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

APPELLEES-DEFENDANTS

BRIEF OF APPELLANTS-PLAINTIFFS

Appeal from the Circuit Court of
Lafayette County, Mississippi
Circuit Court No. L08-236

ORAL ARGUMENT REQUESTED

Margaret P. Ellis, MS Bar No. [redacted]
Post Office Box 1850
Jackson, MS 39215
Telephone: (601) 946-7444
Facsimile: 228-762-5414

Roderick D. Ward III, MS Bar No. [redacted]
Stevens & Ward
1855 Lakeland Drive, Suite P 121
Jackson, MS 39216
Telephone: (601) 366-7777
Facsimile: (601) 366-7781

August 11, 2009

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Court Rules

Other Authorities

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. 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, Appellants
2. Hon. Henry L. Lackey, 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.
8. William E. Henderson, Jr.,

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

For Appellants:

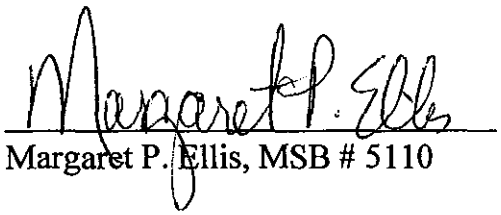
1. Margaret P. Ellis, Esq.
2. Roderick D. Ward III, Esq.

For Appellees:

1. Clinton M. Guenther, Esq.

2. Walter Alan Davis, Esq.

THIS the 11th day of August, 2009.



Margaret P. Ellis, MSB # 5110

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 34 of the Mississippi Rules of Appellate Procedure, Plaintiffs request oral argument as they believe that a chance to address this Court will aid and assist this Court in its consideration of the multiple issues presented. This appeal raises issues which have not, at the time of making this request, been authoritatively decided by this Court, or which need clarification by this Court.

Plaintiffs respectfully request that oral argument be granted.

STATEMENT OF THE ISSUES

1. The trial court failed to properly apply the law of the case, and specifically failed to follow this Court's findings that Plaintiffs' Complaint filed on July 9, 2003, tolled the running of the statute of limitations, and that dismissal should have been without prejudice so as to allow Plaintiffs to re-institute their case within the five (5) days remaining before the expiration of the statute of limitations.[1]

2. The trial court erred in finding that the statute of limitations had expired and dismissing Plaintiffs' case with prejudice.

3. The trial court failed to find that the Defendants are bound by their affirmative statements that the statute of limitations did not commence to run until the date of the minor's death and Defendants' affirmative statements waived their statute-of-limitations defenses to the contrary.

4. Proper application of *Jenkins v. Pensacola Health Trust, Inc.*, 933 So.2d 923 (Miss. 2006), requires a finding that the statute of limitations commenced to run two years after the date of death, or if given the strict application sought by Defendants, the statute commenced to run on the date of birth and expired eight (8) years after the date of birth. See, Miss. Code Ann. § 15-1-36.

[1] Note: References to the record are as follows: Record Excerpts - R.Ex.; Record - R

STATEMENT OF THE CASE

This case returns to this Court on the second appeal of the same issues determined by this Court on the first appeal. The lower court's dismissal of the Plaintiffs' original Complaint **with** prejudice was first considered by this Court and reversed in *Nelson v. Baptist Memorial Hospital-North Mississippi, Inc.*, 972 So.2d 667 (Miss. Ct. App. 2007), *reh. den., cert. den*, 973 So.2d 244 (2008) [hereinafter *Nelson I*]. Promptly following this Court's mandate issued on January 24, 2008, and consistent with the Appellate Court's opinion stating that five days remained on the statute of limitations, within those (5) five days, Plaintiffs gave notice and waited the requisite sixty (60) days, pursuant to Miss. Code Ann., Sec. 15-1-36 and re-filed their complaint in the Circuit Court for Lafayette County, Mississippi on March 26, 2008. (R.Ex.4,pp.010-044,R.1-35) Wholly disregarding the directives in *Nelson I*, Defendants filed their Motions to Dismiss and sought from the trial court a redetermination of the same points of law that were expressly rejected by both appellate courts (Mississippi Court of Appeals and the Mississippi Supreme Court by denial of certiorari). (R.53-58,59-71,100-120,121-125,126-132)

Defendants also asked the trial court to apply *Jenkins v. Pensacola Health Trust, Inc.*, 933 So.2d 923 (Miss. 2006), *rehearing denied*, in such a way to require a finding that the statute of limitations expired two years after the birth of the infant child, rather than two years from the date of his death.

The trial court, as urged by the Defendants, disregarded the findings set forth in *Nelson I*, and rendered identical rulings it made in the first case, which were 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) Contrary to the directives by this Court in *Nelson I*, the trial court found that the Plaintiffs' Complaint filed July 9, 2003, did not toll the statute of limitations and that the Plaintiffs were time barred to file their Complaint.[1] Upon denial of their Motion for Reconsideration (R.Ex.3,p.008-009, R.375-376), the Nelsons timely appealed to this Court. (R.578-589)

[1]"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).

SUMMARY OF THE ARGUMENT

Once again, this case comes before this Court – same case, same issues, same allegations and same parties. *See, Nelson v. Baptist Memorial Hosp.-North Miss., Inc.*, 972 So.2d 667 (Miss. App. 2007) (also included in Record Excerpt 4,pp.025-036). In *Nelson I*, this Court found that Plaintiffs' complaint was timely filed (July 9, 2003) before the expiration of the two year statute of limitations (July 14, 2003). The Appellate Court also found that Plaintiffs' complaint should have been dismissed **without** prejudice and reversed the trial court's dismissal **with** prejudice. (R.Ex.4 pp.,R.16-25) Subsequent to *Nelson I*, this Court has issued even more clear directives regarding the propriety of dismissal **without** prejudice for failure to provide pre-suit notice.

Recently in *Williams v. Skelton*, 6 So. 3d 428 (Miss. 2009), citing, *Arceo v. Tolliver*, 949 So. 2d 691 (Miss. 2006), this Court granted certiorari for the sole purpose of correcting the Court of Appeals' dismissal **with** prejudice. This Court held that a plaintiffs' "complaint should have been dismissed **without** prejudice for her failure to comply with the pre-suit requirements."*Williams*, at 430 (¶ 7)(emphasis supplied).

Even more recently, in *Price v. Clark, et al* __ So. 3d ___(Miss. 2009) (decided July 23, 2009), this Court said that: "a properly served complaint, albeit a complaint that is wanting of proper pre-suit notice-should still serve to toll the statute of limitations... ." (*Price* Opin. dec. July 23, 2009 at p. 20, ¶ 30)

Contrary to the directives from this Court, Defendants, again, sought dismissal based on the same issues. And, the trial court, once again, dismissed Plaintiffs' claims **with prejudice** for Plaintiffs' failure to give the required sixty (60) days notice on July 9, 2003.

Dismissal without prejudice ordinarily imports the contemplation of further proceedings and prevents Defendants from availing themselves of the defense of res judicata in another action by the same plaintiff on the same subject matter. *Cole v. Fagan*, 108 Miss. 100, 66 So. 400; *W.T. Raleigh Co. v. Barnes*, 143 Miss. 597, 600, 109 So. 8 (1926); *Wilson & Gray v. May Pants Co.*, 37 So. 813 (Miss. 1905). In *Nelson I*, the Plaintiffs' Complaint was found not to be barred by time. The Court's reversal and dismissal without prejudice contemplated the Plaintiffs' re-commencing these proceedings within the five (5) days remaining on the applicable statute of limitations. *Nelson I*, 972 So. 2d 667 at 673, (¶ 22).

