SUPREME COURT OF MISSISSIPPI

NO. 2009-CA-00081

BILLY NELSON AND GAYNELLE NELSON, Individually and as Parents and Next Friends of JUSTIN NELSON, and as Representatives of All Wrongful Death Beneficiaries and Heirs of BOBBY NELSON, Deceased — **APPELLANTS - PLAINTIFFS**

VS.

BAPTIST MEMORIAL HOSPITAL-NORTH MISSISSIPPI, INC.; WILLIAM E. HENDERSON, JR., M.D., OXFORD CLINIC FOR WOMEN, a Partnership; IRA LAMAR COUEY, M.D., General Partner; R. BLAKE SMITH, M.D., General Partner; WILLIAM E. HENDERSON, JR., M.D., General Partner; and JOHN DOES 1 THROUGH 10 — **APPELLEES - DEFENDANTS**

BRIEF OF APPELLEE, BAPTIST MEMORIAL HOSPITAL-NORTH MISSISSIPPI, INC.

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

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

1. Appellants, Billy Nelson and Gaynelle Nelson, individually and as Parents and Next Friends of Justin Wilson, and as Representatives of All Wrongful Death Beneficiaries and Heirs of Bobby Nelson, Deceased;

2. Honorable Henry L. Lackey, Lafayette County Circuit Court Judge;

3. Baptist Memorial Hospital-North Mississippi, Inc.;

4. William E. Henderson, Jr., M.D.;

5. Oxford Clinic for Women;

6. Ira Lamar Couey, M.D.;

7. R. Blake Smith, M.D..

The undersigned counsel further certifies that the following attorneys have an interest in the outcome of this case:

For All Appellants:

1. Margaret P. Ellis, Esquire;

2. Roderick D. Ward, III, Esquire.

For Appellees:

1. Walter Alan Davis, Esquire, for Baptist Memorial Hospital-North Mississippi, Inc.;

2. Clinton M. Guenther, Esquire, for Dr. William E. Henderson, Jr., Dr. Ira Lamar Couey, Dr. R. Blake Smith, and Oxford Clinic for Women.

This, the 12th day of November, 2009.

WALTER ALAN DAVIS, MSB #9875

I. STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not requested by the Appellee Baptist Memorial Hospital-North Mississippi, Inc. ("BMH-NM"). While this case does present a number of different issues, including questions regarding the application of judicially announced changes in the application of the law on statutes of limitation as applied to wrongful death actions, the present matter can be decided upon the record and without the need for oral argument.

II. STATEMENT OF ISSUES

Issue One: Whether Lafayette County Circuit Court Judge Henry Lackey abused his discretion in denying the Nelsons' Motion for Reconsideration entered on December 17, 2008.

Issue Two: Whether the avoidance arguments made by the Nelsons, including preclusion doctrines, "law of the case" and waiver/estoppel claims, require a finding that Judge Lackey's denial of reconsideration was an abuse of discretion.

Issue Three: Whether the "nullity doctrine," by which void proceedings can have no subsequent legal effect, precludes the tolling of the statute of limitations by the prior Nelson lawsuit which was dismissed for a jurisdictional defect.

Issue Four: Whether the fact that Judge Lackey reached the correct result in denying reconsideration, regardless of the analysis used, precludes a finding that he abused his discretion.

Issue Five: Alternatively, should the Court determine that Judge Lackey did in fact abuse his discretion as to some portion of the Nelsons' claims in the denial of the Nelsons' Motion for Reconsideration, which claims should be remanded to the trial Court for further proceedings.

III. STATEMENT OF THE CASE

A. NATURE OF THE CASE

The present medical malpractice action arises out of claims related to the delivery and birth of the decedent Bobby Nelson at the Oxford, Mississippi location of Baptist Memorial Hospital-North Mississippi on April 26, 2001. (R. 7). The Appellant Nelsons made claims against Ms. Gaynelle Nelson's OBG-YNs (and their medical practice, the Oxford Clinic for Women) as well as against BMH-NM and its nursing staff. (R. 7-9). The Nelsons' Complaint in this matter charges the defendants with negligence as of the date of Bobby Nelson's delivery and birth - April 26, 2001 - and further makes allegations that injuries were also incurred by Bobby Nelson as well as the other claimants on that date as a result of the alleged negligence. (R. 6-9).

B. STATEMENT OF RELEVANT UNDERLYING FACTS

On April 25, 2001, Ms. Gaynelle Nelson was admitted to BMH-NM while in labor. (R. 6). Her child, Bobby Nelson, was then delivered at approximately 10:47 a.m. on April 26, 2001. (R. 7). Following transfer to the North Mississippi Medical Center, Inc. in Tupelo, Mississippi, Bobby Nelson later died on July 14, 2001. (R. 7).

C. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

As of April 26, 2003 - two years from the date of the alleged negligence and accrual of claims made in this case, the Nelsons had not filed any action nor had they provided any written notice to BMH-NM about their intention to file suit. However, on July 9, 2003, the Nelsons filed a separate, prior action to the one at bar with the filing of a

Complaint with the Circuit Court of Lafayette County, Mississippi. That Court ultimately dismissed the action with prejudice for the Nelsons' failure to provide statutory notice under Miss. Code Ann § 15-1-36(15). Nelson v. Baptist Mem. Hosp. - N. Miss., Inc., 972 So. 2d 667, 670 (Miss. Ct. App. 2007). Following appeal, the Mississippi Court of Appeals determined that the case was properly dismissed by the trial Court, but that the dismissal should have been without prejudice. Id. As such, the Court of Appeals reversed and dismissed the action without prejudice. Id.

Following the decision by the Court of Appeals, the Nelsons then forwarded a notice letter to BMH-NM on January 24, 2008. Thereafter, the Nelsons filed the present, entirely separate action with the Circuit Court of Lafayette County, Mississippi on March 26, 2008. (R. 1).

