2009-CA-00081-COA R+

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REPLY BRIEF OF PLAINTIFFS/APPELLANTS

ARGUMENT

Although Plaintiffs believe that they have sufficiently addressed all issues in their original brief without making additional arguments, they submit the following in additional support of their position. Respectfully, Plaintiffs believe that this Court addressed and ruled on identical issues which are now before this Court, and that the lower court failed to follow the directives issued by this Court in *Nelson v. Baptist Memorial Hospital-North Mississippi, Inc., et al*, 972 So.2d 667 (Miss. Ct. App. 2007) (hereinafter *Nelson I*), and the Mandate which followed. In *Nelson I*, this Court reversed the lower court's decision that had dismissed Plaintiffs' Complaint *with* prejudice, and specifically mandated that the dismissal be ***without*** prejudice.

Moreover, this Court specifically found that the filing of Plaintiffs' Complaint, albeit without the sixty (60) day notice provided by Miss. Code Ann., § 15-1-36(15), or the attorney certification that an expert has been consulted pursuant to § 11-1-58(1), and that the filing of that Complaint on July 9, 2003, **tolled the running of the statute of limitations.** In *Nelson I*, 672, 673 (¶ 16, 17), citing *Arceo v. Tolliver*, 949 So.2d 691 (¶ 16) (Miss. 2006) (hereinafter *Tolliver I*), this Court noted that the Supreme Court, relying on *Pitalo*,[1] had recently held that

[1]*Pitalo v. GPCH-GP, Inc.*, 933 So.2d 927 (Miss. 2006)

dismissal **without** prejudice was proper for the failure to provide the sixty (60) day notice. Yet, in total disregard of that mandate, the lower court once again dismissed Plaintiffs' newly filed Complaint with prejudice based on almost identical issues which were raised by the Defendants in their dispositive motions. Respectfully, this Court's decision in *Nelson I*, as well as decisions by the Mississippi Supreme Court, make it clear that the remedy for failure to serve prior sixty (60) day notice before filing a complaint is dismissal **without** prejudice, and the filing of that Complaint tolls the running of the statute of limitations. *See*, *Price v. Clark*,___ So.3d ____(Miss. 2009) (2009 WL 2183271 (Miss.) and *Williams v. Skelton*, 6 So.3d 428, 430 (Miss. 2009), citing, *Tolliver I*, 949 So.2d 691 (Miss. 2006).

The death of the infant child in this case occurred on July 14, 2001, and Plaintiffs (on behalf of all wrongful death beneficiaries) filed their original Complaint on July 9, 2003, within the two year statute of limitations with five days remaining on the applicable statute of limitations (as found by this Court in *Nelson I*, 669 (¶ 3)), and the case has not yet been considered on the merits. Respectfully, Plaintiffs submit that the Rules of this Court, nor the laws by the Legislature, were not intended nor enacted for the purpose of preventing Plaintiffs such as these wrongful death beneficiaries from filing legitimate claims, and this matter should be allowed to finally proceed on the merits.

This Court is Not Limited in its Scope of Review.

Defendant BMH-NM argues that somehow this Court's review is limited because Plaintiffs filed a motion for reconsideration (as permitted by Rule 59(e), MRCP), and then appealed from the Order Overruling Plaintiffs' Motion to Reconsider.

The lower court ruled on Defendants' motions for dispositive relief, and granted the motions to dismiss based on its opinion that the statute of limitations had run when Plaintiffs filed their original Complaint on July 9, 2003. That order was entered on July 8, 2008.

Pursuant to Rule 59(e) of the Mississippi Rules of Civil Procedure, Plaintiffs filed their request for reconsideration within ten (10) days of the lower court's ruling, because it was obvious that the lower court had misapprehended and failed to follow this Court's directives set forth in *Nelson I.* The lower court erred (again) when it rendered the same decision it rendered which caused the first appeal, and which was reversed by this Court, while assessing all costs to the Appellees (Defendants and losing parties).

Plaintiffs had responded to Defendants' repetitious motions to dismiss and for summary judgment, and after the lower court made its ruling on July 1, 2008, Plaintiffs filed their motion for reconsideration, and again addressed each and every allegation and issue which Defendants had argued in their respective motions. Thereafter, on December 16, 2008, the lower court issued its Order

Overruling Plaintiffs' Motion to Reconsider and incorporated its previous order by stating: "The prior Order of this Court of July 1, 2008, shall remain in full force and effect without amendment or change." Thus, Plaintiffs appealed from the subsequent order denying reconsideration, and all issues set forth in Defendants' dispositive motions and all issues encompassed in the order entered on July 1, 2008, are clearly, and properly, before this Court without limitation.

For this Court's convenience and easy reference, a copy of each order and the *Nelson I* decision are attached hereto as Appendices A, B and C.

This Court Reversed *Nelson I* with a Mandate that Dismissal Should be *Without* Prejudice, not *With* Prejudice, and the Lower Court Failed to Follow that Mandate.

This Court reversed this case in *Nelson I.* That reversal was based on the same issues now presented before this Court. In *Nelson I*, this Court found that the Complaint should have been dismissed *without* prejudice rather than *with* prejudice, and the Mandate was issued. Now Defendant Physicians and Clinic seem to place a lot of stock in their arguments that this case was not "remanded." (Brief pp. 2-3) Regardless of whether the case was remanded, this Court left no doubt that the case was "reversed," and it did so with its Mandate issued on January 24, 2008. That Mandate directed that the case be dismissed **without** prejudice consistent with this Court's *Nelson I* opinion. In *Nelson I* (972 So.2d 667, 674(¶ 24)), this Court stated:

> THE JUDGMENT OF THE LAFAYETTE CIRCUIT COURT IS REVERSED AND THE ACTION IS DISMISSED WITHOUT PREJUDICE. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEES.

Also, at page 667 of *Nelson I*, as part of its **Holdings**, this Court stated that this case was: "Reversed; action dismissed without prejudice." *Also, see, Nelson I*, at 669, (¶ 1), wherein this Court held: "Finding error, we reverse and dismiss without prejudice." (See opinion as Appendix C).

Accordingly, whether or not the case was remanded, it makes no difference. This Court clearly said that it was "reversed" and that the dismissal should have been *without* prejudice as opposed to *with* prejudice. Respectfully, the lower court failed to follow that Mandate as issued by this Court and once again, almost identical issues already ruled on by this Court, are once again before this Court for a second determination.

Until the Filing of their Respective Briefs, the Defendants' Arguments were the Same.

Defendant Physicians and Clinic criticize Plaintiffs for grouping its arguments as to all Defendants, without distinguishing between the two sets of Defendants. As this Court is aware, there are two sets of Defendants in this case: (1) Baptist Memorial Hospital-North Mississippi (hereinafter referred to as Defendant BMH-NM) and (2) William E. Henderson, Jr., M.D., Oxford Clinic for Women, A Partnership; Ira Lamar Couey, M.D., General Partner and R. Blake Smith, M.D., General Partner; and William E. Henderson,. Jr., M.D., General

Partner (hereinafter referred to as Defendant Physicians and Clinic). Until the filing of the Defendants' briefs before this Court, Defendants were clearly aligned in their arguments. The motions to dismiss, as well as the record made during oral arguments, indicate that the Defendants' arguments mirrored the other, with the exception of the issue of service of process, which applies only to Defendant Physicians and Clinic. (R.53-71, 100-132) The oral arguments on behalf of both sets of Defendants were primarily based on *Jenkins v. Pensacola Health Trust, Inc.*, 933 So.2d 923 (Miss. 2006) and the failure to toll the statute of limitations by the filing of Plaintiffs' first complaint without first giving notice, or attaching an attorney's certificate. However, all of these arguments are redundant to this Court as all Defendants made these very arguments in their motions for rehearing, and this Court was not persuaded by these arguments at that time when they denied rehearing and allowed their *Nelson I* decision to stand. (*See*, arguments by Defendant BMH-NM at Vol.5, pp.12-15, and arguments by Defendant Physicians and Clinic at Vol. 5, pp. 15-18).