Further, in the court below and throughout appeal, the Defendants in *Nelson I* repeatedly stated that Plaintiffs' initial Complaint was filed five (5) days before the expiration of the applicable statute of limitations for the wrongful death of the minor infant (these arguments are set out in detail on pages 29-31 of this brief). Only in motions for rehearing in *Nelson I* did Defendants raise, for the first time, that the statute of limitations commenced to run on the date of the birth of the infant child (April 25, 2001), rather than the date of his death (July 14, 2001).

Mistakenly relying on *Jenkins v. Pensacola Health and Trust*, 933 So.2d 923 (Miss. 2006), and wholly disregarding Mississippi Code Annotated, § 15-1-36(3) set forth below, Defendants asserted that the statute of limitations commenced to run on the date of birth, rather than the date of death of the infant child, and expired two years later on April 25, 2003.

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).

It is clear that Defendants' application of *Jenkins* in this manner is misplaced. The *Jenkins* decision does not alter the applicable statute of limitations for this case, and does not bar Plaintiffs' claims. In fact the *Jenkins* decision, read in conjunction with the above statute, clearly provides that **if** the statute of limitations commenced to run on April 25, 2001, the right to sue and the cause of action belonged to the infant, not the parents and sibling. If the cause of action belonged to the child, then pursuant to Miss. Code Ann., § 15-1-36(3), the statute of limitations for the infant child was six years, plus two, causing the statute of

limitations to expire April 25, 2009. Clearly, Plaintiffs' claims were filed well within the applicable statute of limitations.

Moreover, Defendants have waived their jaundiced defense through their delay in raising the issue, their failure to seek review of the trial court's findings in *Nelson I*, and their numerous affirmative statements made before this Court and the trial court, alleging that the statute of limitations commenced to run on the date of the infant's death.

Finally, contrary to Defendants' assertions, *Jenkins* created no remedy that was not at all times available to Defendants. The *Jenkins'* Court stated: "[S]ince 1999, this Court has followed the precedent set by *Thiroux* and *Thompson*." *Jenkins* 933 So.2d 923, at 926 (¶ 11). Assuming *arguendo* that *Jenkins* did create a new remedy, Defendants have waived their right to raise avail themselves of this defense. For more than a year after *Jenkins* was rendered, Defendants continued to make affirmative statements that the statute of limitations commenced to run on the date of the infant child's death. When Defendants did raise the issue, albeit belatedly, in their motions for rehearing, the Court of Appeals rejected those arguments, as did the Supreme Court on Defendants' motions for a certiorari review. (R.Ex.4,p.035)

Accordingly, Defendants are bound by the findings by the lower court and, more specifically, by the findings of this Court in *Nelson I*. The Courts' findings as to the statute of limitations became the law of the case.

Regardless of the application, *Jenkins* does not bar Plaintiffs' claims. According to *Jenkins*, the statute of limitations for the underlying tort was eight years and Plaintiffs' claims were timely filed, or in the alternative, as provided by the statute, the statute of limitations was two years and that date commenced to run on the date of the infant's death, July 14, 2001.

ARGUMENT

STANDARD OF REVIEW

A motion to dismiss under MRCP 12(b) raises an issue of law. *Harris v. Miss. Valley State* Univ., 873 So. 2d 970, 988 (¶ 54), *Young v. Sherrod*, 919 So.2d 145, 148 (¶ 8) (Miss. Ct. App. 2005); *Newell v. Southern Jitney Jungle Co.*, 830 So.2d 621, 623 (¶ 5) (Miss. 2002); *T.M. v. Noblitt*, 650 So.2d 1340, 1342 (Miss.1995); *Tucker v. Hinds County*, 558 So.2d 869 (Miss. 1990); *Lester Engineering Co. v. Richland Water and Sewer District*, 504 So.2d 1185, 1187 (Miss. 1987). This Court reviews questions of law with a de novo standard of review. *Walker, Inc. v. Gallagher*, 926 So.2d 890 (¶¶ 3, 4)(Miss. 2006); *Richardson v. Sara Lee Corp.*, 847 So.2d 821, 823 (¶ 5)(Miss. 2003); *Russell v. Performance Toyota, Inc.*, 826 So.2d 719, 721 (¶ 5) (Miss. 2002); *Bilbo v. Thigpen*, 647 So.2d 678, 688 (Miss. 1994); *UHS-Qualicare, Inc. v. Gulf Coast Community Hospital, Inc.*, 525 So.2d 746, 754 (Miss. 1987). When reviewing a trial court's grant or denial of a motion to dismiss, this Court applies a de novo standard of review. *Foss v. Williams*, 993 So.2d 378 (¶ 17) (Miss. 2008),

rehearing denied (citing *Burleson v. Lathem*, 968 So.2d 930, 932 (¶ 7) (Miss. 2007)).

The trial court's grant of a motion to dismiss based upon the statute of limitations presents a question of law to which this Court also applies de novo review. *Champluvier v. Beck*, 909 So.2d 1061, 1063 (¶ 10) (Miss. 2004)(citing *Sarris v. Smith*, 782 So.2d 721, 723 (¶ 6) (Miss. 2001); *Parmley v. Pringle*, 976 So.2d 422, 423 (¶ 5) (Miss. Ct. App. 2008)(citing *Anderson v. R & D Foods, Inc.*, 913 So.2d 394, 397 (¶ 7) (Miss. Ct. App. 2005).

Motions to dismiss are converted to summary judgments when the judge considers matters outside the pleadings before the Court. The Court also reviews motions for summary judgment using a de novo standard. *Deere & Co. v. First Nat. Bank of Clarksdale*, ___ So.3d ___, 2009 WL 1691510 (¶ 23) (Miss. 2009) (citing *Treasure Bay Corp. v. Ricard*, 967 So.2d 1235, 1238 (Miss. 2007)). A motion for summary judgment may be granted only if "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Id. The evidence must be viewed in the light most favorable to the nonmoving party. *Flores v. Elmer*, 938 So.2d 824 (¶ 7)(Miss. 2006)(citing *McKinley v. Lamar Bank*, 919 So.2d 918, 926 (Miss. 2005).

When considering a motion to dismiss, the allegations in the Complaint must be taken as true and the motion should not be granted unless it appears beyond doubt that the plaintiff will be unable to prove any set of facts in support of

his claim. *Scaggs v. GPCH-GP, Inc.*, 931 So.2d 1274, 1275 (¶ 6) (Miss. 2006). This Court has cautioned that trial courts are not to try issues, but to determine whether there are issues which should be tried. *Townsend v. Estate of Gilbert*, 616 So.2d 333, 335 (Miss. 1993). Furthermore, it is well-settled that motions for summary judgment are to be viewed with a skeptical eye, and if error is to be committed, it should be in denying the motion. *Crum v. Johnson*, 809 So.2d 663 (Miss. 2002).

The decision before the Court is not dependent on resolution of any factual dispute which should be submitted to a finder of fact. Therefore, the question before the Court is one of law, which is reviewed de novo. *Pope v. Brock*, 912 So.2d 935, 936 (¶ 3) (Miss. 2005) *rehearing denied*; *Sarris v Smith*, 782 So.2d 721, 723 (¶ 6) (Miss. 2001).

