IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2009-CA-00081

BILLY NELSON AND GAYNELLE NELSON, INDIVIDUALLY AND AS PARENTS AND NEXT FRIENDS OF JUSTIN NELSON, A MINOR, AND AS REPRESENTATIVES OF ALL WRONGFUL DEATH BENEFICIARIES OF BOBBY NELSON, DECEASED **APPELLANTS/PLAINTIFFS**

VS.

BAPTIST MEMORIAL HOSPITAL-NORTH MISSISSIPPI, INC.; WILLIAM E. HENDERSON, JR., M.D. GENERAL PARTNER; OXFORD CLINIC FOR WOMEN, A PARTNERSHIP; IRA LAMAR COUEY, M.D., GENERAL PARTNER; R. BLAKE SMITH, M.D., GENERAL PARTNER; AND JOHN DOES 1 THROUGH 10 **APPELLEES/DEFENDANTS**

ON APPEAL FROM THE CIRCUIT COURT OF LAFAYETTE COUNTY, MISSISSIPPI

BRIEF OF APPELLEES/DEFENDANTS WILLIAM E. HENDERSON, M.D.; IRA LAMAR COUEY, M.D.; R. BLAKE SMITH, M.D.; AND OXFORD CLINIC FOR WOMEN

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have or may have an interest in the income of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Billy Nelson, Appellant
2. Gaynelle Nelson, Appellant
3. Margaret P. Ellis, Counsel for Appellants
4. Roderick D. Ward, III, Counsel for Appellants
5. William E. Henderson, M.D., Appellee
6. Ira Lamar Couey, M.D., Appellee
7. R. Blake Smith, M.D., Appellee
8. Oxford Clinic for Women, Appellee
9. Clinton M. Guenther, Counsel for Appellees Henderson, Couey, Smith and Oxford Clinic for Women
10. Tommie Williams, Counsel for Appellees Henderson, Couey, Smith and Oxford Clinic for Women
11. Baptist Memorial Hospital-North Mississippi, Inc., Appellee
12. Walter Alan Davis, Counsel for Appellee Baptist Memorial Hospital-North Mississippi, Inc.
13. Honorable Henry L. Lackey, Circuit Judge
14. Honorable James W. Kitchens, Justice, Mississippi Supreme Court; former counsel for Appellants, and former law partner of Appellants' counsel, Margaret P. Ellis

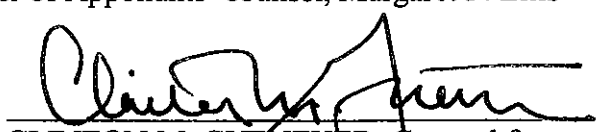

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

PRELIMINARY REMARKS:

This is the second time this cause of action comes before this Court, the first time's having been the appeal addressed in *Nelson v. Baptist Memorial Hospital*, 972 So.2d 667 (Miss. App. 2007) (hereinafter also *"Nelson I"*). From and after that appeal, a second lawsuit was filed and dismissed, giving rise to this appeal. Due to several peculiarities of Plaintiffs' brief, in response thereto the doctors and their clinic (hereinafter also collectively "the doctors") believe it necessary to preliminarily show to the Court the following:

1. The defendants are not all one-and-the-same.

Throughout the Nelsons' brief, they refer collectively to "Defendants", as if the doctors and the defendant hospital are all one-and-the-same and all make the same arguments. Perhaps unintentionally, but nevertheless that is misrepresentative of the defendants' positions, as can be seen and understood from the record and the different arguments made by the different defendants to the trial court. The only time in the Nelsons' brief that they make any distinction between the defendants and/or their arguments is when the Nelsons argue about service of process on the doctors, beginning on page 36 of their brief.

The doctors and their clinic are not one-and-the-same as the defendant hospital; all of their arguments made to the trial court and herein were and are not identical to those of the hospital, and some of the arguments made by the doctors are not applicable to the hospital. Likewise, all of the arguments made by the hospital were and are not the same as all of those made by the doctors.

2. The first lawsuit was not reversed and remanded.

This case is not one that was reversed and remanded by the Court of Appeals in *Nelson I*, like Plaintiffs state at page 36 of their brief when they argue that, "...certainly service [of process] was proper after this case was **reversed** and **remanded**..." (**Emphasis** added). The *Nelson I* court only

reversed the trial court's judgment dismissing the case with prejudice, and it only ordered that the case was dismissed without prejudice. The case was not remanded to the trial court for any further proceedings, nor was any other finding or ruling of the trial court reversed or modified.

Service of process of Plaintiffs' second complaint is not and never has been at issue, and the issue of ineffective service of process on the doctors in Plaintiffs' first lawsuit was resolved by the trial court over four years before Plaintiffs filed their second Complaint. If the case had been remanded, and if the Nelsons had effectively served process on all the defendants in the first suit, there would have been no need for further issuance and service of process; nor would there have been any need to file a second complaint.

Although Plaintiff's second complaint was based upon the same set of facts, occurrences and cause of action as their first complaint, since the lawsuit was not remanded, the Nelsons' second complaint is, by operation of law, a second, separate and distinct lawsuit. However, because it is based upon the same set of facts, occurrences and cause of action as their first complaint, their second complaint is governed by the same statute of limitations as their first complaint, something which Plaintiffs admit.

3. The issue of ineffective service of process on the doctors in Plaintiffs' initial lawsuit is not properly an issue before this Court in Plaintiffs' second appeal.

In their Statement of the Issues filed herein, and made a part of their brief at p. x, Plaintiffs did not state anything about asking this Court to consider the trial court's ruling in their first lawsuit, that process of their first complaint was not effected on the doctors or their clinic. However, in Plaintiffs' brief at pp. 36-40, Plaintiffs raise the issue, make extensive argument concerning it, propose that "**This Court should find that service on the Clinic and the individual doctors was proper in the initial suit**", and ask this Court to "**deny Defendants' motions on that issue.**"

(Nelson's Brief p. 40). In those pages in support of their request for the Court to make such a finding, the Nelsons refer to and quote from testimony given by Candace Hogue, the doctors' clinic's office manager, at a May 24, 2004 hearing in Plaintiffs' first lawsuit. Plaintiffs did not make a transcript of that hearing a part of the record on this, Plaintiffs' second, appeal.

For those reasons, the doctors filed a motion to supplement the record to make a part of the record a copy of the transcript of the abovementioned hearing at which Ms. Hogue testified, because the transcript of that hearing contains the entire testimony of Ms. Hogue, not just the minuscule portion of her testimony quoted by the Nelsons in their brief.

Since at the time that the doctors have to file their brief no ruling has been made on the doctors' motion to supplement the record, the doctors have included in their brief their argument in response to Plaintiffs', addressing the issue of service of process in Plaintiffs' first lawsuit, making reference to the pages of that hearing's transcript where Ms. Hogue's testimony appears. The doctors do so in the event that the Court should decide to consider that issue in this appeal.

Nevertheless, in so doing the doctors do not intend to waive their argument that the Nelsons have improperly and/or untimely raised the issue of service of process on the doctors, which was at issue in Plaintiff's first lawsuit but was not addressed by the Court of Appeals in Plaintiffs' first appeal. If this Court should find that that issue is not appropriately or timely before the Court, the doctors request the Court's indulgence and understanding that in light of the portion of Plaintiffs' brief devoted to that issue, the doctors could not ignore the issue and felt it necessary to address it in their brief. If this Court does entertain that issue, then the doctors request the Court consider the evidence of Ms. Hogue's testimony as to the trial court's finding that process was never effected on the doctors or their clinic.

CHRONOLOGY

This matter, like its predecessor in *Nelson I,* arises from and concerns the birth and death of Bobby Nelson, who was born on April 25, 2001 and died about two and a half months later, on July 14, 2001. Due to the nature of the issues on appeal, a brief chronology of pertinent events may be helpful to the Court.

	Event	Date
•	Bobby Nelson's birth	April 25, 2001
•	**Bobby Nelson's death (SOL for wrongful death began)**	**July 14, 2001**
•	**Complaint (filed with 5 days remaining in SOL)**	**July 9, 2003**
•	Order (granting additional 90 days to serve process)	November 3, 2003
•	**Time to serve process expired; SOL began again**	**February 4, 2004**
•	**SOL expired with no process on doctors or clinic**	**February 9, 2004**
•	Hearing on Defendants' Motions to Dismiss	May 24, 2004
•	**Order Sustaining Defendants' Motions to Dismiss**	**June 18, 2004**
•	**Final Judgment of Dismissal with Prejudice**	**June 23, 2004**
•	Hearing on Plaintiff's Motion to Reconsider	June 7, 2005
•	Order Affirming Prior Order (of dismissal)	September 27, 2005
•	Plaintiffs' Notice of Appeal	October 27, 2005
•	**Court of Appeals' decision** (dismissal without prejudice)	**May 8, 2007**
•	**Court of Appeals' mandate**	**January 24, 2008**
•	**(Second) Complaint**	**March 26, 2008**
•	Opinion and Order Dismissing Cause with Prejudice	July 1, 2008
•	Order Overruling Plaintiffs' Motion to Reconsider	December 17, 2008
•	Plaintiffs' Notice of Appeal	January 9, 2009

STATEMENT OF THE CASE

In the Nelsons' first lawsuit concerning Bobby Nelson's death, the trial court dismissed the complaint with prejudice for several reasons, namely because: (1) the Nelsons had failed to comply with two statutorily required prerequisites (Miss. Code Ann. §§ 15-1-36(15) and 11-1-58(1)) before they filed their complaint; and (2) because they had failed to serve process on the defendant doctors and their clinic (hereinafter also collectively "the doctors"), ruling that the statute of limitations had expired.[1] *Nelson I* at 670 (¶ 15); (Record pp. 117-119)[2]

The Court of Appeals in *Nelson I* agreed that Plaintiffs' failure to provide the required written pre-suit notice and certificate of expert consultation warranted the trial court's dismissal. However, the Court of Appeals found that the dismissal should have been without prejudice. The *Nelson I* court, therefore, reversed the trial court and dismissed the action without prejudice for Plaintiffs' failure to comply with the subject statutory pre-suit prerequisites. The Court of Appeals did not address Plaintiffs' contention that the trial court erred in ruling that the doctors had not been served with process prior to the expiration of the statute of limitations. The Court of Appeals also did not address what effect, if any, failure to comply with pre-suit prerequisites had on tolling the statute of limitations.

