

COPY

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

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

Appellants

VERSUS

MEMORIAL HOSPITAL AT GULFPORT and THOMAS VAUGHAN, M.D.
AND JOHN DOES 2-5

Appellees

BRIEF OF APPELLANTS

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Appellants

v.

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

Appellees

Appeal from the Circuit Court of Harrison County, Mississippi

Brief for Appellant

OF COUNSEL:

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

Appellees

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following 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. Nicole Huffman, Counsel for Appellee Vaughan
15. Lynda C. Carter, Counsel for Appellee Vaughan
16. Thomas Vaughan, M.D., Appellee
17. Memorial Hospital at Gulfport, Appellee
18. Honorable Jerry O. Terry, Circuit Judge Harrison County

A handwritten signature in black ink, appearing to read "William B. Weatherly", is written over a horizontal line.

William B. Weatherly

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STATEMENT OF THE ISSUES

1. Whether the Circuit Court erred in its January 9 and February 17, 2006 orders granting MHG's motion to dismiss the Hopkins Complaint¹ under M.R.C.P. 4(h).
 - a. Whether the Circuit Court erred in finding as a matter of law that no other circumstances could ever be considered in showing good cause or excusable neglect under M.R.C.P. 4(h) where no attempt had been made to serve process within the initial 120 days.
 - b. Whether this case's procedural history prevented the Long Plaintiffs² from attempting service of the Hopkins Complaint on MHG within 120 days of its initial filing showing good cause to avoid dismissal of the claims against MHG under M.R.C.P. 4(h).
 - c. Whether a M.R.C.P. 4(h) dismissal of claims against the only initially named defendant also dismisses claims against a fictitious defendant who is named in an amended complaint and served prior to the dismissal.
2. Whether the Circuit Court erred in dismissing the claims against Dr. Vaughan.
 - a. Whether the Longs were prohibited by law and/or court orders from commencing or prosecuting their claims against Dr. Vaughan during much or all of the time prior to April 14, 2005.
 - b. Whether the Circuit Court erred in ruling the statute of limitations tolling language

¹The complaint the Hopkins firm filed October 17, 2002 for Lori McKinney is referred to as the Hopkins Complaint.

²Douglas Long, Richard Long, Earl Long, Joyce Long, Crystal Long, Edward Long, Jr., Christopher Long, John Colby Long, Teri Long Scarborough, and Corey Long will be referred to as the Long Plaintiffs or the Longs.

of the Mississippi Supreme Court's August 22, 2003 order was surplusage beyond that Court's power which could not toll the running of the statute of limitations against Vaughan or MHG.

- c. Whether the failure to serve the initially named defendant within 120 days of filing a complaint prevents a later amendment substituting an identified defendant for a fictitious defendant from relating back to the date of the original filing of the complaint.
3. Whether equitable principles such as equitable tolling apply to preserve the Longs' claims against MHG and/or Dr. Vaughan in light of the procedural history and the reasoning of *Long v. McKinney*, 897 So. 2d 160 (Miss. 2004).

STATEMENT OF THE CASE

This is the second appeal involving the Huey P. Long wrongful death claims. The first dealt with two complaints filed one day apart by McKinney (the Hopkins Complaint) and the Long Plaintiffs (the Weatherly Complaint³); the attempt to consolidate the two; and the rights of wrongful death beneficiaries and their counsel to participate in the "one suit" permitted by the statute. This appeal concerns the proceedings and orders following the *Long v. McKinney*, 897 So. 2d 160 (Miss. 2004) decision reversing the Circuit Court's refusal to allow the Long Plaintiffs and their counsel to participate in litigating the suit declared to be the one action permitted by the statute.

Following the *Long v. McKinney*, 897 So. 2d 160 (Miss. 2004) decision allowing them to participate fully in the Hopkins action, Weatherly entered a formal appearance for the Longs in

³The complaint William Weatherly filed October 18, 2002 on behalf of the Long Plaintiffs is referred to as the Weatherly Complaint as the Circuit Court did.

that action. (R. 11) The Hopkins firm withdrew and Lori McKinney continued on pro se. (R. 13-15). After the Hopkins firm withdrew, McKinney finally allowed Weatherly and the Longs access to Huey P. Long's medical records. (R. 185-186, 189-195) Weatherly then had a summons issued for and served on MHG, the only initially named defendant on the Hopkins Complaint. (R. 47-48) After learning through the medical records that Dr. Thomas Vaughan was the anaesthesiologist in Huey P. Long's surgery, Weatherly filed an amended complaint on July 26, 2005 substituting Vaughan for one of the Hopkins Complaint John Doe physician defendants. (R. 21-33)

MHG moved to dismiss on August 4, 2005 alleging failure to serve process within 120 days under M.R.C.P. 4(h). (R. 34-36) On August 8, 2005, MHG answered raising Tort Claims Act notice and statute of limitations defenses and failure of service under M.R.C.P. 4(h). (R. 49-58) The Circuit Court granted MHG's motion on January 9, 2006, denying reconsideration on February 17, 2006⁴. (R. 70-73)

Vaughan was served with the amended complaint on January 5, 2006 after Weatherly, on behalf of the Longs, was granted an extension. Vaughan filed his own motion to dismiss and an answer on February 7, 2006. (R. 89-107, 133) His motion to dismiss was based on the theory that when the Circuit Court dismissed the Hopkins Complaint claims against MHG, the entire Hopkins Complaint died rendering the amendment naming him a nullity. In his supporting memorandum, he also raised statute of limitations defenses, arguing the claims against him did not relate back to the original filing of the Hopkins Complaint. (R. 116-127) On April 28, 2006,

⁴In the February 17, 2006 order, the Circuit Court erroneously refers to the motion for reconsideration as being filed by Lori McKinney. The motion for reconsideration was clearly filed for the Longs by Weatherly who had no authority to represent or act for McKinney and is based in substantial part on the actions of the Hopkins firm who formerly represented McKinney. (R. 74-81, 134)

the Circuit Court granted his motion, finding the statute of limitations expired on claims against Vaughan no later than February 3, 2005. (R. 214-218)

On May 16, 2006, Weatherly filed a notice of appeal on behalf of the Long Plaintiffs appealing the January 9, February 17, and April 28, 2006 orders of the Circuit Court dismissing the claims against MHG and Vaughan. (R. 219-220)

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Huey P. Long died October 8, 2002 after surgery on October 5, 2002 at MHG. He was survived by a daughter, Lori McKinney; three sons, Douglas Long, Richard Long, and Earl Long; Joyce Long, Crystal Long, Edward Long, Jr., and Christopher Long (heirs of another son, Edward Long); and John Colby Long and Corey Long, (heirs of a fifth son, David Long). (R. at 214-215)

McKinney and the Longs both immediately hired counsel to pursue a wrongful death action. McKinney hired the Hopkins firm who opened an estate and filed the Hopkins Complaint on October 17, 2002 naming MHG and five John Doe Defendants, including the surgeon and the anesthesiologist. (R. at 37-38, 214-215) McKinney, represented by Albin Hopkins, realizing MHG could be a community hospital covered by the Tort Claims Act, sent a notice of claim to MHG which was received on October 17, 2002. The next day, October 18, 2002, the Weatherly Complaint was filed naming only John Doe Defendants as they did not have access to the medical records to identify potential defendants and could not sue MHG yet because the Tort Claims Act waiting period had not yet passed. (R. at 65, 67, 77, 161, 184) Neither McKinney nor the Long Plaintiffs requested the issuance of any summons at the time the complaints were filed. (R. 215)

From the beginning, the Hopkins firm opposed any participation by the Longs or their attorney in any wrongful death suit. Both the Hopkins firm and MHG opposed all of Weatherly's

attempts to obtain Huey P. Long's medical records. (R. at 184-185) On November 21, 2002, a subpoena was served on MHG. Less than two weeks later, on December 2, 2002, MHG filed a motion to quash listing itself as a defendant in the caption, clearly indicating it had knowledge it was a named defendant in a Huey P. Long wrongful death case. (R. at 65-67)

