

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**CASE NO. 2007-CA-00980**

**THOMAS LUCAS, KATHLEEN LUCAS MUNN,  
JAMES L. MCNEILL, INDIVIDUALLY, AND ON  
BEHALF OF THE ESTATE OF JANE LUCAS**

**APPELLANTS**

**V.**

**BAPTIST MEMORIAL HOSPITAL-NORTH MISSISSIPPI, INC.**

**APPELLEE**

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**ON APPEAL FROM THE CIRCUIT COURT OF LAFAYETTE COUNTY, MISSISSIPPI**

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**APPELLANTS' BRIEF**

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**ORAL ARGUMENT REQUESTED**

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BEHALF OF THE ESTATE OF JANE LUCAS**

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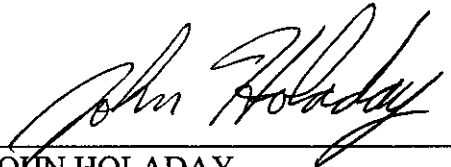
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## **CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualifications or recusal.

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3. Virgil Norris, Jr., M.D., Defendant below
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7. Baptist Memorial Hospital–North Mississippi, Inc., Appellee
8. Mike Watts, Esq., Holcomb Dunbar, P.A., Counsel for Baptist Memorial Hospital–North Mississippi, Inc.
9. Thomas Lucas, Kathleen Lucas Munn, James L. McNeill, Individually, and on behalf of Jane Lucas , Appellants

  
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JOHN HOLADAY

### **STATEMENT REGARDING ORAL ARGUMENT**

Thomas Lucas, Kathleen Lucas Munn, James L. McNeill, Individually, and on behalf of Jane Lucas, Appellants herein, respectively request that oral argument be granted. Appellants respectively suggest that oral argument will be of benefit to the Court in making a just and appropriate disposition of this case.

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## STATEMENT OF ISSUES

- I. The trial court erred in dismissing Appellee Baptist Memorial Hospital–North Mississippi, Inc., from this case and entering a Final Judgment in that regard.
  - a. Plaintiffs timely served Defendant within the applicable statute of limitations and asserted good cause for not serving Defendant within the applicable 120 day time period.
  - b. The trial court never ruled on Plaintiffs’ Motion for Time Until November 24, 2003, During Which to Serve Defendant Baptist Memorial Hospital for Alternative Relief in Rebuttal of Defendant’s Second Motion to Dismiss and never ruled on Plaintiffs’ assertion that good cause existed for the failure to serve Defendant outside the applicable 120 day time period for service or process.
  - c. Defendant waived and/or should be estopped from asserting the insufficiency of process and statute of limitations arguments.
  - d. The trial court’s dismissal of Defendant violates the spirit, intent and purpose of statutes of limitation in this Country and in this State, and as a result, unfairly deprives Plaintiffs of their Due Process Rights under Article 3, Sections 14 and 24 of the Mississippi Constitution and the Fourteenth Amendment of the United States Constitution.
- II. The trial court erroneously denied Plaintiffs’ Motion to Alter or Amend Judgment Dismissing Defendant.



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APPELLANTS

V.

BAPTIST MEMORIAL HOSPITAL-NORTH MISSISSIPPI, INC.

APPELLEE

BRIEF OF APPELLANTS

STATEMENT OF THE CASE

Course of the Proceedings

① Plaintiffs filed this medical negligence action in the Circuit Court of Pontotoc County, Mississippi, on or about December 31, 2002, relating to alleged acts of negligence which occurred on or about September 20, 2001. Plaintiffs subsequently filed an Amended Complaint on or about ② April 29, 2003. The trial court subsequently granted Plaintiff's Motion for Additional Time to Serve Process on or about May 1, 2003. On or about August 20, 2004, Defendant Baptist Memorial Hospital-North Mississippi, Inc., (hereinafter referred to as "Defendant") filed a ④ 8/20/04 Motion to Dismiss With Prejudice for Failure to Serve Process Within Time Allowed. ③ On or about March 21, 2005, ⑤ the case was transferred to the Circuit Court of Lafayette County on Motion to Transfer previously filed by Defendant. On or about July 22, 2005, the Circuit Court of Lafayette County held a hearing ⑥ on Defendant's Motion. On or about September 27, 2006, Plaintiffs filed a ⑦ Motion for Time Until November 24, 2003, During Which to Serve Defendant ⑧ Baptist Memorial Hospital for Alternative