After the mandate was entered in *Nelson I*, and contending that they still had five (5) days remaining in the statute of limitations, the Nelsons sent written pre-suit notice of their intent to file a second complaint and, in fact, did so on March 26, 2008, that time also providing a certificate of expert consultation. Defendants then moved for summary judgment and to dismiss Plaintiffs' second

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[1]Process was effected upon the defendant hospital, BMH-North Mississippi.

[2]References to the Record are to the record in this appeal.

complaint as being time-barred because of the expiration of the statute of limitations.

Subsequent to the *Nelson I* decision, in the case of *Wimley v. Reid*, 991 So.2d 135 (Miss. 2008), the Mississippi Supreme Court found unconstitutional the provision in § 11-1-58(1) that a certificate of expert consultation must accompany a complaint. However, the mandate in *Nelson I* had been issued some eight months earlier. Also subsequent to *Nelson I,* the Mississippi Supreme Court revisited the issue of the statute of limitations in a wrongful death case, in the cases of *Caves v. Yarborough*, 991 So.2d 142 (Miss. 2008) and *UMMC v. McGee,* 999 So.2d 837 (Miss. 2008).

In light of those two decisions concerning and clarifying statutes of limitation for wrongful death claims, despite any different argument made heretofore, the doctors now agree that the statute of limitations for the Nelsons' wrongful death claims began to run on July 14, 2001, the date of Bobby Nelson's death. However, there may be certain "survivor" claims for which the statute of limitations began to run earlier. For any such survivor claims which the Nelsons may have that are not subsumed by their wrongful death claim, it is not conceded that the statute began to run on July 14, 2001. The statute for some if not all of those survivor claims may have begun to run as early as the date of Bobby Nelson's birth, April 25, 2001. In any case, those survivor claims began to run before the date of the child's death.

Nevertheless, for the purposes of this appeal, that point is not at issue, and it does not matter whether the statute of limitations for the Nelsons' claims began on the date of Bobby Nelson's death or even as early as the date of his birth. In either instance, Plaintiffs' filing of their first complaint in July, 2003 without first complying with the two subject statutorily required prerequisites [should have] resulted in nothing to have tolled the statute of limitations. As a result, the statute of limitations [should have] expired on July 14, 2003, five days after they filed their initial Complaint on July 9, 2003, two years after Bobby Nelson's death.

Even assuming *arguendo* that the filing of their initial complaint on July 9, 2003 did toll the statute of limitations for five days (despite failure to comply with statutory prerequisites), the judicially determined law of the case is that Plaintiffs never served the doctors with process. So at least as to the doctors, the statute of limitations unquestionably expired in February, 2004, long before Plaintiffs' filed their second complaint in March, 2008.

Finally, Plaintiffs did not state in their Statement of the Issues in this appeal anything with regard to the trial court's determination in their first lawsuit that process had not been served on the doctors; as such, that issue is not before this Court. Plaintiffs also failed to seek further appellate review or determination of the issue following the Court of Appeals' decision in *Nelson I.* Therefore, Plaintiffs should be precluded from seeking any further appeal of the trial court's determination of that issue. However, in their brief at pp. 36-40, Plaintiffs raise the issue, ask the Court to consider the issue, and ask the Court to reverse the trial court's ruling on that issue. For those reasons, the doctors could not ignore Plaintiffs' arguments, and in the event this Court does consider that issue, respond to Plaintiffs' arguments in their brief.

SUMMARY OF THE ARGUMENT

At issue in this appeal is what effect, if any, the dismissal of a complaint without prejudice for failure to comply with the statutorily required prerequisites of §§ 15-1-36(15) and 11-1-58(1), Miss. Code Ann. (Rev. 2003) has upon the running of the statute of limitations, particularly whether or not the filing of a complaint without first complying with those statutorily required prerequisites should do anything to toll the running of the statute of limitations. Even so, as it concerns the doctors and their clinic, outcome determinative to this appeal should be the recognition that a dismissal without prejudice of a plaintiff's first complaint has no effect on a statute of limitations which had expired long before the plaintiff's second complaint was filed, when there was no service of process of the first complaint.

If it is determined that the Nelsons' filing their initial complaint without first complying with the subject statutory prerequisites nevertheless did toll the statute of limitations, then the result of such a determination will mean that those statutory prerequisites are completely defeated and their effectiveness is rendered meaningless. However, if the filing of such a complaint is a legal nullity, as this Court has held, then the statute of limitations should not be considered tolled by such filing of a complaint.

For those reasons, since the Nelsons did not comply with either of those prerequisites before they filed their initial complaint, dismissal with prejudice of their second complaint was appropriate. The statute of limitations was never tolled, and it expired on July 14, 2003, five days after the Nelsons filed their first complaint on July 9, 2003, and more than four years before they filed their second Complaint, the subject of this appeal.

In addition to but aside from that issue, the law is clear that if a plaintiff does not effect service of process on a defendant within the 120 day period provided by M.R.C.P. 4(h) and/or any

properly obtained extensions thereof, then any [remaining] portion of the statute of limitations, which was tolled by the filing of the complaint, begins to run again. That is what happened to the Nelsons' first complaint with regard to the doctors and their clinic, as was judicially determined by the trial court in June, 2004 in *Nelson I.*

In *Nelson I*, Plaintiffs had a total of 210 days within which to serve the defendants. They served none of the defendants within the first 120 days, but they were granted an additional 90 days. During that additional 90 days, they did serve process upon the defendant hospital, but they did not serve the doctors. Plaintiffs' first complaint was filed on July 9, 2003 with five days remaining in the statute of limitations. Plaintiffs' time to serve process expired 210 days later, on February 4, 2004. When process was not served on the doctors by February 4, 2004, the statute of limitations began to run again; five days later it expired. On June 18, 2004 the trial court found and ruled that service had not been effected on the doctors or their clinic. For that reason, and others, the trial court ruled that the lawsuit against the doctors and clinic was time-barred and dismissed the case with prejudice. On appeal, the *Nelson I* court reversed the trial court's judgment of dismissal with prejudice and ordered that the dismissal was without prejudice.

While the decision in *Nelson I* did result in a dismissal without prejudice of Plaintiffs' first complaint, that dismissal is of no consequence to the fact that the statute of limitations [had already] expired, thus making the second lawsuit time-barred. A dismissal without prejudice does not deprive a defendant of any defense they are entitled to make to a newly filed lawsuit, nor does it confer any new right or advantage on a plaintiff. It certainly does not extend or revive a statute of limitations that has already expired.

Before Plaintiffs' first lawsuit was dismissed by the trial court in *Nelson I* in June, 2004 [and even if the dismissal by the trial court had been without prejudice], the statute of limitations against

the doctors and their clinic nevertheless [would have] expired in February, 2004 due to the lack of process on those defendants. Since Plaintiffs' second complaint was filed in March, 2008, more than four years later, it was certainly time-barred and ripe for dismissal with prejudice.

For those reasons, but certainly for the reason that process was not served on the doctors and their clinic for the first complaint, the trial court did not err when it dismissed with prejudice Plaintiffs' second complaint against the doctors and their clinic. Therefore, dismissal with prejudice of the Nelsons' second complaint, the subject of this appeal, should be affirmed.

Finally, regarding the issue of service of process on the doctors, the trial court in *Nelson I* held an evidentiary hearing on the matter, at which the doctors' office manager testified that certain documents had been left by an unidentified person unknown to her to be a process server; and that she did not know that the documents were copies of summons and complaint until after the process server had left the clinic. She also testified that she had never been the agent for service of process for the clinic or any of the doctors. The doctors had also filed affidavits swearing that they had not been personally served with process.

All that evidence was considered by the trial court and was part of the record in *Nelson I,* as was the trial court's ruling that process was never effected on the doctors. The trial court's ruling in that regard is a part of the record on this appeal as it was attached as an exhibit to a pleading in the record. (Record pp. 117-119). However, the transcript of the hearing at which Ms. Hogue testified was not made a part of the designated record on this appeal. In the event this Court were to grant Plaintiffs' request and consider the issue, the doctors moved the Court to allow supplementation of the record with that transcript, so the Court would have the benefit of Ms. Hogue's entire testimony that was considered by the trial court in making its determination that process had not been served on the doctors in Plaintiffs' initial suit.

Insofar as the doctors are concerned, determinative to the Nelsons' claims against them and despite any other issue involving Plaintiffs' second complaint and this appeal, it has already been judicially determined that the doctors were not served with process of Plaintiffs' first complaint. The trial court's determination of that fact and its conclusion of law were not reversed or disturbed by the Court of Appeals' ruling in *Nelson I.*

So, if not as to all the defendants, then certainly as to the doctors, the statute of limitations had expired years before Plaintiffs' second complaint was filed. Therefore, if for no other reason, the trial court reached the correct result in dismissing with prejudice Plaintiffs' second complaint against the doctors and their clinic. Even if the trial court reached the correct result by the wrong path, the correct result should be affirmed.

ARGUMENT

A. Background and overview:

Plaintiffs' cause of action began with the birth of their son, Bobby Nelson, on April 25, 2001 at Baptist Memorial Hospital-North Mississippi in Oxford, Mississippi. Defendants are alleged to have been negligent in connection with Gaynelle Nelson's labor and delivery, which Plaintiffs allege resulted in Bobby Nelson's death about two and a half months later, on July 14, 2001. As a result, the Nelsons filed a complaint alleging damages, injuries and the wrongful death of Bobby Nelson on July 9, 2003, five days shy of the second anniversary of Bobby's death. Plaintiffs [admittedly] failed to comply with two statutorily required prerequisites before filing their complaint, Miss. Code Ann. § 15-1-36(15)(Rev. 2003) and Miss. Code Ann. § 11-1-58(1) (Rev. 2003), by filing the complaint without first having given Defendants at least 60 days prior written notice of their intent to sue, and by failing to certify that they had consulted with a qualified expert about the claim prior to filing the complaint.

In June, 2004, that complaint was dismissed by the trial court on several grounds, one of which was a finding by the trial court that the Nelsons did not serve process on the doctors or their clinic. After an evidentiary hearing, the trial court determined and held not only that Plaintiffs had failed to give Defendants the required prior written notice and failed to certify their consultation with a qualified expert witness, but that the doctors and clinic had not been served with process; and that the two year statute of limitations had expired. The trial court, therefore, dismissed the suit with prejudice as time-barred; the Nelsons appealed.