On April 25, 2008, BMH-NM filed with the court below several matters, including its Answer and Affirmative Defenses, as well as a Motion to Dismiss, or in the Alternative, for Summary Judgment. (R. 38-43; 53-71). Contained in BMH-NM's Answer as well as the Motion to Dismiss was a statute of limitations defense. (R. 41, 53-71). After a hearing on the motions, Lafayette County Circuit Judge Henry Lackey granted BMH-NM's Motion to Dismiss by opinion and order dated July 2, 2008. (R. 457-460).

The Nelsons filed a Motion to Reconsider that dismissal on July 11, 2008. (R. 461). Judge Lackey denied that motion by order dated December 17, 2008. (R. 575-76). On January 9, 2009, the Nelsons then filed a "Notice of Appeal" of Judge Lackey's December 17, 2008 order denying reconsideration. (R. 578-79) (appealing ***"the Order Overruling Plaintiffs' Motion to Reconsider its Order of July 1, 2008, of this Court in this case entered and filed on December 17, 2008.")*** (emphasis added). The Nelsons did ***not***, however, file a notice of appeal with regard to the separate dismissal order of July 2, 2008, which granted BMH-NM's Motion to Dismiss, or in the Alternative for Summary Judgment.

Judge Lackey's December 17, 2008 order denying reconsideration is now the sole matter before this Court for review.

IV. SUMMARY OF THE ARGUMENT

Insofar as the Nelsons have only appealed to this Court the trial court's order denying reconsideration dated December 17, 2008, review by this Court is limited to whether Judge Lackey abused his discretion in the denial of reconsideration. The Nelsons did not present Judge Lackey with any intervening change in the law nor did they present any new evidence that was not previously available. Moreover, they did nothing beyond "rehash rejected arguments" in the manner already noted by this Court to be insufficient to justify reconsideration.

The preclusion doctrines argued by the Nelsons are inapplicable insofar as ***res judicata*** and collateral estoppel effects are not given to dismissals "without prejudice" as is the case here. The "law of the case" doctrine is inapplicable as this is not the same case on remand, but rather an entirely new, separately filed lawsuit. BMH-NM did not waive any arguments, as the statute of limitations defense was both timely pled in its Answer as well as timely presented by motion to the trial Court. Estoppel arguments fail as the question involved is one of law, to which estoppel doctrines do not apply.

With respect to the merits of the original limitations argument and based upon the allegations of the Complaint itself, the "survival" claims portion of this wrongful death action accrued to Bobby Nelson as of April 26, 2001 and expired by virtue of the statute of limitations on April 26, 2003. Even if this Court finds that the Nelsons' claims accrued and began running at a later date, the statute of limitations has nevertheless run. This Court should reconsider the recent Clark decision and determine that prior proceedings which suffer from fatal jurisdictional defects are void *ab initio,* can have no subsequent legal effect and their pendency cannot toll the statute of limitations for subsequent suits. As such, the prior action filed by the Nelsons did not toll the limitations period in this case and their claims are time barred. Further, the fact that Bobby Nelson died prior to the expiration of the statute of limitations triggers the application of Miss. Code Ann. § 15-1-36(6) to preclude any effective application of the built-in minor's savings provision of Miss. Code Ann. § 15-1-36(3). The "survival" claims which are therefore barred in this action include the claims for: 1) pain and

suffering; 2) bodily injury; 3) medical and hospital expenses; 4) lost wages/lost earning capacity; 5) emotional distress; and 6) hedonic damages. Insofar as the particular loss of consortium claims asserted by the Nelsons in this case accrued at the same time as the "survival" claims and are also wholly derivative of those claims and subject to the same defenses, then those claims are also time-barred. Finally, as the Nelsons did not properly assert any estate claims and there are no subrogation claims asserted, Judge Lackey's decision reached the correct result by dismissing the entire action, regardless of the analysis employed by him. Judge Lackey did not abuse his discretion and this Court should affirm Judge Lackey's denial of reconsideration in this matter.

V. ARGUMENT

A. THE LIMITED SCOPE OF APPEAL AND STANDARD OF REVIEW

As noted previously, the Nelsons have filed a notice of appeal regarding the trial Court's denial of reconsideration. (R. 578-79). That notice, however, only appeals Judge Lackey's denial of reconsideration and does not appeal the original order granting BMH-NM's Motion to Dismiss, or in the Alternative for Summary Judgment. (R. 578-79) (appealing "***the Order Overruling Plaintiffs' Motion to Reconsider its Order of July 1, 2008, of this Court in this case entered and filed on December 17, 2008.")*** (emphasis added). The limited nature of the Notice of Appeal restricts the issues before this Court to only the propriety of Judge Lackey's denial of reconsideration:

Mississippi Rules of Appellate Procedure 3(c) states that an appellant such as Mrs.

> Eldridge must "designate as a whole or in part the judgment or order appealed from." Therefore, since Mrs. Eldridge's notice only pertains to the June 12, 2000 judgment, the only issue properly before this Court on appeal is whether a conservatorship should have been established for Mrs. Eldridge.

Overton v. Sparkman, 813 So. 2d 753, 755 (Miss. Ct. App. 2001). Here, in light of the narrow Notice of Appeal, the question before this Court is limited to Judge Lackey's denial of reconsideration by order dated December 17, 2008.

This Court reviews orders denying reconsideration under an "abuse of discretion" standard. See, e.g., Point South Land Trust v. Gutierrez, 997 So. 2d 967, 976 (Miss. Ct. App. 2008). Further, the governing standard for Motions for Reconsideration is itself instructive in determining whether Judge Lackey abused his discretion:

> In order to prevail on a motion for reconsideration, "the movant must show: (i) an intervening change in controlling law, (ii) availability of new evidence not previously available, or (iii) [the] need to correct a clear error of law or to prevent manifest injustice." Brooks v. Roberts, 882 So. 2d 229, 233 (P15) (Miss. 2004) (citation omitted). Regarding the propriety of reconsidering a judgment, the United States Court of Appeals for the Fifth Circuit has stated that "'[r]econsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly.' A motion for reconsideration may not be used to rehash rejected arguments or introduce new arguments." LeClerc, 419 F.3d at 412 n.13 (internal citation omitted). Nor may it be used "to resolve issues which could have been raised during the prior proceedings." Westbrook, 68 F.3d at 879 (citations omitted).

