant in the suit although allegations were made against John Doe defendants as well.

Plaintiffs failed to ever request summons be issued or service perfected on any defendant during the 120-day period required under Rule 4(h) of the Mississippi Rules of Civil Procedure. No attempt at service was ever made on any defendant. (R. 215). In addition, no attempt was ever made to identify or substitute a named defendant for any of the John Doe Defendants listed in the Complaint. Likewise, at no time during the 120-day period, was the trial court ever requested to grant an extension of time to perfect service. The 120-day period expired on February 14, 2003.

On July 26, 2005, Plaintiffs filed their Amended Complaint, which named for the first time, Thomas Vaughn, M.D., as a defendant. (R. 21-33). Dr. Vaughn was served with this Amended Complaint on January 5, 2006, over three years after the surgery at issue. (R. 113). Prior to being

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As a point of historical reference, Lori McKinney's brother, Douglas Long, filed a separate wrongful death action on October 18, 2002. However, as a matter of law, this Court has previously held in Long v. McKinney, 897 S0. 2d 160,173 (Miss. 2004), that the complaint filed by Douglas Long was of no force and effect from the time of its filing and was properly dismissed by the trial court.

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Memorial Hospital at Gulfport is a community hospital subject to protections and provisions of the Mississippi Torts Claim Act, §11-46-1, et seq., Miss. Code Ann. (Rev. 2007). No notice was received by MGH prior to any suit being filed against it as is required by §11-46-11, Miss. Code Ann. (Rev. 2007). Therefore, the Hopkins Complaint was ineffectual at its inception, and therefore, did not toll the statute of limitations period against Memorial Hospital even for the 120-day service period.

served with the Amended Complaint, Dr. Vaughn had no previous notice that any lawsuit had been filed or even that his care and treatment of Huey P. Long was the subject of any concern or was being called into question in any manner. (R.113,133). This fact is not disputed. Likewise, it is undisputed that Lori McKinney had a copy of the medical record of Memorial Hospital at Gulfport since sometime in 2002, prior to the expiration of the 120-day period.[3] Dr. Vaughn timely filed a Motion to Dismiss, Answer and Affirmative Defenses on February 6, 2006, asserting that no good cause existed for Plaintiffs' failure to serve their original Complaint, that the Amended Complaint was in fact a new cause of action which was barred by the applicable statute of limitations, and that proper notice had not been received prior to filing of the action as required by statute. (R. 89-133). By Order dated April 28, 2006, the trial court granted Dr. Vaughn's motion to dismiss. (R. 214-218). Thereafter, plaintiffs timely appealed the lower court's ruling.

SUMMARY OF THE ARGUMENT

The matters on appeal are not complicated, in fact, the opposite is true. A wrongful death action was filed a mere nine days after a death, it was not timely served, and years later an amended complaint was filed naming for the first time a medical doctor who had participated in a procedure on the decedent over three years before. The Plaintiffs never requested summons be issued or service be attempted of their Complaint. They waited until after the statute of limitations had expired before naming as a defendant the anesthesiologist who participated in the surgical procedure

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While the record does not indicate the exact date upon which the medical records were received by McKinney or her counsel, Rule 11 considerations reasonably lead one to believe that counsel had the records prior to filing suit. In any event, in their Brief on Appeal, Plaintiffs admit the Hopkins firm had the records during the time period prior to the expiration of the 120-day period for service of the original complaint. Brief of Appellant, pp. 4-5, 30.

at issue. The Plaintiffs had the medical record identifying the physician in hand, at or near the time of filing the Complaint. Because the Plaintiffs did not, and cannot, demonstrate good cause for their failure to prefect timely service of their original Complaint, the trial court dismissed the action. Because Plaintiffs failed to name the physician as a defendant within the statutory limitations period, the trial court properly dismissed that action as being barred by the statute. Other extrinsic facts and matters have no bearing on these issues as Plaintiffs have no reason why they did not, and could not have, acted as proscribed by the Mississippi Rules of Civil Procedure and Mississippi law.

STANDARD OF REVIEW

In the case *sub judice*, the Plaintiffs failed to timely serve **any** of the Defendants' herein with the original Complaint as required pursuant to Miss. R. Civ. P. 4(h). When said failure was brought to the attention of the trial court, the trial court found that Plaintiffs failed to demonstrate (or even attempt to show) good cause or excusable neglect for their failure to timely serve any of the Defendants. Thus, the issues relating to the failure of the Plaintiffs to serve the original Complaint are reviewed for an abuse of discretion, as this "Court reviews under an abuse of discretion standard a trial court's finding regarding the existence of good cause or excusable neglect." Mitchell v. Brown 835 So.2d 110, 112 (Miss. Ct. App. 2003)(citing *Rains v. Gardner,* 731 So.2d 1192 (Miss. 1999).

Once the trial court exercised its discretion and determined that there was no good cause or excusable neglect shown for the failure to timely serve, it dismissed the Complaint. Thus, the

Amended Complaint constituted a new filing. Therefore, the only consideration to be given with respect to the Amended Complaint was whether or not it was filed before the expiration of the statute of limitations. Whether or not the claim was barred by the statute of limitations is a question of law which is reviewed *de novo*. Carter v. Citigroup Inc. 938 So.2d 809, 817 (Miss. 2006).