In its decision in *Nelson I*, the Court of Appeals affirmed that the Nelsons' failure to comply with Miss. Code Ann. § 15-1-36(15) was an "inexcusable deviation" from that statute's requirement to provide notice before filing their complaint, warranting dismissal. *Nelson*, 972 So.2d at 673 (¶

17). Likewise, with regard to the certificate of consultation with an expert required by Miss. Code. Ann. § 11-1-58(1), the Court of Appeals agreed that the Nelson's failure to file the required certificate with their complaint properly called for the claim to have been dismissed. The Court of Appeals upheld the dismissal but concluded that the dismissal should have been without prejudice for the Nelsons' failure to comply with those two statutes. The *Nelson I* court did not address the statute of limitations, nor did it reverse the trial court's finding that the doctors had not been served with process.

Following that ruling by the Court of Appeals and the denials of the defendants' motions for rehearing and petitions for writs of certiorari, the Nelsons filed a second complaint based upon the identical allegations of negligence they originally sued upon. Plaintiffs contend that the Court of Appeals' decision in *Nelson I* granted them license to again pursue their cause of action in a second complaint.

Plaintiffs' theory of why they should succeed in their appeal of this second case, at least as against the doctors and clinic, is premised upon their fallacious argument and representation that the doctors and clinic were, in fact, served with process of their first complaint. Necessary to every argument made and every case cited by Plaintiffs in that regard is the assumption of proper service of process. Even the Court in *Nelson I* acknowledged that **"Assuming proper service of process**, filing a complaint tolls the statute of limitations until a suit's dismissal." *Nelson*, 972 So.2d at 671 (¶ 9). (**Emphasis** added). However, the Nelsons [appear to have] intentionally omitted the words "Assuming proper service of process" when they cite that same quote from the *Nelson I* court at page 15 of their brief.

Fatal to their contention that they did serve process on the doctors is the undisputed fact that the trial court, after an evidentiary hearing on the matter, ruled as a matter of law that process had

not been served upon the doctors or the clinic. That finding and ruling by the trial court was not reversed or otherwise disturbed by the Court of Appeals in *Nelson I*. Since it was left undisturbed, that ruling by the trial court remains the law of the case, and it applies to this appeal of the dismissal of the Nelsons' second lawsuit on the same cause of action.

At the heart of this appeal, then, lies the issue of statute of limitations applicable to the Nelsons' cause of action: when the statute of limitations began to run; if anything occurred to toll the running of the statute of limitations; and even if so, if the statute of limitations began to run again and then expired. Plaintiffs contend that the statute of limitations began to run on the date of Bobby Nelson's death. Although that issue was contested at the trial court level after Plaintiffs' first appeal, in light of several, more recent holdings by the Mississippi Supreme Court, cited above (*Caves* and *McGee)*, the doctors agree that July 14, 2001, the date of Bobby Nelson's death, was the date for the beginning of the statute of limitations for the Nelsons' wrongful death claims.[3]

The Nelsons contend that when they filed their first complaint on July 9, 2003, the statute of limitations was tolled with five days remaining in it. Defendants contend that because Plaintiffs failed to comply with two statutory prerequisites before they filed their first complaint, the filing of that complaint did nothing to toll the statute of limitations, because the complaint was a legal nullity, resulting in the expiration of the statute of limitations five days later.

Although, generally speaking, the proper filing of a complaint may ordinarily toll the statute of limitations, if service of process is not effected on a defendant within the time prescribed by law

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Insofar as at least some of Plaintiffs' survival claims are concerned, the doctors contend that the statute of limitations may have begun to run as early as the date of Bobby Nelson's birth. However, that specific issue is not before the Court on this appeal. Nevertheless, the outcome should be the same, since the statute of limitation for those claims would [also] have expired before Plaintiffs filed their first complaint.

(and any extensions thereof which may be granted), then any unexpired portion of the statute of limitations begins to run anew. If the statute of limitations thereby expires without process having been served, then the expiration of the statute of limitations is a procedural bar of the claim against any defendant not served with process. Even assuming for argument's sake that the filing of their first complaint did toll the statute of limitations (despite their failure to comply with the two abovementioned statutorily required prerequisites), Plaintiffs still were required to serve process within the time prescribed by law. They failed to do so on the doctors and their clinic.

The Nelsons did not serve any of the defendants within the first 120 days after they filed their first complaint. They were granted an additional 90 days within which to serve process, during which time they did serve process on the defendant hospital, but during which time they did not serve the doctors. When process was not served on the doctors, and when the abovementioned 210th day expired, the five days remaining in the statute of limitations began to run again and expired five days later.

In Plaintiffs' first lawsuit, the trial court heard evidence from the doctors' office manager, who testified that she never had been the agent for service of process for any of the doctors or the clinic; and that when an unidentified person who turned out to be a process server left some unidentified documents with her, she did not know until the process server had left the clinic that the documents were summons and a complaint. The trial court, therefore, found and ruled that process had not been served on the doctors or their clinic, and that the statute of limitations [had] subsequently expired. That finding and ruling by the trial court was not reversed or disturbed by the Court of Appeals in *Nelson I*, and there was never any showing that the trial judge had abused his discretion in making that ruling.

Even if pursuant to M.R.C.P. 4(h) the trial court had dismissed without prejudice Plaintiffs' first complaint for failure to serve process on the doctors, the result would have been the same. After the 210 days within which to serve process expired by which time the doctors and their clinic were not served with process, the five days remaining in the statute of limitations would still have begun to run and expired in February, 2004. The trial court entered its order dismissing Plaintiffs' first lawsuit in June, 2004 for that very reason (among others), because the statute of limitations had expired with no process having been served upon the doctors.

Although the Nelsons may have been allowed to file a second complaint based upon the Court of Appeals' ruling, that ruling did not alter the trial court's determination that process was never effected on the doctors and their clinic; nor does it change the fact that the statute of limitations, therefore, began to run again and expired against the clinic doctors. The *Nelson I* Court did not make any finding that Plaintiffs' first complaint tolled the statute of limitations. The fact that the statute of limitations expired several years before the Plaintiffs filed their second complaint is ample reason that the trial court's dismissal with prejudice of the second complaint was proper, if not for all the defendants then certainly for the doctors and their clinic.

In addition, as mentioned, the Nelsons never sought further appellate review of the Court of Appeals' not finding that the trial court was in error and not reversing or remanding the trial court's ruling that process was never effected on the doctors. Plaintiffs should not now, in this appeal of their second, separate and subsequent lawsuit, be allowed to challenge the trial court's ruling on that issue that arose in their first lawsuit. That ruling by the trial court, which went undisturbed by the Court of Appeals, should remain the law of the case.

B. Law of the Case:

Concerning the issue of the "law of the case", just as it was in *Wilner v. White,* 929 So.2d 343 (Miss. App. 2005), it is the **"reach"** of the Court of Appeals' decision in *Nelson I* that is **"one of the central disputes now on the second appeal."** *Id.* at 346 (¶ 5). (**Emphasis** added).

> 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. ...
>
> ...When an appellate court considers a second appeal in a case that it previously reviewed, its prior holdings usually are not to be changed. *Id.* at ¶ 6. (citations omitted).

Plaintiffs devote approximately half of their brief to the "law of the case" and whether or not the applicable statute of limitations began to run on the date of Bobby Nelson's birth or on the date of his death. They also erroneously state that **"Defendants' argument** that the law of the case does not apply to this case is based on **their assertion** that this is not the same case that was filed on July 9, 2003." (**Emphasis** added). (Nelsons' Brief p. 20).

An example of what the doctors mention in their Preliminary Remarks concerning Plaintiffs' referring to "Defendants" as if they are all one-and-the-same, it is not and never has been the assertion or the argument of the doctors that this is not the "same case" as in Plaintiffs' first complaint, or that the "law of the case" established by the court in *Nelson I* does not apply to Plaintiffs' second complaint. The doctors have also never cited or relied upon the case of *Continental Turpentine & Resin Co. v. Gulf Naval Stores, Co.*, 244 Miss. 465, 142 So.2d 200 (Miss. 1962) upon which Plaintiffs assert that "Defendants rely" on p. 22 of their brief. The doctors agree, as Plaintiffs state, that "...**this is the same case**." (Nelson's Brief p. 21) (**emphasis** in original)

insofar as the facts and allegations of the underlying cause of action that gave rise to both complaints are concerned - that is, the alleged wrongful death of Bobby Nelson. It is also the "same case" as far as the statute of limitations is concerned.

However, the doctors disagree with what Plaintiffs contend that the the "law of the case" means or allows in the case *sub judice*. The Nelsons give too much "reach" to the *Nelson I* decision when they opine that the Court of Appeals "...**intended** that Plaintiffs be allowed to reinstate their proceedings **all** within the five (5) days remaining on the applicable statute of limitations." (Nelsons' Brief p. 13) (**Emphasis** added). Although the *Nelson I* court's reversal of the trial court's dismissal without prejudice may have allowed Plaintiffs to file another complaint, there was no ruling by the *Nelson I* court that the Nelsons' failure to comply with the two subject statutorily required prerequisites tolled the statute of limitations. Such a holding or "law of the case" is nowhere expressed in the *Nelson I* court's decision. Likewise, the doctors certainly disagree that the Court of Appeal's ruling in *Nelson I* allowed Plaintiffs to "correct" any failure to serve the doctors and their clinic with process in their first lawsuit, when they did not do so before the statute of limitations expired.

With respect to Plaintiffs'arguments regarding the defendants' positions as to when the statute of limitations began to run (primarily addressing *Jenkins v. Pensacola Health Trust, Inc.*, 933 So. 2d 923 (Miss. 2006)), at least insofar as the doctors are concerned as abovementioned, the doctors now agree that the statute of limitations for Plaintiffs' wrongful death claims began to run on the date of Bobby Nelson's death. However, regardless of whether the statute of limitations for Plaintiffs' claims began to run on the date of birth, the date of death or somewhere in between, the doctors have never waived any defense with regard to the [expiration of the] statute limitations. It is and has always been their contention that regardless of when the statute of limitations began, the

statute subsequently expired against the doctors, if for no other reason than because they were not served with process.

In their Motion to Dismiss [the Nelsons' first Complaint], their very first pleading filed in response to Plaintiffs' first complaint, the doctors not only raised the issue of Plaintiffs' failure to comply with §§ 15-1-36(15) and 11-1-58(1), they specifically and expressly raised the defense of the expiration of the statute of limitations. As the doctors argued in that motion:

> "9. In [the] meantime and in addition to Plaintiffs' non-compliance with [any] of the abovementioned laws of the state of Mississippi, Mississippi Rules of Civil Procedure, and Order of this Court, **any tolling of the statute of limitations which may have occurred has ceased, thereby allowing the statute of limitations to have begun to run again, and to have expired, thus barring this and any subsequent claim** against these defendants based upon the allegations herein." (Record p. 115): (**Emphasis** added).