Point South Land Trust v. Gutierrez, 997 So. 2d 967, 976 (Miss. Ct. App. 2008).

B. THE NELSONS DID NOT ESTABLISH BEFORE THE TRIAL COURT ANY INTERVENING CHANGE IN LAW OR ANY NEW EVIDENCE NOT PREVIOUSLY AVAILABLE

In their Motion for Reconsideration filed on July 11, 2008, the Nelsons did not present Judge Lackey with any "intervening change in law" since the original dismissal order of July 2, 2008. (R. 461-474). Moreover, while the Nelsons attached a number of quoted legal authorities to their Motion to Reconsider, they did not submit any additional evidence before the Court, newly discovered or otherwise. (R. 475-574). In fact, they did nothing other than "rehash rejected arguments" in the manner that the Gutierrez court noted insufficient. Point South Land Trust v. Gutierrez, 997 So. 2d 967, 976 (Miss. Ct. App. 2008) ("A motion for reconsideration may not be used to rehash rejected arguments or introduce new arguments.")

As such, the Nelsons did not carry their burden to establish either of these avenues for relief on a motion to reconsider and these two grounds for relief cannot be used to find that Judge Lackey abused his discretion in denying reconsideration.

C. THE NELSONS DID NOT ESTABLISH BEFORE THE TRIAL COURT "THE NEED TO CORRECT A CLEAR ERROR OF LAW OR PREVENT MANIFEST INJUSTICE"

The only remaining avenue for the Nelsons to prevail is to establish that Judge Lackey abused his discretion in failing to grant reconsideration on the basis of "the need to correct a clear error of law or prevent manifest injustice." Point South Land Trust v.

Gutierrez, 997 So. 2d 967, 976 (Miss. Ct. App. 2008).

1. THE PRIOR FILED SUIT WAS VOID *AB INITIO* BECAUSE OF A JURISDICTIONAL DEFECT AND CANNOT SERVE TO TOLL THE STATUTE OF LIMITATIONS

Here, Judge Lackey specifically denied reconsideration based upon the determination that the Nelson's filing of the original suit was a "nullity" in that it was filed without the jurisdictional prerequisite of notice to the Defendants. (R. 575). As such, Judge Lackey determined, the filing of that action could not serve to toll the statute of limitations.

In candor to the Court, this Court recently addressed a similar issue and *in the absence of any authority presented*, declined to endorse a similar ruling. Price v. Clark, 2009 Miss. LEXIS 365 (Miss. July 23, 2009) ("No precedent is cited by either the trial court or the parties supporting the trial court's failure to give a tolling effect to the original complaint due to Price's failure to provide statutory notice."). This Court should, however, reconsider this determination upon consideration of legal authority, from both this Court as well as other courts around the country.

This Court has consistently found the notice provision of § 15-1-36 to be mandatory and jurisdictional. See, e.g., Arceo v. Tolliver, 2009 Miss. LEXIS 393 (Miss. Aug. 20, 2009) ("The statute makes notice, with the required content, mandatory."); Saul v. Jenkins, 963 So. 2d 552, 554 (Miss. 2007) ("Supreme Court "consistently [has] found that the notice requirement of section 15-1-36(15) is mandatory

and jurisdictional . . ."). As such, the filing of an original suit without ever triggering the jurisdiction of the Court is a "nullity."

This Court has also noted on repeated occasions that a legal "nullity" is equivalent to the action being "void" and more specifically, void from the beginning, or "void *ab initio*." See, e.g., Barbour v. State ex rel. Hood, 974 So. 2d 232, 238 (Miss. 2008). Where a prior suit is "void," its pendency can provide no basis for any subsequent action:

> It is equally well settled that a judgment rendered by a court having no jurisdiction of the subject matter is void, not merely voidable, and may be attacked directly or collaterally, anywhere, and at any time. Such a judgment is a usurpation of power and is an absolute nullity. Duvall v. Duvall, 224 Miss. 546, 552, 80 So. 2d 752, 754 (1955)(citations omitted). Further, a void judgment ***can furnish no basis for any subsequent action***. Southern Trucking Serv., Inc. v. Mississippi Sand & Gravel, Inc., 483 So. 2d 321, 324 (Miss. 1986).

Oktibbeha County Dep't of Human Servs. v. N. G., 782 So. 2d 1226, 1236 (Miss. 2001) (emphasis added). Obviously, tolling a statute of limitations by virtue of a wholly void, prior filed suit would constitute "a subsequent action" based upon that prior void suit contrary to this Court's own determinations of the effect of void proceedings.

> Thus the filing of a claim, ***ordinarily sufficient to toll a statute of limitations***, does not have that effect if such a proceeding is a nullity and void from the beginning. See Nutter v. Woodard, 34 Mass. App. Ct. 596, 596, 614 N.E.2d 692 (1993).

Xarras v. McLaughlin, 66 Mass. App. Ct. 799, 801 (Mass. App. Ct. 2006) (emphasis added); Ozbay v. Eli Lilly & Co., 2008 U.S. Dist. LEXIS 26549 (E.D. Va. Apr. 2, 2008) (action which is legal nullity cannot toll statute of limitations period); Mason v. Board of Zoning Appeals of Fairfax County, 25 Va. Cir. 198, 200 (Va. Cir. Ct. 1991) ("Void proceedings do not toll a regular statute of limitations.") Richardson v. Hughes, 146

S.W.2d 255, 258 (Tex. Civ. App. 1940) (same). The "nullity doctrine" is also applied in this context to criminal proceedings.