ARGUMENT

I. THE TRIAL COURT PROPERLY DISMISSED THE ORIGINAL COMPLAINT

The Mississippi Rules of Civil Procedure require that Plaintiffs must perfect service of a summons and the complaint within 120 days after the filing of the complaint. Rule 4(h), Miss. R. Civ. Pr.[4] If Plaintiffs fail to have service perfected during that time period, the complaint shall be subject to a dismissal, unless the party on behalf service was required can demonstrate good cause why such service was not perfected within the required period. Rule 4(h), Miss. R. Civ. Pr. Absent such a showing of good cause, Mississippi law mandates the action shall be dismissed. See, Horst v. Southwest Miss. Legal Serv. Corp, 610 So.2d 374, 387 (Miss. 1992)(when no good cause is shown for failure to serve the complaint within 120 days, Rule 4(h) mandates the complaint's

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Rule 4(h) states:

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action **shall be** dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

Miss. R. Civ. Pr. (emphasis added).

dismissal.) The trial court herein correctly found that no good cause existed for Plaintiffs' failure to serve. Therefore, it dismissed the cause of action in its entirety.

A. No Good Cause Existed for Plaintiffs' Failure to Request Summons be Issued and Process Served Within the 120 Period Required by Rule 4(h)

Rightly so, Plaintiffs concede that the burden for demonstrating good cause is upon them. *See*, Holmes v. Coast Transit Authority, 815 So. 2d 1183, 1184 (Miss. 2002). However, as the trial court recognized, Plaintiffs were unable to meet this burden. (R. 70-73; 214-218). Good cause can never be shown where Plaintiffs fail to even request summons be issued, as Plaintiffs failed to do in this case. LeBlanc v. Allstate Ins. Co., 809 So. 2d 674, 67 (Miss. 2002) (holding Plaintiff's failure to even have processed issued demonstrated a lack of diligence beyond excusable neglect.) It is undisputed that none of the Plaintiffs herein ever requested a summons be issued, much less that process be served within the 120 day period following the filing of the Complaint. (R. 70-73; 214-218).

The holding of this Court in Montgomery v. Smithkline Beecham Corp., 910 So.2d 541 (Miss. 2005), is directly on point with the case at hand. The Montgomery Court held that "good cause can never be demonstrated where the Plaintiff has not been diligent in attempting to serve process" within the required period under Rule 4(h). Id. at 545. (citations omitted.) Likewise, it held, diligence cannot be shown where the plaintiffs **"did not make any attempt–diligent or otherwise–to serve process."** Id. at 546. (emphasis added). Like the plaintiffs in Montgomery, the Plaintiffs herein took no steps whatsoever to have process served. Plaintiffs have offered no evidence to this Court to demonstrate any amount of diligence on their part to effect service of process. Why? Because there is none – no one ever requested that summons even be issued, much less attempted to serve process.

Similar again to the plaintiffs in Montgomery, the Plaintiffs herein focus on extrinsic matters "while ignoring any demonstration of diligence." Id. at 546. Instead of offering good cause for their failure to even request summons be issued, they assert that "several months were spent by all counsel involved arguing the threshold issues of representation and attorneys' fees." (R. 76.) Yet, during all those months, during all those filings, not one request for summons to be issued was made. Not even one motion for additional time to serve was filed. The fact that they were busy filing motions on other issues does not excuse their lack of diligence in getting processed served. As was held in Montgomery, excuses as to why more time is needed are insufficient to establish due diligence where no such attempts at service were ever made. Id. at 547.

In support of their position, Plaintiffs' isolate one phrase from the Montgomery decision and apply it out of context. Brief of Appellant, p. 15. Plaintiffs quote the following text:

> "In demonstrating good cause and diligence, a plaintiff must show that he or she **has been unable to serve process because** the defendant evaded process or engaged in misleading conduct, or *for some other acceptable reason*, as discussed in Holmes, 815 So. 2d at 1186."

910 So. 2d at 545. (emphasis added). Plaintiffs' assert that the italicized phrase - *"for some other acceptable reason"*– stands for the proposition that good cause may be demonstrated even when no attempt at service has been made. The argument ignores the fact, however, that the italicized phrase is dependent upon the preceding phrase shown herein in bold type –**"that he or she has been unable to serve process."** Id. at 545. (emphasis added). Quite simply, there is no reason why Plaintiffs could not request that process be issued, much less even attempt to serve process. Plaintiffs' were not unable to serve process, they just did not serve process. It is disingenuous of Plaintiffs' to assert they were "unable to act" when they did not even try to act. As acknowledged by Plaintiffs in their Brief on Appeal, all Plaintiffs, and counsel, herein were quite active in filing motions and attending

hearings throughout the 120 day period. Yet, no action – diligent or otherwise – was taken to effect service of process until three years after the Complaint was filed. Such dilatoriness cannot constitute good cause.

B. Plaintiffs Were Not Prevented From Requesting Summons Be Issued or Process Served Within The 120 Day Period of Rule 4(h).

Plaintiffs argue that mitigating circumstances existed which excuse them from requesting summons be issued and process served. Specifically, Plaintiffs submit that the procedural history of the matter of Long v. McKinney, 897 So. 2d 160 (Miss. 2004) both prevented them from effecting service and establishes their due diligence. To the contrary, their "War of the Roses"[5] demonstrates an absence of due diligence in more than one respect.[6] Astoundingly, however, Plaintiffs argue that because they were concentrating on fighting with each other, wrestling over who would control the lawsuit, who would get what fees, they should be excused for their failure to act to preserve their claim. This argument ignores both the law and the facts.

In Long v. McKinney, this Court held that the rights of all wrongful death claimants are preserved when the original suit is filed. Id. at 173 ¶ 58. Likewise, it was also held that "the interests of any claimants not joined in the suit shall be represented by counsel for the claimant filing the suit." Id. Thus, the interests of all the claimants were preserved by McKinney when she

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A historical reference to the civil war which took place in Medieval England between the House of York and the House of Lancaster over control of the Monarchy. However, the modern day reference to the film starring Michael Douglas and Kathleen Turner is also applicable. In that portrayal, the spouses, warring over control of material possessions, destroyed those possessions in the process.