Around the same time, Weatherly filed a motion for the Long Plaintiffs to consolidate the Hopkins and Weatherly complaints. The Hopkins firm filed a motion for McKinney seeking dismissal of the Weatherly Complaint. (R. at 65, 76) On December 19, 2002, the Circuit Court denied the Long motion to consolidate, granted the McKinney motion to dismiss the Weatherly Complaint, and ruled McKinney and her counsel had the right to control the wrongful death litigation. (R. at 161-163)

The Long Plaintiffs moved for reconsideration of the December 19, 2002 order. On reconsideration, on February 6, 2003, the Circuit Court amended its December 19, 2002 order ruling that the Longs should be allowed to join the Hopkins action, that Weatherly should be allowed to be counsel of record for the Long Plaintiffs, that Weatherly was to receive copies of pleadings and notices of hearings and be allowed to attend depositions and retain experts and to subpoena records, but that his participation would be subject to the right of the Hopkins firm and McKinney to control of the litigation. (R. 211-213)

McKinney sought reconsideration of the February 6, 2003 order.⁵ On March 24, 2003, the Circuit Court issued an order finding "its Order of February 6, 2003, should be and is

⁵This motion was described in footnote 7 of *Long v. McKinney*, 897 So. 2d 160 (Miss. 2004) as "Lori, 'on behalf of' the Longs, filing a motion against the Longs, in an attempt to exclude them, against their will, from participation in the litigation wherein she and the Hopkins Firm purport to represent them," saying it was an example of the potential conflicts of interest present in the statute and the difficulty faced by the bench and bar in light of prior refusals of the court to provide clear procedural rules for wrongful death actions.

reconsidered and voided” and “reaffirm[ing] its Order of December 19, 2002 ... recogniz[ing] Hopkins, Barvie & Hopkins, P.L.L.C., as attorney of record in this case” (R. 164-165) The voiding of the February 6, 2003 order and recognition of the Hopkins firm as sole attorney of record in the case in combination with the reaffirmance of dismissal of the Weatherly Complaint effectively prohibited Weatherly and the Long Plaintiffs from doing anything in an action for the wrongful death of Huey P. Long.⁶

Meanwhile the initial 120 day period from the Hopkins Complaint filing passed on February 14, 2003 and the 120 day period on the Weatherly Complaint passed on February 15, 2003. The Weatherly Complaint had been dismissed in December of 2002, before the running of its initial 120 day period and thus could not be served on anyone. (R. 161-163) The Hopkins firm was vigorously opposing any effort by Weatherly or the Longs to participate in any wrongful death action. The Hopkins firm allowed the 120 day period on the Hopkins Complaint to pass with no effort to obtain issuance of a summons against MHG. (R. 215)

When the Circuit Court refused to certify the March 24, 2003 order for interlocutory appeal, Weatherly filed a petition for interlocutory appeal and stay on behalf of the Longs with the Mississippi Supreme Court on April 21, 2003. (R. 159, 215) Weatherly also filed a motion to expedite the appeal based on concerns about the statute of limitations, particularly in regard to the John Doe defendants. On August 22, 2003, the Mississippi Supreme Court granted the petition

⁶The April 28, 2006 order finds the February 6, 2003 order allowed Weatherly to join the Hopkins complaint and participate in preparation and trial of the case. However, it fails to recognize the February 6 order was expressly voided by the March 24, 2003 order with no exception allowing Weatherly or the Longs to do anything in the Hopkins action. (See R. 164 and *Long v. McKinney*, 897 So. 2d 160, ¶¶ 72-73 (Miss. 2004) (interpreting the March 24, 2003 order as concluding that neither the Longs nor Weatherly should be allowed to further participate in the one wrongful death suit permitted by the statute).

and issued an order stating:

the trial court ... dismiss[ed] the suit filed by [the Long Plaintiffs] and denied the motion to consolidate Thereafter, the trial court denied joinder by [the Longs] in the first suit filed by McKinney. ... the panel finds that the petition for interlocutory appeal should be granted. Further, the panel finds that the motion to expedite the appeal should be granted and that the statute of limitations *in this matter* shall be tolled pending the appeal.

(R. at 159-160). In the same order, that Court described the “matter” before it as the wrongful death claims of both McKinney and the Longs, both the Hopkins and the Weatherly suits, the orders on the issues of consolidation and joinder and the motion to expedite the interlocutory appeal because of concerns about statute of limitations issues on the wrongful death claims. The Court then made very clear the wide breadth of its order staying all proceedings below on both the Hopkins Complaint and the Weatherly Complaint pending disposition of the appeal; entering an order for expedited briefing; and ordering “that the statute of limitations in this wrongful death suit is hereby tolled pending the determination of this appeal.” (R. at 159-160)

Despite the expedited briefing schedule, the first appeal decision came December 2, 2004, almost two years after the original circuit court order giving McKinney and the Hopkins firm control of the wrongful death litigation. *Long v. McKinney*, 897 So. 2d 160 (Miss. 2004). With the delays associated with petitions for rehearing and amicus briefs, the mandate lifting the stay and reactivating the Hopkins Complaint in the trial court with the right of Weatherly and the Longs to participate was delayed to April 14 and filed on April 18, 2005. (R. at 10)

It is only at this point that Weatherly and the Longs were allowed to become fully involved in the Hopkins action. (R. 185) On May 26, 2005, Weatherly entered a formal appearance as counsel of record for the Longs. (R. 11) On May 31, 2005, the Hopkins firm filed a motion to withdraw as counsel for McKinney and the wrongful death beneficiaries citing a conflict between the parties which could not be resolved causing withdrawal to be in the best

interest of McKinney. (R. 13) This motion was granted on June 3, 2005 leaving Weatherly as counsel for the Longs on the Hopkins Complaint, controlled up to this point by the Hopkins firm which had not had a summons issued for or served on MHG. (R. 15, 215)

The same day that withdrawal of the Hopkins firm was approved, Weatherly had a summons issued for MHG which was served on June 6, 2005. (R. 47-48) MHG clearly already knew it was a defendant in the action and with the resolution of the procedural conflicts between McKinney, the Hopkins firm and the Longs, it would have to begin its defense. One day before it was served with process, MHG filed a motion for extension of time to file its answer which the Circuit Court granted on July 7, 2005. (R. 16, 19)

When the Hopkins firm withdrew in early June of 2005, Weatherly was finally able to obtain Huey P. Long's medical records from another attorney "advising" and "counseling," but not representing, McKinney after the Hopkins withdrawal. In these records, Weatherly and the Long first learned Dr. Thomas Vaughan's identity as the anaesthesiologist in Huey Long's fatal surgery. (R. 185-186) Shortly thereafter, and prior to MHG actually filing its answer, on July 26, 2005, Weatherly filed an Amended Complaint substituting Vaughan for a John Doe defendant on the Hopkins Complaint. (R. 21-33)

On August 4, 2005, MHG filed a motion asserting the Hopkins action must be dismissed as to MHG under M.R.C.P. 4(h) because it had not been served within 120 days of the filing of the Hopkins Complaint. It asserted the period for service under Rule 4(h) expired on February 14, 2003 because McKinney failed to move for an extension of time prior to the expiration of the initial 120 day period. MHG asserted none of the plaintiffs could not show good cause to avoid dismissal as a matter of law because McKinney had made no effort at all to serve MHG within the initial 120 days. (R. 34-36) MHG filed its answer on August 8, 2005. It raised a number of

defenses including expiration of the statute of limitations, failure to comply with the notice requirements of the Tort Claims Act, and other Tort Claims Act defenses and limitations. (R. 49-57)