> Since the warrant was void, it did not toll the statute of limitations. ***"The word 'void' in its strictest sense means that which has no force and effect, is without legal efficacy, is incapable of being enforced by law, or has no legal or binding force."*** BLACK'S LAW DICTIONARY 1411 (REV. 5TH ED. 1979). ***Since a void warrant has no legal effect, there was nothing to toll the statute of limitations.***

State v. Fain, 484 So. 2d 558, 559 (Ala. Crim. App. 1986) (emphasis added); see also State v. Ferrante, 269 S.W.3d 908, 910 (Tenn. 2008) ("We hold that a defendant's appearance in court following the issuance of an affidavit of complaint that is ***void from inception does not toll the running of the statute of limitations.***") (emphasis added).

This Court should hold likewise, even if the pendency of other prior suits - in which jurisdiction is present - might otherwise toll the statute of limitations. The filing of the original suit in this case was a nullity, was void *ab initio* and cannot serve to toll the statute of limitations.

Regardless, it cannot be said that at the time he considered the Motion to Reconsider, Judge Lackey was faced with a "clear error of law" as presented by the Nelsons. Indeed, this Court did not make the determination in Clark until several months after Judge Lackey issued his ruling. He cannot be said to have "abused his discretion" in light of the unclear nature of the law at that time. Again, the sole issue before the Court is his denial of reconsideration - not his determination on the merits of the underlying Motion to Dismiss, or in the Alternative for Summary Judgment.

Moreover, the need to correct "clear error" or prevention of manifest injustice was not an appropriate basis for relief before Judge Lackey on reconsideration, insofar as Judge Lackey reached the correct result even if he did not analyze all of the multiple legal reasons that justify his decision. Certainly, as Judge Lackey did not have the benefit of the changes in law that have occurred ***since*** his decision in December of 2008, he could not have applied those changes in rendering his decision. Nevertheless, this Court may affirm those portions of the trial court's decisions which reach the correct result, regardless of the rationale employed. See, e.g., Methodist Hosp. of Hattiesburg, Inc. v. Richardson, 909 So. 2d 1066, 1070 (Miss. 2005) ("An appellate court may affirm a trial court if the correct result is reached, even if the trial court reached the result for the wrong reasons."); Puckett v. Stuckey, 633 So. 2d 978, 980 (Miss. 1993)

2. THE "LAW OF THE CASE," PRECLUSION DOCTRINES AND OTHER ARGUMENTS OF AVOIDANCE DO NOT APPLY

As a preliminary matter, the Nelsons present a number of avoidance arguments which do not related to the merits of the statute of limitations issues. None of these preliminary arguments themselves have merit and can be dispensed with by the Court with a straightforward interpretation of the well established aspects of the legal principles involved.

a. PRECLUSION DOCTRINES ARE INAPPLICABLE

The Nelsons have argued that the doctrines of *res judicata* and collateral estoppel precluded arguments made by BMH-NM to the trial court below. Yet, the application of either of these doctrines requires that there have been a final judgment "on the merits" in a prior litigation.

> A final judgment on the merits is an elementary requirement for the application of the doctrines of *res judicata* and collateral estoppel.

Anderson v. R & D Foods, Inc. 913 So. 2d 394, 400 (Miss. App. 2005) (citing Vaughn v. Monticello Ins. Co., 838 So. 2d 983, 986(¶ 16) (Miss. Ct. App. 2001)); M.A.S. v. Mississippi Dept. of Human Services, 842 So. 2d 527, 529 (Miss. 2003) ("Generally, collateral estoppel 'precludes parties from re-litigating issues authoritatively decided ***on their merits*** in prior litigation to which they were parties or in privity.'") (emphasis added).

Here, in the prior litigation, the Court of Appeals plainly ruled that the prior suit was dismissed without prejudice. Nelson v. Baptist Memorial Hospital-North Mississippi, Inc., 972 So. 2d 667, 674 (Miss. App. 2007). As such, the prior decision by the Court of Appeals is not a "decision on the merits" and it carries no preclusive effect. The United States Supreme Court as well as the Mississippi Supreme Court has plainly said so. See, e.g., Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 396, 110 S. Ct. 2447, 110 L.Ed.2d 359 (1990) (holding *res judicata* and collateral estoppel inapplicable to a dismissal without prejudice.); Stockstill v. State 854 So. 2d 1017, 1028 (Miss. 2003).

> The claims for malicious prosecution, negligence, and intentional and/or negligent infliction of emotional distress ***were not adjudicated on the merits by the district court as they were dismissed without prejudice.***

Norman v. Bucklew, 684 So. 2d 1246, 1255 (Miss. 1996) (emphasis added). With no finding on the merits in the prior appeal, the doctrines of *res judicata* and collateral estoppel are simply inapplicable. Indeed, this is the very reason that the prior decision does not serve as a complete bar to the refiling of the suit presently before the Court. If these doctrines were applicable to the prior decision of the Court of Appeals, it is the Nelsons who would be precluded by these doctrines and dismissal would have been proper on preclusion grounds.

b. THE "LAW OF THE CASE" DOCTRINE IS INAPPLICABLE TO THE PRIOR, SEPARATE LAWSUIT IN NELSON I

The Nelsons have also argued that the Court of Appeals made a determination binding on the trial Court via the "law of the case" doctrine, with respect to the running of the statute of limitations.

The "law of the case" doctrine can properly be considered the flip side of *res judicata*. *Res judicata* applies to bind parties to adjudications of law in ***subsequent*** actions, while the "law of the case" doctrine applies only to proceedings in the ***same*** action.

> ***The law of the case rule applies only to one case, and does not, like res judicata, foreclose parties or privies in one case by what has been done in another case.***

Continental Turpentine & Rosin Co. v. Gulf Naval Stores Co. 244 Miss. 465, 479, 142

So. 2d 200, 207 (Miss.1962) (emphasis added). In Continental Turpentine, the Mississippi Supreme Court specifically declined to apply the doctrine in a second, subsequent lawsuit as it was "a separate and distinct action from the present case." Id.