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Defendants find it odd that Plaintiffs filed their Complaint nine days after the death of Mr. Long, alleging a cause of action sounding in medical malpractice arising from his surgery at Memorial Hospital at Gulfport, but did not take the time to even review the medical records. Arguably, within that time period, they likewise did not obtain an expert review to even establish that any malpractice had occurred.

instituted the wrongful death action and filed the original Complaint. Furthermore, Attorney Hopkins, who filed the original Complaint, was involved in litigation from its inception throughout the entire 120-day period for service and beyond. (R. 13). Plaintiffs have offered no explanation, whatsoever, as to why Hopkins did not request summons be issued or service be obtained within the requisite period.

Weatherly, however, now argues that he and the Longs were prevented by actions of the trial court and Hopkins in effectuating service, which notion is disputed herein. Such argument ignores the ruling of this Court in Long v. McKinney, that the Weatherly Complaint was of no force and effect from the time of its filing. 897 So. 2d at 173 ¶58. Therefore, any arguments as to why that complaint was not served are not pertinent to this appeal. In response to their argument, however, it is significant to note that Weatherly never once requested summons be issued of his complaint nor did he ever attempt service of his complaint. Likewise, during the time period Weatherly was allowed to participate in the original action, he took no steps to request summons be issued or to attempt service of the original Complaint. Moreover, not once did he or the Longs bring to the trial court's attention that no service had been perfected on any defendant on any complaint or seek assistance or relief in that regard.[7]

The original Complaint was the only complaint with any legal force or effect at any time. Long, 897 So. 2d at 173. Assuming for the sake of argument that Weatherly and the Longs were prevented from effecting service of the original Complaint, which is denied, good cause still cannot

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A simple check of the public record at the Clerk of Court's office would have indicated that no service had been returned on the original Complaint.

be shown.[8] Where competent counsel has been involved in the litigation since its inception but failed to act, the fact that other counsel was also involved and was unaware of that failure, does not alleviate the requirement that Complaint must be served within 120 days of filing. Montgomery, 910 So. 2d at 548. "[Hopkins] has been counsel of record in this matter since its inception, and as counsel of record, maintained all the duties and obligations to the client as provided in Rules 1.1, 1.2, 1.3 and 1.4 of the Mississippi Rules of Professional Conduct." Id. It was his duty thereunder to timely serve the Complaint. The fact that he did not, does not require a finding of good cause simply because other counsel was or was able to participate in the litigation.

What the procedural history of the Long v. McKinney matter shows is that the all the Plaintiffs were quite prolific in filing numerous motions, attending several hearings, all in their attempt to wrestle control of the litigation, but no one, at any time, ever requested service of the Complaint or additional time to serve the Complaint. Instead, they focused not on the underlying action, but on the tug-of-war over control of the litigation. Because they focused their attentions elsewhere, does not alleviate them of their responsibility to timely serve the Complaint. Nothing but their own actions prevented Plaintiffs from trying to effect service of the original Complaint at any time during the 120-day period. Service could have been requested at any time. Only, no one requested it. While concentrating their efforts elsewhere, they let the litigation die.

Plaintiffs assert they were prohibited by law, restrained or enjoined by any order, decree or process of any court in this state from requesting summons be issued and service be made. As shown above, such is not true. No attempt was ever made to have summons issued. So, therefore,

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As shown above, during the period when Weatherly was involved in the underlying claim, he took no steps whatsoever to have summons issued or to attempt service of process. Likewise, he never moved the Court for additional time to perfect service.

nothing can be said to have prevented the action when the action was never taken. Furthermore, during the time period that Weatherly was allowed to participate in the underlying action, he took no steps to have summons issued or service perfected either. Therefore, contrary to Plaintiffs' assertions, § 15-1-57, Miss. Code Ann., is not applicable to these proceedings and will not salvage their claim.

Good cause does not exists for plaintiffs who merely ignore their complaint. Parties in litigation cannot simply file a lawsuit, be distracted by other matters, and let a complaint languish unattended and then claim that these time constraints do not apply to them simply because they concentrated their efforts elsewhere. "A Plaintiff must be diligent in serving process if he is to show good cause in failing to serve process within the 120 days" Id. at 52. (quoting Resolution Trust Corp. v. Starkey, 41 F.3d 1018, 1022 (5th Cir. 1995))(emphasis added). Diligence cannot be shown where **no action** was taken to have summons issued, no steps were taken to have process served, but Plaintiffs merely ignored the underlying action for months. A failure to take any action whatsoever will not rise to the standard of excusable neglect.[9] Plaintiffs herein have not provided any explanation why summons was never requested of the original Complaint or service of process ever attempted during the 120 day period. See Montgomery, 910 So. 2d at 548 ¶27. Therefore, there is no basis for a finding of good cause.

C. The Trial Court Dismissed the Entire Action

Plaintiffs argue that when the trial court entered its order in January 2006, it dismissed only those claims against Memorial Hospital of Gulfport, but that the Complaint was still viable as to the

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The standard for excusable neglect is very strict. Moore ex rel. Moore v. Boyd, 799 So. 2d 133, 136 (Miss. App. 2001)(quoting Black v. Carey Canada, Inc., 791 F. Supp. 1120, 1126 (S.D. Miss. 1990).

John Doe Defendants. Essentially, the position being taken by Plaintiffs is that if a complaint contains allegations against John Doe Defendants, the statute of limitations and Rule 4(h) do not apply. Such a position is absurd. A complaint cannot languish in limbo indefinitely until such time, whenever a plaintiff gets good and ready, to act. Otherwise, plaintiffs' could file a complaint, assert that they have a cause of action against unknown John Doe Defendants, and at some point in the future – whether it be 120-days, three years or ten years — file an Amended Complaint, substitute a named defendant for a John Doe, and have their complaint served.

