

IN THE SUPREME COURT OF MISSISSIPPI

CASE NO: 2006-TS-00875

DOUGLAS LONG , ET AL

APPELLANTS

VERSUS

MEMORIAL HOSPITAL AT GULFPORT
AND THOMAS VAUGHN, M.D.

APPELLEES

**MEMORIAL HOSPITAL AT GULFPORT's
APPELLEE's BRIEF**

Appeal from the
Circuit Court of Harrison County, Mississippi
First Judicial District

Patricia K. Simpson (REDACTED)
FRANKE & SALLOUM, PLLC
Post Office Box 460
Gulfport, MS 39502
Telephone: 228.868.7070
Facsimile: 228.868.7090

IN THE SUPREME COURT OF MISSISSIPPI

DOUGLAS LONG, ET AL.

APPELLANTS

VERSUS

CAUSE NO: 2006-CA-00875

MEMORIAL HOSPITAL AT GULFPORT
AND THOMAS VAUGHN, MD

APPELLEES

CERTIFICATE OF INTERESTED PERSONS

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 the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Douglas Long, Appellant
2. Lori McKinney, 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, Attorney for Appellants


13. Memorial Hospital at Gulfport, Appellee
14. Patricia K. Simpson, Attorney for Appellee Memorial Hospital At Gulfport
15. Thomas Vaughn, M.D.. Appellee
16. Lynda C. Carter, Attorney for Appellee Thomas Vaughn, M.D.
17. Nicole Huffman, Attorney for Appellee Thomas Vaughn, M.D.
18. Honorable Jerry O. Terry, Circuit Judge, Harrison County

Respectfully submitted,

MEMORIAL HOSPITAL AT GULFPORT

FRANKE & SALLOUM, PLLC

BY: _____

PATRICIA K. SIMPSON, 

FRANKE & SALLOUM, PLLC
2605 Fourteenth Street
Post Office Drawer 460
Gulfport, MS 39501
Tel: (228) 868-7070
Fax: (228) 868-7090

IN THE SUPREME COURT OF MISSISSIPPI

DOUGLAS LONG. ET AL.

APPELLANTS

VERSUS

CAUSE NO: 2006-CA-00875

MEMORIAL HOSPITAL AT GULFPORT
AND THOMAS VAUGHN, MD

APPELLEES

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF CONTENTS	iii
TABLE OF CASES, STATUTES AND OTHER AUTHORITIES	iv
STATEMENT OF ISSUES	vi
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	2
SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
The Circuit Court Correctly Dismissed the Complaint Against Mhg Pursuant to Rule 4(h)	4
The Statute of Limitations Has Run as to MHG	13
The Doctrine of Equitable Estoppel Does Not Apply	14
CONCLUSION	15

IN THE SUPREME COURT OF MISSISSIPPI

DOUGLAS LONG. ET AL.

APPELLANTS

VERSUS

CAUSE NO: 2006-CA-00875

MEMORIAL HOSPITAL AT GULFPORT
AND THOMAS VAUGHN, MD

APPELLEES

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

I. FEDERAL CASES

Healthcare Compare Corp. v. Super Solutions Corp., 151 F.R.D. 114 (D.Minn. 1993) 6

II. STATE CASES

Bacou-Dalloz Safety Inc. v. Hall, 938 So. 2d 820, 823 (Miss. 2006) 5, 8

Bang v. Pittman, 749 So. 2d 47, 52 (Miss. 1999) 8

Gale v. Thomas, 759 So. 2d 1150 (Miss. 1999) 12

Harrison Enters., Inc. v. Trilogy Commc'ns, Inc., 818 So. 2d 1088, 1095 (Miss. 2002) 14

Heard v. Remy, 937 So.2d 939 (Miss. 2006) 8, 9

Holmes v. Coast Transit Authority, 815 So. 2d 1183, 1185 (Miss. 2002) 6, 7, 13

In Re Holtzman, 823 So. 2d 1180, 1183 (Miss. 2002) 8

Montgomery v. Smithkline Beecham Corp., 910 So. 2d 541 (Miss. 2005) 8

Moore ex. rel. Moore v. Boyd, 799 So. 2d 133 (Miss. Ct. App. 2001) 7

Perry v. Andy, 858 So. 2d 143, 146 (Miss. 2003) 7, 8

South Central Regional Medical Center v. Guffy, 930 So. 2d 1252, 1259 (Miss. 2006) 12

