IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

IN RE: THE ESTATE OF
MARKIN A. BELL, DECEASED PLAINTIFF/APPELLANT

VS. CAUSE NO. 2007-IS-00435

MICHAEL E. DIXON AKA MIKE DIXON
D.B.A. CENTRAL ENERGY SERVICES DEFENDANT/APPELLEE

BRIEF OF APPELLANT

Submitted by:
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The undersigned counsel of record certifies that the following listed Persons may have an interest in the outcome of this case.

1. The Estate of Markin A. Bell.
2. Jeana Bell, Mother of Deceased.
3. Jackie Baines, Step-Father of Deceased.
4. James A. Bell, Jr., Father of Deceased.
5. Kenneth Jody Bell, brother of Deceased.
6. Colin Smith, brother of Deceased.
7. Ray McNamara, Counsel for Appellee.
8. Circuit Judge Bobby DeLaughter, Lower Court Judge.

C. Eiland Harris,
Attorney for Appellant

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STATEMENT OF THE ISSUES

The lower Court on motion for summary judgment by the defendant granted summary judgment, finding that the plaintiff could not being this action since another action of the same or similar nature was brought and was dismissed with prejudice. The lower Court also found that the motion for summary judgment should be granted to the defendant because of res judicata and entered its order of dismissal with prejudice and final judgment. (R. Vol. 2, page 209)

The first case was brought by the wrongful death beneficiaries of Markin A. Bell, (R. Vol. 1, pages 20-23) and the second case was brought by the Estate of Markin A. Bell, Deceased, (R. Vol. 1, pages 3-6). The Estate of Markin A. Bell, Deceased was not a party to the first suit and since under Miss. Code Ann. § 11-7-13 the Estate of Markin A. Bell, Deceased, was a party that could file this action and the question of privity did not prevent the case sub judice. (R. Vol. 1, page 3)

The Plaintiff asserts that the Estate is a proper party to bring a wrongful death action and the action was not bound by the first suit filed since the first suit

was not litigated on its merits. To consider res judicata you have to weight it against Miss. Code Ann. § 11-7-13, the statue that provides who may file suit in a wrongful death case. Any of the parties listed in the statute may bring an action the only limitation being if the action has already been decided on its merits.

While res judicata is a general principal of law in this instance it runs contrary to Miss. Code Ann. § 11-7-13, and since Mississippi law is more specific on who may bring a wrongful death suit this case should not have been dismissed, and the lower Court erred in granting summary judgment to Defendant below.

The lower Court, in its memorandum opinion and order (R. Vol. 2, pages 205-208) states only one action may be brought in a wrongful death case, and this is true, IF the case has been decided on its merits. The lower Court fails to read further in Long, supra, wherein it states "but the determination of such suit shall not bar another action unless it be decided on its merits" Long v. McKinney NO. 2003-IA-00849-SCT, page 11.

The statute is clear, without a decision on the merits in a wrongful death case another party may file a similar action without being barred by the principal of res judicata.

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STATEMENT OF THE CASE

1. That Markin A. Bell, was late a resident citizen of the Second Judicial District of Hinds County, Mississippi and resided at 9315 Dry Grove Road, Raymond, Mississippi 39154, until the date of his death on July 18, 2003.

2. Markin A. Bell's untimely death occurred on July 18, 2003, at approximately 4:00 p.m. when Markin A. Bell was operating a 2000 Mazda 626 in a northerly direction on Dry Grove Road in Hinds County, Mississippi, in his lane of traffic, when suddenly and without warning a collision occurred between the vehicle Markin A. Bell was driving and the 2001 Ford Heavy Duty Truck owned and operated by Michael E. Dixon aka Mike Dixon d.b.a. Central Energy Services.

3. Michael E. Dixon aka Mike Dixon d.b.a. Central Energy Services, while driving his 2001 Ford Heavy Duty Truck in a Southerly direction on Dry

Grove Road cross the center line of said Dry Grove Road and drove into the lane being legally occupied by Markin A. Bell, Deceased, causing a head on collision and the wrongful death of Markin A. Bell, Deceased.

4. Suit was filed in the Second Judicial District of Hinds County, Mississippi, styled, "Jeana Bell, individually and on behalf of wrongful death beneficiaries of Markin A. Bell, vs. Michael E. Dixon aka Mike Dixon d.b.a. Central Energy Services. (R. Vol. 1, pages 26-29) Said suit was dismissed with prejudice for a "discovery violation" and not after a hearing on the merits of the case. This was acknowledged in Defendants argument on the motion for dismissal. (R. Vol. 3, page 3)

5. The estate of Markin A. Bell had not been opened at the time the first case was dismissed, and the Estate of Markin A. Bell was not a party plaintiff to the first action. The Estate was opened on July 17, 2006, and the estate was authorized to commence and filed suit.

6. The second action was filed in the Second Judicial District of Hinds County, Mississippi, styled, "Estate of Markin A. Bell vs. Michael E. Dixon aka Mike Dixon d.b.a. Central Energy Services on July 17, 2006.