If the Court were to accept Plaintiffs' position, plaintiffs would be allowed to circumvent the statute of limitations, simply by naming John Doe defendants. All statutes of limitations would then be left meaningless and void. Certainly, that was not the intent of the Legislature in crafting such statutes. Rather, statutes of limitations are enacted to reward the vigilante, not to excuse the negligent. *See generally*, Douglas Parker Electric Inc. v. Mississippi Design and Dev. Corp., 949 So.2d. 874 (Miss. App. 2007). They provide a generous, specified time to allow a party to investigate its claim, while at the same time, giving some comfort to other parties that the possibility of a lawsuit will not be held over their heads indefinitely.

In adopting the Rules of Civil Procedure, this Court recognized that in order to protect the interests of all parties, time limitations must be imposed. Rules 4(h) and 9(h) of the Mississippi Rules of Civil Procedure were promulgated to provide mechanisms to ensure that the rights of all litigants are protected. To effect the orderly administration of justice, a generous 120-day period was given to Plaintiffs to allow them to effect service of process on a Complaint. Rule 4(h), Miss. R. Civ. Pr. In return for that generosity, all that is asked of Plaintiffs is that they act diligently, not merely rest upon their laurels. Doe v. Mississippi Blood Services, Inc., 704 So. 2d 1016, 1019 (Miss. 1997). If a Plaintiff tries and is unable to effect service within that period, there are

mechanisms to request more time. Rule 4(h), Miss. R. Civ. Pr. Plaintiffs herein choose not to take advantage of those mechanisms. That was their choice and now they, not the Defendants, must suffer the consequences.

The trial court's January 2006 order dismissed the "subject complaint."[10] (R. 73). No service had been timely perfected on any defendant. No named defendant had been substituted for any John Doe Defendant. Therefore, once the 120-day period under Rule 4(h) passed, the original Complaint was rendered legally comatose and without any force or effect. King v. American RV Centers, Inc., 862 So. 2d 558 (Miss. App. 2003), (*overruled on other grounds by* Wilner v. White, 929 So. 2d 315 (Miss. 2003). Thus, as the trial court correctly held, the complaint was without any force or effect as to anyone and properly dismissed it in its entirety.

II. THE AMENDED COMPLAINT DOES NOT RELATE BACK TO THE ORIGINAL COMPLAINT

Plaintiffs assert that the Amended Complaint, naming Dr. Vaughn as a defendant, relates back to the filing of the original Complaint and that Dr. Vaughn was properly substituted for a John Doe defendant therein. The Mississippi Rules of Civil Procedure provide two means by which claims against newly named defendants may relate back to the original filing. First, Rule 15(c) provides an amendment changing the party against whom an action has been filed to may relate back to the date of the earlier filed pleading by meeting the three-pronged test prescribed under Rule 15(c), subsections (1) and (2). Miss. R. Civ. Pr. Second, under Rule 15(c)(2), a party may amend

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The trial court did not say it was dismissing only "the claims" against Memorial Hospital at Gulfport, but dismissed the entire complaint.

to provide the true identity of a "fictitious party" pursuant to the provisions of Rule 9(h).[11] If a newly named defendant is a "fictitious party" as contemplated by Rule 9(h), plaintiffs will not be required to meet the three prong test of Rule 15(c), subsections (1) and (2), in order for such claims to relate back to the date of the original filing, but will be considered to relate back to the original pleading, provided that the provisions of Rule 9(h) are met. As is demonstrated below, Plaintiffs' Amended Complaint, however, does not meet any of these requirements, and, therefore, cannot relate back to the filing of the original Complaint.

A. The Amended Complaint Does Not Meet the Provisions of Rule 9(h).

1. Judicial Intervention Was Not Required to Identify Dr. Vaughn.

The purpose of Rule 9(h) is to provide a mechanism to bring in known, but unidentified, responsible parties whose identity can only be obtained **through the use of judicial mechanisms, such as discovery**. Rawson v. Jones, 816 so. 2d 367 (Miss. 2001), *r'hrg denied*, May 23, 2002 (emphasis added). The Longs argue that they were unable to use subpoena power of the courts to obtain the medical records. Nonetheless, subpoenas or other methods of judicial intervention were not necessary in order for the Longs to have obtained the records which McKinney already had and which they could have obtained with little effort.

As heirs of Huey P. Long, Mississippi law provided to the Plaintiffs an easy mechanism to obtain the medical records. At any point in time, pursuant to Section 41-9-65, Miss. Code Ann. (Rev. 2006), any one or all of the Plaintiffs, could have requested records directly from the hospital

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[11] However, an amendment pursuant to provisions Rule 9(h) is not considered to be a an amendment to change of a party against whom a claim is asserted, but merely provides the true identity of a party. Cmt.

without invoking the subpoena power of the court or going through any other person.[12] All they had to do was show proof of their relationship to Huey Long, fill out a form and ask. Judicial assistance was not needed. Plaintiffs only needed to take the time to write or to go to the hospital to get the records. Furthermore, Mississippi law allowed them two years within which to do it! Two years within which to investigate their claim prior to filing suit. § 15-1-36, Miss. Code Ann. (Rev. 2006). But, instead, they raced to the courthouse to file their action and never once asked for the medical records directly from the hospital, as was their right to do.

Moreover, it is an undisputed fact that Plaintiff McKinney and her counsel had a copy of the medical record naming Dr. Vaughn as the anesthesiologist who assisted in the surgical procedure on Mr. Long at or near the time of filing the original Complaint. Brief of Appellant, p. 4-5, 30. Likewise, it is reasonable to assume that at some point, more likely than not during the 120-day period, some or all of the heirs would have received a bill for anesthesiological services which would have listed Dr. Vaughn's name. In any event, copies of the medical record were available to all plaintiffs, had they only taken the time ask. Therefore, no judicial intervention was required and Plaintiffs cannot avail themselves of the protections of Rule 9(h).