The question here is a matter of procedure and law; the law, as applied by the lower court, was incorrect and therefore the lower court's judgment must be overturned regardless of the standard. Furthermore, looking de novo, the question of law was incorrectly concluded, and since the lower court misapprehended the law and refused to follow the dictates by this Court, it was an abuse of discretion to dismiss Plaintiffs' Complaint with prejudice.

I. THE TRIAL COURT ERRED IN REVIEWING AND RECONSIDERING ARGUMENTS PREVIOUSLY REJECTED BY THESE APPELLATE COURTS IN *NELSON I.*

Defendants mistakenly place their faith upon the procedural technicalities to shield them from the effect of the doctrine of the "law of the case," which applies to all subsequent stages of the proceedings. Otherwise, as stated by the New Mexico court, why should appellate courts write opinions if they are not to be followed and only the ultimate issue is binding (see Argument II for discussion of the use of Mexico law. It will not be repeated here). It is not a rule to which the courts are bound by any legislative enactment. *Farmers' State Bank*, 31 N.M. 344, 245 P. 543, 548. In New Mexico, the doctrine allows some latitude where the substitution of parties would promote the interests of justice. The doctrine has also been applied in concurrent actions where these requisites are met. *Tally v. Ganahl, supra*; *Portland Trust Co. v. Coulter*, 23 Or. 131, 31 P. 280, 282 (1892); *Wilkes v. Davies*, 8 Wash. 112, 116-120, 35 P. 611, 612-614 (1894).

Moreover, in *Continental Turpentine & Rosin Co. v. Gulf Naval Stores Co.*, 244 Miss. 465, 142 So. 2d 200 (Miss. 1962) (a case relied upon by Defendants), the Court did not find the doctrine inapplicable to the second action: only that the doctrine could not apply where the facts and evidence had changed. In the case *sub judice,* neither facts nor evidence have changed.

In *Anderson v. R & D Foods, Inc.*, 913 So.2d 394 (Miss. Ct. App. 2005), the Court of Appeals, following the Supreme Court established decision, stated the rule of the doctrine:

> While the 'law of the case' doctrine is not an inexorable command, a decision of a legal issue or issues by an appellate court establishes the 'law of the case' and must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court, unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice.

Anderson, 913 So.2d at 400 (¶ 18). Put another way, the mandate issued by an appellate court is binding on the trial court on remand, unless the case comes under one of the exceptions to the law of the case doctrine. This "mandate rule" is a specific application of the law of the case doctrine. *Nelson v. Bonner*, ___ So.3d ___, 2009 WL 2152324 (¶ 5) (Miss. Ct. App. 2009) citing *Dunn v. Dunn*, 695 So.2d 1152, 1155 (Miss.1997)); Also see *Leggett v. Badger*, 798 F.2d 1387 (11th Cir. 1986).

Furthermore, exceptions to the law of the case doctrine such as "material changes in evidence, pleadings or findings" as outlined in *Continental Turpentine*, or the need for the Court to "depart from its former decision" "after mature consideration" so that "unjust results" will not occur as described in *Brewer v. Browning*, 115 Miss. 358, 364, 76 So. 267, 269 (1917), do not exist in the case *sub*

judice. Moreover, there is no new law or manifest injustice that would require an exception to proper application of the doctrine.

Questions of law determined on the first appeal now become the law of the case, both for trial and appellate court, on this appeal. The previous appellate decision reversed the trial court and dismissed the Plaintiff's Complaint **without** prejudice. A dismissal **without** prejudice "prevent[s] the dismissal from operating as a bar to any new suit which the plaintiff might thereafter desire to bring on the same cause of action." Ballentine's Law Dictionary with Pronunciations, 2d (1948) 834 citing *W.T. Raleigh Co. v. Barnes*, 143 Miss. 597, 600, 109 So. 8 (1926); *Cole v. Fagan*, 108 Miss 100, 66 So 400 (1914).

The phrase "without prejudice" ordinarily imports the contemplation of further proceedings and works to prevent Defendants from availing themselves of the defense of res judicata in another action by the same plaintiff on the same subject matter. *Cole*, 108 Miss. 100, 66 So. 400; *W.T. Raleigh Co. v. Barnes*, 143 Miss. 597, 600, 109 So. 8 (1926); *Wilson & Gray v. May Pants Co.*, 37 So. 813 (Miss. 1905). Here, the reversal of the trial court's judgment and finding that dismissal of the Plaintiffs' original Complaint should be **without** prejudice, allowed the Plaintiffs to give notice and file their complaint in accordance with the remaining time applicable to their statute of limitations. If Plaintiffs' Complaint on the first appeal had been time barred, this Court would obviously have affirmed the

dismissal with prejudice, rather than making the conscious and deliberate decision to reverse and find dismissal **without** prejudice.

The decision in *Nelson I* intended that Plaintiffs be allowed to re-institute their proceedings all within the five (5) days remaining on the applicable statute of limitations. "Dismissal without prejudice prevents the plaintiff from being barred from filing a new suit on the same cause of action." *Nelson I*, 972 So. 2d 667 at 673, ¶ 22. "Their (Plaintiffs) failure to attach the attorney certificate and to file sixty day notice do not rise to the level of egregiousness sufficient to warrant dismissal with prejudice." *Nelson I,* at 674 (¶ 23) (emphasis added). There is no doubt that in *Nelson I,* the Court of Appeals followed the conscious and deliberate holding of the Supreme Court in *Arceo v. Tolliver*, supra, at 698 (¶ 16). Upon request for rehearing and clarification, this Court in *Arceo* denied rehearing, but modified the original opinion and substituted dismissal **without prejudice**, rather than dismissal **with** prejudice. *Arceo*, supra, at 692 (¶ 1) and 698 (¶ 16). The changing of **with prejudice** to **without prejudice** was the only change made in the reissued opinion by this Court.

There is no question that the *Nelson I* decision was the result of a conscious and deliberate act to allow Plaintiffs an opportunity to re-institute their proceedings within the five (5) remaining days on the applicable statute of limitations. "Finding error, we reverse and dismiss **without** prejudice." (Emphasis added) *Nelson I*, (¶ 1).

Recently in the case of *Williams v. Skelton*, 6 So.3d 433 (Miss. Ct. App. 2008), rehearing denied, cert granted at *Williams v. Skelton*, 6 So.3d 428 (Miss. 2009), this Court granted certiorari for the sole purpose to "reiterate that dismissal for failure to comply with the pre-suit requirements of Mississippi Code Annotated Section 15-1-36 should be ***without*** prejudice." (Emphasis supplied) *Williams v. Skelton*, 6 So.3d 428, 431 (¶ 8). Also, see *Williams v. Skelton*, 6 So.3d 428, 430 (¶ 7) (holding that "[I]t must be clarified, however, that dismissal for failure to provide notice under this statute ordinarily should be ***without*** prejudice."citing, *Arceo v. Tolliver*, 949 So. 2d 691, 698 (Miss. 2006)). (Emphasis supplied)

Further, in *Price v. Clark, et al* ___So. 3d. ___(Miss. 2009) (WL2183271, July 23, 2009) (P. 18, ¶ 25) this Court considered dismissal due to Plaintiffs' lack of giving the proper notice. In that case, the lower court found that the filing of the complaint, without first giving notice, had no legal effect and thus did not toll the running of the statute of limitations. Reversing on this issue, this Court held:"While failure to provide proper statutory notice cannot be cured by serving notice-of-claim letters after a complaint is filed, a properly served complaint-albeit a complaint that is wanting of proper pre-suit notice-should still serve to toll the statute of limitations until there is a ruling from the trial court." *Price v. Clark*,, (¶ 30).