The Motion to Dismiss or in the Alternative, Motion for Summary Judgment filed by Defendant BMH-NM primarily argued that the statute of limitations had expired in this case relying on the application of *Jenkins*. (R.59-71) Likewise, the Defendant Physicians and Clinic's Motion for Summary Judgment and to Dismiss also sought dismissal primarily on the issue of the expiration of the statute of limitations based on Defendants' interpretations and late reliance upon

Jenkins. Plaintiffs once again remind this Court that all Defendants made these same arguments to this Court and to the Supreme Court, and both Courts rejected these same arguments made at that time, and this Court should do so now. Further, if this Court now accepts these same arguments, it will, in effect, reverse this Court's ruling in *Nelson I.*

Specifically, grounds for dismissal set forth by Defendant Physicians and Clinic are as follows:

> a. the retroactive application of a new rule of law enunciated (in *Jenkins v. Pensacola Health Trust, Inc.*) while Plaintiffs' first lawsuit was on appeal and before the appellate decision was final;
>
> b. the application of that rule of law (enunciated in *Jenkins*) to this lawsuit;
>
> c. the result of the Complaint's being a legal nullity and of no effect on the statute of limitations when Plaintiffs filed their first lawsuit without first complying with the two statutorily mandated prerequisites [to filing their lawsuit]; and
>
> d. the expiration of any remaining portion of the statutes of limitations, which may have been tolled, when Plaintiffs failed to effect proper service of process on these Defendants on or before February 9, 2004.
> (R-110)

Respectfully, there is no doubt that the return of this case on this second appeal is a great miscarriage of justice for these Plaintiffs, and this is just another attempt by Defendants to direct this Court's attention to matters other than the ones which should be decided by this Court. Nevertheless and despite the previous

identical and/or similar arguments rejected by this Court, it now appears in the brief filed by Defendant Physicians and Clinic that they admit that the statute of limitations is not an issue and that the wrongful death claim commenced to run at the time of the infant's death, July 14, 2001. (Def. Phys. & Clinic Brief at p.6)

It also appears that the Defendant Physicians and Clinic now (for the first time in its Brief) concede that the statute of limitations had not expired at the time that the Plaintiffs filed their lawsuit and that upon issuance of the Mandate, Plaintiffs had five (5) days remaining on their statute of limitations. However, Defendants do argue that the filing of the first lawsuit did not toll the statute of limitations because the Complaint was filed without notice and without the attachment of an attorney's certificate of consultations. Defendants continue to make these arguments despite the holdings which have been made abundantly clear in *Price* and *Williams v. Skelton*, and *Nelson I.* Specifically, in *Nelson I*, this Court found that the filing of the original Complaint tolled the running of the statute of limitations, which could not have been tolled if said statute had expired. Accordingly, the statute would have expired on July 14, 2003, but for the filing of the Complaint, as found by this Court in *Nelson I.*

Defendants also argue, as they did in the lower court, that the Plaintiffs did not properly serve the Defendant Physicians and Clinic after the filing of the first complaint and the statute of limitations expired, even though they claim that this

issue is not properly before this Court. Again, these same arguments were made to this Court and rejected by this Court in *Nelson I.*

Of interest too, is the claim by Defendant Physicians and Clinic that these Plaintiffs never "sought further appellate review of the Court of Appeals' decision 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." (Brief, p.16) Defendants mistakenly argue that the trial court's ruling as to the service of process went undisturbed. This is not true. This Court did not affirm or reverse that ruling, but instead refused to address the issue because ***it was a moot issue.*** (*See, Nelson I*) Moreover, these Defendants made these same arguments before this Court in *Nelson I*, and this Court refused to accept them and held that the issue was moot. Plaintiffs respectfully submit that this Court contemplated that a reversal of dismissal with prejudice and a mandate that the case be dismissed *without* prejudice, would allow these Plaintiffs to re-file their Complaint and issue service of process. Otherwise, obviously this Court would have addressed same and not found the issue to be moot. *See, Nelson I*, 972 So.2d 667, 673 (¶ 21).

Dismissal Without Prejudice Allowed Plaintiffs to Re-file their Complaint, and the Lower Court Erred in Dismissing the Complaint with Prejudice as it Placed Parties in the same Posture as Before the First Appeal and This Court's Decision in *Nelson I.*

In Paragraph 22 of this Court's *Nelson I* opinion, this Court recognized and stated:

> Dismissal without prejudice prevents the plaintiff from being barred from filing a new suit on the same cause of action. (Citations omitted) On the other hand, dismissal with prejudice, which prevents the plaintiff from bringing a new suit based on the same cause of action, is extreme and harsh, and only the most egregious cases warrant such dismissals. (Citations omitted) As previously stated, the supreme court has recently ruled that dismissal without prejudice was proper when a plaintiff failed to serve notice upon medical provider defendants at least sixty days before initiating an action.

Nelson I, 673-674 (¶ 22).

This Court noted that the failure of Plaintiffs to serve notice or to attach an attorney's certificate of consultation with an expert did not "rise to the level of egregiousness sufficient to warrant dismissal with prejudice." *Nelson I*, 972 So.2d at 674 (¶ 23). There was no doubt that this Court intentionally and deliberately reversed the lower court's entry of dismissal ***with*** prejudice, and directed that the case be dismissed ***without*** prejudice for the sole purpose of allowing Plaintiffs to take advantage of the remaining time left on the statute of limitations.

Moreover, this Court noted that the Mississippi Supreme Court had recently made the deliberate decision to withdraw its original decision in *Tolliver I* which had found dismissal ***with*** prejudice, and substitute its revised opinion for dismissal ***without*** prejudice. There was no other word changed in that substitution except *with* prejudice was changed to *without* prejudice. *See, Tolliver I*, 949 So.2d 691 (¶ 16) (FN3) (Miss. 2006) (noting that the original opinion held dismissal with prejudice, and that upon rehearing, the Supreme Court substituted its opinion with an identical opinion with the exception of holding dismissal ***without*** prejudice).

Additionally, in the recent denial of rehearing (Dec.3, 2009) in *Price v. Clark*, __So.3d ___ (Miss. 2009) (2009 WL 2183271 (Miss.), the Supreme Court held: "Despite the fact that Price filed her claim only one day after sending her notice-of-claim letters, the proper remedy was dismissal **without** prejudice because the claim, albeit in violation of the sixty-day notice requirement, did serve to toll the two-year statute of limitations ..." *Price*, ¶ 53 (emphasis supplied) *Also, see*, ¶ 27, wherein the Supreme Court reaffirmed that Rule 3(a) of the Mississippi Rules of Civil Procedure provided that the filing of a complaint continued to toll the running of the statute of limitations. *Price*, (¶ 27).

This Court's *Nelson I* opinion was also sanctioned by the Supreme Court when it noted in *Arceo v. Tolliver*, 19 So.3d 67 (Miss. 2009) (hereinafter *Tolliver II)*, that the filing of the suit in *Tolliver I*, "though without the required notice," tolled the statute of limitations. Again in *Tolliver II*, the Supreme Court discussed the thirty-eight days remaining on the statute of limitations at the time that the plaintiff filed its original complaint (albeit without sixty notice) in *Tolliver I*, and that a dismissal *without* prejudice allowed the plaintiff to re-file the Complaint within the remaining time on the statute of limitations. In *Tolliver II*, the Supreme Court stated: "That thirty-eight day period began to run again on the date that this

Court issued its mandate in *Tolliver I*, March 15, 2007, and expired on April 23, 2007,[2] again absent some tolling or suspension thereof."