2. Plaintiffs Engaged In No Due Diligence Inquiry to Identify Dr. Vaughn Prior to the Running of the Statute Of Limitations

In addition, in order to reap the benefits of Rule 9(h), a parties must show they were diligent

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Section 41-9-65 in pertinent part provides:

> Hospital records are and shall remain the property of the various hospitals, subject however, to reasonable access to the information contained therein upon good cause shown by the patient, his personal representatives or heirs, his attending medical personnel and his duty authorized nominees, and upon payment of any reasonable charges for such service.

Miss. Code Ann. (Rev. 2006).

in pursing the identity of the unknown party and that steps were taken to ascertain the Defendant's true identity. Wilner v. White, 929 So. 2d 315, 323 (Miss. 2006). *See also*, Gasparrini v. Bredemeier, 802 So.2d 1062 (Miss. Ct. App. 2001). Rule 9(h) requires that a Plaintiff must exercise due diligence in ascertaining the identity of unknown parties. "It is not designed to allow tardy plaintiffs to sleep on their rights." Bedford Health Prop., LLC v. Williams, 946 So.2d 335, 341 (Miss. 2006) (*quoting* Doe v. Mississippi Blood Services, Inc., 704 So.2d 1016,1019 (Miss. 1997)). If Dr. Vaughn was a "fictitious party," it was incumbent upon the plaintiffs to be about the business of identifying him. However, there is no evidence before this Court that any plaintiff took any action to identify Dr. Vaughn within the 120-day period after filing the Complaint.

Plaintiffs had in their possession the medical record but there is no evidence before this Court that anyone ever took the time to review them. This Court held in Womble v. Singing River Hospital, 618 So. 2d 1252 (Miss. 1993), that "a reasonably diligent inquiry by the appellants into the history of the deceased medical treatment would have revealed to [them] the identities of persons they sought to identify." Id. at 1267. Just as the plaintiffs in Womble "were not ignorant of the identities of [the John Doe Defendants] in the sense contemplated by Rule 9(h)", neither were the Plaintiffs in this action ignorant of Dr. Vaughn's identity. Id. At 1267-68. Had they only reviewed the medical records which were not only in their possession, but also readily available to each of them without need for judicial intervention,[13] they could have easily identified Dr. Thomas Vaughn by name as the anesthesiologist who provided services to Huey P. Long during his surgery on October 5, 2002, and against whom they made specific allegations of negligence in their Complaint.

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As stated earlier, the Longs did not make any request for copies of the records from the hospital's Medical Records Department as they were allowed to do by law, without judicial intervention. §41-9-65, Miss. Code Ann. (Rev. 2006).

Because no such diligent inquiry was made, Plaintiffs cannot now claim the privileges and protections of Rule 9(h) to salvage their barred claim.

3. Rule 9(h) Will Not Toll The Statute Of Limitations Where Plaintiffs Are Not Ignorant of A Parties' Identity.

When in good faith, plaintiffs are unable to identify unknown defendants, Rule 9(h) allows the statute of limitations to be tolled. Id. Rule 9(h) speaks in terms of a plaintiff as being "ignorant of the name of the opposing party." Miss. R. Civ. Pr. Thus, plaintiffs who do not know the identity, or name, of the individual whom they believe may be a proper defendant at the time the complaint is filed. As previously established herein, Plaintiffs were not ignorant of Dr. Vaughn's name as they had custody of the medical record, which had they reviewed them, would have identified Dr. Vaughn as the anesthesiologist who participated in the surgical procedure on Mr. Long. Womble, 618 So. 2d at 1267. Because Plaintiffs knew, or should have known, of Dr. Vaughn's identity at the time of filing the original Complaint, or at least within the 120-day period for service, Plaintiffs were not ignorant of Dr. Vaughn's name and cannot take advantage of the provisions of Rule 9(h).

In addition to the customary meaning of not knowing a person's name, the term "ignorant"as used in Rule 9(h), has also been determined by this Court to include situations where although the identity of the individual is known, the plaintiff is unaware of the facts giving rise to a cause of action against that person. In Womble, it was held:

> It is a principle of general application, though, that ignorance of the opposing party for fictitious party practice extends beyond mere lack of knowledge of the true name of the person. Even if the plaintiff knows the true name of the person, he is still ignorant of his name if he lacks knowledge of the facts giving him a cause of action against the (sic.) that person.

618 So. 2d at 1267. In the case at bar, however, Plaintiffs were not ignorant of Dr. Vaughn's identity in any sense contemplated by Rule 9(h).

In addition to not being ignorant as to Dr. Vaughn's name, as previously established, Plaintiffs were not ignorant of the facts giving them a cause of action against Dr. Vaughn. In fact, their Complaint contains specific allegations asserting that the **anesthesiologist** who participated in the surgical procedure was negligent. See, Paragraphs 4, 27 and 28 of the Complaint. (R. 37-46). Plaintiffs allege therein that the anesthesiologist actions or failure to act was the cause or a contributing cause of Mr. Long's demise. Thus, by no stretch of the imagination, was Dr. Vaughn a "fictitious party." Not only was his name known to Plaintiffs, or should have been known, but they asserted facts in their complaint the he, as the anesthesiologist on duty, caused or contributed to Mr. Long's death.

Finally, it is pertinent to note in filing the Amended Complaint, Plaintiffs dropped the name of John Doe 1 and substituted it with the name of Thomas Vaughn, M.D. However, in the original Complaint, John Doe 1 is described as a "surgeon" while John Doe 2 is described as an "anesthesiologist." While this may be seen as merely a technical error, it is evidence of an improper attempt to substitute. Rule 9(h) requires that the substitution be made for the correct party, not just any John Doe. See Bedford, 946 So.2d at 343. Consequently, because Dr. Vaughn's identity was not unknown in any sense contemplated by Rule 9(h) and because he was improperly substituted, the Amended Complaint cannot relate back to the filing of the original Complaint. Therefore, Plaintiffs are not entitled to any relief from the running of the statute of limitation in this matter. Wilner, 929 So. 2d at 323.

