

**IN THE SUPREME COURT OF MISSISSIPPI**

**NO. 2008 IA-00602-SCT**

**DR. HENDRICK KUIPER, AND  
RIVER REGION MEDICAL  
CORPORATION/MEDICAL FOUNDATION**

**APPELLANTS**

**VS.**

**JOSEPH TARNABINE AND  
MARGARET TINA BRANAN  
CO-EXECUTORS ON BEHALF OF THE ESTATE  
OF MARTHA JONES TARNABINE**

**APPELLEES**

**APPEAL FROM THE CIRCUIT COURT  
OF WARREN COUNTY, MISSISSIPPI**

**BRIEF OF APPELLEES**

**ORAL ARGUMENT NOT REQUESTED**

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CO-EXECUTORS ON BEHALF OF THE ESTATE  
OF MARTHA JONES TARNABINE**

**APPELLEES**

**CERTIFICATE OF INTERESTED PERSONS**

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

Vicksburg Healthcare, LLC  
2100 Hwy. 61 N  
Vicksburg, MS 39183

River Region Medical Corporation  
2100 Hwy. 61 N  
Vicksburg, MS 39183

River Region Medical Foundation  
2100 Hwy. 61 N  
Vicksburg, MS 39183

St. Paul Insurance Company  
143 LeFleurs Square  
Jackson, MS 39211-5525

Hendrik Kuiper, M.D.  
1901 Mission 66  
Vicksburg, MS 39180

R.E. Parker, Jr.

Clifford C. Whitney III  
Varner, Parker & Sessums, P.A.  
1110 Jackson Street  
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Marcie T. Southerland, Esq.  
1120 Jackson Street  
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Joseph Tarnabine  
Margaret Tina Branan  
c/o Attorney Marcie T. Southerland  
1120 Jackson Street  
Vicksburg, MS 39183

THIS THE 15<sup>th</sup> day of MAY, 2009.

Respectfully submitted,



MARCIE T. SOUTHERLAND

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## STATEMENT OF ISSUES

- I. **DEFENDANT KUIPER IS NOT ENTITLED TO SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE CASE.**
- II. **DEFENDANT RIVER REGION MEDICAL CORPORATION/MEDICAL FOUNDATION SHOULD NOT BE DISMISSED FOR LACK OF SERVICE OF PROCESS.**

## STATEMENT OF THE CASE

### *Nature of the Case, Course of Proceedings, and Disposition in the Court Below*

On December 31, 2002, Plaintiffs Joseph Tarnabine and Margaret Tina Branan, as co-executors of the estate of Martha Jones Tarnabine, filed suit in the Circuit Court of Warren County, Mississippi, against Dr. Hendrick Kuiper, River Region Medical Corporation/Medical Foundation, and John Does 1 through 5, alleging medical malpractice and wrongful death. Defendants were served with process but never filed an answer to the complaint. Default Judgments were entered against both Defendants on February 3, 2004.

Plaintiffs filed, on February 24, 2004, a Petition for Writ of Inquiry pertaining to the damages suffered by the plaintiffs. A hearing was held on March 24, 2004. The lower court entered an Order Awarding Damages in the Amount of \$2,000,000.00 for the wrongful death of Martha Jones Tarnabine.

Defendants filed their Motion to Set Aside Default Judgment Pursuant to M.R.C.P. 55(c) on May 6, 2004. A hearing was held on the motion on July 16, 2004.

On June 20, 2005, the lower court found that the defendants had been properly served with process pursuant to Rule 4 of the Mississippi Rules of Civil Procedure. However, the lower court entered an order setting aside the default judgment and ordering the case to proceed on the merits.

Plaintiffs filed their Petition for Interlocutory Appeal on July 11, 2005. Defendants filed their Response to Petition for Interlocutory Appeal and Conditional Cross-Petition for Interlocutory Appeal on or about July 25, 2005. Interlocutory Appeal was granted on August 11, 2005.

On March 15, 2007, this Court entered a *per curiam* affirmance upholding the trial court in setting aside the default judgment and ordering the case to proceed on the merits. Plaintiffs filed a motion for written opinion that was denied on June 7, 2007.

Defendant River Region filed its Motion to Dismiss By River Region Medical Corporation and River Region Medical Foundation on July 8, 2005. On December 7, 2007, counsel for Plaintiffs received a Notice of Hearing on the Motion to Dismiss and Motion for Summary Judgment by River Region Medical Corporation and River Region Medical Foundation. Apparently counsel for Defendant River Region failed to file said notice with the Clerk of Court. The hearing was scheduled by Defendants' counsel on January 10, 2008. However, Counsel for Defendants failed to note that on his calendar and was late appearing. A hearing was had once counsel for Defendants appeared in court.