Triple C Transp. Inc. v. Dickens, 870 So. 2d 1195, 1200-01 (Miss. 2004) 5

University of Mississippi Medical Center v. Easterling, 928 So. 2d 815, 818 (Miss. 2006) ... 3, 12, 13

III. STATE STATUTES

<i>Miss. Code Ann.</i> § 11-46-11(1)	3, 4, 11-16
<i>Miss. Code Ann.</i> § 11-46-11(2)	13
<i>Miss. Code Ann.</i> § 11-46-11(3)	4, 13, 14
<i>Miss. Code Ann.</i> § 11-46-11(3)	11

IV. FEDERAL RULES

<i>F.R.C.P.</i> 4(j)	7
----------------------------	---

V. STATE RULES

<i>M.R.C.P.</i> 4(h)	2, 6, 7
<i>M.R.C.P.</i> 12(h)(3)	12

IN THE SUPREME COURT OF MISSISSIPPI

DOUGLAS LONG. ET AL.

APPELLANTS

VERSUS

CAUSE NO: 2006-CA-00875

MEMORIAL HOSPITAL AT GULFPORT
AND THOMAS VAUGHN, MD

APPELLEES

STATEMENT OF ISSUES

1. The circuit court correctly dismissed the Complaint against MHG pursuant to Rule 4(h).
2. The trial court does not have subject matter jurisdiction over MHG.
3. The statute of limitations has run as to MHG.
4. The doctrine of equitable estoppel does not apply.

STATEMENT OF THE CASE

The initial Complaint was filed against Memorial Hospital at Gulfport (MHG) and John Does 1-5 by Lori McKinney on behalf of all wrongful death beneficiaries of Huey Long on October 17, 2002. *R. 37* A second Complaint was filed against John Doe Defendants by Douglas Long on October 18, 2002. *R. 162, 215* No summons on either Complaint was requested or issued. *R. 4, 70-71, 75-77* Apparently, a dispute broke out between the parties. Although MHG was not involved in the prior proceedings, the docket sheet indicates that a Motion to Consolidate the causes of action was filed by Long on December 2, 2002. *R. 4* A response was filed by McKinney and the matter was heard by the trial court. *R. 4* A motion to reconsider was filed and heard. *R. 4* The trial court entered an order of clarification on February 6, 2003. *R. 4* A second motion to reconsider was filed and granted by the trial court on March 24, 2003. *R. 5* Certification for interlocutory appeal was denied by the trial court on April 17, 2003. This Court entered its order granting the petition for interlocutory appeal on August 22, 2003.

The mandate was issued by this Court on April 14, 2005. *R. 10* MHG was served with the complaint on June 6, 2005. MHG filed a motion for additional time to respond on July 7, 2005 and an order granting the time was entered on July 7, 2005. *R. 16, 19* An amended complaint was filed on July 26, 2005. MHG filed its Motion to Dismiss on August 4, 2005 and filed its Answer on August 8, 2005. *R. 34, 49* A hearing was held on MHG's motion and the trial court entered its order dismissing the complaint on January 9, 2006.

STATEMENT OF FACTS

MHG is a community hospital subject to the Mississippi Tort Claims Act (MTCA). *R. 37, 49* The decedent, Huey Long, was admitted as a patient to MHG on October 1, 2002. *R. 39* On October 5, 2002, he underwent surgery. *R. 39* The Plaintiffs allege that the decedent suffered a punctured jugular vein during the surgical procedure which caused him injury and resulted in his death on October 8, 2002. *R. 39* Suit was filed against MHG on October 17, 2002. *R. 37* The lawsuit only named MHG as a defendant. *R. 37* No summons was issued for MHG until June 3, 2005. *R. 6* No attempt to serve MHG was made during the 120 day period after filing the initial complaint. *R. 4, 6* No motion for extension of time to serve MHG was ever requested or filed by the Longs. *R. 4-9* The Longs failed to comply with the notice provisions of the MTCA. *Appellant's Brief, p. 20* No notice of claim was sent to MHG prior to the filing of the Complaint on October 17, 2002.