It is clear that this Court intended that Plaintiffs be allowed to take advantage of the five (5) days remaining on the statute of limitations, which Plaintiffs did immediately upon issuance of the mandate when they served their sixty (60) day notice and then properly and timely re-filed their Complaint.

These Plaintiffs find it hard to believe that these Defendants continue to argue that they are entitled to dismissal based on the identical issues argued and determined by this Court in *Nelson I*. Although Plaintiffs believe that the decisions by our Supreme Court and this Court were clear at the time that the lower court entered its opinion, in all fairness to the lower court, it did not have the benefit of the decisions of *Price v. Clark*, __So.3d ___, 2009 WL 2183271 (Miss.) and *Williams v. Skelton*, 6 So. 3d 428, 430 (Miss. 2009), citing, *Tolliver I*, 949 So. 2d 691 (Miss. 2006). In those cases, our Mississippi Supreme Court erased all doubt, if any, in the minds of the bench and the bar by its clear pronouncements that the filing of the complaint (albeit without notice) tolled the running of the statute of limitations.

The Mississippi Supreme Court stated in *Price* that the filing of the complaint tolls the statute of limitations pursuant to Rule 3(a) MRCP, albeit

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[2]"FN7. The statute of limitation technically would have expired on April 22, 2007; however, that was a Sunday." (38 days)

without having provided the sixty day notice. Further, in *Williams*, the Supreme Court granted certiorari from this Court for the sole purpose of correcting this Court's dismissal **with** prejudice, and finding dismissal **without** prejudice was proper for the plaintiff's failure to comply with pre-suit requirements.

The lower court stated in its opinion granting Defendants' motions to dismiss, that the "Basic Question Considered" was whether Plaintiffs' failure to give the sixty day notice prior to filing the original complaint, tolled the statute of limitations. The lower court then continued its discussion of the basic question as and stated: "The fundamental question the Court now considers is whether the filing of the Original Complaint on July 9, 2003, without first giving Defendants the Sixty Day notice as required by § 15-1-36 MCA tolled the two year Statute of Limitation." Then, contrary to this Court's opinion in *Nelson I*, and other appellate court decisions, the lower court found that the filing of the complaint did **not** toll the statute of limitations, and stated: "The filing of the first complaint was a nullity and therefore could not toll the Statute of Limitations." (Appendix A, R-457-460)

This case now returns to this Court on the second appeal of the same issues determined by this Court on the first appeal, and which have been clearly addressed by this Court and the Supreme Court. And, although Plaintiffs believe that this Court's direction in *Nelson I* was clear when it stated that the "date a plaintiff files an action is the relevant date for statute of limitation purposes," surely the recent decisions of *Price* and *Williams* should leave no doubt that the

lower court erred, and this matter should once again be reversed and remanded because prior to filing this Complaint, Plaintiffs gave proper notice, had the certificate attached and service of process was clearly perfected on all Defendants.

In *Nelson I* this Court Found that Plaintiffs' Statute of Limitations had Not Expired at the Time Plaintiffs filed their original Complaint and This Court Should find that said Arguments are Precluded by the Law of the Case.

Consistent with this Court's statement in its opinion that Plaintiffs "filed a complaint on July 9, 2003, **prior to the expiration of the statute of limitations on July 14, 2003,**" (Emphasis added) when the Mandate was issued on January 24, 2008, these Plaintiffs promptly gave proper notice within the five days remaining in the statute of limitations and timely and properly re-filed their Complaint. The Defendants then immediately filed their dispositive motions based on the very issues already determined by this Court. The trial court, as urged by all Defendants, disregarded this Court's findings set forth in *Nelson I*, and rendered identical rulings it made in the first case (dismissal with prejudice which was reversed by this Court), and entered its Opinion and Order Dismissing This Cause with Prejudice on July 2, 2008, same as in *Nelson I*. (R.Ex.2, R.457-460) And, although this Court held that the filing of the complaint tolled the statute of limitations, the lower court held that the Plaintiffs' Complaint filed July 9, 2003,

did not toll the statute of limitations, but was a nullity, and that the Plaintiffs were time barred to file their Complaint.[3]

There is no doubt that this case comes back before this Court, not only with the same Plaintiffs, same Defendants, same facts, same allegations, and same issues, but with the same rulings made by the same lower court which were already decided by this Court in *Nelson I*. For all practical purposes, we are back before this Court with the same basic facts, parties and legal issues as presented on appeal in *Nelson I*.

It is well settled in this State that a decision on a question of law decided on a former appeal becomes the law of the case. Accordingly, that law will be applied in subsequent trials and appeals of the same case involving the same issues and facts. *Trilogy Communications, Inc. v. Thomas Truck Lease, Inc.*, 733 So.2d 313, 316-317 ¶ 7 (Miss. Ct. App. 1998). Respectfully, this Court should be guided by its decision in *Nelson I* and once again reverse this case finding that the filing of the original Complaint tolled the running of the statute of limitations and remind the lower court that the original Complaint was reversed and dismissed ***without*** prejudice by this Court, and direct that Plaintiffs be allowed to finally proceed with this case on its merits. *Also, see, Fortune v. Lee County Bd. of Sup'rs*, 725 So.2d 747 (Miss. 1998).

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[3]"Assuming proper service of process, filing a complaint tolls the statute of limitations until a suit's dismissal." *Nelson I*, 972 So.2d 667,671 (¶ 9).

Mississippi Code Ann., § 15-1-55 Does not Limit the Statute of Limitations Specifically Set Forth in § 15-1-36(3).

The applicable statute of limitations for the filing of this case was two years from the date of death, or six years, plus two, from the date of the birth of the Nelson infant.

Miss Code Ann. § 15-1-36(3) provides in pertinent part the following:

> (3) Except as otherwise provided in subsection (4) of this section, if at the time at which the cause of action shall or with reasonable diligence might have been first known or discovered, the person to whom such claim has accrued shall be six (6) years of age or younger, then such minor or the person claiming through such minor may, notwithstanding that the period of time limited pursuant to subsections (1) and (2) of this section shall have expired, commence **action on such claim at any time within two (2) years next after the time at which the minor shall have reached his sixth birthday, or shall have died, whichever shall have first occurred.** (Emphasis added)

Miss Code Ann. § 15-1-36(3).

Defendant BMH-NM argues that the deceased infant's claim is somehow limited by the exclusions found in Miss. Code Ann., § 15-1-55. Respectfully, this section, if applicable and not in conflict with the above statute, applies only if death occurs within the last year of the limitations period, which did not occur in this case and is not applicable here. Thus, the specific provision found in § 15-1-36(3) applies here, wherein the above statute, when considered in conjunction with *Jenkins*, requires the finding that the statute of limitations for this minor occurred two years after the date on which the minor would have become six years of age.

Accordingly, the statute of limitations would have been eight years from the date of infant Bobby Nelson's date of death.

Or, as more fully set forth in Plaintiffs' original brief, the applicable statute of limitations would be two years from the date of the death of infant Bobby Nelson. Respectfully, all claims, including wrongful death and "survival" claims, were brought well within the statute of limitations and this Court should once again direct the lower court to finally allow this claim to proceed to a conclusion on the merits. Regardless, it makes no difference whether Plaintiffs had six years, plus two years, or two years from the date of death, and this Court has already found that Plaintiffs' first Complaint was filed within the applicable statute of limitations and the statute was tolled. (*See, Nelson I*).

The Issue of Service of Process is Clearly Before this Court Because the Lower Court Failed to follow this Court's directives in *Nelson I* and Because Defendants Raised this Issue in their Motions to Dismiss and for Summary Judgment.

When Plaintiffs re-filed their Complaint in the lower court, as permitted by a dismissal without prejudice, Defendant Physicians and Clinic's filed their motion to dismiss or for summary judgment and raised the issue of defective service of process relating back to Plaintiffs filing of their original Complaint. (R-110) Although this Court specifically said in *Nelson I* that it was a ***moot issue***, Defendant Physicians and Clinic continued to raise it in the lower court, but now try and convince this Court that the issue is not before this Court.

because Plaintiffs properly served process upon re-filing, or consider the issue and find that the service of the first complaint was proper.