7. The defendants filed for a motion for summary judgment stating this action should be barred by the entry of the Order of Dismissal in the first suit because of the res judicate and the identity of the parties. The Court granted summary judgment and this appeal followed. (R. Vol. 2, page 209)

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SUMMARY OF THE ARGUMENT

1. **The Court erred in granting summary judgment to the Defendant.**

2. The Court erred in finding that the summary judgment should be granted because of res judicata when Mississippi law stated who may bring an action for wrongful death and the only exclusion was if a prior case had been decided on its merits. Also the holding in Long, supra, that there shall be but one (1) suit for the same death which shall ensue for the benefit of all parties concerned, but the determination of such suit shall not bar another action unless it be decided on its merits..." (Emphasis added) Long, supra, at page 11.

3. The Court erred in determining who could properly file a wrongful death action and the question of privity between the parties. In a wrongful death case any suit filed in such an action would have the same or similar identities and same cause of action

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ARGUMENT

1. The Court erred in granting summary judgment to Appellant.

This Court has addressed many times the Court's review of a summary judgment. One of the last reported cases is Harmon v. Regions Bank, NO. 2006-CA-00453-SCT. In which this Court stated, "The Court applies a de novo standard of review to a trial court's grant or denial of amotion for summary judgment, Citing McKinley v. Lamar Bank, 919 So. 2d 918, 925 (Miss.2005). Our rules of civil procedure require the trial court to grant summary judgment where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Miss. R. Civ. P. 56(c). The facts are viewed in the light most favorable to the nonmoving party, with the movant bearing the burden of demonstrating that no genuine issues of material fact exist for presentation to the trier of fact. Hardy v. Brock, 826 So. 2d 71, 74 (Miss. 2002). However, the party opposing the motion must be diligent and "may not rest upon the mere allegations or denials of the

pleadings, but instead the response must set forth specific facts showing that there is genuine issue of material fact for trial." Harrison v. Chandler-Sampson Ins., Inc., 891 So.2d 224, 228 (Miss. 2005) (citing Miller v. Meeks, 762 So. 2d 302, 304 (Miss. 2000)). If any triable issues of material fact exist, the trial court's decision to grant summary judgment will be reversed.

In the case, sub judice, genuine issues of material fact did exist. The case had not been heard on its merits and the cause of action for the death of Markin A. Bell had not been tried or any of the issues surrounding the case had been decided. There was never a hearing on the allegations of the suit, the first or the second, and the granting of summary judgment, as stated in Harmon, supra, should be reversed.

2. The Court erred in finding that the summary judgment should be granted because of res judicata.

> Res judicata is a doctrine that protects the finality of judgments. Not all judgments. It applies only to final judgments on the merits. (Emphasis added) Anderson v. Laverne, 895 So. 2d 828, 833 (10) (Miss. 2004). Res judicata requires four elements: (1) identity of the subject matter, (2) identity of the cause of action, (3) identity of the parties, and (4) identity of the quality or character of a person against whom the claim is made. Norman v. Buckle, 684 So. 2d 1246, 1253 (Miss. 1996). "If these four identities are present, the parties will be prevented from relitgating all issues tried in the prior lawsuit as well as all matters which should have been litigated and decided in the prior suit." Anderson, 895 So. 2d at 832 (10) (quoting Dunaway v. W. H. Hopper & Assocs., 422 So. 2d 749,

751 (Miss. 1982)).

However, in order for the doctrine of Res judicata to take effect there has to be a determination that the prior action was determined on its merits. It this is lacking then Res judicata is not present and should not be considered. In this case is was clear that the case was not tried on its merits and that Mississippi law provided for additional suits to be brought with the only limitation being whether or not a prior case had been decided on its merits.

The identity of the parties is lacking and the prior case was not litigated on its merits.

Under Anderson, supra, res judicata is a stated to be a doctrine that protects the "finality of judgments". **It applies to final Judgments on the merits**. In this case there never was a hearing on the merits of the case and therefore no "FINAL JUDGMENT ON THE MERITS". The prior case was dismissed because of a "discovery violation" and not after any hearing on the merits. No witness was heard no evidence presented and no decisions as to the elements concerning either case has been made to date, and t he merits of the case have never been presented to the Court and therefore no meritorious hearing of same ever occurred. (R. Vol. 3, page 3)

In Long, supra, this Court looked to the current Statute on wrongful death.

"Whenever the death of any person . . . shall be caused by any real, wrongful or negligent act or omission . . . as would, if death had not ensued, have entitled the party injured or damaged thereby to maintain an action and recover damages in respect thereof, . . . and such deceased person shall have left . . . children . . . , the person or corporation, or both that would have been liable if death had not ensued, and the representatives of such person shall be liable for damages, notwithstanding the death, ... The action for such damages may be brought in the name of the personal representative of the deceased person . . . for the benefit of all persons entitled under the law to recover, or by widow for the death of her husband, or by the husband for the death of the wife, or by the parent for the death of a child or unborn quick child, or in the name of a child, or in the name of a child for the death of a parent, or by a brother for the death of a sister, or by a sister for the death of a brother, or by a sister for the death of a sister, or a brother for the death of a brother, or all parties interested may join in the suit, and there shall be but one (1) suit for the same death which shall ensue for the benefit of all parties concerned, but the determination of such suit shall not bar another action unless it be decided on its merits...". (Emphasis added) Long, supra, at page 11.