Also from the very beginning, in response to both of Plaintiffs' complaints, and despite whether or not the statute of limitations began to run on the date of Bobby Nelson's birth or of his death, the doctors have contended, and the trial court has ruled, that service of process was not effected on the doctors after the first complaint was filed and before the statute of limitations expired. As to Plaintiffs' argument at page 36 of their brief that "The trial court in its opinion **on return of this case** made no ruling as to defendant doctors' and clinic's arguments regarding the service of process." (**emphasis** added), the trial court had already ruled upon that issue twice, once in the trial court's June 18, 2004 order dismissing Plaintiffs' first complaint, and again in its September 27, 2005 order denying Plaintiffs' motion for reconsideration; and the *Nelson I* court did not reverse or remand that ruling of the trial court.

There was no reason for the trial court to again rule on that issue in Plaintiffs' second lawsuit, and it is untimely for Plaintiffs to now appeal the trial court's ruling regarding service of process of their first complaint, especially when they failed to seek further appellate review of the Court of

Appeals' decision regarding that issue in *Nelson I.* However, if this Court is going to consider that issue now, in this appeal, then the Court must also consider the transcript of the hearing which the trial court held on May 24, 2004, at which the trial court heard testimony of the doctors' office manager. The Nelsons did not make that hearing's transcript a part of their record on this appeal. The doctors, therefore, moved to supplement the record with a transcript of that hearing, should this Court consider the issue of service of process in the first lawsuit and review whether or not the trial judge abused his discretion in making that ruling.

In further response to Plaintiffs' arguments about "law of the case", in dismissing with prejudice Plaintiffs' second complaint the trial court did not do anything "contrary to the directives" of the Court in *Nelson I*, as Plaintiffs allege at page 2 of their Brief. The trial court's dismissal with prejudice of Plaintiff's second complaint had nothing to do with the *Nelson I* court's ruling that the first dismissal should have been without prejudice, and as shown below, there have been numerous rulings on cases which have been dismissed with prejudice following a prior dismissal without prejudice.

Plaintiffs further erroneously argue that because the Court of Appeals denied Defendants' motions for rehearing, and because the Mississippi Supreme Court declined to grant certiorari, those appellate courts, therefore, "...rejected those arguments." (Nelsons' Brief p. 16). An appellate court's refusal to entertain an appeal has no precedential effect. *Anderson v. R&D Foods, Inc.*, 913 So.2d 394, 400 (¶ 18) (Miss. App. 2005). Any points or issues raised or arguments made in Defendants' motions for rehearing and/or petitions for writ of certiorari were not arguments which were rejected by the appellate courts; [because] they were arguments which simply were not entertained by those appellate courts. The refusals by the Court of Appeals and Mississippi Supreme Court to entertain those arguments, therefore, had no precedential effort on (for or against) those

arguments.

Nevertheless, the fact remains that despite the Court of Appeals' ruling in *Nelson I*, a dismissal without prejudice does not grant a plaintiff carte blanche license to completely ignore matters that occurred with regard to the first appeal. In the Nelsons' case, the two most important things that occurred with regard to the doctors are that (1) they were not served with process within the time allowed, and (2) the statute of limitations subsequently expired five days later. The Court's ruling in *Nelson I* did nothing to change those occurrences, and the Court in *Nelson I* did not reverse the finding of the trial court that the doctors and their clinic had not been served with process. Plaintiffs' arguments with regard to the "law of the case" are either erroneous, inapplicable or irrelevant with regard to their second lawsuit and this second appeal.

C. Effect of dismissal without prejudice for failure to comply with pre-suit requirements; and the effect of failure to comply with those prerequisites on the statute of limitations:

A dismissal without prejudice does not magically turn back the hands of time, nor does it allow the arbitrary "correction" of procedural "errors", such as failure to serve process (although in some instances that option may be available provided that the statute of limitations has not already expired). While dismissal without prejudice does not act as a procedural bar to refiling the lawsuit, a dismissal without prejudice does not relieve a plaintiff of the duty of complying with the statute of limitations, nor does it revive a statute of limitations that has already expired. *Watters v. Stripling*, 675 So.2d 1242, 1243-44 (Miss. 1996); *51 Am. Jur. 2d Limitation of Actions § 273.*

It has been established in this state that "...pre-suit **requirements** are clearly within the purview of the Legislature, and do not encroach upon this Court's rule-making responsibility. The Mississippi Supreme Court has consistently held that "...**the Legislature has authority** to establish **pre-suit requirements** as a **condition precedent** to filing **particular kinds** of lawsuits." *Wimley*

v. Reid, 991 So.2d 135 (Miss. 2008). (**Emphasis** added); *Thomas v. Warden*, 999 So.2d 842, 847 (¶ 21) (Miss. 2008). The pre-suit requirements of Miss. Code Ann. § 15-1-36(15) and 11-1-58 have thus been found constitutional.[4]

The Mississippi Supreme Court in *Thomas v. Warden, supra,* 845-46 (¶ 14-15) also recognized that the plain meaning of § 15-1-36(15) is that a plaintiff [simply] cannot [even] begin a lawsuit against a health care provider for alleged professional negligence unless the defendant has first been given at least 60 days' prior written notice of the plaintiff's intent to sue. Referring to and relying upon its prior decisions in *Pitalo v. GPCH-GP, Inc.*, 933 So.2d 927 (Miss. 2006) and *Arceo v. Tolliver*, 949 So.2d 691 (Miss. 2006), the *Warden* court further held:

> Thus, because the defendants in this case did not have "sixty (60) days' prior written notice of the intention to begin the action", **this lawsuit was not lawfully filed, and it is of no legal effect**. *Thomas v. Warden*, at 846 ¶15 (**emphasis** added).

The *Warden* Court went on to note that since the subject statute had not been found to be unconstitutional, the Court's constitutional duty is to interpret and apply the law as the Legislature has [clearly and unambiguously] written it, not as (or if) the Court thinks the law might otherwise have been "more fairly written." *Id.* at ¶ 17.

Although in a footnote to its decision the *Warden* court noted that their opinion should not be read as dispositive of whether or not the statute of limitations had expired, there logically can be (and legally should be) no other conclusion in light of that Court's ruling. Since, as the *Warden* court determined, failure to comply with constitutional pre-suit prerequisites results in a lawsuit

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After the decision in *Nelson I*, in *Wimley v. Reid, supra,* the provision of § 11-1-58(1) that required a certificate of expert consultation must accompany or be filed with a complaint was found unconstitutional. However, the decision in *Nelson I* became final before the decision in *Wimley*. Nevertheless, pre-suit consultation with an expert is still required.

which "...**was not lawfully filed, and ...is of no legal effect**", surely something which is so legally significant as a statute of limitations cannot be legally effected (e.g. tolled) by something which has been determined to be of no legal effect.

The doctors are aware of the Mississippi Supreme Court's ruling in *Price v. Clark*, 2009 WL 2183271 (Miss.) (July 23, 2009), that failure to provide statutorily required pre-notice of suit does not result in the tolling of the statute of limitations for a complaint that is filed and properly served.[5] Yet that ruling cannot be reconciled with this Court's ruling in *Thomas v. Warden*, especially when the court in *Price v. Clark* also upheld former rulings of this Court requiring strict compliance with statutory notice; and when the *Price* court expressly acknowledged that "...failure to provide proper statutory [pre-suit] notice **cannot be cured** by serving notice-of-claim letters **after** a complaint is filed..." *Price* at ¶ 16 and ¶ 30. (**Emphasis** added). If the failure to provide pre-suit notice cannot be cured by providing notice after the complaint is filed, yet the statute of limitations is nevertheless considered tolled even though the required notice was not provided, then what is the point of the law requiring the notice, or the point of a ruling requiring strict compliance with the notice. Perhaps more importantly, if tolling is to be the result, the law requiring the pre-suit notice cannot be effectively enforced.

As has also been determined by the Mississippi Supreme Court in several prior decisions, the subject statutory prerequisites are clear and unambiguous, and they are requirements, not suggestions. The plain language of those laws states that something was necessary, something had to be done, before the Nelsons filed (or even could file) their first complaint. According to this

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They are also aware of pending motions for rehearing and motions for leave to file *amici curiae* briefs in that case.

Court's ruling in *Warden* and since those things were not done, the filing of the Nelsons' first Complaint was of no legal effect. Since it was of no legal effect, the filing of their complaint logically also necessarily had no [legal] effect upon (i.e. tolling) the statute of limitations.

This Court has also held in *Stuart v. Univ. of Miss. Med. Center,* 2009 WL 2563466 (Miss.) (Aug. 20, 2009) regarding similar MCTA pre-suit notice requirements, that such requirements are no more or less important than a statute of limitations, meaning that statutorily required pre-suit notice is just as important as a statute of limitations. As such, for lawsuits that require pre-suit notice pursuant to statute, the notice requirement and statute of limitations must be considered in light of each other, precisely because pre-suit notice requirements are not required for all types of suits. That is, for suits which require pre-suit notice (i.e. particular types of suits, such as ones against health care providers) (see *Wimley v. Reid, supra*), the statute of limitations is (should be) tolled by filing suit where and after proper pre-suit notice is given. By the same token, when the required pre-suit notice is not given, the statute of limitations is not (should not be) tolled, if suit is filed without first serving notice in compliance with the statute that requires it.

It is true that ordinarily when a complaint is filed and properly served, the complaint tolls the running of the statute of limitations for the 120-day period provided for in M.R.C.P. 4(h).[6] *Owens v. Mai*, 891 So.2d 220, 223 (¶ 16) (Miss. 2005). However, again, surely that rule of law holds for lawsuits that do not first require compliance with statutorily mandated prerequisites to filing suit. Statutorily required prerequisites do not blanketly exist for all lawsuits against all categories or types of defendants, only for "particular" kinds of lawsuits. Two such requirements did exist and applied

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Both the *Nelson I* Court and the court in *Price v. Clark* recognized that there must be "proper service of process" for the filing of a complaint to toll the statute of limitations. *Nelson* at 671 (¶ 9).

to the Nelsons' cause of action when they filed their lawsuit against the health care defendants on July 9, 2003. To hold that the statute of limitations for a claim against a health care provider is not tolled despite total non-compliance with those statutory prerequisites would nullify any effectiveness of those legislatively enacted prerequisites and would thereby render them effectively meaningless.