The Longs petitioned for an interlocutory appeal which was granted by this Court on August 22, 2003. *R. 5* At no time prior to the petition being granted was the trial court advised that the complaint had not been served on MHG.

SUMMARY OF THE ARGUMENT

The trial court did not err when it dismissed the Complaint against MHG pursuant to Rule 4(h) of the M.R.C.P.. The Longs did not attempt to serve MHG during the 120 day service period. It is long standing law that in order to establish good cause for the failure to serve a summons and complaint on a defendant within 120 days of filing the complaint, the plaintiffs must demonstrate at least as much as would be required to show excusable neglect, as to which simple inadvertence

or mistake of counsel or ignorance of the rules usually does not suffice. Good cause can never be demonstrated where the plaintiff has not been diligent in attempting to serve process. No explanation has been provided as to why the Longs failed to attempt service on MHG during the 120 day period. No explanation was provided as to why the Longs failed to request an extension of time to obtain service of process. The trial court was correct in dismissing the complaint against MHG.

The trial court lacks subject matter jurisdiction over MHG in this case as the result of the Plaintiffs' failure to comply with the Mississippi Tort Claims Act ("MTCA"). The Longs agree that the mandates of the Tort Claims Act were not followed. *See Appellant's Brief, p. 20* As indicated in the footnote in the Longs brief, McKinney sent a notice of claim to MHG after filing the initial complaint. *See Appellant's Brief, p. 20* Pursuant to *Miss. Code Ann. § 11-46-11(1)*, a party *shall* file a notice of claim with the chief executive officer of the governmental entity ninety days prior to maintaining an action thereon. *Miss. Code Ann. § 11-46-11(1)*. Pursuant to *Miss. Code Ann. § 11-46-11(1)*, a plaintiff is required to wait ninety days after giving notice before filing suit. The Mississippi Supreme Court has ruled that the failure to wait ninety days after giving notice to file a lawsuit is grounds for summary judgment. *University of Mississippi Medical Center v. Easterling*, 928 So. 2d 815, 818 (Miss. 2006) Applying the mandates of *Easterling*, this case must be dismissed as the trial court did not have subject matter jurisdiction over MHG. Taken on its face, the notice of claim purportedly submitted by McKinney in this case this does not comply with the notice requirements of the MTCA.

It is long standing precedent that a plaintiff who does not serve the defendant within the 120-day period must either refile the complaint before the statute of limitations ends or show good cause for failing to serve process on the defendant within that 120 day period; otherwise dismissal is proper. Pursuant to *Miss. Code Ann. § 11-46-11(3)*, all actions under the MTCA must be commenced within one year next after the date of the tortious action. *Miss. Code Ann. § 11-46-11(3)* also provides that the statute of limitations may be tolled for an additional period of time if a claimant provides notice in compliance with *Miss. Code Ann. § 11-46-11(1)& (2)*. Once the claimant has complied with those requirements, the statute of limitations will be tolled as provided in *Miss. Code Ann. § 11-46-11(3)*. It is undisputed that those requirements were not complied with in this case, thus, the statute of limitations was not tolled.

The doctrine of equitable estoppel does not apply in this case. There is no allegation or evidence that MHG or Dr. Vaughn induced the Longs into delaying the filing of the complaint in this case. In fact, the complaint was filed very quickly after the death of Huey Long. Equitable estoppel did not toll the statute of limitations in this case.

ARGUMENT

The circuit court correctly dismissed the Complaint against MHG pursuant to Rule 4(h)

It is undisputed that MHG was not served with the Complaint within 120 days of the Complaint being filed. Rule 4(h) of the Mississippi Rules of Civil Procedure provides as follows:

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.