> ***By its terms, the law of the case doctrine applies only in a subsequent appeal in the same case.*** *See Peoples State Bank,* at ¶ 10; *Jundt,* at ¶ 7; *Tom Beuchler Constr.,* at 339; 18 James W. Moore, Federal Practice §§ 131.13[3] and 134.20[1] (3d ed.2006). As explained in 18 Moore, *supra,* at § 131.13[3], ***"the law of the case doctrine operates only until a final judgment is obtained, after which it has no relevance." The doctrine does not apply to bar claims or issues in a subsequent, separate lawsuit.***

Riverwood Commercial Park, L.L.C. v. Standard Oil Co., Inc. 729 N.W.2d 101, 106 (N.D. 2007) (emphasis added).

> We disagree that the law of the case doctrine is applicable to the instant case; the doctrine applies to a single case throughout all of its subsequent stages, including retrial and ensuing appeal. *Houston Endowment, Inc. v. City of Houston,* 468 S.W.2d 540, 543 (Tex.Civ.App.-Houston [14th Dist.] 1971, writ ref'd n.r.e.). ***Because the instant case involves a different lawsuit from the one on appeal in Rauch I, the law of the case doctrine does not apply.*** Instead, the doctrine of collateral estoppel[1] controls NRG's first and third points of error.

NRG Exploration, Inc. v. Rauch, 905 S.W.2d 405, 409 (Tex. App.- Austin 1995).

The Mississippi Courts have also noted the application of "law of the case" to be confined to subsequent proceedings in the same lawsuit and more specifically, where a case is sent back to the trial Court ***on remand***:

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[1]As noted *infra*, the doctrine of collateral estoppel does not apply in the present case, either, as there has been no "decision on the merits" of the prior action.

> When an appellate court issues a ruling and ***sends the case back on remand***, the ruling is the law of the case.

Southland Enterprises, Inc. v. Newton County, 940 So. 2d 937, 943 (Miss. App. 2006) (emphasis added).

> This is the point in our prior opinion that becomes the fulcrum on which application of the "law of the case" doctrine turns for today's issues. That doctrine prevents altering the earlier-determined legal principles at the time of later proceedings in the same case.
>
> The doctrine of the law of the case is similar to that of former adjudication, relates entirely to questions of law, and ***is confined in its operation to subsequent proceedings in the case.*** Whatever is once established as the controlling legal rule of decision, ***between the same parties in the same case***, continues to be the law of the case, so long as there is a similarity of facts.

Wilner v. White, 929 So. 2d 343, 346 (Miss. App. 2005) (emphasis added).

> Thirdly, the Andersons argue that the supreme court's denial of R & D's petition for an interlocutory appeal rendered the trial court's original order "the law of the case." According to the law of the case doctrine, "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, as long as there is a similarity of facts." *Mauck v. Columbus Hotel Co.,* 741 So. 2d 259, 266-67(¶ 22) (Miss.1999). Thus, a mandate issued by an appellate court binds the trial court ***on remand***, unless an exception to the doctrine applies. *Pub. Employees' Ret. Sys. v. Freeman,* 868 So. 2d 327, 330(¶ 10) (Miss.2004).

Anderson v. R & D Foods, Inc. 913 So. 2d 394, 400 (Miss. App. 2005) (emphasis added).

Here, the filing of a new Complaint triggered the institution of a new, separate lawsuit. Miss. R. Civ. P. 3(a) ("A civil action is commenced by the filing of a Complaint with the Court."). As a separate, subsequent lawsuit, this action is unaffected by the

"law of the case" doctrine and can only be bound - if at all - through the application of either *res judicata* or collateral estoppel principals. See, e.g., NRG Exploration, Inc. v. Rauch, 905 S.W.2d 405, 409 (Tex. App.- Austin 1995). The "law of the case" doctrine simply has no application here.

c. THERE WAS NO WAIVER OF ARGUMENTS

Further, even though the original underlying motions in the present case were filed only one month after the filing of suit, the Nelsons argue that BMH-NM has somehow waived the statute of limitations defense based on events occurring ***prior*** to the institution of this suit.

Granted, decisions from this Court dictate that affirmative defenses can be waived by a failure to timely assert them. Again, however, this action was filed on March 26, 2008 and the Motion to Dismiss, or in the Alternative for Summary Judgment was filed on April 24, 2008, only a month after the institution of suit. (R. 53). Indeed, the time for filing an answer had not yet even arrived. Miss. R. Civ. P. 8 expressly permits a Defendant to assert the affirmative defense of statute of limitations in its answer. Miss. R. Civ. P. 8(C). Yet, failing to do so is not even itself a waiver as long as the issue is raised in a dispositive motion and the Plaintiff is given sufficient time to respond. See, e.g., McGuffie v. Herrington 966 So.2d 1274, 1277 (Miss. App. 2007); Bennett v. Madakasira, 821 So.2d 794, 802(¶ 29) (Miss. 2002). The undersigned counsel can find absolutely no authority that supports a contention that a statute of limitations defense can

be waived by a failure to assert it *before the action is even filed.* Each and every Mississippi case involves conduct *after* the institution of suit. See, e.g., Whitten v. Whitten , 956 So. 2d 1093, 1099 (Miss. App. 2007) (two year delay *after suit filed* with active participation in litigation constituted waiver); East Mississippi State Hosp. v. Adams, 947 So. 2d 887, 891 (Miss. 2007) (two year delay *after suit filed* with active participation in litigation constituted waiver); MS Credit Center, Inc. v. Horton, 926 So. 2d 167, 180 (Miss. 2006) (eight month delay in asserting defense *after suit was filed* and active participation in litigation constituted waiver).