Three weeks later, on August 29, 2005, both Weatherly's home and law office were destroyed by Hurricane Katrina, including his Huey P. Long wrongful death case file. Among the records lost was information on his attempts to locate Dr. Vaughan who had moved from the Harrison County area. In November 2005, when Weatherly was first able to recreate part of his file, he realized the 120 day period after filing for service of the amended complaint on Dr. Vaughan was fast approaching. He requested and was granted a 60 day extension on November 23, 2005. On January 5, 2006, the investigator/process server hired to locate Vaughan found him and served the amended complaint. (R. 59-63, 179-181, 186-187)

Meanwhile on September 6, 2005, the Mississippi Supreme Court entered an order on emergency procedures following Hurricane Katrina authorizing Circuit Courts to take action to prevent injustice. The Circuit Court of Harrison County suspended deadlines through October 31, 2005. Neither order extended statutes of limitations. The Harrison County order did extend the deadline for responding to MHG's motion to dismiss. See September 12, 2005 Emergency Administrative General Order of the Judges of the Second Circuit Court District, Harrison, Hancock and Stone Counties (<http://www.mssc.state.ms.us/news/89R99015EMERADMN.pdf>); September 6, 2005 Emergency Administrative Order of Mississippi Supreme Court (<http://www.mssc.state.ms.us/news/KatrinaOrder.pdf>)

On December 8, 2005, Weatherly responded to MHG's motion to dismiss under M.R.C.P. 4(h) arguing the Hopkins Complaint claims against MHG should not be dismissed because the procedural history of this case (including the McKinney/Hopkins opposition to any

participation by Weatherly and the Longs in the wrongful death claims; the Long's October 17, 2002 Tort Claims Act notice to MHG; the dismissal of the Weatherly Complaint less than 120 days after filing; the March 24, 2003 voiding of the February 6, 2003 order allowing him and the Long Plaintiffs to participate in the Hopkins action; the interlocutory appeal and petition for stay; the August 22, 2003 Mississippi Supreme Court order tolling the statute of limitations, the April 14, 2005 mandate allowing Weatherly and the Longs to participate in the Hopkins Complaint and the subsequent events concerning withdrawal of the Hopkins firm) demonstrated good cause for why Weatherly and the Longs had not had a summons issued and served process on MHG prior to the first week of June 2005. (R. 64-68) Despite these arguments, on January 9, 2006, the Circuit Court granted MHG's motion to dismiss on the theory that no attempt had been made by anyone to serve MHG between October 17, 2002 and June 6, 2005 and that absent such an attempt, good cause can never be demonstrated as a matter of law. Despite Weatherly's clear argument that the procedural history provided justification and a reason why the Long Plaintiffs made no attempt to serve MHG within 120 days of filing of either the Hopkins or Weatherly Complaint, the Circuit Court held they provided "no reason why service was not attempted on MHG before the 120 day period ran." (R. at 70-73)

Weatherly filed a motion to reconsider on behalf of the Longs on January 19, 2006 pointing out the Court's failure to consider the effects of case procedural history on justification and good cause for not serving MHG within the initial 120 day period. (R. 74-82) MHG responded on February 1, 2006 arguing M.R.C.P. 4(h) had to be strictly construed and the procedural history relied on by Weatherly and the Longs did not fall within the previous interpretations of good cause and excusable neglect which were the only exceptions allowed by Rule 4(h). (R. 83-88) On February 17, 2006, the Circuit Court refused to reconsider. (R. 134)

Before the motion to reconsider was heard, Vaughan filed a motion to dismiss with his answer on February 7, 2006. He argued the entire original Hopkins Complaint was barred by the statute of limitations because of lack of any attempt to serve MHG within 120 days of initial filing. He claimed the dismissal of the Hopkins Complaint on January 9, 2006 rendered it a nullity from the beginning meaning there was nothing to amend and nothing for the amended complaint to relate back to automatically resulting in the statute of limitations running on the claims against him. He also claimed a lack of diligence in discovering his identity and substituting him for the John Doe anesthesiologist on the basis that his name appeared in Huey P. Long's medical records. Although he filed no motion for summary judgment, he submitted an affidavit and a statement of itemized facts in support of summary judgment. In his supporting memorandum on both a motion to dismiss and for summary judgment, he asked the court to convert the motion to dismiss to a motion for summary judgment if it considered anything outside of what he submitted on his motion to dismiss. (R. 89-107,112-127, 132-133)

The Long Plaintiffs were granted additional time to respond to Vaughan's motions and filed their response on March 10, 2006. They argued the January 9, 2006 order did not dismiss the entire Hopkins Complaint, but only the MHG claims leaving in place the claims against the anesthesiologist on which the statute of limitations had not run because the Mississippi Supreme Court order of August 22, 2003 had tolled the statute of limitations from August 22, 2003 until April 14, 2005. They also argued the effect of the March 24, 2003 order voiding the February 6, 2003 order was to deny them the independent use of subpoena and discovery powers which prevented them from obtaining copies of the medical records and learning the identity of Dr. Vaughan, and that they took prompt action to substitute him for a John Doe defendant as soon as they obtained the medical records. Thereafter, they diligently sought to locate Vaughan in order

to serve him, but their search was initially fruitless because of his move from Harrison County and then was interrupted by Hurricane Katrina. He was timely served within a validly granted extension of the 120 day period that began running upon filing of the amended complaint. (R. 141-195)

On April 28, 2006, the Circuit Court granted Vaughan's motion to dismiss and entered summary judgment dismissing the claims against him as barred by the statute of limitations. Relying on *King v. American RV Centers Inc.*, 862 So.2d 558 (Miss. App. 2003), the Circuit Court held that the failure to serve the named defendant MHG within 120 days of the filing of the Hopkins Complaint legally rendered that complaint comatose and it was pushed into death by the inability to show any effort to serve MHG for more than two years. The Circuit Court then held that in the normal course of events, the two year medical malpractice statute of limitations would have begun to run against Dr. Vaughan on October 8, 2002 (the date of Huey P. Long's death) at the earliest and on October 17, 2002 (the date the Hopkins Complaint was filed) at the latest. No reasoning was given for why the date of the filing of the Hopkins Complaint might be the date that started the statute running against Dr. Vaughan. The Circuit Court held the Mississippi Supreme Court language tolling the statute of limitations in the order granting interlocutory appeal was surplusage beyond the power of that Court as recognized in its emergency order concerning Hurricane Katrina and thus did not interrupt or toll the running of the statute. It held the only tolling occurred on filing the Hopkins Complaint on October 17, 2002 which only lasted for 120 days under M.R.C.P. 4(h). According to the Circuit Court, the statute started ticking again on Vaughan on February 17, 2003 and expired at the latest on February 3, 2005, five months before the amended complaint was filed and almost eleven months before Vaughan was served. The Circuit Court held it had no discretion to allow the action to continue in light of its

earlier finding of neither good cause nor excusable neglect for failure to serve the Hopkins Complaint on anyone within 120 days of its initial filing. (R. 214-218)

SUMMARY OF THE ARGUMENT

Based on the Supreme Court's opinion in *Long v. McKinney*, 897 So. 2d 160 (Miss. 2004), it is clear that the Longs and their attorney were prevented by one statute or another and/or one court order or another from taking the action contemplated by the procedural rules to preserve and prosecute their claims against MHG and Dr. Vaughan for most of the time between Huey P. Long's death and the date of the orders being appealed here. Miss. Code Ann. § 15-1-57 specifically recognizes that both statutes and court orders can prevent a person from taking the necessary action to commence and/or prosecute his action during the normal time for the statute of limitations. It commands that those times not count in determining when a statute of limitations has run against a person. Likewise the language used in the case law applying M.R.C.P. 4(h) recognizes that it is possible for exceptional mitigating circumstances to exist which provide good cause for not attempting to serve a defendant within 120 days of a complaint being filed and allows for the grant of permission to serve outside the 120 day period when such circumstances exist. The circumstances here are so unusual that no case law has addressed anything quite like them. But because of some unfortunate language in a couple of the cases and a misunderstanding that fundamental separation of powers issues distinguish the Katrina emergency administrative court orders from the present case, the learned and experienced trial judge in this case was lead astray once again to apply erroneous legal standards in dismissing the Longs' claims against both Dr. Vaughan and MHG.