Alternatively, Plaintiffs submit that if this Court Decides that the issue of Service of Process on Defendant Physicians and Doctors for the Original Complaint should be Considered, then this Court should Find that the Service of Process was Proper.

Plaintiffs adopt the arguments in their original brief and submit that the service of process was proper and sufficient. Without waiving our argument that service of process was a moot issue on reversal of *Nelson I*, Plaintiffs submit the additional arguments below.

The majority of the cases cited by Defendant Physicians and Clinic are not synonymous or applicable to the case before this Court. In many of the cases cited by Defendants, either the party attempting service had failed to serve process or had failed to show good cause why process was not served, or the party asserting the defense of improper service of process had not been served at all. For example, in *Lucas v. Baptist Memorial Hospital-North Mississippi, Inc.*, 997 So. 2d 226 (Miss. App. Ct. 2008), additional time had been sought to serve process, and Defendant was never served.

In addition, in *Kolikas v. Kolikas*, 821 So.2d 874 (Miss. App. Ct. 2002), party attempted process by publication and attempted no process on party despite having an address. Unlike the majority of those cases, in the case before this Court Plaintiffs served process on the office manager who told Plaintiffs' process server

that she had the authority to accept process on behalf of the Clinic and the Physicians. (*See,* the affidavit of Plaintiffs' process server at R-429-430, and which is reproduced herein and attached as Appendix D).

Again, this Court ruled on this matter in *Nelson I* and stated that a dismissal for failure to serve process was a dismissal ***without*** prejudice. In *Nelson I,* this Court stated: "Mississippi Rules of Civil Procedure Rule 4(h) requires a plaintiff serve the summons and complaint on a defendant within 120 days of filing a complaint; otherwise, the judge dismisses the action ***without*** prejudice." (Emphasis added) *See, Nelson I,* 972 So.2d 667, 670 (¶ 8). Plaintiffs submit that the service of process on Defendant Physicians and Clinic was proper when Plaintiffs were permitted to re-file after reversal of the *Nelson I* decision. Furthermore, the service of process for the original Complaint was proper by service on the office manager. Before this Court is clear evidence that Plaintiffs' process server, Tommy Gadd, executed service of process by serving Candace Hogue, the office manager, who accepted the service on behalf of all individual doctors and the Oxford Clinic.

Moreover, if there is a question as to whether the office manager had apparent authority to accept process, that issue is to be decided by the trier of fact. In *Cooley v. Brawner*, 881 So.2d 300 (Miss. App. Ct. 2004) (cert. den. Sept. 2, 2004), this Court stated: "The question of whether or not a person has apparent authority is a factual issue to be decided by a chancellor or by the jury, if in the

circuit court." 881 So.2d at 302. The *Cooley* Court, citing as authority 2A C.J.S. *Agency* § 20 (1972), stated as follows:

> An apparent or ostensible agent is one whom the principal has intentionally or by want of ordinary care induced third parties to believe is his agent, although no authority has been conferred on him either expressly or by implication. *Id.* An apparent agent is one who reasonably appears by third parties to be the authorized agent of the principal. *Id.*

Cooley, 881 So.2d at 302.

The evidence before this Court shows that Plaintiffs' process server, Tommy Gadd, was told that the office manager, Ms. Hogue, was permitted to accept process. Thus, Mr. Gadd left all summons and complaints with Ms. Hogue. The evidence clearly supports that Ms. Hogue was the office manager for the Oxford Clinic for Women, wherein all Defendants were members or officers, or either, all Defendants were employed by the Clinic. The uncontradicted evidence reveals that immediately upon receipt of the summons attached to the complaint, Candace Hogue, the office manager, *recognized that they were complaints and delivered* the documents to the appropriate Defendant Doctors. When asked during the hearing on Defendants' first motions to dismiss in the initial suit what she did with the documents when she was served, Candace Hogue answered: "I took them immediately to Dr. Henderson." She further testified that as soon as she received the summons, "if they were in the office they got them immediately, if not, they get them as soon as they were in the office." It was apparent that this was

not the first time this office manager had accepted process and that she had clearly told Plaintiffs' process server that she possessed that authority.

Deciding whether a receptionist was a proper person for service of process, in *Cooley*, the appellate court said it should be determined whether the person "fully understood what was taking place, or the nature of the act." There is no question that Candace Hogue, the office manager, *immediately notified the Defendant doctors*, and, understood what was taking place. According to the affidavit of the process server, Ms. Hogue knew and recognized that it was a lawsuit. Candace Hogue's testimony is unrebuked that the summons and complaints were immediately given to the doctors.

Dismissal in the *Cooley* case was affirmed because of the insufficient record developed to determine whether the receptionist was a *de facto* agent for the doctor. This Court found that no effort was made to clarify whether the receptionist fully understood what was taking place or the nature of accepting service. In the initial case before this Court, the office manager testified that she immediately delivered the summons and complaint to the doctors. There is no question that she understood that it was a complaint and legal document which needed to be immediately delivered to the doctors.

In *Williams v. Kilgore*, 618 So.2d 51, 56 (Miss. 1992), the summons and complaint were left with the defendant doctor's office manager. Defendant doctor claimed that she was not his agent. The Supreme Court rejected that argument and

stated: "We find nothing in our case law which precludes the acceptance of service of process by an agent such as an office manager, who, by custom and practice, is vested with apparent authority to do so." 618 So.2d at 56. The evidence is clear that Ms. Hogue accepted process and told Plaintiffs' process server that she had authority to accept the service. Clearly, the office manager was a proper person to accept service of process, therefore service of process on defendants was proper, sufficient and ineffective.

CONCLUSION

Plaintiffs believe that the issues now before were decided in *Nelson I*. After this Court issued the Mandate in *Nelson I*, with five (5) days remaining on the statute of limitations, Plaintiffs gave the proper sixty (60) day notice, re-filed their Complaint within the proper time, and then issued service of process on all Defendants. None of the Defendants complain that Plaintiffs committed any errors in those proceedings. Instead, as fully set forth above, all Defendants claim (*inter alia*) that because Plaintiffs failed to give the sixty (60) day notice before filing the original complaint on July 9, 2003, that the filing of the complaint was a nullity and did not toll the running of the statute of limitations. And, as Plaintiffs have said many times, although they believe it was clear when the lower court issued its rulings, this Court and the Supreme Court have removed all doubt - the filing of a Complaint, albeit without providing the sixty (60) day notice tolls the running of the statute of limitations, and the remedy is dismissal *without* prejudice.

Once again, these Plaintiffs request that this Honorable reverse the decision by the lower court and remand this matter to proceed, finally, on its merits. Further, Plaintiffs request that all costs of these proceedings and this appeal be assessed to Defendants.

Respectfully submitted,

Margaret P. Ellis, MB #[redacted]

CERTIFICATE OF SERVICE

I, Margaret P. Ellis, one of the Attorneys for the Plaintiffs-Appellants, Billy Nelson and Gaynelle Nelson do hereby certify that I have this date mailed by United States Mail, postage prepaid, a true and correct copy of the foregoing Reply Brief to the following:

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IN THE CIRCUIT COURT OF LAFAYETTE COUNTY, MISSISSIPPI

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

VS. CAUSE NO. L08-236

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; WILLIAM E. HENDERSON, JR., M.D., General Partner; and JOHN DOES 1 THROUGH 10

OPINION AND ORDER DISMISSING THIS CAUSE WITH PREJUDICE

This matter came on to be heard before the Court upon the Defendants' Motion to Dismiss and the Court, after hearing argument of Counsel, reviewing the file and the briefs submitted, does now hereby find, order, determine and adjudicate as follows:

FACTS AS DETERMINED BY THE COURT

Bobby Nelson was born on April 25, 2001, he died on July 14, 2001. His was delivered in the Baptist Memorial Hospital-North Mississippi, Inc. in Oxford, Mississippi. He was transferred to the North Mississippi Medical Center in Tupelo where he remained until his death on July 14, 2001. It is alleged that Bobby Nelson's death was the result of the negligence of the Defendants, their agents and/or employees.