B. Rule 15(c)(1) and (2) Are Not Applicable to the Amended Complaint.

As Rule 9(h) provides Plaintiffs no relief, Plaintiffs must rely on the three-prong test in Rule

15(c) in order for the amended complaint to relate back to the filing of the original Complaint.[14] In order for an amendment which changes the name of the party against whom the action was originally filed to relate back to the date of the original pleading, under Rule 15(c)(1) and (2), the following is required:

1. The claim or defense asserted in the amended pleading must have arisen out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading; **and**

2. Within 120 days of filing of the original pleading, the party sought to be brought in must have received such notice of the instituted action such that the new party will not be prejudiced in maintaining his defense on the merits; **and**

3. Within the 120 days of filing of the original Complaint, the new party must have known or should have known, that but for a mistake concerning the identity of the proper party, the action would have been brought against the new party.

Only if each and every one of these requirements are met, can an amended pleading be considered to relate back to the original pleading. Rule 15(c)(1) and (2), Miss. R. Civ. Pr. In this instance, only one of those conditions can be met, e.g., that the claim arises out of the same transaction or

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Rule 15(c) provides:

> **(c) Relation Back of Amendments**. Whenever a claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted related back if the foregoing provision is satisfied and, within the period provided by Rule 4(h) for service of summons and complaint, the party to be brought in by amendment:
>
> (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining the party's defense on the merits, and
>
> (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against that party. . . .

occurrence. "The standard for determining whether amendments qualify under Rule 15(c) is not simply an identity of transaction test; . . . the courts also inquire into whether the opposing party has been put on notice regarding the claim or defense raised by the amending pleading." Bracy v. Sullivan, 899 So. 2d 210, 212-13 (Miss. App. 2005)(citations omitted).

The undisputed facts are that Dr. Vaughn did not receive any notice of this action until nearly three and one half years after the original Complaint was filed. (R. 132-133). Likewise, it is undisputed that there was no mistaken in identity with regard to Dr. Vaughn, as such has not even been alleged. Clearly, Dr. Vaughn will be prejudiced if Plaintiffs are allowed to bring him into a lawsuit over three years after the Complaint was filed, and over one year after the statute of limitations has run. Therefore, Plaintiffs cannot meet the provisions of Rule 15(c)(1) or (2) and therefore, the Amended Complaint cannot be treated as relating back to the time of the filing of the original Complaint, and is therefore time barred. Curry v. Turner, 832 So.2d 508, 513 (Miss. 2002).

III. THIS COURT'S AUGUST 22, 2003 ORDER DID NOT TOLL THE STATUTE OF LIMITATIONS AS TO DR. VAUGHN

Plaintiffs argue that this Court's order dated August 22, 2003, tolled the statute of limitations at to Dr. Vaughn. However, at this time this Court entered its Order, there was no actual case or controversy or any parties before the Court over whom it could toll the statute of limitations. As conceded by Plaintiffs, "[w]ithout a case or controversy or any parties before the court, the Mississippi Supreme Court has no jurisdiction to issue an order affecting the application of the Statute of Limitations legislation." Brief of Appellant, p. 24. (emphasis added) (*citing* § 9-3-9, Miss. Code Ann. (Rev. 2006). No summons were ever issued and no service was ever effected on any defendant within the required time period after the Complaint was filed.

This Court has previously recognized in its Emergency Administrative Order after Hurricane

Katrina that it does not have the authority to extend the Statute of Limitations. Accordingly, in the Court's August 22, 2003, Order, it recognized that any tolling applied to "this suit" — the Court recognized that it cannot toll the statute of limitations as to parties or claims which are not before the Court and subject to the Court's jurisdiction. Without service of process, the courts cannot obtain personal jurisdiction over a defendant. James v. McMullen. 733 So.2d 358 (Miss. Ct. App. 1999)(holding service of process is the physical means by which jurisdiction is obtained.) As with the Katrina Order, at the time this Honorable Court entered its August 22, 2003, Order, there was were no defendants over whom it had personal jurisdiction, thus no actual case or controversy before it for tolling to apply. The original Complaint had died on the vine well before any appeal was taken to this Honorable Court[15], and thus the only issues before the Court at the time, were those with regard to the "War of the Roses" – the issues between the Plaintiffs themselves, not any actual case in controversy with regard to any defendant.

Of course, the issue of failure to timely serve could not be addressed by this Honorable Court at the time of the Long v. McKinney appeal. Again, there were no defendants before the court to raise the affirmative defense. In addition, because a failure to serve process is a waivable defense, it does not come into play unless and until such time as a defendant is served with process out of time. Once that occurred, the Defendants herein raised their applicable defenses and the trial court properly granted dismissals on those basis.