ARGUMENT

STANDARD OF REVIEW

To the extent that a trial court's rulings based on M.R.C.P. 4(h) are based on legal principles, appellate review is plenary. Other bases for such rulings are subject to an abuse of discretion standard. *Bennett v. McCaffrey*, 937 So. 2d 11, ¶ 8 (Miss. 2006). In reviewing dismissal of a claim based on the statute of limitations involving issues under M.R.C.P. 4(h) or of relation back under M.R.C.P. 15, the appellate court applies a de novo standard of review. *Ralph Walker, Inc. v. Gallagher*, 926 So. 2d 890, 893-894 (Miss. 2006) Under this standard of review, dismissal will be affirmed only if the moving party can show beyond doubt that there is no set of facts which the opposing party might prove which would result in his claim not being barred. *Id.*

I. THE CIRCUIT COURT ERRED IN DISMISSING THE CLAIMS AGAINST MHG

The January 9 and February 16, 2006 orders granting MHG's motion to dismiss the Longs' claims are based on M.R.C.P. 4(h). Rule 4(h) is also key to the April 28, 2006 order dismissing the Longs' claims against Dr. Vaughan. That rule 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.

A. It is Possible for Circumstances to Exist Which are Capable of Satisfying the Good Cause Standard of M.R.C.P. 4(h) in the Absence of any Attempt to Serve a Defendant Within 120 Days of Initial Filing of a Complaint.

The Circuit Court granted MHG's motion to dismiss on the theory that *Montgomery v. SmithKline Beecham Corp.*, 910 So. 2d 541 (Miss. 2005) and *Bang v. Pittman*, 749 So. 2d 47 (Miss. 1999) create an absolute rule with no exceptions prohibiting any possibility of meeting the

good cause requirement under Rule 4(h) unless the party making the claims against a defendant has made some attempt at serving the defendant within 120 days of the initial filing of the complaint.⁷ What *Montgomery* actually says is:

this Court has stated that, although there is no requirement of a motion for additional time, "the better method to be utilized in future cases would be for plaintiffs counsel to seek authority for extensions from the court, rather than unilaterally making this decision himself." *Fortenberry v. Mem'l. Hosp.*, 676 So. 2d 252, 256 (Miss. 1996). **Ordinarily** under Rule 4(h), where the 120 days has expired, a court must notify⁸ the plaintiff that, because of the failure to serve process, the case is subject to dismissal. The plaintiff must then appear and attempt to show good cause why process was not served within the 120-day period for service. "Good cause" can never be demonstrated where plaintiff has not been diligent in attempting to serve process. *Bang v. Pittman*, 749 So. 2d 47, 52 (Miss. 1999). 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). The referenced portion of *Holmes v. Coast Transit Auth.*, 815 So. 2d 1183 (Miss. 2002) quotes the following language from 4B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1137, at 342 (3d ed. 2000):

good 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 service of the 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. (emphasis added)

The list quoted from Wright and Miller is clearly worded in the disjunctive meaning that the other circumstances listed can be considered and can provide a good cause basis for not granting

⁷The January 9th order states: "As a matter of law, a plaintiff can never demonstrate good cause and diligence where no attempt to serve process was made." R. at 71

⁸The Circuit Court gave no notice to anyone that the case was subject to dismissal between February 14, 2003 and the order of dismissal almost three years later on January 9, 2006.

dismissal even in the absence of actual attempts to serve the defendant.

In *Montgomery*, the words “ordinarily” and “a plaintiff must show that he or she has been unable to serve process or for some other acceptable reason, as discussed in *Holmes*” clearly indicate that there is not an absolute rule that good cause can never be demonstrated absent an attempt to serve the defendant. This language clearly contemplates the possibility of justifiable reasons that are alternatives to actual attempts at service in unusual situations.

It is only in the ordinary Rule 4(h) situations that good cause cannot be demonstrated in the absence of attempts at service. Moreover, the structure of the opinion in *Triple "C" Transp., Inc. v. Dickens*, 870 So. 2d 1195 (Miss. 2004) makes it clear that the categories or ways in which good cause for nonservice can be shown are alternatives to demonstrating good cause by showing diligent attempts to serve. The emphasized language in both *Montgomery* and *Holmes*, as well as the structure of the *Triple "C"* decision, demonstrate the use of the word “never” in the sentence about diligent attempts to serve process is not intended to preclude consideration or acceptance of unusual reasons or circumstances for not attempting to serve process, or the actions of someone other than the defendant preventing attempts at service, as good cause for not dismissing claims against a defendant under Rule 4(h). Furthermore, subsequent to both the *Montgomery* and *Bang* decisions, the Mississippi Supreme Court has cautioned against reading the *Montgomery* and *Bang* decisions too broadly in regard to M.R.C.P. 4(h). See *Cross Creek Prods. v. Scafidi*, 911 So. 2d 958, 960 (Miss. 2005).

Thus, the Circuit Court was operating under a misconception of the law when it stated that as a matter of law the lack of any attempt to serve process on MHG within the initial 120 days of filing the Hopkins Complaint prevented any showing of good cause under Rule 4(h) and based its lack of good cause finding on that erroneous legal standard.

B. The Circuit Court Acted Under Misconceptions of the Law and the Facts in Finding that the Procedural History of the Huey P. Long Wrongful Death Actions Did Not Meet the Long Plaintiffs' Burden of Showing Good Cause for Not Serving MHG Within 120 Days of October 17, 2002.

In its April 28, 2006 order, apparently in an effort to impute the actions or lack of action of McKinney and the Hopkins firm to the Longs and Weatherly, the Circuit Court stated on “February 6, 2003, the trial court did enter an order authorizing Weatherly to join in the “Hopkins complaint” and participate in the preparation and trial of the case.” (R. at 215) In relying on the February 6, 2003 order to show the Longs could have timely served MHG and preserved their claims against both MHG and Vaughan, the Circuit Court either forgot or ignored both its March 24, 2003 order completely voiding the February 6, 2003 order and the Supreme Court’s August 22, 2003 order and *Long v. McKinney* decision. These rulings establish the trial court’s actions, particularly in voiding the February 6, 2003 order, prevented the Longs from joining the Hopkins/McKinney litigation and did not allow the Longs or Weatherly to participate further in the Hopkins/McKinney litigation. (R. 159; 897 So. 2d 160 at ¶ 73) The Supreme Court rulings became binding on the trial court following remand under the mandate rule.⁹ A party cannot ignore a court order simply because he believes the order is improvidently or erroneously granted even if that later turns out to be the case. *Ill. Cent. R.R. Co. v. Winters*, 815 So. 2d 1168, ¶ 32 (Miss. 2002) citing *Masonite Corp. v. International Woodworkers of America*, 206 So. 2d 171, 183 (Miss. 1967) and *Maness v. Meyers*, 419 U.S. 449, 458 (1975). Thus, the Longs and Weatherly could not ignore the March 24, 2003 order expressly voiding the February 6, 2003 order which would have allowed them to participate in the Hopkins/McKinney action.

Because MHG is a community hospital covered by the Tort Claims Act, the Longs, and

⁹See *Pub. Employees' Ret. Sys. v. Freeman*, 868 So. 2d 327, 330 (Miss. 2004)

anyone acting on their behalf, were prohibited by law from serving a complaint on MHG until the expiration of the 120 day tolling period after service of the Longs notice of claim on MHG on October 17, 2002. Thus, they could not legally serve the Hopkins Complaint on MHG prior to the Circuit Court's initial order against them. Given that the trial court entered orders which were binding on the Longs and Weatherly within 120 days of filing both the Hopkins and the Weatherly complaints, dismissing the Weatherly complaint, holding that the Longs could not file a valid wrongful death action separate from the Hopkins Complaint, denying consolidation of the Weatherly Complaint with the Hopkins Complaint, giving the Hopkins firm and McKinney complete control of all wrongful death claims for the death of Huey P. Long and denying the right of the Longs and their counsel to participate fully in the Hopkins action, neither the Longs nor Weatherly, acting on their behalf, could take action to serve the Hopkins Complaint or any other complaint on MHG prior to the issuance of the April 14, 2005 Supreme Court mandate reversing the Circuit Court's orders.