The statute of limitations applicable to Plaintiffs' cause of action is two years pursuant to

FILE THIS THE 2 DAY OF July, 2008
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MARY ALICE BUSBY, CIRCUIT CLERK
BY AR D.C.

APPENDIX A

§ 15-1-36(2) MCA.

This Court dismissed a prior action with prejudice. The prior lawsuit was based upon the same facts, dates and allegations as the case *sub judice*.

The Court of appeals found this Court in error for dismissing the case with prejudice and found it should have been dismissed, but without prejudice.

The Plaintiffs filed their second lawsuit, making the same allegations of negligence and alleging the same damages, injuries and wrongful death of Bobby Nelson as in this first lawsuit. This second lawsuit was filed on March 26, 2008.

Prior Lawsuit:

Plaintiffs herein filed a lawsuit alleging the same damages, injuries and wrongful death of the infant, Bobby Nelson on July 9, 2003. Plaintiffs failed to give the required 60 days notice to these health care providers as demanded by §15-1-36(36) (Miss. Code Ann.) and further failed to file with their complaint the statutorily mandated affidavit stating that the plaintiff's attorney had consulted a qualified expert about the claim and based upon such consultation, reasonably believes there is a basis for the claim (Miss. Code Ann.§11-1-58)

No process for Defendants was issued. On November 3, 2003 Plaintiffs requested and received an additional 90 days in which to serve process on Defendants. Judge Andy Howorth granted this extension of time. The Nelsons then sent notice of the suit as required by the Statute on November 10, 2003, waited sixty days and then filed what they styled "Amended Complaint" and included the statutorily required certificate stating their attorney had consulted a qualified expert. They then had process issued for the defendants.

Judge Howorth recused himself and it was assigned to this Court. The hospital filed a motion to reconsider the order entered by Judge Howorth granting the Nelsons additional time to

complete service of process. The Clinic and Doctors joined in the motion and this Court vacated the Order entered by Judge Howorth. The actions of this Court vacating Judge Howorth's Order was in error, as correctly found by the Court of Appeals. This Court dismissed the matter with prejudice. The Court of Appeals agreed this Court was correct in dismissing the case but found it was error to dismiss the matter with prejudice. Subsequently the Plaintiffs filed the pending action.

Basic Question Considered

The fundamental question the Court now considers is whether the filing of the Original Complaint on July 9, 2003 without first giving Defendants the Sixty Day notice as required by §15-1-36 MCA tolled the two year Statute of Limitation.

The language of §15-1-36(15) MCA appears clear to this Court:

> 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.... 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. (Emphasis added)

Bobby Nelson was born on April 26, 2001. If Defendant's interpretation of case law and statutes is adopted by the Court, the Two (2) Year Statute would have expired on April 26, 2003 which was about two and one-half months prior to the date the first lawsuit was filed.

If Plaintiffs interpretation of case law and statutes is adopted by the Court, the Two (2) Year Statute would have expired on July 14, 2003, two years after the death of Bobby Nelson. Plaintiffs filed their first complaint on July 9, 2003 some 1 year and 360 days after the death of Bobby Nelson. They contend the statute was tolled for 120 days thereafter and that when they were granted an additional 90 days by Judge Howorth from November 3, 2003 the service of

Notice and the refiling of their first lawsuit was within the proper time allowed by the Statute of Limitations, as extended.

CONCLUSION

The Court realizes its conclusion may appear harsh but Plaintiffs filing of the First Complaint on July 9, 2003 did not toll the running of the Statute. The Mississippi Court of Appeals found that Plaintiff failed to abide by the statutorily required, mandatory notice provisions of § 15-1-36(15) MCA and expert consultation certificate required by § 11-1-58(1). Therefore the lower Court's dismissal was affirmed but it was found that the dismissal should have been without prejudice rather than with prejudice. The giving of 60 days notice of intent to file suit pursuant of § 15-1-36 MCA is jurisdictional. The filing of the first complaint was a nullity and therefore could not toll the Statute of Limitations. *See Black v. City of Tupelo,* 853 So. 2d. 1221.

Therefore, it is immaterial whether the Statute ran on April 26, 2003 or July 14, 2003. The Plaintiffs did not file a proper lawsuit over which the Court had jurisdiction until long after the two (2) years had expired and therefore this action is time barred

ORDER

This matter is time barred and is hereby dismissed with prejudice for failure of the Plaintiffs to file their Complaint within the time allowed by statute.

The cost of this proceeding is hereby taxed to the Plaintiffs for all of which let execution timely issue.

SO ORDERED AND ADJUDGED ON THIS THE 1ST DAY OF JULY, 2008.

HENRY L. LACKEY-CIRCUIT JUDGE

IN THE CIRCUIT COURT OF LAFAYETTE COUNTY, MISSISSIPPI

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

VS. CAUSE NO. L08-236

BAPTIST MEMORIAL HOSPITAL-NORTH MISSISSIPPI, INC; WILLIAM E. HENDERSON, JR., M.D., OXFORD CLINIC FOR WOMEN, as Partnership; IRA LAMAR COUEY, M.D., General Partner; WILLIAM E. HENDERSON, JR., M.D., General Partner; and JOHN DOES 1 THROUGH 10

LAFAYETTE COUNTY CIRCUIT COURT MISSISSIPPI

ORDER OVERRULING PLAINTIFFS' MOTION TO RECONSIDER

This matter is before the Court upon the Motion of Plaintiffs requesting the Court to reconsider its Order of July 1, 2008 and the Court, upon review of the complete file, the briefs of counsel, and giving mature consideration to same, does now hereby find, order, determine and adjudicate as follows:

In the Court's Order of July 1, 2008 it was determined that Plaintiff's failure to file the statutorily required Notice, sixty (60) days prior to filing its Complaint pursuant to § 15-1-36 was jurisdictional and consequently a nullity, failing to toll the running of the Statute of Limitations. The Court is not convinced it was in error in that conclusion.

Therefore, having reconsidered its prior ruling the Court hereby overrules Plaintiffs'

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BY AM D.C.

APPENDIX B

Motion and denies the relief therein requested.

The prior Order of this Court of July 1, 2008 shall remain in full force and effect without amendment or change.

SO ORDERED AND ADJUDGED ON THIS THE 16TH DAY OF DECEMBER, 2008.

HENRY L. LACKEY-CIRCUIT JUDGE

LAFAYETTE COUNTY
CIRCUIT
COURT
MISSISSIPPI

Court of Appeals of Mississippi.
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
v.
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; and R. Blake Smith, M.D., General Partner, Appellees.
No. 2005-CA-02058-COA.

May 8, 2007.
Rehearing Denied Sept. 18, 2007.

Background: Parents brought wrongful death action against hospital, clinic, and physicians, alleging that defendants' negligence caused the death of their infant son. The Circuit Court, Lafayette County, Henry L. Lackey, J., vacated prior order granting parents additional time to complete service of process and dismissed claim with prejudice. Parents appealed.

Holdings: The Court of Appeals, Ishee, J., held that:
(1) successor judge improperly vacated original trial judge's order granting parents an extension of time to serve process;
(2) parents' failure to give defendants 60-days' notice before commencing the action warranted dismissal;
(3) parents' failure to file a certificate stating that their attorney had consulted a qualified expert warranted dismissal; and
(4) dismissal without prejudice, rather than with prejudice, was warranted.