MRCP 4(h) (emphasis added)

It is long standing law that in order to establish good cause for the failure to serve a summons and complaint on a defendant within 120 days of filing the complaint, the plaintiffs must demonstrate at least as much as would be required to show excusable neglect, as to which simple inadvertence or mistake of counsel or ignorance of the rules usually does not suffice. *Bacou-Dalloz Safety Inc. v. Hall*, 938 So. 2d 820, 823 (Miss. 2006) In *Bacou-Dalloz*, the Mississippi Supreme Court reversed and rendered the trial court's denial of Bacou-Dalloz's motion to dismiss for failure to serve it within 120 days of filing the complaint. Hall attempted to serve Bacou-Dalloz with service through CT Corporation. *Id. at 821* CT Corporation returned the documents and informed Hall's counsel that it was not the registered agent for Bacou-Dalloz. *Id.* Hall made no other attempt to serve Bacou-Dalloz with the original complaint. Four hundred and ninety-nine (499) days after the expiration of the 120 day service period, Hall served Bacou-Dalloz with the Second Amended Complaint. *Id.* Noting that the plaintiff provided no reason why the defendant was not served after the initial attempt, the Court reiterated the requirement that when service is not made within 120 days after the filing of the complaint, a plaintiff must show good cause why process was not served within that period or dismissal of the suit is required. *Bacou-Dalloz Safety Inc. v. Hall*, 938 So. 2d 820, 823 (Miss. 2006) citing *MRCP 4(h)*; *Triple C Transp. Inc. v. Dickens*, 870 So. 2d 1195, 1200-01 (Miss. 2004) and *Holmes v. Coast Transit Authority*, 815 So. 2d 1183, 1185 (Miss. 2002) The Mississippi Supreme Court ruled that "[p]laintiffs' inaction, without adequate explanation, shows

a lack of good cause far beyond excusable neglect.” *Id.* The Court then reversed the trial court’s decision and rendered.

“A plaintiff who does not serve the defendant within the 120-day period must either refile the complaint before the statute of limitations ends or show good cause for failing to serve process on the defendant within that 120 day period; otherwise dismissal is proper.” *Holmes v. Coast Transit Authority*, 815 So. 2d 1183, 1185 (Miss. 2002) In *Holmes*, the plaintiff gave his notice of claim to the transit authority, a political subdivision, 53 days before the expiration of the statute of limitations. *Holmes v. Coast Transit Authority*, 815 So. 2d 1183, 1184 (Miss. 2002) He then timely filed his complaint before the expiration of the statute of limitations. He did not serve the transit authority until 150 days had passed. *Holmes v. Coast Transit Authority*, 815 So. 2d at 1184 After the complaint was filed, but prior to its service upon the transit authority, Holmes and the transit authority engaged in settlement negotiations. In fact, Holmes rejected the transit authority’s final offer of settlement two days before the complaint was served. *Id.*

The Supreme Court upheld the trial court’s dismissal of the complaint finding that good faith settlement negotiations do not constitute good cause for failure to effect timely service of process under M.R.C.P. 4(h). *Holmes v. Coast Transit Authority*, 815 So. 2d 1183, 1186-87 (Miss. 2002) Adopting the reasoning in *Healthcare Compare Corp. v. Super Solutions Corp.*, 151 F.R.D. 114 (D.Minn. 1993) discussing F.R.C.P. 4(j), the equivalent to M.R.C.P. 4(h), the Court reasoned that there is no reason why, if parties are engaged in good faith negotiations, service of process cannot be timely had. *Holmes v. Coast Transit Authority*, 815 So. 2d 1183, 1187 (Miss. 2002) This

is particularly true since timely service of process merely protects the plaintiff's right to litigate and would not call a halt to negotiations. *Id.*

This Court has held that M.R.C.P. Rule 4(h) demands strict compliance, both from parties represented by counsel and those proceeding *pro se*. See *Perry v. Andy*, 858 So. 2d 143, 146 (Miss. 2003) Rule 4(h) is intended to require plaintiffs to timely submit their claims to a court for appropriate judicial review. *Holmes v. Coast Transit Authority*, 815 So. 2d 1183, 1187 (Miss. 2002) Exceptions to this requirement are only permitted upon a showing of good cause or excusable neglect. *Moore ex. rel. Moore v. Boyd*, 799 So. 2d 133 (Miss. Ct. App. 2001) Specifically, this Court has articulated standards as to what constitutes "good cause" as required by Rule 4(h):

[G]ood cause is likely (but not always) to be found when the plaintiff's failure to complete service in timely fashion is a result of the conduct of a third person, typically the process server, the defendant has evaded process or engaged in misleading conduct, the plaintiff has acted diligently in trying to effect service or there are understandable mitigating circumstances or the plaintiff is proceeding *pro se* or in forma pauperis.