The following time line demonstrates actions of persons or entities other than the Longs and their attorney as well as laws and court orders preventing the Longs from serving MHG which should fall within the meaning of "conduct of a third person" or "understandable mitigating circumstances"¹⁰ as alternative methods of showing good cause under M.R.C.P. 4(h) for failure to serve MHG from October 8, 2002 until at least April 14, 2005.

- October 8 through February 14, 2003 - 120 day period from the Longs' Tort Claims Act

¹⁰If laws prohibiting commencement of an action against a particular defendant for a period of time and court orders which effectively prevent a party from being able to actually join and participate fully in the only action a court order allows in a matter do not constitute mitigating circumstances, it would appear that the mitigating circumstances language in numerous decision of the Mississippi Supreme Court and other courts has no meaning.

notice - MHG is a community hospital protected by Miss Code 11-46-11. Thus, no suit could be served against them prior to expiration of 120 days after service of notice of claim which the Longs affected on them on October 17, 2002. This period corresponds to the same 120 day period from filing the Hopkins Complaint.

- December 19, 2002 - Circuit Court dismisses the Weatherly Complaint naming only John Does effectively prohibiting the Longs from properly commencing an action following proper Tort Claims Act notice time frames by adding MHG to the Weatherly suit after expiration of the Tort Claims Act period during which MHG was protected from suit; Circuit Court also gives McKinney and the Hopkins firm control of the Hopkins Complaint denying the Longs consolidation and joinder and the ability to take sufficient control of the Hopkins complaint to serve it themselves on MHG at the proper time or more properly to dismiss it and refile and serve it at the proper time under proper Tort Claims Act procedure.
- December 19, 2002 to August 22, 2003 - December 19, 2002 order is in effect because the voiding of the February 6, 2003 order reinstated the December 19, 2002 order as if the February 6, 2003 order had never been. Later Mississippi Supreme Court rulings, binding on the Circuit Court and the parties under law of the case and the mandate rule, interpret the December 19, 2002 and March 24, 2003 orders as denying joinder and prohibiting participation of the Longs and their attorney in the Hopkins Complaint meaning they did not have the power to serve it.
- August 22, 2003 to April 14, 2005 - Supreme Court stay of the Huey P. Long wrongful death "matter" preventing any action in any wrongful death action case on the death of Huey P. Long by McKinney or the Longs.

- April 14, 2005 - The first day MHG could legally be served by the Longs taking into account the Tort Claims Act period of prohibited action, the Circuit Court orders denying joinder and giving McKinney and the Hopkins firm control of the only action permitted by the Circuit Court's orders, and the Supreme Court stay of all wrongful death matters based on the death of Huey P. Long including the cases filed by McKinney and the Longs.
- June 6, 2005 - the day the Longs served MHG - 50 days after the first date on which they possibly could have served MHG.
- August 12, 2005 - 120 days from the first date the Longs could legally serve MHG without violating Miss Code Ann. § 11-46-11 or a court order.

By seeking and prosecuting an interlocutory appeal of the orders of the Circuit Court dismissing their action and erroneously preventing them from being able to sufficiently participate in the Hopkins actions to be able to ensure that proper procedure was timely followed, the Longs did everything they legally could do without violating a court order to protect their rights. Surely that must constitute good cause under M.R.C.P. 4(h) either as diligence, acts of a third party beyond their control, or understandable mitigating circumstances. If it does not, then the law strips them of their cause of action with no way to protect their rights which surely cannot comport with due process.¹¹

¹¹The Hopkins/McKinney action could not protect their rights because as the hindsight of the decision in *Univ. of Miss. Med. Ctr. v. Easterling*, 928 So.2d 815 (Miss. 2006) demonstrates, it was never a validly commenced action against MHG in the first place because Hopkins/McKinney did not give Tort Claims Act notice to MHG and wait the required period of time before naming MHG in a complaint. The Longs did give Tort Claims Act notice to MHG and the action they filed on October 17, 2002 properly did not name MHG because it could not be added until the 120 day time period had passed under Miss Code § 11-46-11. Thus, the McKinney/Hopkins Complaint jeopardized the Longs claims rather than protecting them, and they could not protect themselves without sufficient control of the action to cause the dismissal and refile at the proper time of the claims against MHG.

C. Even if Dismissal of the Hopkins Complaint Claims Against MHG Was Required by M.R.C.P. 4(h), It Would Not Have Resulted in Dismissal of the Entire Hopkins Complaint.

The wording of M.R.C.P. 4(h) is important. It is clearly phrased in terms of the claims of a specific party against a specific defendant. It does not authorize dismissal of an entire case, but only dismissal of the claims of a party, with the power to serve and no good excuse for failing to serve, against the particular defendant not served within the 120 day period. Thus, even if the claims against MHG could have been dismissed under M.R.C.P. 4(h) on January 9, 2006, M.R.C.P. 4(h) did not authorize dismissal of the remaining claims in the complaint against other defendants. The claims against the physicians, which include the claims against Dr. Vaughan, are asserted against separate John Doe defendants from MHG. Nothing in M.R.C.P. 4(h) justifies dismissal of the claims against other defendants on MHG's motion to dismiss the claims against it for failure to serve it within 120 days of filing.

Moreover, before MHG filed its motion to dismiss or any responsive pleading, the Longs amended the original Hopkins Complaint, substituted Dr. Vaughan for one of the John Doe physicians, and had summons issued and attempted to locate and serve Vaughan. Thus, it was clear when the court considered MHG's motion to dismiss the claims had been asserted against more than one defendant. M.R.C.P. 54(b) states that when more than one claim for relief has been made in an action or when multiple parties are involved, a dismissal order dismissing claims against one defendant which does not expressly dismiss all the claims against all defendants is not final and "shall not terminate the action" as to any claims or defendants before entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. Since the January 9, 2006 order did not include any language referring to the claims against Dr. Vaughan, it did not adjudicate all the claims and rights and liabilities of all the parties. Thus, it

was not final and did not have the effect of terminating the action or dismissing the claims against Dr. Vaughan. M.R.C.P. 54(b).

Therefore, the claims against Dr. Vaughan survived the dismissal of the claims against MHG even if dismissal of the claims against MHG was proper.

II. THE CIRCUIT COURT ERRED IN DISMISSING THE LONG PLAINTIFFS' CLAIMS AGAINST DR. VAUGHAN

A. The Statute of Limitations Was Told As to the Long Plaintiffs Against All Defendants from the Date of the Circuit Court Orders Denying Them and Their Attorneys the Right to Participate Fully in the Wrongful Death Litigation Until the April 14, 2005 Mississippi Supreme Court Mandate Ordering That They Be Allowed to Fully Participate

In *Pope v. Brock*, 912 So. 2d 935 (Miss. 2005), the Court explained that in calculating when a statute of limitations has run against a particular party, specific statutes of limitations and statutes regarding presuit requirements cannot be interpreted in isolation. Any claim that the statute of limitations has run must take into consideration Miss. Code Ann. § 15-1-57 which says:

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

Unlike the court order in *Townsend v. Estate of Gilbert*, 616 So. 2d 333 (Miss. 1993), the court orders appealed in *Long v. McKinney*, 897 So. 2d 160 (Miss. 2004) clearly were directly applicable to and did bind the Long Plaintiffs and their attorney. As noted by the Supreme Court at *Long v. McKinney*, 897 So. 2d at 177 and contrary to the Circuit Court's statement in its April 28, 2006 order at page 215 of the record, the March 24, 2003 Circuit Court order clearly voided the February 6, 2003 order granting the Longs and Weatherly the right to participate in the prosecution of the Hopkins action. The December 19, 2002 and March 24, 2003 orders also

clearly dismissed the Weatherly Complaint and prohibited the Longs from filing any other action asserting their wrongful death claims against MHG and Dr. Vaughan at least as long as the Hopkins action remained pending. Those orders remained in effect from their date through the date on which the Mississippi Supreme Court granted the interlocutory appeal, stayed all action in the lower court for the wrongful death of Huey P. Long and tolled the statute of limitations. During that period, the Longs and Weatherly were bound by court orders, which they could not legally ignore even if they should turn out to be wrong, prohibiting them from filing or prosecuting an action against MHG or any other potential defendant (including Dr. Vaughan) for the wrongful death of Huey P. Long. Thus, this period is not computed in figuring out when the statute of limitations on the Longs' claims against MHG or Dr. Vaughan expired. See Miss. Code Ann. § 15-1-57 and *Ill. Cent. R.R. Co. v. Winters*, 815 So. 2d 1168, ¶ 32 (Miss. 2002).