BMH-NM, through its motion and in supporting memorandum approximately one month after suit was filed, timely asserted its defense of the limitations period before an Answer to the Complaint was even due. There was no "waiver" from either a failure to include the defense in BMH-NM's pleadings, any failure to present the defense by motion, or any failure to request a hearing before this Court. Indeed, short of filing a motion before an Answer was even due, there was little that could be done to bring this issue to the Court's attention in this case any faster. Again, as this is an entirely separate and distinct lawsuit, the doctrine of waiver is simply inapplicable because BMH-NM did not yet have a sufficient opportunity to waive anything with respect to this case. The Nelsons may only seek to potentially bind BMH-NM to findings of the prior action through other doctrines which are ***actually applicable*** to prior, separate lawsuits, such as *res judicata* or collateral estoppel. The attempts of the Nelsons to utilize those doctrines fails for entirely separate reasons as discussed *supra.*

d. ESTOPPEL ARGUMENTS FAIL BECAUSE ESTOPPEL DOES NOT APPLY TO QUESTIONS OF LAW

The Nelsons also argue that BMH-NM was somehow estopped from arguing that the statute of limitations has expired. Yet, the question regarding when statutes of limitation begin to run is a question of law for the Court to decide. As such, estoppel arguments fail as they can only be applied to bind parties to prior representations ***of fact:***

> The doctrine of estoppel is not available, because that doctrine has reference to factual matters, and **not to contentions upon the law** as applied to a given state of facts. **There can be no estoppel where both parties were equally in possession of all the facts pertaining to the matter relied on as an estoppel, and the position taken in respect thereto involved solely a question of law.** [emphasis supplied]

Weeks v. Weeks 654 So. 2d 33, 36 (Miss. 1995) (quoting Mississippi Power & Light Company v. Pitts, 181 Miss. 344, 179 So. 363, 365 (Miss.1938) (emphasis added)).

3. THE STATUTE OF LIMITATIONS BARS THE "SURVIVAL" CLAIMS IN THIS ACTION

The underlying questions resolved by Judge Lackey in his dismissal of this action - and in his denial of reconsideration which is on review here, relate to the actual running of the statute of limitations on the claims presented by the Nelsons. As set forth above, Lackey's application of the "nullity doctrine" was the appropriate one and this Court should reconsider the Clark decision and find that the prior suit did not toll the statute of

limitations because it was jurisdictionally void and can have no subsequent effect.[2] As such, it cannot be aid that Judge Lackey was faced with a "clear error of law" in ruling upon the Motion to Reconsider.

Further, at the time of Judge Lackey's decision in the trial court below on the Nelson's Motion for Reconsideration, the Clark decision had not yet been rendered and in light of the narrow scope of appellate review, this Court should find that Judge Lackey did not abuse his discretion in light of the state of the law at the time.

Nevertheless, even if this Court were to find adversely to BMH-NM on the application of the "nullity doctrine" and the application of Judge Lackey's discretion on that issue, the underlying denial of reconsideration should still be affirmed.
Even with the changes in law which have occurred, this Court may affirm those portions of the trial court's decisions which reach the correct result, regardless of the rationale employed. See, e.g., Methodist Hosp. of Hattiesburg, Inc. v. Richardson, 909 So. 2d 1066, 1070 (Miss. 2005) ("An appellate court may affirm a trial court if the correct result is reached, even if the trial court reached the result for the wrong reasons."); Puckett v. Stuckey, 633 So. 2d 978, 980 (Miss. 1993)

As the statute of limitations had expired in this matter on the "survival" claims asserted by the wrongful death beneficiaries in this case before even the Nelson complaint was ever filed and before any notice letter under Miss. Code Ann. § 15-1-36

[2]This would result in a finding that all of the Nelsons' claims would be time barred, even if the statute of limitations for some claims ran from the date of death.

was ever received, this Court should affirm the denial of reconsideration with respect to all of the "survival" claims asserted, including all claims asserted for Bobby Nelson's alleged: 1) pain and suffering; 2) bodily injury; 3) medical and hospital expenses; 4) lost earning capacity; 5) emotional distress; and 6) hedonic damages. Likewise, this Court should affirm the denial of reconsideration with respect to any other damages stemming from "survival" claims. Dismissal of these claims would also include any claim for increased damages which occurred as a result of the death of Bobby Nelson, as a mere increase the ***amount*** of damages does not create a new cause of action.

a. THE STATUTE OF LIMITATIONS RUNS ON "SURVIVAL" CLAIMS FROM THE DATE THAT THE CAUSE OF ACTION ACCRUED

Judge Lackey's principal rulings in this matter were premised, in part, upon the venerable and longstanding principle that a wrongful death action is a single, indivisible cause of action to which a single statute of limitations applied. However, since the decisions at issue here were made, the Supreme Court has issued additional opinions analyzing wrongful death actions and has dramatically changed the face of wrongful death litigation. In sum, the Court has noted that claims under Mississippi's wrongful death statute are subject to separate statutes of limitation depending upon the nature of the claim asserted:

> [C]ases filed pursuant to our wrongful-death statute may involve more than one kind of claim. For instance, in addition to claims the decedent could have brought "if death had not ensued," there may be individual claims of loss of consortium, society and companionship, estate claims, and insurance subrogation claims. While

> it is true that the wrongful-death statute requires that all such claims be brought in one suit, each claim is subject to its own statute of limitations.

Caves v. Yarbrough, 991 So. 2d 142, 149 (Miss. 2008).

> This Court recently has explained when the statute of limitations begins to run for survival claims and wrongful-death claims under the MTCA. Caves v. Yarbrough, 991 So. 2d 142, 153 (Miss. 2008). In a suit under the wrongful-death statute, there may be several different kinds of claims, and each kind of claim is subject to its own statute of limitations. The limitation period begins to run on the earliest date all of the elements of a tort are present. Caves, 991 So. 2d at 153.

Univ. of Miss. Med. Ctr. v. McGee, 999 So. 2d 837, 840 (Miss. 2008); see also Price v. Clark, 2009 Miss. LEXIS 365 (Miss. July 23, 2009).

As noted, Mississippi's wrongful death statute encompasses four distinct types of claims: 1) claims that could have been pursued by the decedent before death, i.e., "survival" claims; 2) true "wrongful death" claims, i.e., loss of consortium claims by individual beneficiaries; 3) estate claims; and 4) subrogation claims. Caves, 991 So. 2d at 149. In the present case, the Nelsons asserted both survival claims (and related claims for damages of pain and suffering, bodily injury, medical and hospital expenses, lost wages/lost earning capacity, emotional distress and hedonic damages) as well as claims by the beneficiaries themselves for loss of consortium. No estate claims were made and in fact, no claims are even possible as the Estate of Bobby Nelson is not a party to the case. See, e.g., Delta Health Group, Inc. v. Estate of Pope, 995 So. 2d 123, 126 (Miss. 2008). Finally, no subrogation claims have been asserted in this case.