Reversed; action dismissed without prejudice.

West Headnotes

[1] Process 313 ⚿63

313 Process
313II Service
313II(A) Personal Service in General
313k63 k. Time for Service. Most Cited Cases
A judge may grant an extension of time to serve process prior to the expiration of the original 120 days for service without a showing of good cause; only after the expiration of the original 120 days must the plaintiff show good cause to receive an extension of time to serve process. Rules Civ.Proc., Rules 4(h), 6(b).

[2] Limitation of Actions 241 ⚿118(2)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(H) Commencement of Proceeding; Relation Back
241k117 Proceedings Constituting Commencement of Action
241k118 In General
241k118(2) k. Filing Pleadings. Most Cited Cases
Assuming proper service of process, filing a complaint tolls the statute of limitations until a suit's dismissal.

[3] Limitation of Actions 241 ⚿118(2)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(H) Commencement of Proceeding; Relation Back
241k117 Proceedings Constituting Commencement of Action

APPENDIX C

241k118 In General
241k118(2) k. Filing Pleadings. Most Cited Cases

Limitation of Actions 241 ⚖119(3)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(H) Commencement of Proceeding; Relation Back
241k117 Proceedings Constituting Commencement of Action
241k119 Issuance and Service of Process
241k119(3) k. Service of Process. Most Cited Cases
The date a plaintiff files an action is the relevant date for statute of limitation purposes, taking into consideration extensions of time to serve process.

[4] Judges 227 ⚖32

227 Judges
227III Rights, Powers, Duties, and Liabilities
227k32 k. Powers of Successor as to Proceedings Before Former Judge. Most Cited Cases
A successor judge in an inferior position does not have the authority to vacate the order of a prior judge granting a new trial.

[5] Judges 227 ⚖32

227 Judges
227III Rights, Powers, Duties, and Liabilities
227k32 k. Powers of Successor as to Proceedings Before Former Judge. Most Cited Cases
Successor judge improperly vacated original trial judge's order granting parents an extension of time to serve process on defendants in wrongful death action, although parents did not show good cause for the extension; parents moved for extension within 120 days for service, such that they were not required to meet heightened good cause requirement, record did not suggest that they acted in bad faith in making the motion, no party was prejudiced by the extension, original judge found sufficient cause to grant an extension, and the parents relied on the extension when they served process after the initial 120 days but during the extension.

[6] Health 198H ⚖807

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(G) Actions and Proceedings
198Hk807 k. Notice. Most Cited Cases
Parents' failure to give hospital, clinic, and physicians, as defendants in their wrongful death action, 60-days' notice before commencing the action, as required for professional negligence actions against healthcare providers, warranted the dismissal of their action. West's A.M.C. § 15-1-36(2, 15).

[7] Health 198H ⚖805

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(G) Actions and Proceedings
198Hk805 k. Sanctions for Failing to File Affidavits; Dismissal with or Without Prejudice. Most Cited Cases
Parents' failure to file, with their complaint, a certificate stating that their attorney had consulted a qualified expert regarding their wrongful death claim against hospital, clinic and physicians, warranted the dismissal of the action, although case was not egregious, because parents had an expert and attached the certificate to their amended complaint. West's A.M.C. § 11-1-58(1).

[8] Pretrial Procedure 307A ⚖690

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak690 k. Dismissal with or Without Prejudice. Most Cited Cases

Parents' failure to file, with their wrongful death complaint, a certificate stating that their attorney had consulted a qualified expert, or to give the defendants 60-days' notice of the case before commencing the action, warranted dismissal without prejudice, rather than with prejudice; statutes at issue had only been in effect a few months when the case was filed and parents tried to remedy their failure to comply with the statutes, and parents' failure to comply did not rise to level of egregiousness sufficient to warrant dismissal with prejudice, especially in light of the fact that they attempted to correct the errors before they served process. West's A.M.C. §§ 11-1-58(1), 15-1-36(15).

[9] Pretrial Procedure 307A ⇐690

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak690 k. Dismissal with or Without Prejudice. Most Cited Cases
Dismissal without prejudice prevents the plaintiff from being barred from filing a new suit on the same cause of action.

[10] Pretrial Procedure 307A ⇐690

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak690 k. Dismissal with or Without Prejudice. Most Cited Cases
Dismissal with prejudice, which prevents the plaintiff from bringing a new suit based on the same cause of action, is extreme and harsh, and only the most egregious cases warrant such dismissals.
***669** James W. Kitchens, Margaret P. Ellis, Roderick D. Ward, Jackson, attorneys for appellants.

Clinton M. Guenther, Greenwood, Robert S. Mink, Jackson, attorneys for appellees.

Before MYERS, P.J., ISHEE and ROBERTS, JJ.

ISHEE, J., for the Court.

¶ 1. Billy and Gaynelle Nelson filed suit for the wrongful death of their son Bobby Nelson, who was born on April 26, 2001, at Baptist Memorial Hospital in Oxford, Mississippi, and subsequently died on July 14, 2001. After granting an extension of time for service, Judge Andrew Howorth recused himself, and his successor, Judge Henry Lackey, vacated the extension for lack of good cause, ruled that the Nelsons had not complied with the statutory requirements for filing a medical malpractice action, and dismissed the claim with prejudice. The Nelsons' motion to reconsider based on their reliance on the extension and their argument that they complied with the statutory requirements during the extended time was denied. Aggrieved, the Nelsons appeal. Finding error, we reverse and dismiss without prejudice.

FACTS

¶ 2. One of the appellants, Gaynelle Nelson, became pregnant during July or August 2000. She received prenatal care at the Oxford Clinic for Women and was scheduled to receive a C-section. When Mrs. Nelson was admitted to Baptist Memorial Hospital on April 25, 2001, and went into labor, the Nelsons allege a nurse delivered her baby, Bobby Nelson, but did not call a doctor. Although Mrs. Nelson had been scheduled for a C-section, she alleges that the nurse attempted to manually stretch her cervix to deliver the baby. Shortly after being delivered, Bobby was transferred to North Mississippi Medical Center in Tupelo, where he remained until his death on July 14, 2001.

¶ 3. Approximately one month before the expiration of the statute of limitations, the parents, Billy and Gaynelle Nelson, retained attorneys to represent them in their suit for the wrongful death of Bobby Nelson. The Nelsons filed a complaint on July 9, 2003, prior to the expiration of the *670 statute of limitations on July 14, 2003.[FN1] The claim alleged that the negligence of Baptist Memorial Hospital (Hospital), Oxford Clinic for Women (Clinic), Dr. William E. Henderson, Jr., and other doctors and employees (Doctors) caused the wrongful death of Bobby. Prior to filing the complaint, the Nelsons did not provide sixty days notice to the Hospital, Clinic, and Doctors as required by Mississippi Code section 15-1-36(15). The original complaint also did not include a certificate stating their attorney had consulted with a doctor about the case, pursuant to section 11-1-58 of the Mississippi Code.

FN1. The Nelsons' brief states they filed a claim on July 10, but the appellees' brief and the record note that the original complaint was filed on July 9.

¶ 4. On November 3, 2003, upon motion by the Nelsons, Judge Howorth entered an order granting an additional ninety days to serve process. The Nelsons then sent notice of the suit on November 10. After waiting sixty days, the Nelsons filed an amended complaint, which included a certificate stating their attorney had consulted a qualified expert, and then they served process on the Hospital, Clinic, and Doctors.

¶ 5. Subsequently, Judge Howorth recused himself and the case was assigned to Judge Lackey. The Hospital filed a motion to reconsider the order entered by Judge Howorth granting the Nelsons additional time to complete service of process, to which the Clinic and Doctors joined. Upon reconsideration, Judge Lackey vacated the original order for lack of good cause and dismissed the claim with prejudice. He also found the statute of limitations had expired for the following reasons: (1) failure to give written notice sixty days before filing a medical malpractice claim, (2) failure to include an attorney certificate with the claim, and (3) ineffective service of process.