At that point the Supreme Court order acted to continue the legal prohibition against the Longs prosecuting any action against any defendant for the wrongful death of Huey P. Long until the April 14, 2005 mandate issued. Thus, the Longs were prohibited by law or court order from commencing or prosecuting an action against MHG or Dr. Vaughan from October 17, 2002 to April 14, 2005. Under Miss. Code Ann. § 15-1-57, none of that time counts against them in calculating the statute of limitations on their claims against MHG or Dr. Vaughan.

B. The Mississippi Supreme Court's August 22, 2003 Order Tolloed the Statute of Limitations For All Plaintiffs Bound by the Order Against All Named and Fictitious Party Defendants Covered by Either the Hopkins or Weatherly Complaints.

There is a difference between extending and tolling a statute of limitations. See *Proli v. Hathorn*, 928 So. 2d 169, ¶¶ 17-18 (Miss. 2006). Extending a statute of limitations increases its length for entire classes of plaintiffs under the statute. Tolling a statute of limitations refers to a period which is not counted against a party as part of the time period he is given for commencing

an action against a defendant. While only the legislature can extend a statute of limitations, a court can toll a statute of limitations.

The fact that a court order can toll the statute of limitations in favor of plaintiff during a period when he cannot take the action necessary to either commence or prosecute an action or remedy against a defendant is clearly recognized by Miss. Code Ann. § 15-1-57. It states that the time when a person cannot either commence or prosecute an action because of a court order does not count against that person bound by the court order as part of the time he is given under the statute of limitations to bring or prosecute his action. It speaks in terms of preserving any action or remedy of a person bound by the court order. It contains no language limiting application of the statute only to actions and remedies against defendants actually before the court when the order was issued.

The Mississippi Supreme Court's statement in the Hurricane Katrina order that it lacked the authority to extend the statute of limitations and that only the legislature could extend a statute of limitations refers to an entirely different situation having no application to this case or that court's August 22, 2003 order. The Katrina order was an administrative order in which no particular action or remedy was before the court in an actual case or controversy. Nor were any specific people before the court in an actual case or controversy. Without any case or controversy or any parties before the court, the Mississippi Supreme Court had no jurisdiction to issue an order affecting the application of statute of limitations legislation to the populace generally. See Miss. Code Ann. § 9-3-9. Conversely in the present case, there was an actual case or controversy concerning wrongful death rights for the death of Huey P. Long between McKinney and the Longs before the Mississippi Supreme Court in *Long v. McKinney*. Thus, under Miss. Code §§ 9-3-9 and 9-1-19, the Mississippi Supreme Court had jurisdiction and authority to grant

injunctions or stays and to prohibit both McKinney and the Longs and their attorneys from taking any further steps in regard to prosecuting any wrongful death causes of action based on the death of Huey P. Long against any defendants pending a decision on the issues appealed. Consequently under Miss. Code § 15-1-57 and the jurisdictional statutes, it had the power to toll the statute of limitations from running as to any existing or potential defendants until the issues in that appeal concerning the right to prosecute the matters were decided.

The Mississippi Supreme Court's supervisory authority over the courts, upon which it was acting in the Katrina order, is, however, much more limited. See *Winder v. State*, 640 So. 2d 893 (Miss. 1994) (court has supervisory authority to enact rules for procedure and evidence). The difference between the Mississippi Supreme Court's authority to act in the present case and in the Katrina order is a matter of separation of powers. The legislature has no power to abate or suspend an individual cause of action or suit. Any attempt by the legislature to suspend an individual cause of action would be void, particularly one actually pending before a court. See *Miller v. Hay*, 143 Miss. 467, 482-483, 106 So. 818 (1926). Conversely, the legislature, not the courts, is vested with the constitutional authority to make changes affecting the time within which an entire class of existing and potential causes of action can be brought before the courts where no particular case or controversy or claimant related to a specific matter is yet before any court. *Kilgore v. Barnes*, 508 So. 2d 1042, 1045 (Miss. 1987).

For these reasons, the Circuit Court was incorrect when it held, based on the language in the Katrina order, that the language in the Mississippi Supreme Court's order of August 22, 2003 tolling the statute of limitations was mere surplusage with no effect because that court had no power to toll the statute of limitations. Because the August 22, 2003 order stayed all action by either McKinney or the Longs in the Huey P. Long wrongful death "matter" regardless of what

case the action would be taken in and legally tolled the statute of limitations until its April 14, 2005 mandate, none of the time between August 22, 2003 and April 14, 2005 counts against the Longs for purposes of determining when the statute of limitations runs on their claims against either MHG or Dr. Vaughan.

C. Dismissal of the MHG Claims in the Hopkins Complaint on January 9, 2006 Does Not Require the Dismissal of the Claims Against Dr. Vaughan.

The medical malpractice statute of limitations applicable to Dr. Vaughan as a private physician is two years. Miss. Code Ann. § 15-1-36(2). Starting with Huey P. Long's death on October 8, 2003, only 318 of the 720 days elapsed prior to the Mississippi Supreme Court's order tolling the statute of limitations. Between the lifting of the order tolling the statute on April 14, 2005 and the actual service of process on Dr. Vaughan on January 5, 2006, only 266 days elapsed. Thus, even without taking into account the effect of Miss. Code Ann. § 15-1-57 based on the Circuit Court's orders effectively prohibiting the Long's from participating in the Hopkins action, the statute of limitations had not expired on the Longs claims against Dr. Vaughan when he was served with process and the amended complaint substituting him for one of the John Does. The concepts of relation back to the original filing of the Hopkins Complaint under either M.R.C.P. 15 or 9(h) are not necessary to defeat his statute of limitations defense. Only the tolling of the statute of limitations based on the Mississippi Supreme Court's August 22, 2003 order is necessary to defeat Vaughan's statute of limitations defense.

Vaughan argued, and the Circuit Court apparently accepted, that the failure to serve MHG within 120 days of original filing of the Hopkins Complaint somehow caused the statute of limitations to run out on the Longs claims against Dr. Vaughan. Even if the Mississippi Supreme Court August 22, 2003 order had not tolled the statute of limitations against Dr. Vaughan, the

failure to serve MHG within 120 days of the original filing of the Hopkins Complaint would not have caused the statute of limitations to run on the claims against Dr. Vaughan. A similar argument was rejected by *Dailey v. Methodist Med. Ctr.*, 790 So. 2d 903 (Miss. Ct. App. 2001).

Dailey was a wrongful death case with multiple defendants. The alleged negligence occurred in December of 1996 and the complaint was filed on October 17, 1997, but Defendant Green was not served until October 28, 1998. Green raised her Rule 4(h) defense in her answer, but there was no actual dismissal. On appeal, she argued that the statute of limitations had run against her because the filing of the complaint without service on her only tolled the statute of limitations for 120 days. She argued that after the initial 120 days expired, the statute should have started running against her again and would have run before she was served. The court rejected that argument, pointing out that under *Crumpton v. Hegwood*, 740 So. 2d 292, ¶ 9 (Miss. 1999), prior to actual dismissal, the complaint does not become a nullity and filing of the complaint controls the statute of limitations.