Prior to the Nelsons' having filed their first lawsuit, the two subject laws had been enacted and were in effect, both of which promulgated statutorily mandated prerequisites requiring pre-suit written notice of intent to sue and accompaniment of the complaint by a certificate stating that a qualified expert had been consulted about a reasonable basis for the claim. Since it is undisputed and was ruled in *Nelson I* that the Nelsons did not comply with either of those two statutorily mandated prerequisites, and as the Mississippi Supreme Court held in *Warden, supra*, without the Nelsons' having first complied with those statutes, then surely the Nelsons' filing of their first Complaint on July 9, 2003 did nothing to toll the statute of limitations. As a result, the statute of limitation [should have] expired five days later on July 14, 2003. Any other holding would render the pre-suit requirements of § 15-1-36(15) and § 11-1-58 of virtually no significance.

Yet those requirements are of great significance; they are laws, legislatively enacted rules, of this state, and "A rule which is **not** enforced **is no** rule." *Tandy Electronics, Inc. v. Fletcher*, 554 So.2d 308, 312 (Miss. 1989) (**Emphasis** added). If the subject statutes are not enforced as they are plainly written, then logically and practically (as well as legally) speaking, what purpose do the pre-suit requirements serve, particularly the pre-suit notice required by § 15-1-36(15). Failure to provide the statutorily required pre-suit notice cannot be cured by providing notice after the complaint is filed, as the *Price* court has already correctly recognized. Yet that same decision's ruling requiring strict compliance with the notice is effectively rendered useless if there is nothing to enforce compliance with the requirement. If failure to comply with the requirements results in no

consequence, then there seems to be no point in requiring strict compliance in the first place.

Pre-suit notice will simply become something that really (practically speaking) does not matter, so long as the lawsuit is filed and process served before expiration of the statute of limitations. Particularly if the saving statute is to apply since pre-suit notice has also now been deemed not to be jurisdictional (*Stuart v. Univ. of Miss. Med. Center, supra),* the law requiring the pre-suit notice might as well be done away with. The result would be that pre-suit notice actually does nothing, and it provides for nothing that is not already otherwise required by law: filing the complaint and serving the defendant before the statute of limitations expires.

Yet strict compliance with such notice requirements has also been ruled to be required, regardless of why a plaintiff fails to provide notice. *Pitalo v. GPCH-GP, Inc.*, 933 So.2d 927, 929 (Miss. 2006); *Price v. Clark, supra,* ¶ 16. So if strict compliance is required, and if failure to strictly comply with the notice requirements amounts to a lawsuit which is of no legal effect, then how can the filing of such a complaint as in *Nelson I* be deemed to have had any [tolling] effect on the statute of limitations.

Constitutional and statutorily mandated prerequisites to particular types of lawsuits should be enforced as they are plainly written, which this Court has also ruled. As the *Nelson I* Court noted, the Nelsons' failure to send the pre-suit notice was not just a minor deviation from the law, it was an **"inexcusable deviation"** from the requirements of § 15-1-36 (15). *Nelson*, 972 So.2d at 673 (¶ 17) (citing *Pitalo*, 933 So.2d at 929 (¶ 17)) (**Emphasis** added). That is, according to the Court of Appeals, the Nelsons had no excuse for not complying with the statutory prerequisites regarding pre-suit notice.

But if there is no real consequence to that "inexcusable deviation", just as if notice had been given, or as if it had not been required in the first place, what difference does such an admonition

or ruling of "inexcusable deviation" make? Even though the suit may be dismissed without prejudice for failure to provide the pre-suit notice, if the statute of limitations is deemed to have been tolled and if service of process has been obtained, a plaintiff has merely to refile the lawsuit. That certainly is no "consequence"; at most it is an inconvenience. But if pre-suit notice is again not provided yet the complaint is refiled, will the statute of limitations still be deemed to have already been tolled? Will it be deemed to be tolled again? If so, the process could theoretically continue *ad infinitum*, lengthening a two year statute of limitations for an indefinite period of additional years, making the requirement for pre-suit notice purely academic and one easily flaunted. Surely that was never the intent of a statute so clear and plain regarding notice to be given before only a particular kind of suit is filed, that is, one against a health care provider.

Even if the Court thinks that the pre-suit notice requirement might have been otherwise or "more fairly written", the Court's constitutional duty, as recognized in *Warden*, is to interpret and apply the law as it is clearly written. As it is clearly written, § 15-1-36(15) precludes the commencement of an action [by the filing of a complaint] against a health care provider without first having given the defendant at least 60 days written notice. Because the Nelsons failed to give that notice (and since they also did not provide a certificate regarding expert consultation, which also was still required by law at that time); and since, therefore, their first complaint, according to *Warden*, was not lawfully filed and was of no legal effect, then this Court should likewise find that the filing of the Nelsons' first Complaint did not affect the statute of limitations by tolling it.

In *Mitchell v. Progressive Ins. Co.*, 965 So.2d 679 (Miss. 2007), the Mississippi Supreme Court held that the filing of an invalid complaint does not "commence" an action within the meaning of M.R.C.P. 3(a) and, therefore, cannot toll the statute of limitations. The *Mitchell* court held: "Mitchell was required to file a complaint **in compliance with** the Mississippi Rules of Civil

Procedure, on or before expiration of the three-year statute of limitations." *Id.* at 683 ¶ 13 (**Emphasis** added). Recognizing that the complaint was filed in violation of M.R.C.P. 11(a) and 46(b) because it was signed only by an out-of-state attorney, the *Mitchell* court held that the filing of that complaint did not toll the statute of limitations; and that eventual dismissal of the claim with prejudice was "imminently correct." *Id.* at 684 ¶ 15. The same reasoning has sound application to the Nelsons, who by statute were not allowed to "commence" their lawsuit without first being in compliance with the laws requiring pre-suit prerequisites.

The Nelsons' filing of their complaint in their first lawsuit, without compliance with the applicable statutory pre-suit requirements, likewise should be ruled to have done nothing to toll the statute of limitations for their cause of action. Thus, the statute of limitations for all of their claims herein should be considered to have expired no later than July 14, 2003 - two years from the date of Bobby Nelson's death - with nothing having occurred to toll the statute of limitations. As a result, the Nelsons' second lawsuit, the subject of this appeal, should be ruled time-barred by more than 4 ½ years, warranting its dismissal with prejudice. *Johnson v. Thomas*, 982 So.2d 405, 415 (¶ 29) (Miss. 2008); *Johnson v. Rao*, 952 So.2d 151, 158 (¶ 20) (Miss. 2007); *Burge v. Richton Municipal Separate School District*, 797 So.2d 1062, 1065 (¶ 12) (Miss. 2001). For those reasons, the trial court's dismissal with prejudice of the Nelsons' second complaint should be affirmed.

D. Effect of dismissal without prejudice for failure to serve process, and the effect of failure to serve process on the statute of limitations:

The appellate courts of this state have also made it clear that procedural rules relating to service of process are to be strictly construed. *Kolikas v. Kolikas*, 821 So.2d 874, 878 (¶ 16) (Miss. App. 2002); *Birindelli v. Egelston.* 404 So.2d 322, 323-24 (Miss. 1981).

It is also now axiomatic in the state of Mississippi that although the filing of a complaint

ordinarily tolls the applicable statute of limitation for 120 days, if the plaintiff fails to serve process on the defendant within that 120 day period (or extensions of that period that may be granted), the statute of limitation automatically begins to run again after the expiration of that 120 day period. *Lucas v. Baptist Memorial Hospital-North Mississippi*, 997 So.2d 226, 234 (¶ 22) (Miss. 2008); *Heard v. Remy*, 937 So.2d 939, 942 (Miss. 2006); *Owens v. Mai*, 891 So. 2d 220, 223 (¶ 16) (Miss. 2005); *Triple C Transport, Inc. v. Dickens*, 870 So.2d 1195, 1199-1200 (¶ 32, 34, 35) (Miss. 2004); *King v. American RV Centers, Inc.*, 862 So.2d 558, 561 (¶ 12) (Miss. App. 2003); *Holmes v. Coast Transit Authority*, 815 So.2d 1183, 1185 (¶ 7) (Miss. 2002); *Watters v. Stripling*, 675 So.2d 1242, 1244 (Miss. 1996).

Further, "Even actual knowledge of a lawsuit by a defendant does not excuse failure by plaintiff to properly serve the defendant with process." *Mansour v. Charmax Indus.*, 680 So.2d 852, 855 (Miss. 1996) (citing *Brown v. Riley*, 580 So.2d 1234, 1237 (Miss. 1991)). It is, and for at least the past 80 years has been, the law in Mississippi that a defendant's knowledge of a lawsuit, however that knowledge was obtained, however "definite and full", or "whatever may have been the defendant's action under that knowledge", is of no consequence if there has been no proper service of process. *McCoy, et al v. Watson*, 154 Miss. 307, 122 So. 368, 370 (1929); *Mosby v. Gandy*, 375 So.2d 1024, 1028 (Miss. 1979); *Brown v. Riley*, 580 So.2d 1234, 1237 (Miss. 1991); *James v. McMullen*, 733 So.2d 358 (¶ 3) (Miss. App. 1999); *Lexington Ins. Co. v. Buckley*, 925 So.2d 859, 868-69 (¶ 44) (Miss. App. 2005).

Regardless of a defendant's knowledge of the pendency of the action, that knowledge simply does not supply the want of compliance with the requirements of valid process (*Mosby v. Gandy*, 375 So.2d at 1027); and unless jurisdiction has been obtained over a defendant in some legally recognized manner, the defendant is not under any obligation to notice what is going on in a court

cause pending against him. *Kolikas v. Kolikas, supra*, (citing *Burns v. Burns*, 133 Miss. 485, 491, 97 So.814, 815 (1923)).

In the 2008 case of *Lucas v. Baptist Memorial Hospital-North Mississippi, supra*, the statute of limitations began running and was tolled for 120 days upon Lucas' filing of the complaint. Pursuant to M.R.C.P. 4(h), Lucas had 120 days to serve process, but he also obtained an extension of another 120 days to serve process. However, when Lucas failed to serve process on the defendant hospital within that [total of] 240 days, the Mississippi Supreme Court affirmed that the statute of limitations had automatically begun to have run again, and that it subsequently expired. In so holding, the Mississippi Supreme Court affirmed the trial court's dismissal with prejudice of Lucas' suit. The *Lucas* court noted that although statutes of limitation may sometimes have harsh effects, there must nevertheless be compliance with the law - in that case, as in the Nelsons' case, proper service of process. *Id.*, 997 So.2d at 234 (¶ 24). (See also *Johnson v. Rao, supra*)

In *Heard v. Remy, supra*, there was an appeal from an order dismissing the plaintiff's case as barred by the statute of limitations, which had run and subsequently expired after the plaintiff failed to serve process on the defendant within the 120 day period allowed by M.R.C.P. 4(h). Relying upon several of the above cited cases, the *Heard* Court held that when process was not served within the time allowed by law, the statute of limitations automatically began to run again and expired. In that case also, the Mississippi Supreme Court affirmed the trial court's dismissal with prejudice, since the action had become time-barred due to the expiration of the statute of limitations.