In this case, the Nelsons seek the same relief against the same defendants on the same facts and evidence asserting the same interests in this litigation as was

found in the first appeal of this action. It is clear that in *Nelson I,* this Court made a conscious decision to reverse the trial court's dismissal **with** prejudice, which then allowed Plaintiffs to re-institute proceedings within the five (5) days remaining on the statute of limitations. Defendants now seek to avoid the previous decision of this Court and obtain relief on facts and issues that this Court was unwilling to grant to Defendants in *Nelson I.* The manifest injustice here is that the Defendants ignore the rules of pleading and this Court's sound discretion and mandate, and violate the Plaintiffs' right to access the court and to have this matter finally determined on its merits. See, e.g., *Hood ex rel. State v. BASF Corp.*, Not Reported in So.2d, 2006 WL 308378 (Miss. 2006).

II. THE TRIAL COURT'S SECOND DISMISSAL WITH PREJUDICE VIOLATED THE LAW OF THE CASE AND THE MANDATE FROM THIS COURT.

Finding error in the lower court's dismissal **with** prejudice, on May 8, 2007, the Court of Appeals decided *Nelson I* (R.Ex.4,pp. ,R.16-25), and ordered that it should be dismissed **without** prejudice. ("Finding error, we reverse and dismiss without prejudice." *Nelson I,* 927 So.2d at 669 (¶ 1)). The Court of Appeals also held that the "filing of a complaint tolls the statute of limitations until a suit's dismissal." *Nelson,* at 671 (¶ 9) The Court of Appeals further noted that Plaintiffs filed their suit on July 9, 2003, "prior to the expiration of the statute of limitations on July 14, 2003." *Nelson I,* at 669-670 (¶ 3). (R.Ex.4,pp. ,R.16-25) Defendants then filed their motions for rehearing, rearguing the same issues, and raising for

the first time the issue of statute of limitations, claiming reliance on *Jenkins v. Pensacola Health and Trust*, 933 So.2d 923 (Miss. 2006). The Court of Appeals rejected these arguments and denied rehearing. Defendants then filed their Rule 17 motions for writ of certiorari advancing all of those same arguments before the Supreme Court. Rule 17 of the Mississippi Rules of Appellate Procedure is discretionary and requires an affirmative vote of four justices in order to be granted. Rule 17(a)(1) provides that a review will ordinarily be granted in "cases in which it appears that the Court of Appeals has rendered a decision which is in conflict with a prior decision of the Court of Appeals or published Supreme Court decision." The Supreme Court declined to grant certiorari and, thus, also rejected those arguments. The mandate was then issued.

Upon mandate, Plaintiffs gave notice within the time remaining on the statute of limitations (5 days), and then filed their suit. However, regardless of the mandate and directives in *Nelson I*, which became the "law of the case," the Defendants raised the same issues as were raised and decided by the Appellate Court. The trial judge (same as the judge who heard the first case), contrary to the directives set out in *Nelson I*, again accepted the Defendants' arguments (those which had been rejected by this Court), and again granted dismissal ***with*** prejudice.

In *Nelson I*, this Court reversed the trial court's Final Judgment of Dismissal with Prejudice entered September 27, 2005, and those findings became the "law of the case." As a part of the lower court judgement, the trial court

adopted the findings contained in its Order Sustaining Defendants' Motions to Dismiss which was entered on June 21, 2004. That opinion, *inter alia*, included a finding **that at the time Plaintiffs filed suit on July 9, 2003, five (5) days remained before the expiration of the applicable statute of limitations.** ®. 117-120) "This action was filed on July 9, 2003, five days before the expiration of the two (2) (sic) statute of limitations for this wrongful death action.") The findings as to the applicable statute of limitations were not contested. Plaintiffs appealed that dismissal by the lower court and assigned four errors. The *Nelson I* issues were as follows:

1. Whether the circuit trial judge erred in overruling another circuit judge in the same district, wherein the other circuit judge had entered an order upon which Plaintiffs detrimentally relied.

2. Whether, based upon the circuit judge's ruling, Plaintiffs timely filed the notice pursuant to Mississippi Code Annotated, Section 15-1-36, based on the reliance of the circuit judge's ruling.

3. Whether the trial judge erred in finding that an office manager was not the proper person to accept service of process and therefore finding that Defendant doctors were not properly served, even though Plaintiffs presented an affidavit from the process server stating that he was advised that she had the authority to accept same. Further, the office manager testified that she was aware of the document which she accepted, and that she immediately gave it to the doctors and the proper people to have such documents.

4. Whether the former circuit judge abused his discretion in granting an extension of 120 days pursuant to Rule 4 of the Mississippi Rules of Civil Procedure.

No additional issues were raised by any Defendant, and there was no issue within Plaintiffs' appeal that challenged the lower court's findings as to the statute of limitations. In fact, throughout the proceedings, both before and after appeal, Defendants affirmatively stated (on at least sixteen (16) occasions) that the statute of limitations commenced to run on the date of the death of the infant, and expired two years later. (More fully set out on pages 29-31 of this brief.)

Consistent with the trial court's findings as to the statute of limitations prior to the first appeal, and the affirmative statements made by Defendants, the Court of Appeals in *Nelson I* also found that at the time that the complaint filed on July 9, 2003, was filed before the expiration of the statute of limitations of July 14, 2003. *Nelson I*, 669-670 (¶ 3) Accordingly, the trial court's finding (subsequently affirmed by this Court) on that issue became final and became the "law of the case." That is, the statute of limitations for the wrongful death of the infant child commenced to run on the date of his death, July 14,2001, and would have expired two (2) years later on July 14, 2003, but for the Plaintiffs' filing suit on July 9, 2003. Thus, when this Court issued its mandate on January 24, 2008, five days remained on the statute of limitations.

Moreover, the case upon which Defendants now rely in their argument that the statute commenced to run on the date of birth, rather than on the date of death, *Jenkins vs. Pensacola Health and Trust*, was decided on April 27, 2006, more than one year before *Nelson I* was rendered on May 8, 2007. At all times after *Jenkins*

was decided and up until motions for rehearing were filed, Defendants continued to make affirmative statements that the statute of limitations commenced to run on the date of the infant's death.

Respectfully, the arguments accepted by the lower court were identical to those arguments set forth in *Nelson I* and rejected by this Court in Defendants' motions for rehearing before the Court of Appeals and in their motions for writ of certiorari before the Supreme Court. Defendants should now be procedurally barred from raising any issue as to when the statute of limitations commenced to run as that issue has been judicially decided. See, Mississippi Supreme Court in *Public Employees' Retirement System v. Freeman*, 868 So.2d 327 ¶ 12 (Miss. 2004).

Defendants also assert that only now, within these renewed proceedings by Plaintiffs' subsequent filing in the trial court, could they have raised the statute of limitations defense. This is not true. As this Court stated in *Jenkins*, this Court has followed such interpretation at least since 1999. See, *Jenkins*, 933 So.2d 923, at 926 (¶ 11). Defendants have had ample opportunities to raise this defense at any time during the proceedings before the lower court, as well as before this Court. In numerous pleadings filed by the Defendants, as well as oral arguments made before the trial court and before the Court of Appeals, the Defendants affirmatively alleged and averred that the statute of limitations commenced to run on the date of the death of the infant child and expired two years from that date, being July 14,

2003. Defendants even cited authorities to support their statements that the statute of limitations commenced to run on July 14, 2001 and expired two years later on July 14, 2003. (R.Ex.13,p.060, R.356) Defendants were obviously able to accomplish before the trial court what both this Court and the Court of Appeals rejected.