More recently in *Heard v. Remy*, 937 So. 2d 939 (Miss. 2006), the Mississippi Supreme Court explained *Crumpton* stating that when a valid extension for good cause to serve a particular defendant is granted even after the expiration of the initial 120 day period, and process is served against that defendant within the extended period, the statute will be held not to have run against the defendant served within the extension granted after the initial 120 day period. In the present case, unlike *Heard*, the request for additional time to serve Vaughan was based on reasons traditionally found to be good cause for extensions of time for service and those reasons were found to be valid when the Circuit Court granted the extension. (R. at 59-63, 186-187) Vaughan was served on January 5, 2006 within a valid good cause extension granted after expiration of the original 120 days prior to the dismissal of the claims against MHG on January

9, 2006. Thus under *Heard*, *Crumpton* and *Dailey*, the statute of limitations did not expire against Dr. Vaughan as a result of the dismissal of the claims against MHG on January 9, 2006 even if that dismissal was valid.

If on the other hand, the entire Hopkins Complaint was dead for failure to serve a defendant within 120 days, then the pleading filed on July 26, 2005 naming Dr. Vaughan was a new action filed against Dr. Vaughan within the statute of limitations for the reasons discussed above. Unlike the facts in *Wilner v. White*, 929 So. 2d 315 (Miss. 2006) and *King v. Am. RV Ctrs., Inc.*, 862 So. 2d 558 (Miss. Ct. App. 2003), leave of the court was not required to file this pleading, whether or not the original Hopkins Complaint was dead, because it was filed before any responsive pleading had been filed to the original Hopkins Complaint. See *Wilner*, 929 So.2d at n.3. Either way, Vaughan was properly served under M.R.C.P. 4(h) with a pleading properly filed prior to the running of the statute of limitations on the Longs' claims against him.

D. The Substitution of Dr. Vaughan in the July 2005 Amended Complaint Relates Back to the October 17, 2002 Filing of the Hopkins Complaint Even If the MHG Claims in the Hopkins Complaint Were Properly Dismissed Under Rule 4(h) on January 9, 2006.

If this court should determine that the Hopkins Complaint was not dead and the August 22, 2003 order did not toll the statute of limitations against Dr. Vaughan, then he was properly substituted for a John Doe defendant on the original Hopkins Complaint and the substitution relates back to October 17, 2002 under M.R.C.P. 9(h) and 15(c). M.R.C.P. 9(h) allows a true party to be substituted later for a fictitious party in the original complaint, with the substitution relating back to the date of original complaint, by a plaintiff who diligently seeks the information needed to name and substitute the true party. Fictitious party practice under Rule 9(h) extends beyond mere lack of knowledge of the opposing party's name. Even if the plaintiff knows the true name of the person, he is still ignorant of his name for purposes of Rule 9(h) if he

lacks knowledge of the facts giving him a cause of action against the that person. *Bedford Health Props., LLC v. Estate of Williams*, 2006 Miss. LEXIS 632 (Miss. Nov. 2, 2006) citing *Doe v. Mississippi Blood Services, Inc.*, 704 So.2d 1016 (Miss. 1997), *Wilner v. White*, 929 So.2d 315, 322 (Miss. 2006); *Walker v. Gallagher*, 926 So.2d 890, 896 (Miss. 2006) and *Womble v. Singing River Hosp.*, 618 So.2d 1252 (Miss. 1993).

Unlike *Bedford*, there is no possibility here that Dr. Vaughan was substituted for, and replaced, a named party on the original complaint. MHG is a hospital. Vaughan is a doctor. The original Hopkins Complaint named MHG as a hospital defendant and a couple of John Doe doctors. The amended complaint reduced the number of John Does from 5 to 4, kept MHG as a defendant and substituted Dr. Vaughan for the John Doe doctor who was dropped. (R. 166-168, particularly at ¶ 10) Also, unlike *Bedford*, the Longs were not present at the hospital when Huey P. Long was injured and died and did not have knowledge from such presence of Dr. Vaughan's identity as one of Huey P. Long's treating physicians. (R. 189-195) Thus, unlike *Bedford*, this is a case where M.R.C.P. 9(h) is applicable.

Knowledge of Vaughan Identity as the Physician Whose Action Fatally Injured Huey P Long

The Longs were not involved in Huey P. Long's treatment at MHG prior to his death and had no contact with any of the doctors. Thus, they had no independent knowledge of who the doctors were who treated him, and specifically who the anesthesiologist was who allegedly punctured his jugular vein. That information was in the MHG medical records for Huey P. Long, but despite diligent efforts, the Longs were not able to obtain access to those medical records prior to the issuance of the Mississippi Supreme Court's mandate on April 14, 2006. (R. 184-195)

Diligence

Huey P. Long's medical records were originally requested in a subpoena which MHG opposed. At some point the Hopkins firm obtained those medical records but ignored or refused the multiple requests of the Longs and their attorneys for access to those records both before and even after the Hopkins firm withdrew from the case. Weatherly and the Longs were not able to obtain the medical records until an attorney, advising but not representing McKinney in this action, persuaded McKinney to give them to the Longs. They tried repeatedly to get the medical records even while the wrongful death actions were stayed by order of the Mississippi Supreme Court, but their efforts were unsuccessful, and they were told not to contact those in possession of the records again. (R. 184-195) With the Circuit Court having issued orders dismissing their suit, denying them the right to participate in the Hopkins action and the Mississippi Supreme Court having stayed all action in the entire Huey P. Long wrongful death matter from August 22, 2003 to April 14, 2005, they did not have access to judicial process to aid in obtaining the information needed to identify and substitute Dr. Vaughan. Meanwhile, the Longs and their attorney did everything they possibly could through the appeal of the Circuit Court's orders to get back to the point where they could use judicial process both to discover the identity of the John Doe defendants and to prosecute their claims against them.

Immediately upon obtaining the medical records and learning Dr. Vaughan's name, the Longs filed¹² an amended complaint substituting Dr. Vaughan for one of the previously named John Doe physicians. They requested a summons for Dr. Vaughan on July 26, 2005 shortly after filing the amended complaint. They immediately began attempts to locate and serve him, but

¹²Because no defendant had yet filed a responsive pleading, this amendment did not require leave of the court under M.R.C.P. 15.

were hampered first by the fact that he had moved and second by Hurricane Katrina which not only disrupted all normal business and life in the Gulfport area but destroyed the Long's counsel's home, office and case file, forcing him to evacuate to Oxford for 40 days. When he was able to return to the area and begin reconstructing his file, prior to the expiration of the 120 days from filing the amended complaint, Weatherly sought an extension of the time within which to locate and serve Vaughan based on his move, the efforts to locate him, and the disruptions caused by Hurricane Katrina. Vaughan was served within the extension granted by the court based on this good cause. (R. at 166-187)

Gasparrini v. Bredemeier, 802 So.2d 1062 (Miss. 2001) states the purpose of M.R.C.P. 9(h) is to provide a mechanism to bring in responsible parties for whom a plaintiff needs the aid of judicial mechanisms to identify and obtain sufficient information to file a valid claim. In *Gasparrini*, the plaintiffs were allowed the benefit of Rule 9(h) even though they knew the actual name of the fictitious defendant when they filed the complaint because they did not have sufficient information to be aware of the cause of action against him until he was deposed. *Gasparrini* pointed out that unlike the plaintiffs in *Doe*, *Womble* and *Rawson*, *Gasparrini* did not have the aid of medical records or other physical evidence to aid him and once discovery began, he was more than diligent in his pursuit to ascertain the identities of the fictitious parties.