Caves explains that the statute of limitations on claims by the wrongful death

beneficiaries that are actually "survival" claims of the decedent begin to run on the date that those claims accrued, and not necessarily with the date of death. Id. In this sense, the cases continue the rationale of Jenkins with respect to these "survival" type claims. When looking to the statute of limitations these survival-type claims in this case, a proper analysis finds that the limitations period expired before the filing of suit and therefore those claims are barred.

i) THE STATUTE OF LIMITATIONS ON "SURVIVAL" CLAIMS EXPIRED PRIOR TO THE INSTITUTION OF SUIT IN THIS CASE

With the understanding that the statute of limitations on the survival claims begins to run on the date that they accrue, we must look to the particular date or dates as when the survival-type claims in this case would have accrued in this case.

A cause of action accrues when all of the elements of that action have occurred. Medical negligence, as with general negligence, contains four basic elements: duty, breach, causation and damages. Estate of Northrop v. Hutto, 9 So. 3d 381, 384 (Miss. 2009).

The legal duties involved are ongoing and are therefore met without temporal measurement. As to any alleged breach, the last (and in fact only) date upon which negligent conduct is alleged to have occurred is April 26, 2001. (R. 6-9). Damages are also alleged to have occurred on that same date, all so all elements of the asserted claims were met on that date. (R. 9). Therefore, the statute of limitations begins to run on all of Bobby Nelson's survival claims on that date - April 26, 2001.

The governing statute of limitations on claims of medical negligence is two years, as contained in Miss. Code Ann. § 15-1-36(1). Running the statute forward from April 26, 2001, the two year limitations period expired on April 26, 2003. As of that date, no suit had been filed[3] and no notice letter ever sent[4] to BMH-NMeSoto with respect to the Nelson claims. With the statute expired on that date, the July 9, 2003 Complaint and January 9, 2004 Amended Complaint in Nelson I, as well as the March 26, 2008 Complaint filed in this case, were all filed outside the limitations period. At a minimum, Judge Lackey's denial of reconsideration of summary judgment on all "survival" claims was not an abuse of discretion and should be affirmed by this Court.

The Nelsons argue that the statute of limitations period under Miss. Code Ann. § 15-1-36 is in fact ***eight*** years in light of the application of subsection three of that statute, the built in "minor's saving" provision. Miss. Code Ann. § 15-1-36(3).

What the Nelsons fail to note, however, are the remaining provisions of Miss. Code Ann. § 15-1-36, and more specifically, subsection six of that statute:

> (6) When any person who shall be under the disabilities mentioned in subsections ***(3)***, (4) and (5) of this section at the time at which his right shall have first accrued, shall depart this life without having ceased to be under such disability, ***no time shall be allowed by reason of the disability of such person to commence action on the claim of such person beyond the period prescribed under Section 15-1-55, Mississippi Code of 1972.***

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[3]The initial Complaint in Nelson I was filed on July 9, 2003.

[4]The very first Notice Letter to BMH-NMeSoto was received on November 10, 2003.

Miss. Code Ann. § 15-1-36(6) (emphasis added).[5] Subsection (3) of the statute - the section urged by the Nelsons in this case - is explicitly mentioned in this section.

Plain application of § 15-1-36(6) to this case means that § 15-1-36(3) does not provide an eight year limitations period for survival claims in this case. Rather, the benefit of that provision, if any at all, is limited to "the period prescribed under Section 15-1-55, Mississippi Code of 1972" - the period allowed under Mississippi's estate savings clause. Id.

Here, Bobby Nelson's asserted claims would have accrued to him on April 26, 2001 - the same date upon which negligence is asserted to have occurred and damages suffered. At the time those claims accrued, he was under the disability of a minor, the legal disability listed in Miss. Code Ann. § 15-1-36(3). Bobby Nelson departed this life before the removal of his minority. Therefore, all provisions of § 15-1-36(6) are met and the benefit of additional time added to the statute of limitations by § 15-1-36(3) is curtailed and limited to "the period prescribed under Section 15-1-55, Mississippi Code of 1972."

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[5]This statute is specific to those making claims of medical malpractice. As such, the "minors saving" provision of § 15-1-36(3) applies ***to the exclusion*** of the more general minors savings provision contained in Miss. Code Ann. § 15-1-59. See, e.g., Johnson v. Thomas, 982 So. 2d 405, 413 (Miss. 2008) ("[I]t is well settled that specific statutes govern over general ones."); In Diogenes Editions v. State, 700 So. 2d 316, 320 (Miss. 1997); Lenoir v. Madison County, 641 So. 2d 1124, 1129-30 (Miss. 1994); Wilbourn v. Hobson, 608 So. 2d 1187, 1191 (Miss. 1992). Either the minors savings portions of § 15-1-55 applies to toll Bobby Nelson's survival claims, or they are not tolled at all by virtue of his minority.

The question now turns to what "the period prescribed under Section 15-1-55, Mississippi Code of 1972" is for purposes of application to this case. If § 15-1-55 provides any additional time to the limitations period in this case, then that specific period is the only extension of the limitations period. If the provision does not provide any extension in this case, then the limitations period is not extended at all. The relevant code section provides:

> **§§ 15-1-55 Effect of death of party before bar is complete.**
>
> If a person entitled to bring any of the personal actions herein mentioned, or liable to any such action, shall die before the expiration of the time herein limited therefor, such action may be commenced by or against the executor or administrator of the deceased person, after the expiration of said time, and within one year after the death of such person.

Miss. Code Ann. § 15-1-55; see also Necaise v. Sacks, 841 So. 2d 1098, 1104 (Miss. 2003) (§ 15-1-55 "provides that the estate of a person who dies before the expiration of the applicable statute of limitations may sue or be sued after the running of the applicable statute and within one (1) year after the death of the person.").