Relief in Rebuttal of Defendant's Second Motion to Dismiss. On or about October 12, 2006, Defendant filed a Response to Plaintiffs' Motion for Time Until November 24, 2003, During Which to Serve Defendant Baptist Memorial Hospital for Alternative Relief in Rebuttal of Defendant's Second Motion to Dismiss. The trial court never ruled on Plaintiffs' Motion for Time Until November 24, 2003, During Which to Serve Defendant Baptist Memorial Hospital for Alternative Relief in Rebuttal of Defendant's Second Motion to Dismiss. The Circuit Court of Lafayette County granted Defendant's Motion to Dismiss on or about February 9, 2007. On or about March 14, 2007, the trial court entered a Judgment as to Defendant. On or about March 28, 2007, Plaintiffs filed a Motion to Alter or Amend Judgment Dismissing Defendant Baptist Memorial Hospital-North Mississippi, Inc. On or about May 7, 2007, the trial court denied Plaintiffs Motion to Alter or Amend Judgment Dismissing Defendant. On or about June 5, 2007, Plaintiffs timely appealed the trial court's rulings.

**Statement of Facts Relevant to the Issues Presented for Review**

Plaintiffs filed this medical negligence action in the Circuit Court of Pontotoc County, Mississippi, on or about December 31, 2002, relating to alleged acts of negligence which occurred on or about September 20, 2001. R. at 1. Plaintiffs subsequently filed an Amended Complaint on or about April 29, 2003. R. at 5. In essence, Plaintiffs claimed that the decedent, Jane Lucas, was admitted to Defendant's hospital for a lung biopsy and subsequently died. R. at 5-10. Plaintiffs alleged that Ms. Lucas died due to her lung filling with blood and that her lungs filled with blood due to one or more medications which she was taking and which Defendant knew or should have known she was taking. R. at 5-10. The trial court subsequently granted Plaintiff's Motion for Additional Time to Serve Process on or about May 1, 2003. R. at 14-15.

Plaintiffs unsuccessfully attempted service on Defendant in April of 2003. Tr. at 11, R. at 101, 113, 115, 122, 161-62, 190. Plaintiffs attempted service on Defendant through CT Corporation again when it sent a copy of the Summons and Complaint to CT Corporation via certified mail. R. at 116. CT Corporation rejected that Summons and Complaint due to a discrepancy with the name of Defendant. R. at 120. Plaintiffs ultimately served process on Defendant on or about November 7, 2003. R. at 18, 51, 68. The trial court ultimately granted Defendant's Motion to Dismiss for failure to serve process and for the running of the statute of limitations. R. at 189-90.

### **SUMMARY OF THE ARGUMENT**

The trial court erred when it granted Defendant's Motion to Dismiss on the basis of the insufficiency of process served on Defendant by Plaintiff and found that the applicable statute of limitation had expired, and subsequently entered a Judgment for Defendant. Plaintiffs had good cause as to why they had served Defendant outside of the 120 day time period<sup>3</sup> for service, and Plaintiffs served Defendant within the applicable statute of limitations. In addition, the trial court failed consider Plaintiffs' arguments for good cause and failed to rule on their Motion to allow for the process to be timely. Defendant waived the affirmative defense of insufficiency of process and should not have been allowed to raise same. Further, the trial court's dismissal of Defendant from this case violated rules of equity as well as Plaintiffs' Constitutional rights. Finally, the trial court erred when it denied Plaintiffs' Motion to Alter or Amend the Judgment in this matter.

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<sup>3</sup>For simplicity sake, Plaintiffs will refer throughout this Brief to the 120 day time period, although Plaintiffs acknowledge that there was an initial 120 day time period provided by Rule 4 and an additional 120 day time period granted by the trial court.