Because there were no defendants over whom either the trial court, or this Court, had jurisdiction, the Court's order did not toll the statute of limitations. As the statute had never been tolled as to Dr. Vaughn, who was neither named in the original Complaint nor was he a fictitious

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The Notice of Appeal was filed on May 16, 2006. The 120-day period expired on February 14, 2003, over three months prior to the appeal.

party, the limitations period ran as to him on October 5, 2005, two years after the alleged tortious conduct occurred. §15-1-36, Miss. Code An.. (Rev. 2006)

IV. THE AMENDED COMPLAINT WAS PROPERLY DISMISSED.

A. The Amended Complaint Was Improperly Filed

Plaintiff argues that no motion to amend the Complaint was necessary as at the time of filing the Amendment, because no defendant had filed an answer. While ordinarily, such is true under Rule 15(a), Miss. R. Civ. Pr., there must be a viable pleading to amend. However, Plaintiffs argument over looks several facts. In this case, there was no viable complaint to amend. As Memorial Hospital at Gulfport, the only named defendant in the original Complaint, was a public hospital, notice is require prior to filing suit. § 11-1-46, et seq, Miss. Code Ann. (Rev. 2006). There is no indication in the record that Memorial Hospital received any pre-suit notice of any action. Thus, at the time of filing, the original Complaint was without legal force and effect as to Memorial Hospital. Since no John Doe Defendant was timely substituted, within the 120 day period, the Complaint was ineffectual as to them. Because no defendants were timely served, on the 121st day after filing the original Complaint that was without any force or effect. King v. American R. V. Centers, *supra.* As such it was properly dismissed.

B. The Amended Complaint Is Barred By The Statute Of Limitations

Plaintiff argues that if the dismissal of the original Complaint was dead for failure to serve, then the filing of the Amended Complaint against Dr. Vaughn on July 26, 2005, constitutes a new action filed against Dr. Vaughn within the statute of limitations period. For the reasons stated above, the Supreme Court's August 23, 2003 Order did not toll the statute of limitations as to Dr. Vaughn. Because Dr. Vaughn was not a fictitious party within the meaning of Rule 9(h), the statute of limitations was not tolled until such time as he was identified. His identity had been known to

Plaintiffs, in every sense of contemplated by Rule 9(h), at or near the time of filing the original Complaint, or at least within the 120 day period for service. Therefore, with no mechanism available to toll the statute of limitations, the statutory period ran as to Dr. Vaughn on October 5, 2004, two years after the date the alleged tortious conduct occurred. §15-1-36, Miss. Code Ann. (Rev. 2006). The Amended Complaint missed the statutory boat by nearly two years. In any event, even if the Amended Complaint was timely filed, it is still subject to dismissal.

C. If Viewed As A Timely Filed New Action, the Amended Complaint Against Vaughn Is Also Not Viable and Must Be Dismissed.

Although Dr. Vaughn asserts that statute of limitations ran on October 5, 2004, even if your were to assume for the sake of argument it had not, the Amended Complaint is still not viable and subject to dismissal. As a new filing, the Amended Complaint is subject to laws in effect at the time of filing, specifically § 11-1-58 and § 15-1-36(15), Miss. Code Ann. (Rev. 2006), both of which require a dismissal of the Amended Complaint.[16]

The Amended Complaint failed to contain a Certificate of Consultation as required by § 11-1-58, Miss. Code Ann. (Rev. 2006), certifying that an expert had been consulted and there exists a reasonable basis for the commencement of the action. Because no Certificate of Consultation was attached, even if the Amended Complaint is viewed as a new action, it must be dismissed. Walker v. Whitfield, 931 So. 2d 583 (Miss. 2006). (holding dismissal of action was warranted where no certificate of consultation was attached to Complaint at time of filing).

Furthermore, it is undisputed that Dr. Vaughn received no notice of the action prior to being served with the Amended Complaint on January 5, 2006. Therefore, under the holding of Arceo v.

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These statutes are two of the "procedural guns" which Plaintiffs admittedly were trying to avoid by rushing to file their Complaints before the newly passed laws took effect January 1, 2003. T. 49.

Tolliver, 2006 WL 3317036, (Miss. 2006), the Amended Complaint likewise must be dismissed. Such a failure to provide notice pursuant to § 15-1-36(15), Miss. Code Ann. (Rev. 2007), is an inexcusable deviation from the Legislature's requirements for process and notice and as such warrants a dismissal of the claim. Pitalo v. GPCH-GP, Inc., 933 So.2d 927, 929. (Miss. 2006). The fact that the claim would then be time barred, was of no moment. The failure to follow the dictates of the Statute and the consequences therefore, fall squarely upon the plaintiffs' shoulder.

V. EQUITABLE PRINCIPLES DO NOT APPLY TO PREVENT THE LOSS OF PLAINTIFFS' CLAIMS

It is a maxim of equity that one must first do equity in order to receive equity. (citations omitted.). The basic premises of the "clean hands" doctrine is that "no person as a complaining party can have the aid of a court in equity when his conduct with request to the transaction in question has been characterized by willful inequity." Richardson v. Cornes, 903 So. 2d 51, 55 (Miss. 2005) quoting , O'Neil v. O'Neill, 551 So. 2d 228, 233 (Miss. 1989). It is bewildering that Plaintiffs would assert that equity would apply to salvage their claim, especially considering the circumstances under which their predicament arose in the first place.

Plaintiffs assert that matters beyond their control, or their attorneys' control, hampered them from perfecting their claim. The converse, however, is true. It was a web fashioned by their own actions in which their cause of action became entangled and died. The first silken thread of the web was woven when, with the intent to circumvent the new law, Plaintiffs rushed to the courthouse in order to file their actions before the newly passed laws became enacted. At the hearing on the motion to dismiss, counsel for Plaintiffs admitted that in October of 2002, *"the reason that we got these lawsuits filed to begin with, because tort reform was coming . . . and that's why we were both under the gun, Hopkins and I, to get something filed."* T. 49. (emphasis added). These counsel

raced to the courthouse to get a lawsuit filed before the newly enacted laws regarding tort reform were to take effect. Contrary to plaintiffs' counsel's assertions, the newly enacted laws were not "procedural guns" forcing the filing of the lawsuit, but instead were mechanisms which could limit Plaintiffs' potential recovery and which would require them to seek expert review before accusing someone of medical malpractice.[17] Simply put, these Plaintiffs rushed to file lawsuits less than two weeks after the death of Huey P. Long to avoid the perceived constraints of the new laws.