Perry v. Andy, 858 So. 2d 143, 146 (Miss. 2003)

The Longs contend that the trial court was "operating under a misconception of the law" when it ruled that good cause could not be demonstrated where the Plaintiff fails to attempt service on the Defendant within the 120 days of filing the complaint. See *Appellant's Brief*, p.16 This Court has mandated that "good cause can ***never be demonstrated*** where the plaintiff has not been diligent in attempting to serve process." *Montgomery v. Smithkline Beecham Corp.*, 910 So. 2d 541

(Miss. 2005) citing *Bang v. Pittman*, 749 So. 2d 47, 52 (Miss. 1999) In the current case, no attempt to serve MHG was made within the 120 day period. It is undisputed no summons was requested or issued during that time period. MHG contends that, as a matter of law, good cause cannot be shown where no attempt to serve was made.

The Plaintiff bears the burden of showing good cause. To establish good cause, the plaintiff must demonstrate “at least as much as would be required to show excusable neglect, as to which simple inadvertence or mistake of counsel or ignorance of the rules usually does not suffice.” *In Re Holtzman*, 823 So. 2d 1180, 1183 (Miss. 2002) The fact that dismissal may work to preclude the action because of the running of the statute of limitation is of no consequence. *Id.* A plaintiff must be **diligent in serving process** if he is to show good cause in failing to serve process within 120 days. *In Re Holtzman*, 823 So. 2d 1180, 1184 (Miss. 2002) The Mississippi Supreme Court has ruled that allegations that defendants avoid service of process, cannot be located or were unknown until discovery may qualify as good cause. *Id.* The Court has held that “the excusable neglect standard is a very strict standard”. *Perry v. Andy*, 858 So. 2d 143, 147 (Miss. 2003)

This case presents the identical issues as presented in *Bacou-Dalloz Safety Inc. v. Hall*, 938 So. 2d 820, 823 (Miss. 2006) and *Heard v. Remy*, 937 So.2d 939 (Miss. 2006). It is undisputed that no attempt to serve MHG was made during the initial 120-day period following the filing of the complaint. More importantly, no adequate explanation as to why service wasn’t attempted has been provided by the Longs. In *Remy*, the Court mandated that a failure to attempt service for four months without adequate explanation shows a lack of diligence beyond excusable neglect. *Heard*

v. *Remy*, 937 So.2d 939, 944 (Miss. 2006) Heard's complaint was dismissed by the trial court after he found that good cause did not exist for Heard's failure to serve Remy within 120 days. *Id.*

In *Remy*, Heard failed to obtain service on Remy within the 120-day period following the filing of the complaint. *Heard v. Remy*, 937 So.2d 939, 940-941 (Miss. 2006) Approximately twenty days after the expiration of the 120-day period for service of process, Heard filed a motion for extension of time within which to serve process on Remy. *Id. at 940* The trial court granted an extension of 60 days but did not make any findings as to whether Heard had shown good cause for the failure to serve Remy during that time. *Id.* Remy was served during that sixty day time period. *Id.* Remy filed a motion for judgment on the pleadings asserting that the statute of limitations had run prior to Heard's filing of the motion for extension of time to serve. *Id.* After conducting a hearing on the motion, the trial court found that good cause did not exist where no attempt at service was made for four months and such failure to attempt service showed a lack of diligence beyond excusable neglect. *Id. at 943* This Court upheld the trial court's ruling finding that the continuing failure to attempt service during the four month (120 day) period without adequate explanation shows a lack of diligence beyond excusable neglect. *Id.*

The Longs contend that the case procedural history prevented them from attempting service of the Complaint in this case. *See Appellant's Brief, p. 1, 17-20* However, there are several options they could have taken in this case. The Longs could have ascertained whether or not MHG had been served with the initial complaint by simply looking at the court docket. It cannot be overlooked that the Longs initiated the extensive legal battle that ensued by filing a second complaint and then filing a motion to consolidate. The Longs could have notified the trial court

when the motion to consolidate was filed that no Defendant had been served yet. When the request for reconsideration was filed, the issue could have been presented to the trial court. Simply looking at the court docket would allow the Longs to determine if service had been accomplished. Since the February 6, 2003 Order specifically allowed the Longs to participate in the litigation filed by McKinney, the Longs could have filed a motion to extend time to serve MHG or, in fact, could have had a summons issued and served on MHG directly. After the March 24, 2003 Order (which still allowed the Longs to participate in the litigation), they could have filed a motion to alert the trial court that no service on the Defendants had been made yet.