## ARGUMENT

### **I. The Trial Court erred in dismissing Appellee Baptist Memorial Hospital–North Mississippi, Inc., from this case and entering a Final Judgment in that regard.**

This Court has on many occasions set forth the standard of review on the trial court's grant or denial of a Motion to Dismiss. In the case of *Burleson v. Lathem*, 968 So.2d 930, 932 (Miss. 2007), this Court stated as follows:

When reviewing a trial court's grant or denial of a motion to dismiss or a motion for summary judgment, this Court applies a de novo standard of review. *Scaggs v. GPCH-GP, Inc.*, 931 So.2d 1274, 1275 (Miss.2006); *Park on Lakeland Drive, Inc. v. Spence*, 941 So.2d 203, 206 (Miss.2006); *McLendon v. State*, 945 So.2d 372, 382 (Miss.2006); *Monsanto Co. v. Hall*, 912 So.2d 134, 136 (Miss.2005). "When considering a motion to dismiss, the allegations in the complaint must be taken as true and the motion should not be granted unless it appears beyond doubt that the plaintiff will be unable to prove any set of facts in support of his claim." *Scaggs*, 931 So.2d at 1275 (citing *Lang v. Bay St. Louis/Waveland Sch. Dist.*, 764 So.2d 1234, 1236 (Miss.1999)).

*Burleson v. Lathem*, 968 So.2d 930, 932 (Miss. 2007). Plaintiffs assert that the trial court's grant of Defendant's Motion to Dismiss should be denied in light of this standard.

#### **a. Plaintiffs timely served Defendant within the applicable statute of limitations and asserted good cause for not serving Defendant within the applicable 120 day time period.**

It is undisputed that the applicable statute of limitations did not run in this case until at the earliest date, May 15, 2004. R. at 189-90. Plaintiffs undisputedly served Defendant with service on or about November 7, 2003. R. at 18, 51, 68. Plaintiffs admit that such service was outside of the 120 day original time period provided by Rule 4 of the Mississippi Rules of Civil Procedure and outside of the 120 additional days provided by the trial court's grant of additional time to serve process.

However, the cases from this Court which would justify dismissal of the Plaintiffs' cause against the untimely served Defendant are distinguishable from the case at hand. *Triple "C" Transport, Inc., v. Dickens*, 870 So. 2d 1195, 1200 (Miss. 2004)(finding that process was never properly served on subject defendant). On the contrary, pursuant to Rule 4, Plaintiffs asserted good cause for failing to serve Defendant within the applicable 120 day time period.<sup>1</sup>

For example, Plaintiffs asserted that they attempted to serve Defendant in April of 2003. Tr. at 11, R. at 101, 113, 115, 122, 161-62, 190. Plaintiffs further maintained that their counsel<sup>2</sup> had severe difficulties within his practice and overwhelming obstacles which obstructed and prevented him from serving Defendant sooner. R. at 163-64. Defendant acknowledged service and laid in wait without moving the Court to dismiss the case on the basis of insufficiency of process until after the limitation period expired. See section I.a. above and accompanying cites. In addition, the Circuit Court of Pontotoc County originally found that Plaintiffs had asserted good cause for their failure to serve Defendant within the first 120 days after filing Plaintiffs' original Complaint. R. at 14-15. These and other reasons asserted by Plaintiffs establish that they failed to serve Defendant with service within the 120 day time period for good cause. Thus, this Court should overrule the trial court's grant of Defendant's Motion to Dismiss.

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<sup>1</sup>As set forth in section II of Appellants' Brief, the trial court did not rule on Plaintiffs' subsequently filed Motion for Time Until November 24, 2003, During Which to Serve Defendant Baptist Memorial Hospital for Alternative Relief in Rebuttal of Defendant's Second Motion to Dismiss. R. at 161. Further, there is no evidence that the trial court ever addressed or considered Plaintiffs' good faith argument. R. at 189-90.

<sup>2</sup>Plaintiffs' counsel during the underlying litigation was Peter Martin. Peter Martin remains on the case. However, the undersigned counsel, John Holaday, did not become involved with this case until after the Notice of Appeal had been filed in this matter.

- b. The trial court never ruled on Plaintiffs' Motion for Time Until November 24, 2003, During Which to Serve Defendant Baptist Memorial Hospital for Alternative Relief in Rebuttal of Defendant's Second Motion to Dismiss and never ruled on Plaintiffs' assertion that good cause existed for the failure to serve Defendant outside the applicable 120 day time period for service or process.**

Plaintiffs filed a Motion for Time Until November 24, 2003, During Which to Serve Defendant Baptist Memorial Hospital for Alternative Relief in Rebuttal of Defendant's Second Motion to Dismiss. R. at 161. In that Motion, Plaintiffs requested that the trial court find that there was good cause for their failure to serve Defendant within the applicable 120 period for service of process and specifically requested that the Court allow the November of 2003 process to be deemed proper. R. at 161-170. Defendant responded to that Motion. R. at 184. Plaintiffs Motion was proper and supported by law. See Rule 4(h) of the Mississippi Rules of Civil Procedure. In fact, virtually every case from this Court and the Court of Appeals which has dealt with an insufficiency of process defense has undergone a detailed analysis of the good case issue. See e.g., Triple "C" Transport, Inc. v. Dickens, 870 So. 2d 1195, 1201 (Miss. 2004); *Holmes v. Coast Transit Authority*, 815 So. 2d 1183, 1186-87 (Miss. 2002).