In any civil suit where there has been a dismissal for any reason, and when the statute of limitations has expired, dismissal with prejudice is warranted. *Tolliver v. Mladineo*, 987 So.2d 989, 996-97 (Miss. 2007); *Watters v. Stripling, supra*, 675 So.2d at 1244. In *Watters*, the Mississippi Supreme Court held that although a dismissal pursuant to M.R.C.P. 4(h) for failure to serve process

required dismissal without prejudice, and though the filing of Watters' action had tolled the applicable statute of limitations, "...we hold that it **only tolls** [the statute of limitation] **for the 120 days service period** of Rule 4(h), and **the fact that the action is now barred is of no consequence**. *Id.* (**Emphasis** added). Because the statute of limitations had expired in the interim, the dismissal without prejudice was "of no consequence"; that is, it did nothing to change the fact that the statute of limitations had expired.

With regard to a statute of limitation in this state, its effect and its effective bar of an action is also well established. As stated in *University of Mississippi Medical Center v. Robinson*, 876 So.2d 337, 340 (¶ 11) (Miss. 2004): "The effect of the attachment of the bar of the statute of limitations appears well established in Mississippi. ...**This bar is a vested right which cannot be revived. ...The completion of the period of limitations prescribed to bar any action shall defeat and distinguish the right as well as the remedy**. The running of the statute of limitations is the point where one's right to pursue a remedy is extinguished **and another's vested right in the bar arises**." (Citations omitted.) (**Emphasis** added).

In the Nelsons' case, the two year statute of limitations applicable to claims for Bobby Nelson's alleged wrongful death began running on the date of his death, July 14, 2001. Even if it should be held that despite the Nelsons' failure to comply with the pre-suit requirements the two year statute of limitations was tolled when the Nelsons filed their initial complaint on July 9, 2003, the Nelsons concede that statute was tolled with only five days remaining in it. The Nelsons did not serve process on the doctors within 120 days of the filing of that Complaint, nor within the additional 90 days which they obtained, as the trial court determined and ruled. The total 210-day period of time in which the Nelsons had to serve the defendants expired on February 4, 2004. In accordance

with clear and repeated case precedent, when process was not effected on the doctors and their clinic by February 4, 2004, the statute of limitations began to run again, and it expired five days later, on February 9, 2004.

Just as it was of no consequence to the plaintiffs in *Watters v. Stripling, supra,* the Court of Appeals' dismissal without prejudice of the Nelsons' first complaint in *Nelson I* was of no consequence to the expiration of the statute of limitations in the Nelsons' case. In fact, the result would have been the same if the trial court in *Nelson I* had, itself, dismissed the complaint against the doctors and their clinic without prejudice. That is, if on June 18, 2004 the trial court had ruled in accordance with M.R.C.P. 4(h) that the Nelsons' failure to serve the doctors and their clinic resulted in a dismissal without prejudice, the statute of limitations still would have expired on February 9, more than four months earlier. Just as in *Watters*, such a ruling would have been of no consequence to and would have had no effect upon the statute's of limitation having expired four months earlier. If the Nelsons had filed a second complaint on June 19, 2004 (or even on February 10, 2004, the day after the statute expired), the second complaint would [still] have been time-barred.

The very same situation occurred in *Owens v. Mai*, 891 So.2d 220 (Miss. 2005). In that case, the Mississippi Supreme Court noted that the Court of Appeals had not addressed "...**an important, determining issue. The statute of limitations had expired prior to the first action's being dismissed for failure to serve process. So, when the plaintiff filed her second complaint, the trial court properly dismissed it as time-barred.**" *Id.* at 221. (**Emphasis** added).

The *Mai* Court went on to note: "Also, this case presents a subtle issue which was not addressed by the Court of Appeals. While the filing of a complaint tolls the statute of limitations, **if service is not made upon the defendant within 120 days as required by M.R.C.P. 4(h), the limitations period resumes running at the end of the 120 days.**" *Id.* at 223. (**Emphasis** added).

The *Mai* Court ruled that Owens' failure to serve Mai with process resulted in the resumption of the running of the statute of limitations; and that because of that, the statute of limitations had expired more than a year prior to Mai's motion to dismiss, and over a year and a half before Owens' filed a second complaint. The *Mai* Court held that when Owens filed the second complaint, the statute of limitations had run; and, therefore, that the trial court had correctly dismissed the second complaint as time-barred.

Just as in *Mai*, the doctors and their clinic in *Nelson I* were not served with process, which resulted in the resumption of the running of the statute of limitations for the Nelsons' claim against them. As a result, the statute of limitations expired; and it had expired more than four years before the Nelsons' filed their second complaint. Although the Court of Appeals in *Nelson I*, like the Court of Appeals in *Mai*, did not address the issue that the trial court had found that process had not been effected on the doctors, the dismissal without prejudice ordered by the Court of Appeals in *Nelson I*, also as in *Mai*, did not revive the statute of limitations. It also did not allow the Nelsons five days (or any amount of time) to go back and "correct" failure to serve process on the doctors prior to the expiration of the statute of limitations. The statute of limitations expired on February 9 , 2004, with no process having been effected on the doctor, and more than four years before the Nelsons' second complaint. Therefore, the trial court correctly dismissed with prejudice the Nelsons' second complaint against the doctors and their clinic as time-barred.

Finally, the Nelsons argue that even assuming service of process was not effected upon the physicians or their clinic, that "...dismissal **without** prejudice was proper pursuant to Rule 4(h), M.R.C.P....and **Plaintiffs have now corrected that problem, if any, pursuant to their refiling and service of process** of their second Complaint." (Nelsons' Brief p. 40) (**Emphasis** in original.) First, as shown by several of the cases cited above, *Watters v. Stripling* and *Owens v. Mai*, in particular,

the dismissal of an action without prejudice does not mean that a subsequent action will not be time-barred, nor does it allow a plaintiff to revive a statute of limitations that has expired. It does not give a plaintiff any more or new advantage, such as to "correct the problem" of insufficient service of process after the statute of limitations has expired. A dismissal without prejudice also does not divest a defendant of any valid defense, such as the expiration of the statute of limitations.

As the Mississippi Supreme Court ruled also some 80 years ago in *W. T. Raleigh, Co. v. Barnes*, 143 Miss. 597, 109 So. 8, 9 (Miss. 1926):

> The only effect of the words "without prejudice" in the order by which the first suit was dismissed is to prevent the dismissal of that suit in operating as a bar to any new suit which plaintiff might therefore desire to bring on the same cause of action. **The dismissal of a suit without prejudice "does not deprive the defendant of any defense he may be entitled to make to the new suit, nor confer any right or advantage on the complainant [plaintiff], and hence it will not have the effect of excepting from the period prescribed by the statute of limitations, the time during which that suit was pending."** (**Emphasis** added).

That is, although a dismissal without prejudice may prevent a defense of *res judicata* to a subsequent lawsuit, the dismissal without prejudice does not preclude a defense of a subsequent lawsuit's being time-barred because of the expiration of the statute of limitations. Certainly, the Court can hold that a case is dismissed without prejudice without also having to expressly state that a subsequent lawsuit on the same cause of action will be time-barred. In *Owens v. Mai, supra,* and *Watters v. Stripling, supra*, the Courts dismissed the first action without prejudice, yet subsequent lawsuits were also held to have been time-barred.

The Nelsons come to another erroneous and "overreaching" conclusion when they state: "If Plaintiffs' Complaint on the first appeal had been time-barred, this Court would **obviously** have affirmed the dismissal with prejudice, **rather than making the conscious and deliberate decision**

to reverse and find dismissal **without** prejudice." (Nelsons' Brief pp. 12-13) (**Emphasis** in original). That conclusion is incorrect, or at least it is certainly not obvious from the Court of Appeals' decision. In fact, the same issue was addressed in *Stringer v. American Bankers Ins. Co. of Florida*, 822 So.2d 1011, 1014-15 (¶ 11) (Miss. App. 2002), where the Court of Appeals held:

> **The sole issue of concern to this court is that the dismissal was with prejudice, whereas Rule 4(h) states that a dismissal on the ground of failure to timely serve a named defendant shall be without prejudice.** M.R.C.P. 4(h). We cannot help but observe that prior Mississippi decisions have held that the statute of limitations on a pending claim that has been tolled by the filing of a lawsuit commences to run again once the 120 days to perfect service has expired. *Erby v. Cox*, 654 So.2d 503, 504-05 (Miss. 1995); *Pruett v. Malone*, 767 So.2d 983, 985 (¶ 9) (Miss. 2000). **Our ruling today necessarily carries with it the conclusion that the statute of limitations began to run on Stringer's claim in the latter part of 1992, and nothing that has occurred since them could even arguably have served to toll the running. It is entirely possible that the consideration of the futility of dismissing in a manner that would permit the refiling of the suit a substantial number of years after the limitation period would have expired led the Circuit Court to dismiss with prejudice.** If, in fact, the trial court had ever acquired jurisdiction over American Bankers, such a ruling might be appropriate in the interest of judicial economy. **Nevertheless,** in this situation where jurisdiction over the defendant has never been obtained, it remained beyond the Court's authority to rule on an issue that reaches to the validity of the claim itself. An affirmative defense such as the statute of limitations can only be raised by a party properly before the Court - a posture in which American Bankers has not found itself since the inception of this proceeding nearly 10 years ago. **Therefore, although we find the Rule 4(h) dismissal to be appropriate, we find it necessary to alter the form of dismissal of American Bankers from a dismissal with prejudice to dismissal without prejudice. (Emphasis** added).

The Court in *Stringer* expressly stated that despite the fact that a dismissal without prejudice would permit the "futile" refiling of another suit years after the statute of limitations had expired, the form of the dismissal by the trial court should have been without prejudice. The *Stringer* court also expressly recognized that any refiling of the lawsuit would come years after the expiration of

the statute of limitations, just as the Nelsons' second lawsuit was filed years after the expiration of the statute of limitations in their case. Yet, even though acknowledging that the statute of limitations had expired, the *Stringer* court still found it appropriate for the purposes of that appeal to make the form of the dismissal one without prejudice.