In the present case, the Longs did not have the medical records. Their efforts at investigation were not only stalled by the resistance of the unyielding McKinney and her lawyers and the MHG efforts to quash the subpoena for medical records but also by the Circuit Court orders dismissing their independent action and denying them the possibility of meaningful participation in the Hopkins action and then the stay of all lower court activity on all Huey P. Long wrongful death matters. Despite this resistance, they still tried informal means of getting

access to the medical records which were unsuccessful.

This is hardly a case of the Longs' sleeping on their rights as described by *Doe v. Mississippi Blood Services, Inc.*, 704 So.2d 1016, 1019 (Miss. 1997) in denying those plaintiffs the benefit of M.R.C.P. 9(h). The Longs have done everything possible within the law to pursue their right to be allowed to participate in the wrongful death action for the death of Huey P. Long and to have judicial assistance in obtaining the medical records needed to identify Dr. Vaughan and provide the information needed to substantiate a basis for making a claim against him. Even if they had known his identity earlier, the only way they could have taken action to name Dr. Vaughan as a defendant prior to the date when they did would have been to disobey a court order binding them. Such action would have rendered their efforts a nullity anyway since their complaint had been dismissed and the Circuit Court had voided the order initially allowing them and their attorney to participate in the Hopkins action.

In *Seymour v. Evans*, 608 So. 2d 1141 (Miss. 1992) and *Knight v. McCain*, 531 So. 2d 590, 597 (Miss. 1988), the court refused to require a person to apply for a permit once they had been told by the authorities that it would not be granted because the law does not require the doing of a futile act. The Longs went further than Seymour and Knight. They asked for rehearings and kept trying after the Circuit Court denied their motion to consolidate, dismissed their action and voided the order allowing them to participate in the Hopkins action. There was nothing more they could have done except pursue the interlocutory appeals they filed even if they could have obtained the medical records and figured out Dr. Vaughan's identity.

III. IF NO OTHER THEORY APPLIES TO PREVENT THE STATUTE OF LIMITATIONS FROM BARRING THE LONG PLAINTIFFS' CLAIMS, EQUITABLE PRINCIPLES SHOULD BE APPLIED TO PREVENT THE LOSS OF THEIR CLAIMS.

Any one of the alternative arguments presented thus far would preserve the Longs claims

at least against Dr. Vaughan if not against both Dr. Vaughan and MHG. If the court declines to accept any of the arguments presented thus far, then the Longs request the court to use its equitable powers to prevent the loss of their claims. The Mississippi Supreme Court has held

[w]hile the Court is not at liberty to extend or modify statutory limitations, when a party is prohibited from exercising his right to proceed by circumstances which are clearly beyond his control and rise to such a dimension as to implicate due process and fundamental fairness, the Court may and should toll the limitations for the period of the impairment. ... [E]quitable tolling ... may be applied when a movant files in untimely fashion due to extraordinary circumstances which are both beyond his control and unavoidable even in the exercise of due diligence.

Puckett v. State, 834 So. 2d 676, ¶¶ 11, 13 (Miss. 2002).

The circumstances in this case are both extraordinary and beyond the control of the Longs and their attorney. They started the process of properly bringing a wrongful death claim against a hospital protected by the Torts Claims Act by giving the proper pre suit notice. Before the proper time for filing their wrongful death action against the Tort Claims Act defendant, they were beat to the courthouse by their half sister who had control of the necessary information for identifying, naming and bringing in the non Tort Claims Act defendants. The Circuit Court dismissed their complaint and voided an order allowing them to participate in their half sister's action. Despite their efforts to work with the half sister's lawyers, they were met with a brick wall of resistance and a total refusal to permit access to necessary information. They took every action they legally could to protect their right to sufficient participation in the only wrongful death action the courts permitted but were denied sufficient control to follow the proper procedure to protect their claims. When they appealed, the Mississippi Supreme Court stayed the entire wrongful death matter and said it tolled the statute of limitations for over a year and a half while that court finally addressed the problems it said were caused by its failure to issue proper guidance on the proper procedure for wrongful death claims. They could not legally disobey the court orders of the

Circuit Court or the Mississippi Supreme Court which prevented them from taking sufficient control of the litigation to name, file and serve pleadings on the proper defendants within the statute of limitations if they cannot rely upon the Mississippi Supreme Court's order tolling the statute. If they had disobeyed and taken action either on their own dismissed suit or acted without proper entry into the Hopkins litigation, their actions would still have had no effect. Moreover, once the Mississippi Supreme Court had issued its mandate and remanded the case, and they did begin participating fully, their counsel lost his home, office and the case file in Hurricane Katrina. If there was anything else they could have done to preserve their due process right to their day in court on their wrongful death claims other than what they did, there is no suggestion of it in either the statutory or the case law.

In *Puckett*, the court found equitable tolling to be applicable because an inmate's former counsel's actions affirmatively frustrated his efforts through new counsel to apply for post conviction relief by taking the files with him to Oklahoma, ignoring or refusing to respond to requests to return them, and eventually requiring a court order to get them back until after the one year time for filing had passed. In the present case, the affirmative efforts of McKinney and the Hopkins firm, backed up by court orders that later turned out to be erroneous, prevented the Longs from having access to the information they needed and from having any meaningful opportunity to participate in the only wrongful death action permitted by statute at a level that would have allowed them to identify, name and serve the dismissed defendants. They did everything they could through the interlocutory appeal process to get the erroneous orders reversed and to obtain the assistance of the court in preserving their right to prosecute their claims and reasonably relied on an order of the Mississippi Supreme Court tolling the statute of limitations in response to their concerns that the circumstances were preventing them from taking

action to prosecute their claims within the statutory time period. The circumstances are at least as compelling as those in *Puckett* and probably far less likely to occur again than those in *Puckett*. Thus, this is an extraordinary case suitable for the application of equitable tolling.

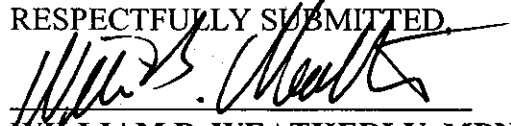
CONCLUSION

This case involves a highly unusual set of circumstances and convoluted proceedings which the Mississippi Supreme Court has already held is not the fault of either the parties, the skilled and experienced trial judge, or the competent lawyers representing the parties. 897 So. 2d 160 at ¶ 65 According to the Supreme Court, it is the result of our wrongful death statute taking a wrong turn into procedural matters outside the authority of the legislature and properly within the jurisdiction of the court, combined with the court attempting to provide procedural guidance under the guise of statutory interpretation over the years leading to the most muddled, misquoted and misunderstood area of procedural law known, generating unnecessary difficulty for both counsel and trial judges. *Id* at ¶¶ 1-7.

The earlier decision of the Supreme Court in this case did clarify matters for future cases, but it did not manage to turn back the clock on this particular case to rescue these parties from the effects of that muddled morass of prior case law much of which the Court held to be erroneous, or the parts of the wrongful death statute which the Court declared unconstitutional. Together, the muddled case law and the unconstitutional parts of the statute caused this case, and these plaintiffs, to get into the mess they are still in trying to get to their day in court. By the time the Supreme Court declared the Longs had the right to join in the first filed suit and participate fully in order to have their day in court, the normal time for taking certain procedural steps to prevent procedural loss of their claims had passed through no fault of their own. Unless this court accepts one or more of the arguments presented above, despite the Supreme Court's later

declaration that their rights should have been protected in the one wrongful death suit recognized by law, in reality the Longs will have lost their claims and their day in court without any meaningful opportunity to participate. That is the essence of a due process violation. Surely such circumstances fit within "understandable mitigating circumstances" and constitute good cause for not dismissing their claims under M.R.C.P. 4(h) and satisfy the requirements of Miss. Code Ann. § 15-1-57 authorizing not counting some of the time when they were unable to act such that the statute of limitations has not run to bar their claims against either MHG or Dr. Vaughan.

RESPECTFULLY SUBMITTED.


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CERTIFICATE OF SERVICE

I, the undersigned attorney for Appellants, 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, do hereby certify that a true and correct copy of the foregoing Appellants Brief was mailed to the following counsel of record:

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