However, the trial court failed to rule on Plaintiffs' Motion nor did it address the good cause argument in any Order of the Court. The Mississippi Court of Appeals has reversed trial courts for their failure to rule on a motion or a request of a party. For example, in the case of *Hall v. State*, 2006 WL 3490618 at \*1 (Miss. App. 2006), the Court of Appeals found, as follows:

Due process of law requires a meaningful opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Furthermore, "[a] judge shall hear and decide all assigned matters within the judge's jurisdiction except those in which disqualification is required." Miss.Code of Judicial Conduct Canon 3(B)(1). "The power to hear and decide carries with it the duty to do so. Mandate will lie to require an inferior court to hear the merits of a cause where it was improperly

dismissed.” *Shewbrooks v. A.C. & S., Inc.*, 529 So.2d 557, 560 (Miss.1988) (quoting *Rosenbarger v. Marion Cir. Ct.*, 239 Ind. 132, 155 N.E.2d 125, 127 (1959)). See also *State ex rel. Dist. Attorney v. Eady*, 246 Miss. 694, 697, 151 So.2d 917, 919 (1963). The question here is whether Hall was heard on the speedy trial motions.

*Hall v. State*, 2006 WL 3490618 at \*1 (Miss. App. 2006).<sup>3</sup> See also *Lancaster v. Stevens*, 961 So.2d 768, 772-73 (Miss. App. 2007).

Not only did the trial court fail to rule on the Plaintiffs’ Motion, but there is no suggestion in its Order dismissing Defendant that it even considered Plaintiffs’ good faith argument. R. at 189-90. Plaintiffs maintain that the trial court erred in its failure to rule on Plaintiffs’ Motion for Time Until November 24, 2003, During Which to Serve Defendant Baptist Memorial Hospital for Alternative Relief in Rebuttal of Defendant’s Second Motion to Dismiss and its failure to address or consider Plaintiffs’ arguments relating to good cause for serving Defendant after the 120 day time for service of process on Defendant. As a result, the trial court’s dismissal of Defendant should be reversed, and the case should be remanded to the trial court.

**c. Defendant waived and/or should be estopped from asserting the insufficiency of process and statute of limitations arguments.**

Although Plaintiffs admit that Defendant included the affirmative defense of insufficiency of process in its Answer, Rule 12 still provides that Defendant waived this affirmative defense. Plaintiffs have copied below the pertinent provisions of Rule 12 of the Mississippi Rules of Civil Procedure, namely, Rules 12(b), (g) and h(1).

**RULE 12. DEFENSES AND OBJECTIONS--WHEN AND HOW PRESENTED--BY PLEADING OR MOTION--MOTION FOR JUDGMENT ON**

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<sup>3</sup>Although Plaintiffs acknowledge that the *Hall* case is a criminal case, there is no indication that the ruling in that case was limited to criminal cases. Plaintiffs maintain that is ruling is equally applicable to civil cases.

## THE PLEADINGS

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

- (1) Lack of jurisdiction over the subject matter,
- (2) Lack of jurisdiction over the person,
- (3) Improper venue,
- (4) Insufficiency of process,
- (5) Insufficiency of service of process,
- (6) Failure to state a claim upon which relief can be granted,
- (7) Failure to join a party under Rule 19.

No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56; however, if on such a motion matters outside the pleadings are not presented, and if the motion is granted, leave to amend shall be granted in accordance with Rule 15(a).