In Mississippi, it is well settled that a decision on a question of law decided on a former appeal becomes the law of the case; therefore, 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)(citing *Leatherwood v. State*, 539 So.2d 1378, 1382 (Miss. 1989). In *Anderson v. R & D Foods, Inc.*, 913 So.2d 394, 400 (Miss. Ct. App. 2005), this Court stated that, "[a]ccording 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, so long as there is a similarity of facts." Id citing *Mauck v. Columbus Hotel Co.*, 747 So.2d 259,266-67 (Miss. 1999).

Defendants' argument that the law of the case does not apply to this case is based on their assertion that this is not the same case that was filed on July 9,2003. They claim that it was not the same case that was originally dismissed by the trial court, appealed to this Court, assigned to the Court of Appeals, orally argued before the Court of Appeals, decided by the Court of Appeals, considered on

motion for re-hearing before the Court of Appeals whereby the Court of Appeals rejected the same arguments now being set forth by Defendants, and finally, wherein the Mississippi Supreme Court unanimously rejected these same arguments when it declined to accept Defendants' Motions for Writ of Certiorari. While procedural posture of the underlying claims might have changed, the same facts, parties and legal issues presented on appeal in the prior case are presented on this appeal. Defendants' argument holds no merit: **this is the same case**.

Following this Court's mandate on January 24, 2008, Plaintiffs gave proper notice and then filed the instant Complaint on March 26, 2008. This Complaint mirrored the Complaint filed July 9, 2003, and the Amended Complaint filed January 9, 2004, alleging identical facts and allegations of negligence against identical parties, Plaintiffs and Defendants. Defendants now seek to have this Court declare that the re-filing of this claim constitutes a new claim, whereby they are not bound by their affirmative actions, the findings of the trial court, or the findings set forth in *Nelson I*. There is no question that this is the same case which was at one time before this Court and wherein this Court reversed dismissal **with** prejudice and found that the dismissal should have been granted **without** prejudice, allowing Plaintiffs to re-file within the remaining time under the statute of limitations.

Defendants misstate the decisions of this Court regarding the doctrine of law of the case and its applicability to subsequent proceedings. In their

Memorandum Brief in Support of the Motion to Dismiss, Defendants rely on *Continental Turpentine & Rosin Co. v. Gulf Naval Stores Co.*, 244 Miss. 465, 142 So. 2d 200 (Miss. 1962), to support the proposition that Plaintiffs have filed a new case and, thus, the law of the case is barred. Defendants stated that the Court "specifically declined to apply the doctrine in a second, subsequent lawsuit as it was 'a separate and distinct action from the present case.'" (R.63) In *Continental Turpentine*, the Plaintiff filed the first action against the Defendants. A trial was held and judgment was entered, paid off, settled and that case was closed. *Id.*, 244 Miss. at 479, 142 So.2d at 206. A trial order in that action was the subject of appeal. *Wood Naval Stores Export Association v. Latimer et al.*, 220 Miss. 652, 71 So.2d 425 (1954); See *Harrell v. Duncan*, 593 So.2d 1, 3-4 (Miss. 1991). Plaintiff later filed a subsequent second action. In the appeal of the second action, Plaintiffs argued that the law of the case and collateral estoppel barred consideration of the issue asserting that the second lawsuit and trial were a "branch" of the first. The Court rejected this view and stated:

> The opinion of this Court in the first case was correct under the facts as shown by the evidence introduced in that trial. Moreover, it was a separate and distinct action from the present case. If, however, the first case were a branch of the present action, as is contended by appellants, and Supreme Court would not be bound by the opinion rendered on the first appeal, because, where the evidence on the second trial is materially different on essential elements, the decision on the first appeal will not be taken as the 'law of the case.'

Continental Turpentine, 244 Miss. 465, 481, 142 So.2d 200, 208.

By ignoring the rule, Defendants evade the doctrine's basic definition of "the case." Defendants erroneously rely upon the following language from *Continental Turpentine* as foreclosing application of the doctrine:

> 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. *United States v. Davis*, 3 F.Supp. 97, 98 (D.C.N.Y. 1933); *Carroll v. Bunt*, 50 N.M. 127, 172 P.2d 116 (1946); *Farmers' State Bank of Texhoma, Oklahoma v. Clayton National Bank*, 31 N.M. 344, 245 P. 543 (1925).

Id. 244 Miss. at 479; 142 So.2d 207.

This language actually sets forth a mere basic premise of the doctrine for the Court's subsequent discussion of the "differing facts" exception. In the strictest sense, the term "case" as read in the doctrine is defined as (1) the same plaintiffs (2) with the same interests seeking (2) the same relief against (3) the same defendants with (4) identical facts and evidence and (5) legal theories in the absence of a judgment. In the broadest reading, the doctrine requires only the same parties in the same case with similar ultimate facts and evidence. *Moeller v. Am. Guar. and Liab. Ins. Co.*, 812 So.2d 953, 960 (¶ 22) (Miss. 2002); *Thompson v. State*, 206 So.2d 195 (Miss. 1968); *Mauck v. Columbus Hotel Co.*, 741 So.2d 259, 266-67(¶ 22) (Miss.1999); *TXG Intrastate Pipeline Co. v. Grossnickle*, 716 So.2d 991 (¶ 97) (Miss.1997); *Compare Bush Const. Co. v. Walters*, 254 Miss. 266, 272, 179 So.2d 188, 190 (1965) (Plaintiffs' counsel elected to file two separate wrongful death suits).

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

Fortune v. Lee County Bd. of Sup'rs, 725 So.2d 747 (Miss. 1998)(quoting *Simpson v. State Farm Fire & Cas. Co.*, 564 So.2d 1374, 1376 (Miss.1990) *rehearing denied* and *Mississippi College v. May*, 241 Miss. 359, 366, 128 So.2d 557, 558 (1961).

For example, in *United States v. Davis*, *supra*, the federal court was searching for the correct legal theory where the government sought to apply res judicata in the absence of a judgment. As the Court there explained:

> This doctrine applies only within the four corners of a particular litigation, and, consequently, falls into an entirely different category from the doctrine of res adjudicata [sic] under which the parties or their privies in a case are foreclosed by a judgment in another and wholly separate cause.

Davis, 3 F.Supp. 97, 98.

The *Davis* court went further:

> It is, of course, an old saying that circumstances alter cases. For that well-known reason the doctrine of the law of the case has to be confined to the application of a legal principle to the same, or substantially the same, state of facts. If the facts are substantially changed by an appropriate judicial procedure, as, for example, by a new trial, or, in the present instance, by the evidence adduced before me on the present motion, the doctrine of the law of the case is not to

> be enforced, (citations omitted); for, if it were enforced on such a substantially new pattern of facts, absurd results might often follow.

Id. at 99.