¶ 6. The Nelsons filed a motion to reconsider, and, on September 27, 2005, Judge Lackey entered an order affirming his prior decision. Aggrieved, the Nelsons timely appeal and assert the following issues:

I. Whether Judge Lackey should have reversed the order extending time to serve process when Judge Howorth properly granted it and when the Nelsons detrimentally relied on it.

II. Whether notice was properly given sixty days prior to filing the claim.

III. Whether it was in error to find the Nelsons did not provide an attorney certificate.

IV. Whether the clinic and doctors were properly served with process.

V. Whether the claim should have been dismissed without prejudice.

STANDARD OF REVIEW

¶ 7. We review questions of law with a de novo standard of review. *Russell v. Performance Toyota, Inc.*, 826 So.2d 719, 721(¶ 5) (Miss.2002). This Court also employs a de novo standard to review a trial court's grant or denial of a motion to dismiss. *Harris v. Miss. Valley State Univ.*, 873 So.2d 970, 988(¶ 54) (Miss.2004).

ISSUES AND ANALYSIS

I. Whether Judge Lackey should have vacated the order extending the time to serve process that was granted by Judge Howorth and relied

upon by the Nelsons

[1] ¶ 8.Mississippi Rules of Civil Procedure Rule 4(h) requires a plaintiff to serve the summons and complaint on a defendant within 120 days of filing a complaint; otherwise, the judge must dismiss the action without prejudice. Under *671Mississippi Rules of Civil Procedure Rule 6(b), a court may extend the time a party has to act (1) for cause shown, if within the initial time period, or (2) upon a finding of excusable neglect after the expiration of the time period. A court may grant an extension of time under Rule 6(b), if within the initial 120 day time period, without motion and without notice. Accordingly, a judge may grant an extension of time to serve process under Rule 4(h) prior to the expiration of the original 120 days for service without a showing of good cause. *Cross Creek Prods. v. Scafidi,* 911 So.2d 958, 960(¶ 5) (Miss.2005). Only after the expiration of the original 120 days must the plaintiff show good cause to receive an extension of time to serve process. *Id.*"An application under Rule 6(b)(1) normally will be granted in the absence of bad faith or prejudice to the adverse party." *Id.* at 960(¶ 7) (quoting 4B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1165, at 522 (3d ed.2002)).

[2][3] ¶ 9. Assuming proper service of process, filing a complaint tolls the statute of limitations until a suit's dismissal. *Canadian Nat'l/Ill. Cent. R.R. v. Smith,* 926 So.2d 839, 845(¶ 24) (Miss.2006) (citing *Deposit Guar. Nat'l Bank v. Roberts,* 483 So.2d 348, 352 (Miss.1986)). The date a plaintiff files an action is the relevant date for statute of limitation purposes, taking into consideration extensions of time to serve process. *Crumpton v. Hegwood,* 740 So.2d 292, 294(¶ 9) (Miss.1999).

[4] ¶ 10. The supreme court has stated that "as a general rule, a successor judge is precluded from correcting errors of law made by his predecessor or changing the latter's judgment or order on the merits, but this rule does not apply where the order or judgment is not of a final character." *Mauck v. Columbus Hotel Co.,* 741 So.2d 259, 268(¶ 27) (Miss.1999) (quoting 48A C.J.S. *Judges* § 68, at 654 (1981)). A successor judge in an inferior position does not have the authority to vacate the order of a prior judge granting a new trial. *Amiker v. Drugs for Less, Inc.,* 796 So.2d 942, 948(¶ 22) (Miss.2000). Nevertheless, the supreme court reversed a judge's vacating of a prior judge's order when a party justifiably relied upon it. *Franklin v. Franklin,* 858 So.2d 110, 122-23 (¶¶ 41-43) (Miss.2003).

[5] ¶ 11. In the present case, prior to the expiration of the 120 days to serve process, the Nelsons made a motion for an extension of time. They did not wait until the 120 days had lapsed to request an extension; therefore, according to *Cross Creek,* they were not required to meet the heightened good cause requirement. There was nothing to suggest the Nelsons acted in bad faith in making the motion, and no party was prejudiced by the ninety-day extension. The motion stated that a delay in obtaining medical records had forced the Nelsons to wait for their expert to form an opinion as to the merits of the claim. Judge Howorth found sufficient cause in this to grant an extension, and we find it was in error for the successor judge to later vacate the order based on the good cause standard.

¶ 12. Had Judge Howorth not granted the ninety-day extension on November 3, 2003, the Nelsons would have had four days before the time to serve process expired. Instead of attempting to serve process in those four days, they justifiably relied on this order and served process during the extended time.[FN2] In *Franklin,* the court noted that the attorneys had ***672** expended substantial time and labor in relying on the judge's order stating that they would be awarded attorneys' fees. *Franklin,* 858 So.2d at 122(¶ 43). Similarly, in the present case, the Nelsons expended the remaining days they had to serve process in reliance on the judge's order

granting them an additional ninety days to do so.

> FN2. It seems they also tried to remedy their earlier errors by giving sixty days notice and then filing an amended complaint with a certificate.

¶ 13. Judge Lackey vacated the original order extending time to serve process because the plaintiffs failed to show good cause, which he says was "required by the rules;" however, *Cross Creek,* says that Rule 6(b) only requires a plaintiff to show cause when filing a motion for an extension of time outside the original 120 day time period. Furthermore, the Nelsons justifiably relied on the judicial order and served process after the initial 120 days, but during the ninety-day extension, whereas they would have had four days remaining to do so had the extension not been granted. We, therefore, find that it was in error to vacate the original order because the Nelsons did not show good cause and also because the Nelsons relied on the order and served process in the time granted instead of within the original 120 days.

II. Whether the Nelsons properly gave notice sixty days before filing their claim

[6] ¶ 14. The statute of limitations to initiate a lawsuit against a medical provider is two years from the alleged negligent act. Miss.Code Ann. § 15-1-36(2) (Rev.2003). A plaintiff may not begin an action against a healthcare provider based on professional negligence until the plaintiff gives the provider sixty days written notice of his intent to bring suit. Miss.Code Ann. § 15-1-36(15) (Rev.2003). Service of this notice will extend the time to commence an action by sixty days if the notice is served within sixty days of the expiration of the statute of limitations. *Id.* This serves to toll the statute of limitations for sixty days, essentially allowing for a statute of limitations of two years and sixty days. *Pope v. Brock,* 912 So.2d 935, 939 (¶¶ 19-20) (Miss.2005).

¶ 15. The supreme court has affirmed a trial court's dismissal of a medical malpractice claim when the plaintiff failed to serve the statutorily required notice, pursuant to section 15-1-36(15), at least sixty days before initiating the action. *Pitalo v. GPCH-GP, Inc.,* 933 So.2d 927, 929 (¶¶ 6-7) (Miss.2006). The plaintiff in *Pitalo* filed a complaint in September 2003 and an amended complaint in June 2004, but she never sent the required notice to the defendants. *Id.* at 928(¶ 3). Similarly, Pitalo also did not file a certificate with her complaint stating that her attorney had consulted a qualified expert concerning the claim, as required by section 11-1-58. *Id.*

¶ 16. Relying on its decision in *Pitalo,* the supreme court recently ruled that dismissal without prejudice was proper when a plaintiff failed to serve notice on a defendant at least sixty days before commencing an action.[FN3] *Arceo v. Tolliver,* 949 So.2d 691 (¶ 16) (Miss.2006). Although Tolliver filed a complaint and two amended complaints throughout June and July 2004, the court noted that it was not until November 2004 that she tried to provide the defendants with the statutorily required notice. *Id.* at (¶ 3).