(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by a motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

Miss. R. Civ. P. 12. Defendant filed a Motion to Dismiss for Improper Venue or, in the alternative, to Transfer to the Circuit Court of Lafayette County, Mississippi, on or about January 20, 2004. R.



at 27. The defense and the requested dismissal were available to Defendant under Rule 12(b)(3) above. No other grounds for dismissal were stated in Defendant's Motion including insufficiency of service of process. Defendant suggests that the defense of insufficiency of process was available to it at the time of the filing of this Motion. However, Defendant omitted that defense from the Motion. Rule 12(h)(1) provides two circumstances where a defense of insufficiency of process can be waived. One of those circumstances is if that defense is waived "if omitted from a motion in the circumstances described in subdivision (g)."

See Rule 12(h)(1). Thus, Plaintiffs maintain that Defendant waived its insufficiency of process defense when it omitted it from its Motion to Dismiss for Improper Venue or, in the alternative, to Transfer to the Circuit Court of Lafayette County, Mississippi. See also *L.W. v. C.W.B.*, 762 So.2d 323, 328 (Miss. 2000).

Further, Defendant waived its insufficiency of process defense by actively engaging in litigation and waiting over nine months to file its motion requesting dismissal due to insufficiency of process. Undisputedly, Defendant was served no later than November 7, 2003. R. at 18, 51, 68. Also undisputed is the fact that Defendant waited until August 20, 2003, to file a motion requesting that the trial court dismiss the action for insufficiency of process. R. at 67. In the interim nine months, Defendant filed an Acknowledgement of Receipt of Summons and Complaint (R. at 18), answered the complaint (R. at 19), propounded written discovery to Plaintiffs (R. at 26), filed the above discussed Motion to Dismiss for Improper Venue (R. at 27), filed a Reply in further support of its Motion to Dismiss for Improper Venue (R. at 47), filed a Response to Plaintiffs' Motion to Strike Defenses and Motion for Sanctions (R. at 50), and issued and served two different Subpoena Duces Tecums to healthcare providers for medical records (R. at 55-64). Defendant did not act

timely on their affirmative defense but rather laid in wait the applicable statute of limitation expired on Plaintiffs' claims. Defendant further actively participated in the litigation of the case.

This Court has held definitively that a party cannot litigate a case and wait to assert an affirmative defense. In *MS Credit Center, Inc. v. Horton*, 926 So.2d 167, 180 (Miss. 2006), this Court held as follows:

A defendant's failure to timely and reasonably raise and pursue the enforcement of any affirmative defense or other affirmative matter or right which would serve to terminate or stay the litigation, coupled with active participation in the litigation process, will ordinarily serve as a waiver.

*MS Credit Center, Inc. v. Horton*, 926 So.2d 167, 180 (Miss. 2006). Plaintiffs assert that Defendant waived its affirmative defense of insufficiency of process by actively participating in the litigation process and waiting for over nine months to move the trial court for dismissal on the basis of that affirmative defense. For the same reasons as those supporting waiver, Plaintiffs assert that the doctrine of equitable estoppel is applicable to bar Defendant's raising the insufficiency of process or statute of limitations defense. See e.g. *Harrison Enterprises, Inc. v. Trilogy Communications, Inc.*, 818 So.2d 1088, 1096 (Miss. 2002).

As a result of the doctrines of waiver and estoppel, Plaintiffs assert that the rulings of the trial court dismissing Defendant from this litigation on the basis of insufficiency of process and the statute of limitations should be overruled.

- d. The trial court's dismissal of Defendant violates the spirit, intent and purpose of statutes of limitation in this Country and in this State, and as a result, unfairly deprives Plaintiffs of their Due Process Rights under Article 3, Sections 14 and 24 of the Mississippi Constitution and the Fourteenth Amendment of the United States Constitution.**

Plaintiffs further assert that the trial court's dismissal of Defendant from this action violate

the spirit and purpose of our statutes of limitation in the State of Mississippi. This Court has stated definitively:

Statutes of limitations are well established in our judicial system. We have stated their purpose before as follows:

The primary purpose of statutory time limitations is to compel the exercise of a right of action within a reasonable time. These statutes are founded upon the general experience of society that valid claims will be promptly pursued and not allowed to remain neglected. They are designed to suppress assertion of false and stale claims, when evidence has been lost, memories have faded, witnesses are unavailable, or facts are incapable of production because of the lapse of time.