Because our Courts have explicitly rejected the view that the law of the case doctrine is separate from its kindred res judicata, they found persuasive authority and instruction in the decisions of the Courts of New Mexico. *Continental Turpentine*, 244 Miss. 465, 479, 142 So.2d 200, 207 (1962)(*citing Carroll v. Bunt*, 50 N.M. 127, 172 P.2d 116 (1946); *Reese v. State*, 745 P.2d 1153, 1154, 106 N.M. 505, 506 (1987) (*citing Doctrine of the Law of the Case,* 17 Miss.L.J. 170 (1945). The rule is distinct from res judicata insofar as its application would apply where res judicata could not. *Id.* In *Carroll v. Bunt,* the New Mexico court compared their body of jurisprudence against the Vermont approach to the doctrine, which held the doctrine as separate doctrine from res judicata:

> As applied in this jurisdiction there is littel [sic] or no distinction, except that the doctrine of 'law of the case' applies only to the one case (citation omitted), while res adjudicata forecloses parties or privies in one case by what has been done in another case. (citation omitted)

Carroll, 50 N.M. 127, 131, 172 P.2d 116, 118 (1946).

In *Farmers' State Bank of Texhoma, Okl. v. Clayton Nat. Bank*, 31 N.M. 344, 245 P. 543, 547 (1925), the New Mexico court applied the law of the case to a second dormant case commenced at about the same time, substantially the same case with the same subject-matter, parties, interests, legal proposition, and facts is

involved. Before considering applying the doctrine and correcting its error with regard to the "law of the case in both cases," the New Mexico court stated:

> [W]e find that while the vast majority of the cases in which the doctrine has been applied are second appeals in the same case, it has been applied by some courts in cases technically distinct from that in which the former ruling was pronounced. *Tally v. Ganahl*, 151 Cal. 418, 90 P. 1049 (1907); *Portland Trust Co. v. Coulter*, 23 Or. 131, 31 P. 280 (1892); *Hawley v. Smith*, 45 Ind. 183 (1873); *Wilkes v. Davies*, 8 Wash. 112, 35 P. 611 (1894).

Farmers' State, 31 N.M. 344, 344, 245 P. 543, 548.

In *Tally v. Ganahl*, 151 Cal. 418, 90 P. 1049 (1907), the Appellee argued that the doctrine of the law of the case does not apply where the action in which the ruling was made is subsequently dismissed without prejudice, and a new action begun upon the same cause. The California court held that the law of case would apply to the new action, citing *Portland Tr. Co. v. Coulter*, 23 Or. 131, 31 P. 280 (1892). In the words of the *Tally* court:

> The doctrine of the law of the case is this: That where, upon an appeal, the Supreme Court, in deciding the appeal, states in its opinion a principle or rule of law, necessary to the decision, that principle or rule becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal, and, as here assumed, in any subsequent suit for the same cause of action, and this, although in its subsequent consideration, this court may be clearly of the opinion that the former decision is erroneous in that particular.

151 Cal. 418, 420-421, 90 P. 1049, 1050; See 17 Miss. L. J. 170, 172 (discussion of *Tally v. Ganahl* and the erroneous rule exception).

Even where the appellant strongly contended that the previous decision of the appellate court was erroneous, numerous decisions refused to reconsider the previous ruling and instructed courts to apply the decision of the case, not just the ruling. *U. S. v. Denver & R. G. R. Co.*, 11 N.M. 145, 66 P. 550 (1901).

> "It is an established and almost universally recognized rule that every question which is actually and necessarily determined in a case by an appellate court is "the law of the case," and, right or wrong, is conclusively binding upon the parties and the courts until overruled by some higher court of appeal. (citations omitted) This rule applies not only to questions specifically decided, but also to those questions which are necessarily involved in reaching the decision specifically announced. (citation omitted) While, in our former decision, only one of these questions was specifically presented and decided, the other was necessarily involved in determining this one question.

Denver & R. G. R. Co., 11 N.M. 145, 66 P. 550, 551.

In explaining application of the rule of mandate to the doctrine, the New Mexico court later explained:

> If, as the appellee's counsel contend, the only thing the lower court looks to is the judgment and mandate of this court, it is useless for this court to write an opinion, and, in effect, the rule of the "law of the case" is destroyed, for no one will contend that the court will look to the judgment or mandate, such as was rendered and issued in this matter, for the law of the case, but necessarily must look to the opinion of the court.

First Nat. Bank of El Paso, Tex., v. Cavin, 28 N.M. 468, 214 P. 325 (1923)(citing *Gaines v. Rugg*, 148 U. S. 228, 241, 13 Sup. Ct. 611, 37 L. Ed. 432 (1893); *Wayne v. Kennicott*, 94 U. S. 498, 24 L. Ed. 260 (1876)).

III. DEFENDANTS ARE BOUND BY THE AFFIRMATIVE STATEMENTS AND HAVE WAIVED THEIR DEFENSES TO THE CONTRARY.

Defendants argue that only after *Jenkins v. Pensacola Health and Trust* was rendered did they have a statute of limitations defense, and because it was not available, the defense was not waived and they are not bound by their affirmative statements or the Court's findings to the contrary.

The *Jenkins* decision was rendered on April 27, 2006. In that decision, the Court noted a discrepancy in the holdings found in *Gentry v. Wallace*, 606 So.2d 1117 (Miss. 1992), and those found in *Thiroux v. Austin*, 749 So.2d 1040 (Miss. 1999). However, in comparing that language this Court noted that "[S]ince 1999, this Court has followed the precedent set by *Thiroux*, i.e., "a wrongful death action, since it is predicated on an underlying tort, is limited by the statute of limitations applicable to the tort resulting in the wrongful death." *Jenkins*, 933 So. 2d 923, 926 (Miss. 2006) (¶¶ 10-11). Assuming *arguendo,* and accepting Defendants' flawed rationale that *Jenkins* created rights it did not previously possess (an issue Plaintiffs do not accept), this Court stated in *Jenkins* that the wrongful death statute of limitations had been so interpreted at least since 1999. Thus, regardless of the interpretation of *Jenkins*, such a defense had always been available to Defendants, and their failure to raise the defense has resulted in waiver, and the application of the "law of the case."

In *Jenkins*, this Court was asked to consider whether the statute of limitations had expired as to a claim brought by the administratrix on behalf of all wrongful death beneficiaries of a deceased adult. The claim alleged that the decedent had suffered severe personal injuries which led to her death while confined to a nursing home. The Court defined the question as "whether the statute of limitations which has expired on a particular claim of tortuous conduct is preempted by the statute of limitations on bringing a wrongful death suit." *Jenkins*, 933 So. 2d 923, 924 (¶ 1) (Miss. 2006). The *Jenkins* Court proceeded to expound on that question and said: "Simply stated, the question presented is whether the statute of limitations for wrongful death lawsuits is subject to the statute of limitations for the underlying tort." Id. at 925 ¶ 6. In its findings, this Court held: "the statute of limitations on bringing a wrongful death claim is subject to, and limited by, the statute of limitations associated with the claims of specific wrongful acts which allegedly led to the wrongful death." Id. at 926 (¶ 12); *Lee v. Thompson*, 859 So.2d 981, 990(¶ 21) (Miss. 2003).

In *Nelson I*, Defendants **affirmatively** stated on the record at least **sixteen** (16)[2] times that the statute of limitations commenced to run on the date of the death of the infant child. Moreover, at least **four** of those statements were made post *Jenkins*, which was rendered on April 27, 2006. Defendants went so far as to cite a case in support of their statement as to when the statute of limitations

[2] Sixteen documented times.

commenced and expired. (R-356) Those admissions are set forth below in **bold** lettering, and are a part of the record before this Court.