The next thread of the web was woven when Plaintiffs failed to exercise any due diligence in identifying Dr. Vaughn. Weatherly and the Longs argue that orders of the court, actions of other counsel, all worked to prevent them from securing the medical record of MGH pertaining to Huey P. Long. Weatherly asserts they did the best they could to find out Dr. Vaughn's identity, but such argument files in the face of reality. . . Huey P. Long had been gone from this earth only ten days before the Weatherly Complaint was filed. Their was 720 days still remaining on the statute of limitations, more than sufficient time to allow Weatherly, or Hopkins, an expert, or anyone, to obtain and to review the medical records to identify Dr. Vaughn or any of the medical providers. More than sufficient time remained to allow Plaintiffs to obtain an expert review of the records to make a determination if any malpractice had even occurred in the care of treatment of Huey P. Long. More than sufficient time remained to give adequate notice to any and all the Defendants before filing suit. If Plaintiffs were prevented from identifying defendants or investigating their claim, the only thing which prevented them was their own actions. It is implausible to say that such constitutes equitable conduct. Had Plaintiffs not rushed to the courthouse in an attempt to wrestle control of the litigation

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It is difficult to imagine that McKinney was able to obtain an expert review and opinion in only 8 days after Mr. Long's death. We know, of course, that the Longs did not obtain an expert opinion prior to filing their suit, as they claim they did not even have the medical record.

and to file their action before the new laws became in effect, they could have, with an exercise of due diligence, determined whether any malpractice had even taken place, determined the identity of the proper defendants, if any, and avoided all the things they now claim prevented them from timely pursuing their cause of action.

The final threads of the web were woven by all the events which occurred during the "War of the Roses." The Longs actively, vigorously, and rightly, defended their rights to be involved in the wrongful death litigation. However, in so doing, they failed to take action to preserve their claims. Neither the Longs or McKinney requested summons be issued or attempted service of the only Complaint with any legal force and effect. However, neither McKinney nor the Longs did anything during the 120-day period after filing of the Complaint to protect the underlying action. Not one request for additional time to serve was made during the initial 120 day period. It was not the action of others which prohibited Plaintiffs from preserving their claims, but their own actions which resulted in a failure to serve their Complaint and their cause of action dying on the vine.

Furthermore, Plaintiffs cannot invoke the principles of equity when they take inconsistent positions in legal matters. Thomas v. Bailey, 375 So. 2d 1049, 1053-1054 (Miss. 1979) (holding parties who assert a position that inconsistent with a position they asserted in a prior judicial proceedings are subject to judicial estoppel.) In the Long v. McKinney matter, the Longs argued vehemently that they were entitled to participate in the wrongful death action, that they should be joined with McKinney in prosecuting the claim. However, now on appeal, they assert they should be segregated from McKinney, that the actions of all Plaintiffs should be viewed in isolation. That what McKinney knew should not be applied to the Longs. That the suit filed by McKinney should not be viewed as the wrongful death action which asserted all beneficiaries rights. Interestingly, however, McKinney has been present from the time the law suit was filed, through the hearings on

the motions to dismiss. While admitting she and her counsel had the medical records, they argue that Dr. Vaughn's identity was unknown. Such actions do not demonstrate equitable conduct.

If equity is to be invoked in this matter, it must come down on the side of Dr. Vaughn. Dr. Vaughn should not be forced to defend a malpractice action which was filed years after the statute of limitations had passed, of which he had no notice prior to the time of filing said action, and in which the Plaintiffs continue to attempt to circumvent the applicable Rules of Civil Procedure and the laws of this State. If any roadblocks were placed in the way of Plaintiffs in asserting their claims, these roadblocks were of their own making. Had Plaintiffs not acted in haste, rushing to the Courthouse to file their causes of actions, fighting among themselves over control of the litigation, but had conducted a due diligence inquiry in the facts before filing suit, not only could their problems had been avoided, but possibly this whole action. A party with unclean hands is not entitled to equitable relief.

CONCLUSION

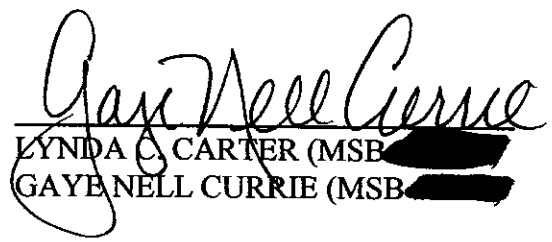
Statutes of limitation not only establish an period in which an action must be brought, but provide a generous time period to allow for Plaintiffs to investigate their claims before filing suit. Herein, the Plaintiffs did not take advantage of the two years available to them within which to conduct a due diligence investigation of their claim. Because Plaintiffs were more interested in hastily filing their Complaints to circumvent newly enacted laws, without even conducting a due diligence investigation of the claim first, and in racing each other to the courthouse in furtherance of what must have been pre-existing sibling rivalry, Plaintiffs neglected to take the necessary steps to perfect their claim within the limitations period. Thus, Plaintiffs' are not hapless victims who suffered at the hands of others, but at their own hand. The trial court did not abuse its discretion in finding that Plaintiffs did not demonstrate good cause when they never even took the time to request

summons be issued. Thus, it properly dismissed the original Complaint. Likewise, it the trial court did not err, but followed the letter of the law, when it dismissed the Amended Complaint as being barred by the statute of limitations. Equity cannot salvage Plaintiffs' claim. If anything, equity demands that the lower court's rulings be upheld on appeal.

Dated this the 6th day of April, 2007.

Respectfully submitted,

THOMAS VAUGHN, M.D.

BY: 

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CERTIFICATE OF SERVICE

I, GAYE NELL CURRIE, one of the attorneys, 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:

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