Defendant Kuiper had filed his Motion for Summary Judgment on September 27, 2007, but had never noticed that motion for hearing. Counsel for Kuiper argued that motion before the trial court on January 10, 2008, without notice to the Plaintiffs. The trial court denied all motions by Defendants. The trial court entered an order on March 20, 2008, allowing the trial to go forward on the merits.

### **STATEMENT OF FACTS**

On December 31, 2002, Plaintiffs Joseph Tarnabine and Margaret Tina Branan, as co-executors of the estate of Martha Jones Tarnabine, filed suit in the Circuit Court of Warren County, Mississippi, against Dr. Hendrick Kuiper, River Region Medical Corporation/Medical

Foundation, and John Does 1 through 5, alleging medical malpractice and wrongful death. Dr. Kuiper was served with process by the Warren County Sheriff's Department on April 15, 2003. River Region Medical Corporation/Medical Foundation, through Corporation Services Company, its registered agent for service of process, was served with process on April 14, 2003.

For ten months Defendants failed to answer, plead, or otherwise defend this lawsuit. Accordingly Plaintiffs filed, pursuant to Miss. Rule of Civil Procedure 55, Applications to the Clerk for Entry of Default and Supporting Affidavits of the Attorney for the Plaintiffs on February 2, 2004. Docket Entries of Default were entered on February 2, 2004. Default Judgments were entered against both Defendants on February 3, 2004.

Plaintiffs filed, on February 24, 2004, a Petition for Writ of Inquiry pertaining to the damages suffered by the plaintiffs. A hearing was held on March 24, 2004, where the lower court heard testimony of the plaintiffs and their expert witness, Dr. Dave Channel, regarding economic loss to the decedent. After the hearing the lower court ruled that the defendants had been duly served with process pursuant to Rule 4 of the Mississippi Rules of Civil Procedure but had failed to answer, plead, or otherwise defend this lawsuit. On May 4, 2004, the lower court entered an Order Awarding Damages in the Amount of \$2,000,000.00 for the wrongful death of Martha Jones Tarnabine.

Defendants filed their Motion to Set Aside Default Judgment Pursuant to M.R.C.P. 55(c) on May 6, 2004. A hearing was held on the motion on July 16, 2004.

The lower court, almost one year later on June 20, 2005, found that the defendants had been properly served with process pursuant to Rule 4 of the Mississippi Rules of Civil Procedure. However, the lower court entered an order setting aside the default judgment and ordering the case to proceed on the merits. The lower court stated that "... the inadvertent delay between the service of process . . . and the filing of the return of service . . . causes the Court



some concern that the [d]efendant may have been prejudiced by the lengthy delay between the service of process and the filing of the return.”

Plaintiffs filed their Petition for Interlocutory Appeal on July 11, 2005. Defendants filed their Response to Petition for Interlocutory Appeal and Conditional Cross-Petition for Interlocutory Appeal on or about July 25, 2005. Interlocutory Appeal was granted on August 11, 2005.

On March 15, 2007, this Court entered a *per curiam* affirmance upholding the trial court in setting aside the default judgment and ordering the case to proceed on the merits. Plaintiffs filed a motion for written opinion that was denied on June 7, 2007.

Defendant River Region filed its Motion to Dismiss By River Region Medical Corporation and River Region Medical Foundation on July 8, 2005. On December 7, 2007, counsel for Plaintiffs received a Notice of Hearing on the Motion to Dismiss and Motion for Summary Judgment by River Region Medical Corporation and River Region Medical Foundation. Apparently counsel for Defendant River Region failed to file said notice with the Clerk of Court. The hearing was scheduled by Defendants’ counsel on January 10, 2008. However, Counsel for Defendants failed to note that on his calendar and was late appearing. A hearing was had once counsel for Defendants appeared in court.

Defendant Kuiper had filed his Motion for Summary Judgment on September 27, 2007, but had never noticed that motion for hearing. Counsel for Kuiper argued that motion before the trial court on January 10, 2008, without notice to the Plaintiffs. The trial court denied all motions by Defendants. The trial court entered an order on March 20, 2008, allowing the trial to go forward on the merits.