(1) In a brief filed June 16, 2006, Defendant Doctors and Clinic stated : **"The dates for the beginning of the running of the applicable statute of limitations and of its expiration are undisputed, respectfully being July 14, 2001, the date of Bobby Nelson's death, and July 14, 2003, two years later."** (R.Ex.7,pp. 49-50 ,R. 294-295)

(2) Same brief, Defendants state: " **The underlying "non-procedural" fact that is most relevant to this appeal is the date on which Plaintiffs' decedent, Bobby Nelson, died: July 14, 2001. That date is undisputed as the date on which the statute of limitations began to run in this case alleging medical negligence against the physician defendants and their clinic, and the alleged wrongful death of Bobby Nelson. As a result, the statute of limitations expired 2 years after Bobby Nelson's death, on July 14, 2003.**" (R.Ex.8,p.51,R.296)

(3) Page 26, same brief, they state:"**Under any argument, if the statute of limitations did not expire on July 14, 2003 (2 years from the date of Bobby Nelson's death), then it surely expired 5 days following the expiration of the additional 90 days Plaintiffs were given to serve Defendants with process (in February, 2004, some 215 days after plaintiffs filed their Complaint).**" (R.Ex.9,p.52, R.297)

(4) Finally, on page 23 of brief filed on July 21, 2006, Defendant Hospital states: " **When the Nelsons filed their complaint on July 9, 2003, there were five days left in the two-year limitations period.**" (R.Ex.10,p.54, R.298-299)

Prior to *Jenkins*, Defendants made the following statements:

(5) The following statement was contained in a motion filed on February 26, 2004: "**Plaintiffs' claim in this matter accrued on July 14, 2001, the date on which Bobby Nelson died, allegedly as a result of the Defendants' negligence.**" (R.Ex.11,pp.55-56,R.300-301)

(6) In another motion, Defendants stated:"**As such, Plaintiffs knew or should have known of the existence of the cause of action which allegedly accrued at the time of Bobby Nelson's death, July 14, 2001, and they apparently (sic) Plaintiffs did, since they filed their Complaint on July 9, 2003.**" R.Ex.12,pp.57-58, R.302-303)

(7) Same document, Defendants said: **"With 5 days to go before the statute of limitations expired..."** (R.Ex.12, p.58, R.303)

(8) Again, in the same document, Defendants stated: "**The 5 days remaining in the 2 year statute of limitations began to run again ...**(The number "5" was calculated by using filing date of July 9, and expiration of statute of limitations on July 14, 2003). (R.Ex.12,p.58, R. 303)

(9) During oral arguments on motions before the lower court on May 24, 2004, defense counsel stated: "**On July 14 of 2001 a child, a young child, Bobby Nelson, died. I don't think there is any dispute as to when the statute of limitations began to run. That is the day of death. Were there any dispute and I don't think there is but I think the Supreme Court made it clear in the case of Wayne General Hospital versus Hayes 2003 West law 22-51-0483 that was decided on November 6th of last year. That in the case of a death that is when the statute begins to run. Everybody is on notice. That is not a latent injury and they talked about the death beginning the statute. So any way Your Honor I don't think that is an issue but that is when we contend the statute of limitations against any of these defendants have run. Well with a two year statute of limitations based upon Mississippi code 15-1-36 the statute of limitations expired on July 14, 2003."** (R.Ex.13,pp.59-60, R. 306)

(10) Same oral arguments, Defendants said:**"It had no effect on the running on the statute of limitations, and consequently the statute of limitations expired I believe it would be July 15 of 2003."** (R.Ex.13,p.61, R. 307)

(11) Another statement: **"We are dealing with a statute of limitations that expired on July 14th of 2003."** (R.Ex.13,p.62, R.308)

(12) Same oral arguments, Defendants stated: **"It (statute of limitations) expired on July 14, 2003."** (R.Ex.13,p.63, R.359)

(13) Another statement, Defendants stated: **"..after which the four or five days in the statute of limitations expired ...."** meaning that when Plaintiffs filed suit on July 9, 2003, at least four or five days remained on the statute of limitations which expired on July 14, 2003. (R.Ex.13,p.64, R. 372)

(14) In Brief filed before Supreme Court, Defendants Doctors and Clinic stated: **"The dates for the beginning fo the running of the applicable statute of limitations and of its expiration are undisputed, respectively being July 14,**

2001, the date of Bobby Nelson death, and July 14, 2003, two year later." (R.Ex.14,p.66, R.373-374)

(15) Same brief: **"The underlying "non-procedural" fact that is most relevant to this appeal is the date on which Plaintiffs' decedent, Bobby Nelson, died: July 14, 2001. That date is undisputed as the date which the statute of limitations began to run in this case alleging medical negligence against physician defendants their clinic, and the alleged wrongful death of Bobby Nelson."** (R.Ex.14,p.67, R.375)

(16) Same brief: **"Under any argument, if the statute of limitations did not expire on July 14, 2003 (two years from the date of Bobby Nelson's death) then it surely expired 5 days following...."** (R.Ex.14,p.68, R. 376)

Defendants are also bound by the judgment entered by the lower court. In its opinion rendered on June 21, 2004, the lower court made a finding as to when the statute of limitations commenced to run. That decision became final without appeal by Defendants and it became the **law of the case**. See, *Anderson v. R & D Foods, Inc.,* 913 So.2d 394 (Miss. Ct. App. 2005). Likewise, Defendants are bound by their abundant admissions in pleadings, statements, briefs and arguments on appeal before this Court, as set forth above. As this Court stated in *Grand Casino v. Shindler*, 772 So.2d 1036, 1039 (Miss. 2000), "As a general rule a party is estopped from taking a position which is inconsistent with the one previously assumed in the course of the same action or proceeding." (Citing *Mississippi State Highway Comm'n v. West*, 181 Miss. 206, 179 So. 279, 283 (1938)). *Also, see, Ms. Credit v. Horton*, 926 So.2d 167 (Miss. 2006), (finding waiver due to the delay in raising issues although they may have been pled). Additionally, in *Whitten v. Whitten*, 956 So. 2d 1093 (Miss. Ct. App. 2007), the Court of Appeals followed the

Supreme Court and held that even if a defense had been raised, if the party failed to timely pursue the defense, the defense was waived. Citing *East Mississippi State Hospital v. Adams*, 947 So.2d 887 (Miss. 2007) and *MS Credit Center, Inc., vs. Horton*, 926 So.2d 167 (Miss. 2006), the Court of Appeals held that although the affirmative defenses of insufficiency of process and insufficiency of service of process were made in the answer, those defenses were waived for failure to pursue them for two years.

Respectfully, Defendants have waived any defense of statute of limitations as it became the "law of the case" in *Nelson I*, and Defendants are so bound.

IV. PROPER APPLICATION OF *JENKINS V. PENSACOLA HEALTH TRUST* REQUIRES A FINDING THAT THE STATUTE OF LIMITATIONS HAD NOT EXPIRED AT THE TIME PLAINTIFFS FILED THEIR COMPLAINT.

Defendants' argued that the application of *Jenkins v. Pensacola Health Trust, Inc.*, 933 So. 2d 923 (Miss. 2006), required a finding that the statute of limitations for the wrongful death of the minor infant commenced to run on the date of the birth of the infant (April 25, 2001) rather than on the date of his death (July 14, 2001), and that the statute of limitations expired two years after the date of birth. (R.53-58,59-71,100-120) The trial court agreed with the Defendants and dismissed Plaintiffs' Complaint, again, **with** prejudice finding that it was time-barred. However, accepting Defendants rationale of *Jenkins*, the statute of limitations for the underlying tort at the time of the occurrence belonged to the

infant and was six years, plus an additional two. Therefore, if the statute of limitations commenced to run at the time of the infant's birth for the claim that he was entitled to bring, then it did not expire until April 25, 2009, long after Plaintiffs had re-instituted these proceedings now pending before this Court (the notice required by § 15-1-36 was provided to Defendants via letter dated January 24, 2008, and the Complaint was filed March 26, 2008, after waiting the requisite sixty (60) days). Respectfully, Plaintiffs are well within the statute of limitations.