Clearly implicit if not expressly stated in their ruling was the *Stringer* court's recognition that if a subsequent suit were to be filed, since the statute of limitations had already expired, the subsequent suit would be "futile", because it would be time-barred. Nevertheless, the *Stringer* court ruled that dismissal of the suit by the trial court should have been without prejudice. That ruling, though, did nothing to extend or revive the statute of limitations, which the *Stringer* court recognized had expired some ten years before they rendered their decision. As in *Watters* and *Stringer*, the dismissal without prejudice was of no consequence to the fact that the Nelsons' second lawsuit was time-barred because of the expiration of the statute of limitations.

The Court of Appeals in *Nelson I* did nothing more or different than the *Stringer* court. As mentioned, the Court of Appeals in *Nelson I,* like the *Stringer* court, could have ruled that the trial court's dismissal should have been without prejudice not only because of Plaintiffs' failure to comply with statutory pre-suit prerequisites, but also in accordance with M.R.C.P. 4(h) for Plaintiffs' failure to serve process upon the doctors. Even the trial court in *Nelson I* could have dismissed Plaintiffs' claim against the clinic doctors without prejudice pursuant to M.R.C.P. 4(h). Yet in the event of either such ruling, the statute of limitations would still have already expired, and neither such ruling would have meant that the statute of limitations had not already expired; nor would either such ruling have revived the already expired statute of limitations.

When an original complaint is not served in accordance with the periods of time prescribed by law, it is "...rendered legally comatose, robbed of all its latent powers to command action." *King*

v. American RV Centers, Inc., 862 So.2d 558, 563 (¶ 21) (Miss. App. 2003). As the Court also noted in *Stringer, supra*, the statute of limitations on Stringer's claim had begun to run again, and nothing subsequently occurred to toll its running. In the Nelson's case, even assuming the statute of limitations was tolled by the filing of their initial complaint, the statute of limitations began to run again on February 4, 2004, and it expired five days later on February 9, 2004, rendering their complaint "legally comatose." Months later, in June, 2004, the trial court dismissed the case, with nothing having [again] occurred to have tolled the statute. In light of those occurrences, the *Nelson I* Court's ruling did nothing (nor could it have done anything) to allow Plaintiffs to go back and "correct" a failure to serve process of their first complaint on the doctors. Service of process of their second complaint also had no effect upon lack of service of process on the doctors of Plaintiffs' first complaint, which was rendered "legally comatose" after the subsequent expiration of the statute of limitations for that very reason.

Ultimately at issue in this appeal is whether or not the trial court reached an incorrect result in dismissing the Nelsons' second lawsuit with prejudice. Even if the trial court reached its result by means of a path with which issue may be taken, the result of dismissing Plaintiffs' second complaint with prejudice as to the doctors was, nevertheless, correct.

> Appellate courts are not in the business of reversing a trial court when it has made a correct ruling or decision. **We are first interested in the result of the decision, and if it is correct we are not concerned with the route - straight path or detour - which the trial court took to get there. ...An appellee is entitled to argue and rely upon any grounds sufficient to sustain the judgment below.**
>
> As this Court [has stated before]...: "The action of the trial judge is presumed to be correct, ..." and unless it is shown to be erroneous, our duty is to uphold it. *Hickox by and through Hickox v. Holleman,* 502 So.2d 626, 635 (Miss. 1987)(citations omitted). **(Emphasis** added).

The judgment of a trial court may be affirmed by an appellate court even if the trial court reached the result for the wrong reasons, as long as the result reached was a correct result. *Methodist Hospital of Hattiesburg, Inc. v. Richardson*, 909 So.2d 1066, 1070 (¶ 7) (Miss. 2005); *National Bank of Commerce v. Shelton*, 2009 WL 2232229 (Miss. App.).

The doctors moved the trial court for summary judgment on alternate grounds, that the applicable statute of limitations had expired if not because Plaintiffs filed suit without first complying with pre-suit requirements, then for failure to serve process. If it should be deemed that the trial court was incorrect in dismissing Plaintiffs' second complaint against all the defendants for Plaintiffs' failure to comply with pre-suit prerequisites (thereby resulting in expiration of the statute of limitations before suit was ever filed), then this Court should still affirm the result, the trial court's dismissal of the Nelsons' second complaint against the doctors. The statute of limitations did expire against the doctors because of failure to effect service of process, even if the statute of limitations was tolled by Plaintiffs' filing of their first complaint without complying with the applicable pre-suit requirements. If the judgment of the trial court can be sustained for any reason, it should be affirmed, even if the judgment is based upon the wrong legal reason. *Brocato v. Mississippi Publishers Corporation*, 503 So.2d 241, 244 (Miss. 1987); *Patel v. Telerent Leasing Corp.*, 574 So.2d 3, 6 (Miss. 1990).

E. Whether or not service of process was proper and/or effected upon the doctors and clinic in Plaintiffs' first complaint:[7]

In asking this Court to now go back more than five years and completely review and consider

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[7] As mentioned, this portion of the doctors' brief is submitted and should be considered if this Court in this appeal agrees to consider the issue of whether the doctors were properly served with process in Plaintiffs' first lawsuit.

whether or not the trial court abused its discretion when it found that process had not been effected upon the doctors and their clinic in *Nelson I*, the Nelsons argue that that issue was not one to have been determined by the trial court, but by "the trier of fact." (Nelson's Brief pg. 37). With regard to that "trier of fact" argument, it is unclear whether or not the Nelsons believe that a jury first has to be impaneled and submitted the issue before it can be decided whether or not a person with whom process has been left had the authority or apparent authority to accept service of process.

If their argument is that a jury and not the trial court must make that determination, that is not the law in this state. Trial courts can and do sit as triers of fact. *Jones v. Jones*, 760 So.2d 828, 830 (¶ 10) (Miss. App. 2000). More importantly, the very same issue regarding service of process was also resolved not by a jury but by a trial court [alone] in numerous cases, including *Brown v. Bond*, 768 So.2d 347 (Miss. App. 2000); *Cooley v. Brawner*, 881 So.2d 300 (Miss. App. 2004); *Johnson v. Rao*, 952 So.2d 151 (Miss. 2007); and *Spurgeon v. Egger*, 989 So.2d 901 (Miss. App. 2007).

Yet in none of those cases did either the Mississippi Supreme Court or the Mississippi Court of Appeals hold that the trial court did not have the authority to determine whether or not the person with whom process was left had the authority or apparent authority to accept service of process, and/or whether or not process had been served. With regard to findings of fact and conclusions of law, where the trial court sits as a finder of fact, the judgment of a circuit judge is entitled to the same deference on appeal as a chancellor is entitled regarding a chancery court decree. If the trial Court's judgment can be sustained for any reason, even if it based on the wrong legal reason, the trial court's judgment must be upheld. *Patel v. Telerent Leasing Corp. (supra).*

The Nelsons also argue that even though the doctors' clinic's office manager was not the agent for service of process for any of those defendants, the doctors nevertheless got notice or

knowledge of the lawsuit because of the office manager's having given them the summons and complaint left with her by a process server, as if that knowledge sufficed for service or process. As abovementioned, knowledge of a pending lawsuit, regardless of how obtained or the extent of such knowledge, simply does not satisfy the requirements for sufficient, legal service of process.

It is of also no consequence when and/or in what manner Candace Hogue (who was not an agent authorized by appointment or by law to receive service of process for any of the doctors and/or the clinic) delivered a copy of the summons and complaint to the doctors. Mississippi law is clear, and has been for decades, that "**A persons's knowledge of the existence of an action does not supply the want of compliance with the statutory or legal requirements as to service**..." *Mosby v. Gandy*, 375 So.2d 1024, 1028 (Miss. 1979) (citations omitted). (**Emphasis** added). The *Mosby* Court also cited with authority prior Mississippi Supreme Court decisions which, over the past 80 years, have "forever set at rest in this state" the issue of "actual notice" of a lawsuit, on which Plaintiffs now base their argument that the doctors and clinic were served with process.

The *Mosby* court cited with approval and authority the Mississippi Supreme Court's decision in *McCoy, et al v. Watson*, 154 Miss. 307, 122 So.368, 370 (Miss. 1929), wherein the Mississipip Supreme Court held: **"It is now so thoroughly so well settled as to make it too late to urge that knowledge by a defendant of a suit, however definite and full, or however obtained, or whatever may have been the defendant's action under that knowledge,** is of any avail or advances the case a step, unless there has been a legal summons or a legal appearance." *Mosby* citing *McCoy,* at page 1028. (**Emphasis** added.) (*See* also *Lexington Insurance Co. v. Buckley*, 925 So.2d 859, 869 (Miss. App. 2005) ¶ 44: "In the absence of process on a defendant, **even though the defendant may know of the pendency of the action, defendant's knowledge** of the existence of

the action **does not supply the want of compliance with requirements of valid process.**" citing *Mosby v. Gandy* at 1027.) (**Emphasis** added).

The Mississippi Court of Appeals in *Kolikas v. Kolikas*, 821 So.2d 874 (Miss. App. 2002) also ruled that: "If a defendant does not voluntarily appear to a cause against him, he cannot be gotten into court **except in the manner laid down by law. He is under no obligation to notice what is going on in a cause in court against him, unless the court has gotten jurisdiction of him in some manner recognized by law."** *Id.* at 878, ¶ 17 (citing *Burns v. Burns*, 133 Miss. 485, 491, 97 So. 814, 815 (1923)). (**Emphasis** added.)

For the purposes of effecting service of process in a manner recognized by law, it does not matter how "immediately" or how "promptly" Hogue "delivered" or "provided" a copy of the summons and complaint to the doctors. The process server himself could have merely "delivered" or "provided" a copy of the summons and complaint to the doctors in any number of ways that are not recognized by law, including having left a copy of the summons and complaint on the windshield of each physician's car or on the front door of each of their houses. No doubt the doctors would have gotten notice or knowledge of the lawsuit against them; yet the above cited cases show that none of those methods suffice for legal service of process, just as leaving them with Ms. Hogue did not suffice.

Plaintiffs' reliance upon the Mississippi Court of Appeals' ruling in *Cooley v. Brawner*, 881 So.2d 300 (Miss. 2004) is also flawed. The Mississippi Court of Appeals in *Brawner* agreed with Dr. Brawner's position, because not only was there no evidence in the record, the Court found that Cooley had made no effort to determine whether or not Dr. Brawner's receptionist fully understood what was taking place or the nature of what she was "accepting" from Cooley's process server. *Brawner* at 302, ¶ 15.