## **SUMMARY OF THE ARGUMENT**

### **I. DEFENDANT KUIPER IS NOT ENTITLED TO SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE CASE.**

On December 7, 2007, counsel for Defendant River Region Medical Corporation/Medical Foundation signed a Notice of Hearing setting the Motion to Dismiss and Motion for Summary Judgment filed by Defendant River Region Medical Corporation/Medical Foundation. Counsel for Defendant also signed a Certificate of Service that same day that counsel for Plaintiffs had been served a copy of the Notice of Hearing.

Nowhere in the Notice of Hearing was there any notice that the Motion for Summary Judgment filed by Dr. Kuiper would be heard on that same day. Both the notice and certificate of service were signed by Clifford C. Whitney as counsel for Defendants River Region Medical Corporation and River Region Medical Foundation. No mention was made of any motion filed by Dr. Kuiper.

Counsel for Plaintiffs could not be expected to defend Kuiper's Motion for Summary Judgment when they had no notice that the motion was to be heard.

### **II. DEFENDANT RIVER REGION MEDICAL CORPORATION/MEDICAL FOUNDATION SHOULD NOT BE DISMISSED FOR LACK OF SERVICE OF PROCESS.**

This same issue has been before this Court and was upheld by this Court in Joseph Tarnabine and Margaret Tina Branan Co-executors on Behalf of the Estate of Martha Jones Tarnabine v. Dr. Hendrick Kuiper and River Region Medical Corporation/Medical Foundation, No. 2005-IA-01354-SCT and is, therefore, *res judicata*. When the final mandate was handed down by this Court, this Court affirmed the trial court's decision that both parties had been served and that the trial court had been correct in setting aside the default judgments in this matter. Counsel for River Region Medical Corporation/Medical Foundation is simply asking this Court for the proverbial "second bite of the apple."

## ARGUMENT

### **I. DEFENDANT KUIPER IS NOT ENTITLED TO SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE CASE.**

The Mississippi Rules of Civil Procedure specifically require that notice of hearing on a Motion for Summary Judgment be served ten (10) days before the hearing on the motion. *M.R.C.P. 56(c)*.

On December 7, 2007, counsel for Defendant River Region Medical Corporation/Medical Foundation signed a Notice of Hearing **setting the Motion to Dismiss and Motion for Summary Judgment filed by Defendant River Region Medical Corporation/Medical Foundation**. Counsel for Defendant River Region Medical Corporation /Medical Foundation also signed a Certificate of Service that same day that counsel for Plaintiffs had been served a copy of the Notice of Hearing. *Appendix I*. Both the notice and certificate of service were signed by Clifford C. Whitney **as counsel for Defendants River Region Medical Corporation and River Region Medical Foundation**.

Nowhere in the Notice of Hearing was there any notice that the Motion for Summary Judgment filed by Dr. Kuiper would be heard on that same day. No mention was made of any motion filed by Dr. Kuiper. In fact, Dr. Kuiper's name appears nowhere in the Notice of Hearing or the Certificate of Service.

Counsel for Plaintiffs clearly states in her argument that she only is addressing the Motion to Dismiss filed by counsel for River Region and not Dr. Kuiper's Motion for Summary Judgment that had not been noticed for hearing. *Tr. 10*. Counsel for Plaintiffs, pursuant to M.R.C.P. 56(c), could not be expected to defend Kuiper's Motion for Summary Judgment when they had no notice that the motion was to be heard. *Jones v. Regency Toyota, Inc.*, 798 So.2d

474, 475-476 (Miss. 2001.); *Palmer v. Biloxi Regional Medical Center, Inc.*, 649 So.2d 179 (Miss. 1994.)

**II. DEFENDANT RIVER REGION MEDICAL CORPORATION/MEDICAL FOUNDATION SHOULD NOT BE DISMISSED FOR LACK OF SERVICE OF PROCESS.**

This same issue has been before this Court and was upheld by this Court in Joseph Tarnabine and Margaret Tina Branan Co-executors on Behalf of the Estate of Martha Jones Tarnabine v. Dr. Hendrick Kuiper and River Region Medical Corporation/Medical Foundation, No. 2005-IA-01354-SCT, and is, therefore, law-of-the-case.

The doctrine of the law of the case is similar to that of former adjudication, relates entirely to questions of law, and is confined in its operation to subsequent proceedings in the case. Whatever is once established as the controlling legal rule of decision, between the same parties in the same case, continues to be the law of the case, so long as there is a similarity of facts. This principle expresses the practice of courts generally to refuse to reopen what has previously been decided. It is founded on public policy and the interests of orderly and consistent judicial procedure.