Assuming that at the time of his birth, the cause of action arose as to the minor, then them applicable statute of limitations would have been eight (8) years: six years, plus the two years as provided by Sec. 15-1-36(3). And, as stated by the *Jenkins* Court, the "gravamen of the claim is the negligent act which led to the death." *Jenkins*, 933 So.2d. at 925 (¶ 8). Had the infant lived, he or someone on his behalf, could have brought this claim at any time before April 25, 2009. Therefore, at the time that the original Complaint was filed on July 9, 2003; at the time that the notices were provided to Defendants; at the time that the Amended Complaint was filed on January 9, 2004; at the time that the second notice was served on Defendants after remand from this Court; and at the time that the Complaint now before this Court was filed on March 26, 2008, the statute of limitations applicable to the cause of action had not expired. The cause of action would not have expired until April 25, 2009, plus an additional sixty (60) days as provided by the extension granted for the notice pursuant to § 15-1-36. Thus, the trial court erred in

granting Defendants' motions and these Plaintiffs should have been allowed to proceed, finally, as to the merits.

Section 15-1-36(3), Miss. Code Ann., read in conjunction with *Jenkins*, provides that the statute of limitations for the wrongful death of this infant commenced at the time of his death and expired on July 14, 2003. Section 3 of § 15-1-36, states as follows:

> Section 5-1-36(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)

Plaintiffs believe that this statute makes it clear that the proper statute of limitation applicable to the action for the wrongful death of the infant minor Bobby Nelson, who was less than three (3) months old at the time of his death, was two years from the date of his death, that date being July 14, 2001. Thus, Plaintiffs' claim was timely brought and this Court should reverse the trial court's dismissal with prejudice (for the second time), and order remand so that Plaintiffs' claims can finally be heard on the merits of the case.

V. SERVICE OF PROCESS ON DEFENDANT PHYSICIANS AND CLINIC WAS PROPER BOTH IN THE FIRST FILING AND THE SECOND FILING OF THE COMPLAINT.

The trial court in its opinion on return of this case made no ruling as to Defendant Doctors and Clinic's arguments regarding the service of process. However, since Defendants again raised the issue in the lower court, and in anticipation of Defendants arguing the issue, Plaintiffs will address same.

In *Nelson I*, the Court of Appeals made it clear that a dismissal for failure to serve process was a dismissal ***without*** prejudice. In its decision of *Nelson v. BMH-NM, et al*, 972 So.2d 667, 670 (Miss. App. Ct. 2007), the Court of Appeals 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) Although the service of process on Defendant Doctors and Clinic in the first case was proper and sufficient, certainly service was proper after this case was reversed and remanded and Plaintiffs commenced this action. And, Defendants have made no claim otherwise. Accordingly, service of process was accomplished.

Furthermore, the service of process served on Defendant Doctors and Clinic in the first case was proper by service on the office manager. 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. This issue was presented to the Mississippi Court of Appeals and

the Court declined to address it. Instead, the Court held that it was a moot issue since the case should have been dismissed **without** prejudice rather than with prejudice, which would negate that finding.

Further, if this Court considers this matter to be before it even though it was not addressed in the lower court's dismissal, Plaintiffs submit that the issue of apparent authority to accept service of process is not to be decided by the trial Court, but 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), the appellate 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 the lower Court in the first case, and which was presented to the lower court in this case, was 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."

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, according to the affidavit of the process server, she 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. The appellate 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. Moreover, an affidavit from the process server was presented to this Court by Plaintiffs in which the process server states, under oath, that the receptionist told him that she had authority to accept the process on behalf of the clinic and all doctors, and that she was familiar with the case.

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. This 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. Although it may not have been her custom and practice, 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.

In *Thornburg v. Magnolia Regional Health Center*, 741 So. 2d 220 (Miss. 1999), this Court found that service upon an "administrator" was sufficient as the "administrator' was a person employed in an executive capacity who could be reasonably expected to notify the entity. The process server in this case had a

reasonable expectation, based on the office manager telling him that she had authority to accept the documents and her familiarity with the case, to believe that she had authority to accept process. There is no question that she promptly provided the summons to the appropriate doctors. This Court should find that service on the Clinic and the individual doctors was proper in the initial suit and deny Defendants' motions on this issue.

In the initial case, Plaintiffs presented sufficient evidence to demonstrate that the office manager had the apparent authority to accept process on behalf of the doctors and the clinic. Thus, process was complete. See, *Cooley v. Brawner*, 881 So.2d 300 (Miss. App. Ct. 2004) (*cert. den.* Sept. 2, 2004), citing as authority 2A C.J.S. *Agency* § 20 (1972). Moreover, assuming, *arguendo*, Defendants are correct and service of process was not sufficient, dismissal **without** prejudice was proper pursuant to Rule 4(h), MRCP. See, *Nelson v. BMH-NM, et al*, and Plaintiffs have now corrected that problem, if any, pursuant to their re-filing and service of process.

CONCLUSION

The governing law in this matter is clear. This Court reversed the trial court's order of dismissal with prejudice and found that the Plaintiffs filed their Complaint prior to the expiration of the applicable statute of limitations and that it was not time barred, but should have been dismissed **without** prejudice. Plaintiffs' claims are not time barred and the trial court should once again be reversed and

directed to reinstate the present action and proceedings against the Defendants as named in the Plaintiffs' Complaint.

WHEREFORE, PREMISES CONSIDERED, the Plaintiffs Billy Nelson and Gaynelle Nelson request that this Court reverse the order of the trial court and allow their case to finally proceed as to the merits. Plaintiffs further request that this Court assess all costs against the Defendants and grant the Nelsons any further relief to which they may be entitled.

Respectfully submitted,

Margaret P. Ellis, MSB #[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 Record Excerpts to the following:

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
Greenwood. MS 38935-8230

Walter Alan Davis, Esq.
Dunbar Davis PLLC
324 Jackson Avenue East
Oxford, MS 38655-3808

THIS the 11th day of AUGUST 2009.

Margaret P. Ellis, MSB #[redacted]

Margaret P. Ellis, MSB#[redacted]
P. O. Drawer 1268
Pascagoula, MS 39568
Telephone: 601-946-7444 (Cell)
Facsimile: 228-762-5414

Roderick D. Ward, III, Esq.
Stevens & Ward
1855 Lakeland Drive, Suite P 121
Jackson, MS 39216
Telephone: 601-366-7777
Facsimile: 601-366-7781

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 Brief of Appellants-Plaintiffs to the following:

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
Greenwood. MS 38935-8230

Walter Alan Davis, Esq.
Dunbar Davis PLLC
324 Jackson Avenue East
Oxford, MS 38655-3808

THIS the 11th day of AUGUST 2009.

Margaret P. Ellis, MSB[redacted]

Margaret P. Ellis, MSB#[redacted]
P. O. Drawer 1268
Pascagoula, MS 39568
Telephone: 601-946-7444 (Cell)
Facsimile: 228-762-5414

Roderick D. Ward, III, Esq.
Stevens & Ward
1855 Lakeland Drive, Suite P 121
Jackson, MS 39216
Telephone: 601-366-7777
Facsimile: 601-366-7781