It is undisputed that MHG did not do anything to avoid service of process in this case. It is also undisputed that the Longs and their counsel knew where MHG was located. The Longs have provided no reason for the failure to serve MHG during the 120 day service period. Nowhere in the response to MHG's motion or the transcript of the hearing on MHG's motion do the Longs provide a reason why no summons was issued or served on MHG within the 120 day service period. *See R. 64-69 and Transcript of Hearings, p. 2-17* The Longs simply contend that the procedural history of the case provides good cause for the failure to serve MHG. Since the Longs failed to provide adequate explanation as to why service was not attempted on MHG in this case, the trial court was correct in ruling that good cause did not exist to satisfy Rule 4(h) and the case was properly dismissed.

The trial court does not have subject matter jurisdiction over MHG

It cannot be overlooked that the parties did not comply with the Mississippi Tort Claims Act ("MTCA"). In a footnote in their brief, the Longs agree that the mandates of the Tort Claims Act

were not followed. *See Appellant's Brief, p. 20* Although the Longs contend that they were prohibited by the MTCA from serving a complaint on MHG until the expiration of the 120 day tolling period after McKinney supposedly served a notice of claim upon MHG on or about October 17, 2002, the Longs' interpretation of the statute mandating a 120 day period is inaccurate. *Miss. Code Ann. § 11-46-11(3)* provides that after complying with the notice requirements of Section (1), the statute of limitations will toll for a period of 120 days unless the claimant receives a denial response from the political entity. The notice requirement of *Miss. Code Ann. § 11-46-11(1)* is a separate matter.

MHG agrees with the Longs that the notice requirements of the MTCA were not followed in this case. As stated in their Appellant Brief, McKinney sent a notice of claim to MHG after the initial complaint was filed. *See Appellant's Brief, p. 20* Pursuant to *Miss. Code Ann. § 11-46-11(1)*, a party **shall** file a notice of claim with the chief executive officer of the governmental entity ninety days prior to maintaining an action thereon. Notice is required to be served in person or via certified mail upon the chief executive officer of the governmental entity. *Miss. Code Ann. § 11-46-11(1) & (2)*. MHG acknowledges that this issue was not presented in the motion to dismiss as the ruling in *University of Mississippi Medical Center v. Easterling*, 928 So. 2d 815, 818 (Miss. 2006) had not yet been handed down. However, the issue of subject matter jurisdiction can be raised at any time, even on appeal. *See M.R.C.P. 12(h)(3) and Gale v. Thomas*, 759 So. 2d 1150 (Miss. 1999) The failure of the Longs to comply with the notice requirements of *Miss. Code Ann. § 11-46-11(1) & (2)* is failure to comply with the jurisdictional prerequisites to maintain an action under the MTCA. *University of Mississippi Medical Center v. Easterling*, 928 So. 2d 815, 818 (Miss. 2006)

and *South Central Regional Medical Center v. Guffy*, 930 So. 2d 1252, 1259 (Miss. 2006) This case must be dismissed as against MHG for the Plaintiff's failure to comply with the ninety day notice requirement of the MTCA. Pursuant to *Miss. Code Ann. § 11-46-11(1)*, a plaintiff is required to wait ninety days after giving notice before filing suit. The Mississippi Supreme Court has ruled that the failure to wait ninety days after giving notice to file a lawsuit is grounds for summary judgment. *University of Mississippi Medical Center v. Easterling*, 928 So. 2d 815, 818 (Miss. 2006)

In this case, the Longs acknowledge that the plaintiffs failed to comply with the notice requirements of the MTCA. McKinney sent a notice of claim to MHG after the initial complaint was filed. It is undisputed that McKinney did not wait ninety (90) days after giving notice to file suit against MHG in this matter. Applying the mandates of *Easterling*, this case must be dismissed as the trial court did not have subject matter jurisdiction over MHG.