The lower Court erred when it considered only part of the language quoted in Long, supra, that there shall be but one (1) suit for the same death....the Court failed to consider the other following language in Long, supra, that stated, "the determination of such suit

shall not bar another action unless it be decided on its merits."

Long recognized that a prior suit shall not bar another action unless it be decided on its merits, and as previously stated there has been no decision on the merits of this case. The Appellant only relies on a dismissal of the prior suit which did not decide the merits in any way and was a dismissal on a procedural issue.

3. **The Court erred in determining who could properly file a wrongful death action.**

According to Miss. Code Ann. § 11-7-13 (Supp. 2004) (as amended by 2004 Miss. Laws ch. 515 (H.B.352)), and its predecessor, there are three alternatives for bringing a wrongful death suit: (1) the heirs (under the will or pursuant to the intestate succession statutes), (2) the estate, and (3) the statutory wrongful death beneficiaries.

Each of these possible claimants could bring an action under the wrongful death statute and the only bar would be if a prior suit was determined on its merits.

A wrongful death suit may be brought in various ways and in this case the suit was filed by Jeana Bell Baines, the Administrator of the Estate of Markin A. Bell, Deceased. Jeana Bell Baines did not file in her own name but as an Administrator of an estate as appointed by the Chancery Court.

"In a wrongful death case the action for such damages may be brought in the name of the personal representative of the deceased person . . . for the benefit of all persons entitled under the law to recover, or by widow for the death of her husband, or by the husband for the death of the wife, or by the parent for the death of a child or unborn quick child, or in the name of a child, or in the name of a child for the death of a parent,

or by a brother for the death of a sister, or by a sister for the death of a brother, or by a sister for the death of a sister, or a brother for the death of a brother, or all parties interested may join in the suit, and there shall be but one (1) suit for the same death which shall ensue for the benefit of all parties concerned, but the determination of such suit shall not bar another action unless it be decided on its merits. (Emphasis added) Long v. McKinney. NO. 2003-IA-00849-SCT.

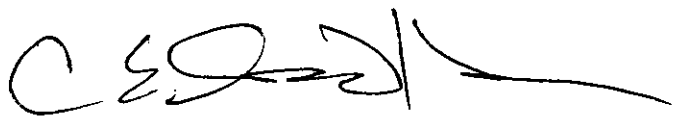
The appealed action was filed by the Estate of Markin A. Bell, an entity that was not included as the plaintiff in any previous action before the lower Court, and as such, under Long, supra, the estate was not barred from bring the current action, and the determination of the prior action, not being decided on its merits, did not prohibit the filing by the estate. The merits of the prior case was never ruled on by the Court. As set forth in Long, supra, a wrongful death suit may be filed by the estate of the deceased. For the application of res judicata to apply the Estate of Markin A. Bell would have had to be a plaintiff in the prior action or the case would have to been decided on its merit. The estate was not and according to Long, supra, res judicata would not bar the second suit and the estate could maintain a suit against the defendant for damages resulting from the wrongful death. The determination in the prior case also does not bar the estate from filing an action because of identity of the parties as shown by Long, supra.

CONCLUSION

The plaintiff relies heavily on Long, supra. Long provided the law to be followed and the plaintiff has done that. Under Long the estate could bring the suit, the first one not being decided on the merits of the case, and the suit filed by the Estate could not be barred by the doctrine of Res adjudicate because of the restatement in Long that a determination on the merits of a previous case was the only bar for a subsequent suit being filed.

The present case should not have been dismissed by the lower Court. The first suit was dismissed because of a discovery violation. With all the Court could have done to address that issue it seems unusual that it decided to issue a dismissal with prejudice, but in any event it was not a hearing on the merits and that prevents the lower Court from dismissing the present case. The Court should have overruled the motion for summary judgment filed by the defendant in the case sub judice. There was and still is material issues of law to be tried and decide. And mainly, the motion should not have been granted because the determination of the second suit was not barred under the aforementioned doctrine of Res judicata.
To allow the Court's order granting summary judgment to stand would be a great injustice to the plaintiff who suffered the injury as a result of the defendant's negligent actions.

Therefore, the summary judgment granted by the lower Court and the order entered thereon should be reversed and this case sent back to the lower Court for it to proceed on its merits.



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CERTIFICATE OF SERVICE

I, C. Eiland Harris, Attorney for Plaintiff/Appellant, do hereby certify that I have this day served a true and correct copy of the foregoing on J. Leray McNamara, Attorney for Defendant/Appellee, by U. S. mail to his office address of Post Office Box 6020, Ridgeland, Mississippi 39158.

This the 8th day of August, 2007

x/C. Eiland Harris
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