> FN3. The original August opinion dismissed the action with prejudice, but the supreme court substituted an opinion in November that dismissed the action without prejudice.

¶ 17. In the present case, the Nelsons made no effort to serve notice prior to filing the original complaint, so in this respect, it is similar to *Pitalo* and *Arceo.* It was not until after Judge Howorth granted an extension of time to serve process*673 that the Nelsons attempted to give the required notice. The Nelsons filed their claim on July 10, 2003, and argue they gave notice on November 10, 2003, sixty days before filing their amended complaint. Nevertheless, they did not provide notice before filing

their initial complaint, as required by the statute. Failing to send the notice was an "inexcusable deviation" from the requirements of section 15-1-36(15), and it warrants dismissal. *Pitalo,* 933 So.2d at 929(¶ 7). Therefore, based on the Nelsons' failure to give notice before filing their initial claim and the recent supreme court decisions in *Pitalo* and *Arceo,* we find that it was proper to dismiss the action.

III. The Nelsons failed to provide a certificate stating that their attorney had consulted a professional regarding the claim

[7] ¶ 18. A complaint in a medical malpractice suit must be accompanied by a certificate stating that the plaintiff's attorney has consulted a qualified expert concerning the claim and, based upon such consultation, the attorney reasonably believes there is a basis for the action. Miss.Code Ann. § 11-1-58(1) (Rev.2002). In *Walker v. Whitfield Nursing Ctr., Inc.,* 931 So.2d 583, 592(¶ 33) (Miss.2006), the supreme court affirmed the dismissal of an action when the plaintiff did not include a certificate with the complaint and also failed to state that an expert had been consulted until depositions began. The plaintiff in *Walker* filed her complaint on April 7, 2004, and served the defendants with that complaint on April 14. *Id.* at 585(¶ 1). Walker never filed the certificate required by section 11-1-58 until September 8, 2005, and then she only did so by attaching it to a response to Whitfield's motion for summary judgment. *Id.* at 586 (¶¶ 4-7).

¶ 19. The present case is distinguishable from *Walker* in that the Nelsons clearly had an expert, from whom they received a professional opinion. The court in *Walker* noted that the plaintiff responded to an interrogatory request by stating that she had not contacted nor consulted an expert regarding the case. *Id.* at 586(¶ 3). Furthermore, the Nelsons did not wait over a year, and partially into discovery, to remedy their failure to file the certificate. Unlike *Walker,* at the time the Nelsons served the amended complaint, it included the attorney's certificate. The Hospital, Clinic, and Doctors were not forced to respond to a complaint lacking an attorney's certificate. The Nelsons also attached their certificate to the amended complaint, not to a response to a motion to dismiss, as the plaintiff did in *Walker.*

¶ 20. The Nelsons did not file the required certificate with their original complaint; therefore, the claim was properly dismissed. We note, however, that the failure to file a certificate in this case is far less egregious than the situation in *Walker,* which was a claim filed much later after section 11-1-58 came into effect.

IV. Whether the Nelsons properly served process on the Clinic doctors

¶ 21. We do not address this issue because we find that the trial court should have dismissed the original claim for failing to provide the statutorily required sixty days notice; therefore, this issue is moot.

V. Whether the action should be dismissed with or without prejudice

[8][9][10] ¶ 22. Dismissal without prejudice prevents the plaintiff from being barred from filing a new suit on the same cause of action. ***674***Williams v. Mid-South Paving Co.,* 200 Miss. 103, 121, 25 So.2d 792, 798 (1946). On the other hand, dismissal with prejudice, which prevents the plaintiff from bringing a new suit based on the same cause of action, is extreme and harsh, and only the most egregious cases warrant such dismissals. *Miss. Dep't of Human Servs. v. Guidry,* 830 So.2d 628, 632(¶ 13) (Miss.2002). As previously stated, the supreme court has recently ruled that dismissal without prejudice was proper when a plaintiff failed

to serve notice upon medical provider defendants at least sixty days before initiating an action. *Arceo* at (¶ 16).

¶ 23. The statute at issue in this case had only been in effect a few months when this case was filed, and the Nelsons tried to remedy their failure to comply with those statutes. Their failure to attach the attorney certificate and to file sixty days notice do not rise to the level of egregiousness sufficient to warrant dismissal with prejudice. This is so especially in light of the fact that they attempted to correct those errors before they ever served process. We find, therefore, that the original complaint filed by the Nelsons should be dismissed without prejudice for failing to attach an attorney's certificate and for failing to give prior sixty days notice.

¶ 24. THE JUDGMENT OF THE LAFAYETTE COUNTY CIRCUIT COURT IS REVERSED AND THE ACTION IS DISMISSED WITHOUT PREJUDICE. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEES.

KING, C.J., LEE AND MYERS, P.JJ., IRVING, CHANDLER, GRIFFIS, ROBERTS AND CARLTON, JJ., CONCUR. BARNES, J., NOT PARTICIPATING.
Miss.App.,2007.
Nelson v. Baptist Memorial Hospital-North Mississippi, Inc.
972 So.2d 667

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IN THE CIRCUIT COURT OF LAFAYETTE COUNTY, MISSISSIPPI

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 — PLAINTIFFS

VERSUS — CAUSE NO. L03-265

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

STATE OF MISSISSIPPI
COUNTY OF UNION

AFFIDAVIT

PERSONALLY APPEARED BEFORE ME, the undersigned authority in and for the aforesaid county and state, the within named TOMMY GADD, who, by me being first duly sworn does state on his oath as follows:

1. My name is Tommy Gadd, an adult resident citizen of New Albany, Mississippi. I am competent to testify to the matters stated herein, and they are based upon my personal knowledge.

2. I am a process server and was retained by the firm of Kitchens and Ellis to serve process on Dr. Henderson, Dr. Couey, Dr. Smith, Dr. Martin and the Oxford

APPENDIX D

Clinic for Women.

3. On January 12, 2004, pursuant to the summons and returns which are attached hereto as Exhibits to this Affidavit, I served all summons on the Office Manager, Ms. Candace Hogue, who advised me that she had authority to accept summons for the document (First Amended Complaint) attached to the summons on behalf of Drs. Henderson, Couey, Smith, Martin and the Oxford Clinic for Women.

4. It was my understanding that Ms. Candace Hogue not only had authority to accept the summons on behalf of Drs. Henderson, Couey, Smith, Martin and the Oxford Clinic for Women, but that she was familiar with this case when she accepted the summons.

5. On January 12, 2004, when Ms. Candace Hogue accepted process on behalf of the aforementioned doctors and clinic, I introduced myself to her and she knew who I was and what I was serving upon her prior to her signing for said document.

6. Further, the Affiant saith not.

LAFAYETTE COUNTY CIRCUIT COURT MISSISSIPPI

Tommy Gadd

TOMMY GADD

SWORN TO AND SUBSCRIBED BEFORE ME ON THIS THE 20th DAY OF MAY, 2004.

Renee Grubbs

MY COMMISSION EXPIRES: NOTARY PUBLIC

MY COMMISSION EXPIRES SEPTEMBER 04, 2004.

CERTIFICATE OF SERVICE

I, Margaret P. Ellis, one of the attorneys for plaintiffs, do hereby certify that I have, via United States Mail, postage prepaid, caused to be delivered a true and correct copy of the foregoing to:

Honorable Henry L. Lackey
Circuit Judge
Post Office Box T
Calhoun City, MS 38916

Clinton M. Guenther, Esq.
Upshaw, Williams, Biggers, Beckham
& Riddick, LLP
Post Office Box 8230
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Walter Alan Davis, Esq.
Dunbar Davis PLLC
324 Jackson Avenue East
Oxford, MS 38655

This the 21st day of May, 2008.

Margaret P. Ellis

Margaret P. Ellis, MSB [redacted]
One of Plaintiffs' attorneys

Attorneys for Plaintiffs:

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