The Statute of Limitations Has Run as to MHG

It is long standing precedent that a plaintiff who does not serve the defendant within the 120-day period must either refile the complaint before the statute of limitations ends or show good cause for failing to serve process on the defendant within that 120 day period; otherwise dismissal is proper. *Holmes v. Coast Transit Authority*, 815 So. 2d 1183, 1185 (Miss. 2002) In the present case, it is undisputed that the complaint was not served within the 120-day period and that it was not refiled before the statute of limitations ended.

Pursuant to *Miss. Code Ann. § 11-46-11(3)*, all actions under the MTCA must be commenced within one year next after the date of the tortious action. *Miss. Code Ann. § 11-46-11(3)* also provides that the statute of limitations may be tolled for an additional period of time if

a claimant provides notice in compliance with *Miss. Code Ann. § 11-46-11(1)*. A claimant must give the political subdivision a notice of claim ninety-days prior to filing suit. *University of Mississippi Medical Center v. Easterling*, 928 So. 2d 815, 818 (Miss. 2006) The notice of claim must comply with the requirements listed in *Miss. Code Ann. § 11-46-11(2)*. Once the claimant has complied with those requirements, the statute of limitations will be tolled as provided in *Miss. Code Ann. § 11-46-11(3)*.

It is undisputed that the Longs did not comply with *Miss. Code Ann. § 11-46-11(1)* in this case. In a footnote in their brief, the Longs agree that the mandates of the Tort Claims Act were not followed. *See Appellant's Brief*, p. 20 Since there was no compliance with the MTCA, the tolling provisions of *Miss. Code Ann. § 11-46-11(3)* are inapplicable. The decedent, Huey Long, died on October 8, 2002. Pursuant to the MTCA, the Longs were required to provide a notice of claim in compliance with *Miss. Code Ann. § 11-46-11(1) & (2)* prior to October 8, 2003 and then wait ninety (90) days to file the complaint. By failing to comply with the notice provisions of the MTCA, the statute of limitations continued running and expired on October 8, 2003. It is clear that the Longs did not re-file the complaint or seek an extension to serve the complaint prior to the expiration of the statute of limitations. The Circuit Court was correct in dismissing the complaint against MHG.

The Doctrine of Equitable Estoppel Does Not Apply

The Longs contend that, barring all else, the doctrine of equitable estoppel applies to toll the statute of limitations in this case. They contend that the circumstances of this case were so

extraordinary and beyond their control that equitable estoppel applies to toll the statute of limitations.

In order for equitable estoppel to apply, three conditions must be met. *See Harrison Enters., Inc. v. Trilogy Commc'ns, Inc.*, 818 So. 2d 1088, 1095 (Miss. 2002) First, one party induced by another to delay filing a complaint. Second, the delay must result in the running of the statute of limitations. Third, the other party knew or should have known that such consequences would follow. *Harrison Enters., Inc. v. Trilogy Commc'ns, Inc.*, 818 So. 2d 1088, 1095 (Miss. 2002) None of these conditions apply in this case. There has been no allegation and no evidence produced that the Longs were induced to delay filing a complaint by MHG or Dr. Vaughn in this case. In fact, the complaint was filed very quickly after the death of Huey Long. Without a party being induced to delay filing a complaint, the doctrine of equitable estoppel cannot apply.

CONCLUSION

It is undisputed that MHG was not served with the Complaint within 120 days of the Complaint being filed. It is also undisputed no summons was requested or issued during that time period. The Longs simply contend that the "procedural history" of the case prevented them from serving MHG. The arguments presented by the Longs overlook the fact that McKinney had individual counsel in this case. There has been no explanation as to why McKinney's or the Longs' counsel did not serve MHG with process during the 120 day period or at any time prior to the granting of the petition for interlocutory appeal. There is also no explanation as to why no summons was issued as to MHG until June 3, 2005. Rule 4(h) provides that the complaint must be dismissed if the Plaintiff cannot demonstrate good cause for failing to serve the

defendant within 120 days. Rule 4(h) demands strict compliance and the Longs failed to show good cause in this case. The dismissal by the trial court was proper.