*Public Employees' Retirement System v. Freeman*, 868 So.2d 327, 330 (Miss. 2004)(citations omitted.)

In addition, a mandate issued by the Supreme Court "is binding on the trial court on remand, unless the case comes under one of the exceptions to the law of the case doctrine." *Id.* (citing *Moeller v. Am. Guarantee & Liab. Ins. Co.*, 812 So.2d 953, 960 (Miss. 2002.)) Exceptions are "material changes in evidence, pleadings or findings." *Id.*

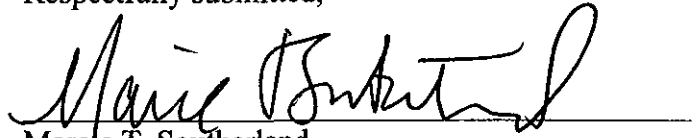
When the final mandate was handed down by this Court, this Court affirmed the trial court's decision that both parties had been served. There has been no material changes in evidence, pleadings or findings, to justify any changes to this Court's previous mandate. Counsel for River Region Medical Corporation/Medical Foundation is simply asking this Court for the proverbial "second bite at the apple."

## CONCLUSION

Dr. Kuiper should not be granted summary judgment in this medical malpractice case. As has been shown, Plaintiffs were not given ten (10) days notice that this matter was to be heard. The Notice of Hearing referenced motions filed by River Region.

In addition, this Court previously affirmed the trial court's findings that River Region had been served. To give River Regions this "second bite at the apple" would go against the case of the law doctrine which was founded on judicial consistency and fairness.

Respectfully submitted,



Marcie T. Southerland

**CERTIFICATE OF SERVICE**

I, Marcie T. Southerland, do hereby certify that I have this day served by United States Mail, or Hand-Delivered, as indicated, a true and correct copy of the above and foregoing to

Mrs. Betty Sephton  
Supreme Court Clerk  
P.O. Box 117  
Jackson, MS 39205

Honorable Isadore Patrick  
P.O. Box 351  
Vicksburg, MS 39181

Honorable R. E. Parker, Jr.  
P.O. Box 1237  
Vicksburg, MS 39181

SO CERTIFIED, this the 15 day of May, 2009.

  
\_\_\_\_\_  
MARCIE T. SOUTHERLAND

**MARCIE T. SOUTHERLAND  
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1120 JACKSON STREET  
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**IN THE CIRCUIT COURT OF WARREN COUNTY, MISSISSIPPI**

**JOSEPH TARNABINE AND  
MARGARET TINA BRANAN  
CO-EXECUTORS ON BEHALF OF THE ESTATE  
OF MARTHA JONES TARNABINE**

**PLAINTIFF**

**VS.**

**CASE NO. 02,0229-CI**

**DR. HENDRICK KUIPER,  
RIVER REGION MEDICAL  
CORPORATION/MEDICAL FOUNDATION  
AND JOHN DOES (1-5)**

**DEFENDANTS**

**NOTICE OF HEARING**

Please take notice that the Motion to Dismiss and Motion for Summary Judgment by River Region Medical Corporation and River Region Medical Foundation, through undersigned counsel, will be brought on for hearing on the 10<sup>th</sup> day of January, 2008, at 11:00 a.m. in the Circuit Court of Warren County located in Vicksburg, Mississippi before the Honorable Issadore Patrick.

This the 7<sup>th</sup> day of December, 2007.

Respectfully submitted,  
RIVER REGION MEDICAL CORPORATION AND  
RIVER REGION MEDICAL FOUNDATION

BY: 

CLIFFORD C. WHITNEY III

OF COUNSEL:  
VARNER, PARKER & SESSUMS, P.A.  
1110 Jackson Street  
Post Office Box 1237  
Vicksburg, Mississippi 39181-1237  
Telephone: 601/638-8741  
Facsimile: 601/638-8666

CERTIFICATE OF SERVICE

I, Clifford C. Whitney III, one of the attorneys for Defendants, River Region Medical Corporation and River Region Medical Foundation, do hereby certify that I have this day mailed, postage prepaid, by United States Mail, via facsimile and/or hand-delivered a true and correct copy of the above and foregoing document to the following counsel of record:

Marcie Southerland, Esq.  
1200 Grove St.  
Vicksburg MS 39180

This the 7<sup>th</sup> day of December, 2007.

  
CLIFFORD C. WHITNEY III