In that case, only affidavits of Dr. Brawner's receptionist and Cooley's process server were submitted, and those affidavits were in conflict. However, unlike the proceedings in *Brawner*, in this case the office manager, Candace Hogue, appeared in Court and provided testimony which undisputedly and unequivocally established that: (1) she had never accepted process on behalf of any of the doctors or the clinic; (2) it was not at any time her custom and/or practice to accept process for the clinic and/or any of the doctors; (3) she had never seen the unidentified person who left unidentified documents with her at the clinic; and (4) she did not know what the documents were that had been left with her until that person had left the clinic. (Transcript of May 26, 2004 hearing pp. 29-33)

Hogue provided testimony, which went unrefuted by any witness, that she had never represented or held herself out to be a proper person to accept service of process on behalf of the clinic or any of the doctors, nor that she did do so on the date on which Plaintiffs' process server left with her a copy of the summons and complaint. (Transcript of May 24, 2004 hearing pp. 34-37, 42-43). Hogue's undisputed testimony at that hearing is that she did not understand what had been left with her until after the process server had left the clinic, without having served any of the doctors or any agent for service of process of the clinic.

With regard to this issue and the facts surrounding it, this case is very similar if not identical to the same issue and facts which the Mississippi Supreme Court considered in *Johnson v. Rao*, 952 So.2d 151 (Miss. 2007). In reviewing fact-based findings, the *Rao* court recognized that it was to examine the trial court's "discretionary ruling" with regard to whether the trial court abused its discretion, and whether substantial evidence existed to support the determination. *Id.* at 154 (¶ 9). In *Rao*, the court examined the evidence to determine whether or not service on the doctor's receptionist was sufficient for service of process on the doctor. As the *Rao* court noted: "Although

much controversy exists regarding the events surrounding Deputy Payne's delivery of the summons and complaint, it is undisputed that he served process upon Dr. Rao's receptionist, Melissa Powell." (that is, and not on Dr. Rao). *Id.* at 153 (¶ 2).

Dr. Rao's receptionist had testified at a hearing on the matter that she was not authorized to accept service of process; that she was not aware that the documents she was given regarded a lawsuit against the doctor; that she had never accepted service of process on behalf of the doctor; that the deputy had not asked to see the doctor; and that he did not inform her he was there to serve the doctor with summons and complaint. The court further noted that there was nothing in the record that revealed that the receptionist was authorized to accept process or that the receptionist had ever accepted process on prior occasions. The court further noted that there was nothing in the record that contradicted the receptionist's testimony that she did not have the authority to accept service of process on behalf of the doctor. *Id.* at 158 (¶ 18).

Dr. Rao's receptionist was the only witness who testified at the hearing on the motion to dismiss, and the only evidence submitted besides the receptionist's "extensive testimony at the hearing" was an affidavit by the deputy. In reviewing the trial court's findings of fact and conclusion of law, the *Rao* court found that the trial court did not err in granting Dr. Rao's motion to dismiss the complaint due to insufficient service of process. In addition, the *Rao* court even went on to affirm that, "...**As the statute of limitations had expired**, the trial court did **not** err in **dismissing** the complaint **with** prejudice." *Id.* at ¶ 20. (**Emphasis** added)

The doctors in this case fail to see how this Court's ruling as to them should be any different from this Court's ruling as to Dr. Rao in his case, considering that this particular issue is the very same, and that the facts surrounding the issue of service of process are virtually identical between the two cases. Virtually the same evidence was provided by the only witness who testified, and that

testimony remains undisputed, that Ms. Hogue was not and never had been, by appointment of law or in fact, an agent for service of process for any of the doctors and/or their clinic; that she did not knowingly or acknowledgingly represent that she was accepting process for any of them; and that none of the doctors nor an agent for service of process for the clinic were ever served with process in any manner "laid down" or "recognized by law."

There was and has been no showing by Plaintiffs that the trial court abused its discretion in determining that process was not effected on the doctors. The trial court considered all the evidence and had the opportunity to observe the demeanor and live testimony of Ms. Hogue at the hearing, and the trial court made its decision with that advantage and from that perspective. (See *Brown v. Bond, supra*, 768 So.2d at 350 (¶ 14)). The trial court also entertained the Nelsons' motion to reconsider that ruling in the Nelson's first lawsuit before they pursued their first appeal, and the trial court came to the same conclusion. The trial court did not abuse its discretion.

If the Nelsons had wanted a further ruling on their appeal of this issue, the time to have raised it would have been within the time allowed pursuant to the Rules of Appellate Procedure after the decision rendered in their first appeal. The trial court's ruling on this issue was not reversed or remanded for further proceedings by the Court of Appeals in its decision in *Nelson I*; and the Court of Appeals' decision did not "negate" the trial court's ruling regarding service of process on the doctors, as Plaintiffs' assert at page 37 of their brief.

Nevertheless, and despite Plaintiffs' having again raised the issue, no new evidence or different argument has been offered and no showing has been made by Plaintiffs that the trial court abused its discretion in its findings of fact and conclusion of law made with regard to the issue of ineffective service of process on the doctors. The trial court's ruling on that issue should not be reconsidered in this appeal, but whether or not it is, it should be upheld and affirmed.

CONCLUSION

This appeal regards Plaintiffs' second lawsuit on this same cause of action. The same statute of limitations that applied to Plaintiffs' first lawsuit applies to their second, the subject of this appeal. If the statute of limitations began to run at the latest on the date of Bobby Nelson's death, it was tolled, if at all, when Plaintiffs filed their initial complaint on July 9, 2003.

Because Plaintiffs completely failed to comply with the two constitutional, legislatively enacted, statutory pre-suit prerequisites in effect at the time Plaintiffs filed their first complaint, that filing [should have] amounted to an unlawful filing and, therefore, a legal nullity. As a legal nullity, it should not be considered to have had any effect on the legally applicable statute of limitations. As a further result, regardless of anything which did or did not happen after July 14, 2003, the statute of limitations should be considered to have expired, thereby warranting the dismissal with prejudice of Plaintiffs' second lawsuit filed on this same cause of action over four years later.

Alternatively, if it should be ruled that Plaintiffs did effectively toll the statute of limitations on July 9, 2003 by filing their initial complaint, because process was not effected by proper service upon the doctors and their clinic within the time allowed by law and the additional time granted Plaintiffs, the statute of limitations began to run and expired five days later. That date occurred several months before their first lawsuit was dismissed. As such, even if that first lawsuit had been dismissed without prejudice by the trial court pursuant to M.R.C.P. 4(h), and despite the Court of Appeals' reversal of the trial court making the dismissal one without prejudice, such a dismissal without prejudice is of no consequence to the [fact that the] statute of limitations [which] had already expired against the doctors and their clinic.

Accordingly, when Plaintiffs' second lawsuit was filed more than four years after the expiration of the statute of limitations, the trial court was imminently correct in dismissing with

prejudice Plaintiffs' second lawsuit against the doctors and their clinic. For all of those reasons, collectively and/or alternatively, the trial court's judgment of dismissal with prejudice as to the doctors and their clinic in this, Plaintiffs' second lawsuit, should be affirmed.

WHEREFORE, Appellees/Defendants William E. Henderson, M.D., Ira Lamar Couey, M.D., R. Blake Smith, M.D. and Oxford Clinic for Women request this Court affirm the trial court's order dismissing with prejudice Plaintiffs' lawsuit herein against them.

RESPECTFULLY SUBMITTED, this the 12th day of November, 2009.

CLINTON M. GUENTHER, MB[redacted]
Of Counsel to William E. Henderson, M.D.,
Ira Lamar Couey, M.D., R. Blake Smith, M.D.
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ADDENDUM

Miss. Code Ann. § 15-1-36(15)(Rev. 2003). No action based upon the health care provider's professional negligence may be begun unless the defendant has been given at least sixty (60) days' prior written notice of the intention to begin the action. No particular formal notice is required, but it shall notify the defendant of the legal basis of the claim and the type of loss sustained, including with specificity the nature of the injuries suffered. If the notice is served within sixty (60) days prior to the expiration of the applicable statute of limitations, the time for the commencement of the action shall be extended sixty (60) days from the service of the notice for said health care providers and others. This subsection shall not be applicable with respect to any defendant whose name is unknown to the plaintiff at the time of filing the complaint and who was identified therein by a fictitious name.

Miss. Code Ann. § 11-1-58(1)(Rev. 2003). In any action against a licensed physician, health care provider or health care practitioner for injuries or wrongful death arising out of the course of medical, surgical or other professional services where expert testimony is otherwise required by law, the complaint shall be accompanied by a certificate executed by the attorney for the plaintiff declaring that:

(a) The attorney has reviewed the facts of the case and has consulted with at least one (1) expert qualified pursuant to the Mississippi Rules of Civil Procedure and the Mississippi Rule of Evidence who is qualified to give expert testimony as to the standard of care or negligence and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis of such review and consultation that there is a reasonable basis for the commencement of such action; or

(b) The attorney was unable to obtain the consultation required by paragraph (a) of this subsection because the limitation of time established by Section 15-1-36 would bar the action and that the consultation could not reasonably be obtained before such time expired. A certificate executed pursuant to this paragraph (b) shall be supplemented by a certificate of consultation pursuant to paragraph (a) or (c) within sixty (60) days after service of the complaint or the suit shall be dismissed; or

(c) The attorney was unable to obtain the consultation required by paragraph (a) of this subsection because the attorney had made at least three (3) separate good faith attempts with three (3) different experts to obtain a consultation and that none of those contacted would agree to a consultation.

Mississippi Rule of Civil Procedure 4(h). 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.

CERTIFICATE OF SERVICE

I, Clinton M. Guenther, of counsel to defendant, hereby certify that I have this day mailed, with postage prepaid, a true and correct copy of the above and foregoing document unto:

Hon. Margaret P. Ellis
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Hon. Walter Alan Davis
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Honorable Henry L. Lackey
Circuit Judge
Post Office Box T
Calhoun City, Mississippi 38916

CERTIFIED this the 12th day of November, 2009.

CLINTON M. GUENTHER

CERTIFICATE OF FILING

I, Clinton M. Guenther, certify that I have this day hand delivered the original and three copies of, and a CD containing the Brief of Defendants/Appellees, WILLIAM E. HENDERSON JR., M.D., IRA LAMAR COUEY, M.D., R. BLAKE SMITH, M.D. AND OXFORD CLINIC FOR WOMEN, on November 12th, 2009, to Ms. Kathy Gillis, Clerk, Mississippi Supreme Court, Gartin Justice Building, Jackson, MS 39205-0249

CERTIFIED this the 12th day of November, 2009.

CLINTON M. GUENTHER, MB #[redacted]