It cannot be overlooked that the appellants did not comply with the Mississippi Tort Claims Act ("MTCA"). The failure of the Longs to comply with the notice requirements of *Miss. Code Ann. § 11-46-11(1) & (2)* is failure to comply with the jurisdictional prerequisites to maintain an action under the MTCA. Pursuant to *Miss. Code Ann. § 11-46-11(1)*, a plaintiff is required to wait ninety days after giving notice before filing suit. It is undisputed that the appellants did not wait ninety (90) days after giving notice to file suit against MHG in this matter. Applying the mandates of *Easterling*, this case must be dismissed as the trial court did not have subject matter jurisdiction over MHG.

It is long standing precedent that a plaintiff who does not serve the defendant within the 120-day period must either refile the complaint before the statute of limitations ends or show good cause for failing to serve process on the defendant within that 120 day period; otherwise dismissal is proper. In the present case, it is undisputed that the complaint was not served within the 120-day period and that it was not refiled before the statute of limitations ended. Pursuant to the MTCA, the Longs were required to provide a notice of claim in compliance with *Miss. Code Ann. § 11-46-11(1) & (2)* prior to October 8, 2003 and then wait ninety (90) days to file the complaint. By failing to comply with the notice provisions of the MTCA, the statute of limitations continued running and expired on October 8, 2003.

The doctrine of equitable estoppel does not apply in this case. None of the requirements of the doctrine are found in this case. There has been no allegation and no evidence produced

defendant within 120 days. Rule 4(h) demands strict compliance and the Longs failed to show good cause in this case. The dismissal by the trial court was proper.

It cannot be overlooked that the appellants did not comply with the Mississippi Tort Claims Act ("MTCA"). The failure of the Longs to comply with the notice requirements of *Miss. Code Ann. § 11-46-11(1) & (2)* is failure to comply with the jurisdictional prerequisites to maintain an action under the MTCA. Pursuant to *Miss. Code Ann. § 11-46-11(1)*, a plaintiff is required to wait ninety days after giving notice before filing suit. It is undisputed that the appellants did not wait ninety (90) days after giving notice to file suit against MHG in this matter. Applying the mandates of *Easterling*, this case must be dismissed as the trial court did not have subject matter jurisdiction over MHG.

It is long standing precedent that a plaintiff who does not serve the defendant within the 120-day period must either refile the complaint before the statute of limitations ends or show good cause for failing to serve process on the defendant within that 120 day period; otherwise dismissal is proper. In the present case, it is undisputed that the complaint was not served within the 120-day period and that it was not refiled before the statute of limitations ended. Pursuant to the MTCA, the Longs were required to provide a notice of claim in compliance with *Miss. Code Ann. § 11-46-11(1) & (2)* prior to October 8, 2003 and then wait ninety (90) days to file the complaint. By failing to comply with the notice provisions of the MTCA, the statute of limitations continued running and expired on October 8, 2003.

The doctrine of equitable estoppel does not apply in this case. None of the requirements of the doctrine are found in this case. There has been no allegation and no evidence produced

that the Longs were induced to delay filing a complaint by MHG or Dr. Vaughn in this case. Without a party being induced to delay filing a complaint, the doctrine of equitable estoppel cannot apply.

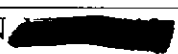
MHG requests that this Court affirm the trial court's dismissal of the complaint against it in this case.

Respectfully submitted,

MEMORIAL HOSPITAL AT GULFPORT

FRANKE & SALLOUM PLLC

BY: 

PATRICIA K. SIMPSON 

FRANKE & SALLOUM, PLLC
2605 Fourteenth Street
Post Office Drawer 460
Gulfport, MS 39501
Tel: (228) 868-7070
Fax: (228) 868-7090

CERTIFICATE OF SERVICE


I, the undersigned, do hereby certify that I have this day served, via certified mail and United States Mail, postage prepaid, a true and correct copy of the above Memorial Hospital at Gulfport's Appellee's Brief to the following:

William B. Weatherly, Esq.
Merlin Law Group
Post Office Box 4077
Gulfport, MS 39502

Lynda Carter, Esq.
Wise, Carter, Child & Caraway
154 Porter Ave.
Biloxi, MS 39530

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

So certified this the 5th day of April 2007.



PATRICIA K. SIMPSON

FRANKE & SALLOUM, PLLC
2605 Fourteenth Street
Post Office Drawer 460
Gulfport, MS 39501
Tel: (228) 868-7070
Fax: (228) 868-7090