By its own terms, this statute only operates to extend the limitations period to a period "after the running of the applicable statute of limitations and within one (1) year of the death of the person," or in other words, only when the death occurs within the final year of the limitations period[6]. See, e.g., Hambrick v. Jones, 64 Miss. 240, 251 (Miss. 1886) (identical language from "Section 2683 of the Code of 1880 [prior codification of 15-1-55] did not apply, because ***it is applicable only where the death of the person occurs within the last year of the time limited.***") (emphasis added); Weir v. Monahan, 67 Miss. 434, 453 (Miss. 1889) (same; citing identical language of prior version of § 15-1-55, namely § 2683 of the Code of 1880).

Here, the provisions of § 15-1-55 are not meet as Bobby Nelson's passing on July 14, 2001 did not occur during the last year of the limitations period on claims accruing on April 26, 2001. The terms of § 15-1-55 are not triggered and the limitations period on survival claims remains unchanged and limited to the two year period contained in § 15-1-36(1). That two year period expired on April 26, 2003 and the survival claims were therefore time-barred. Judge Lackey reached the correct result by denying reconsideration. At a minimum, the Nelson's motion did not present a case of "clear error" to Judge Lackey such that he abused his discretion in denying reconsideration.

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[6]Applying this statute at any time other than the final year in which the statute of limitations runs would, in effect, shorten the limitations period. For example, application of the statute in this case to one year following death would cause the limitations period to expire on July 14, 2002, earlier than the two year limitations period that actually expired in this case on April 26, 2003.

4. THE "SURVIVAL" CLAIMS WHICH ARE BARRED IN THIS CASE

As shown above, the statute of limitations has already passed on all survival claims asserted in this case. As noted in Caves, these claims are those which the decedent could have brought "if death had not ensued." From a review of the claims contained in the Complaint in this case, those claims are asserted for: 1) pain and suffering; 2) bodily injury; 3) medical and hospital expenses; 4) lost wages/lost earning capacity; 5) emotional distress; and 6) hedonic damages. (R. 9). At a minimum, this Court should affirm Judge Lackey as he reached the correct result in rendering his decision denying reconsideration.

5. CLAIMS FOR LOSS OF CONSORTIUM ARE DERIVATIVE AND DISMISSAL OF THE SURVIVAL CLAIMS FROM WHICH THEY DERIVE ALSO REQUIRES DISMISSAL OF THE LOSS OF CONSORTIUM CLAIMS.

Additionally, the Nelson wrongful death beneficiaries have asserted their own individual claims for loss of consortium. As this Court has noted, such claims "may" not accrue until death. See, e.g., Caves v. Yarbrough, 991 So. 2d 142, 149 (Miss. 2008). Of course, the creation of a claim for loss of consortium do not *require* a death of the family member whose consortium is allegedly lost. Rather, those claims may initially accrue when all elements of such a claim are met and can certainly accrue prior to death.

In this case, the allegations of the complaint allege breaches of duty and damages occurring prior to Bobby Nelson's death on July 14, 2001 and more specifically, during his birth on April 26, 2001. The Complaint specifically alleges that as a result of the

asserted negligence on that date, the Nelsons suffered damages. Their loss of consortium claims in this case accrued, if at all, of the time of the original asserted injury on April 26, 2001 and the two year statute of limitations began to run on that date just as it did with regard to the survival claims.

It is also notable that loss of consortium claims are wholly derivative claims, dependent upon the underlying claim of the person whose consortium is lost. See, e.g., Choctaw, Inc. v. Wichner, 521 So. 2d 878, 881 (Miss. 1988). As such, loss of consortium claims are subject to the same defenses as the underlying cause of action. Wichner, 521 So. 2d at 881 (loss of consortium damages reduced by contributory negligence of person upon whom claim is derived). In fact, Mississippi has formally adopted the approach of the American Law Institute ("ALI") approach to loss of consortium claims, including that:

> the determination of issues in an action by the injured person to recover for his injuries is preclusive against the family member, unless the judgment was based on a defense that is unavailable against the family member in the second action.

McCoy v. Colonial Baking Co., 572 So. 2d 850, 854 (Miss. 1990) (citing Restatement (Second) of Judgments, § 348). Should the underlying claim upon which the loss of consortium is based fail, the loss of consortium claim must also fail. See, e.g., Alexander v. Elzie, 621 So. 2d 909, 913 (Miss. 1992) (noting with approval Wichner; approval of cited Arkansas decision finding husband's cause of action for loss of consortium "was derivative he could have no better standing in court than his wife had.").

Therefore, as the wrongful death beneficiaries' claims for loss of consortium are wholly derivative of those claims and accrued on the same date as the claims from which they derive, they are subject to the same defenses as those claims and are barred to the same extent as Bobby Nelson's survival claims. Insofar as those claims are properly dismissed because of the passing of the statute of limitations and this Court should affirm the dismissal of those claims below, the dismissal of those claims also precludes the assertion of the wholly derivative loss of consortium claims.

The statute of limitation on survival claims ran prior to the filing of the original suit. The loss of consortium claims in this case also accrued on the same date as the survival claims, and are also subject to the same defenses as the survival claims because those claims are wholly derivative of the survival claims. No estate or subrogation claims have been properly made. As such, Judge Lackey did not abuse his discretion in denying the Nelsons' Motion for Reconsideration. This Court should affirm Judge Lackey's denial of the Motion for Reconsideration as he reached the correct result.

VI. CONCLUSION

For the foregoing reasons, Judge Lackey did not abuse his discretion in denying reconsideration in this matter. The Nelsons did not present any intervening changes in the law and did not present any new evidence that was previously unavailable. Moreover, they did not present Judge Lackey with sufficient proof of "clear error" in his decision. In any event, as Judge Lackey reached the correct result in the rendering of this

CERTIFICATE OF SERVICE

I, Walter Alan Davis, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing document by U. S. Mail, postage prepaid, and via facsimile, to:

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This, the 12th day of November, 2009.

WALTER ALAN DAVIS