*Mississippi Dept. of Public Safety v. Stringer*, 748 So.2d 662, 665 (Miss. 1999)(quoting *Smith v. Sneed*, 638 So.2d 1252 (Miss. 1994)). It is undisputed that Plaintiffs served this suit against Defendant within the applicable statute of limitation, that Defendant engaged in discovery and litigation, that Defendant suffered absolutely no prejudice as a result of Plaintiffs' alleged failure to serve within the applicable 120 day period. The trial court's dismissal of this action goes against the spirit, intent and purpose of statutes of limitation in this Country and in this State. None of the justifications set forth in the case law set forth above are present here, e.g., stale claims, lost evidence, faded memories, etc. *Mississippi Dept. of Public Safety v. Stringer*, 748 So.2d 662, 665 (Miss. 1999)(quoting *Smith v. Sneed*, 638 So.2d 1252 (Miss. 1994)). Plaintiffs assert that this Court should reverse the trial court's dismissal on grounds of equity, justice and fairness.

In addition, Plaintiffs would argue that a dismissal such as the instant one violates Plaintiffs' substantive and procedural due process rights under Article 3, Sections 14 and 24 of the Mississippi Constitution and the Fourteenth Amendment of the United States Constitution. This Court has recognized that the United States Supreme Court has placed guidelines on the State's ability to restrict citizens from asserting and prosecuting civil causes of action. For example, in *Smith v.*

*Braden*, 765 So.2d 546, 558 (Miss. 2000), this Court stated as follows:

The United States Supreme Court has explained that a state may erect reasonable procedural requirements for triggering the right to adjudication, such as statutes of limitations, and a state accords due process when it terminates a claim for failure to comply with a reasonable procedural rule.

*Smith v. Braden*, 765 So.2d 546, 558 (Miss. 2000)(citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437, 102 S.Ct. 1148, 1158-59, 71 L.Ed.2d 265 (1982)). Plaintiffs maintain that the application to the limitations of Rule 4(h) is unreasonable in violation of the subject Constitutional provisions and the mandates of cases such as *Logan* which dictate that procedural rules must be reasonable. Again, Plaintiffs filed their case within the applicable statute of limitation and served Defendant with process within the applicable statute of limitation. Defendant suffered absolutely no prejudice relating to Plaintiffs' alleged failure to serve Defendant within the applicable 120 day period. To uphold the ruling of the trial court would be to, in essence, shorten the applicable statute of limitation. Such an affirmance of the trial court's dismissal is neither equitable nor Constitutional.

Plaintiffs maintain that this Court should overturn the trial court's grant of Defendant's Motion to Dismiss on these grounds.

## **II. The trial court erroneously denied Plaintiffs' Motion to Alter or Amend Judgment Dismissing Defendant.**

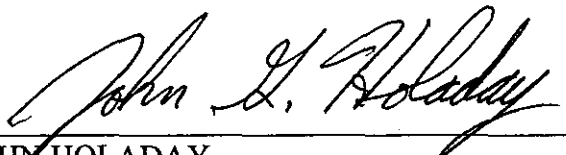
After the trial court dismissed Defendant, Plaintiffs filed a Motion to Alter or Amend Judgment Dismissing Defendant. R. at 195. The trial court subsequently denied that Motion. R. at 239. The primary ground for Plaintiffs' Rule 59(e) Motion was that Defendant had waived the insufficiency of process affirmative defense as set forth in sub-section "c" above. Plaintiffs will not rehash that argument as such is set forth adequately in sub-section "c" above. However, Plaintiffs assert that the trial court erred when it denied Plaintiffs' Motion as there was a "need to correct a

clear error of law or to prevent manifest injustice.” *Journey v. Berry*, 953 So.2d 1145, 1160 (Miss. App. 2007) (citing *Brooks v. Roberts*, 882 So.2d 229, 233(Miss.2004)). The trial court’s denial of Plaintiffs’ Motion to Alter or Amend Judgment should be reversed.

### Conclusion

Based on the foregoing, Appellants Thomas Lucas, Kathleen Lucas Munn, James L. McNeill, Individually, and on behalf of Jane Lucas request that the Court reverse the Orders and Judgment of the Lafayette County Circuit Court dismissing Appellee Baptist Memorial Hospital-North Mississippi, Inc.

This the 9<sup>th</sup> day of January, 2008.

  
\_\_\_\_\_  
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**Certificate of Service**

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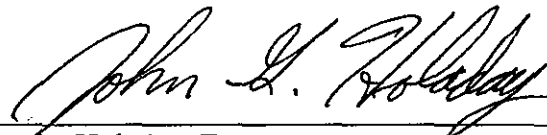
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