**IN THE SUPREME COURT OF MISSISSIPPI**

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| **SHELIA REGAN** | **APPELLANT** |
| **VS.** | **NO. 2009ca-00268** |
| **SOUTH CENTRAL REGIONAL MEDICAL CENTER** | **APPELLEE** |

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**APPELLEE'S RESPONSIVE BRIEF**

**TO THE CIRCUIT COURT FOR THE SECOND JUDICIAL DISTRICT OF JONES COUNTY, MISSISSIPPI**

**CIVIL ACTION NO. 2005-48-cv3**

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| **SHEILA REGAN** | **PLAINTIFF** |
| **VS.** | |
| **SOUTH CENTRAL REGIONAL MEDICAL CENTER** | **DEFENDANT** |

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**IN THE SUPREME COURT OF MISSISSIPPI**

**SHELIA REGAN** **APPELLANT**

**VS.** **NO. 2009ca-00268**

**SOUTH CENTRAL REGIONAL MEDICAL CENTER** **APPELLEE**

## CERTIFICATE OF INTERESTED PERSONS

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

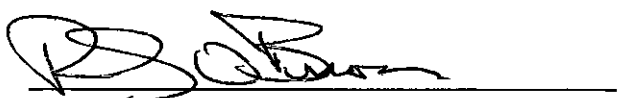
1) Plaintiff, Shelia Regan.

2) Attorney for Plaintiff, Honorable Norman W. Pauli, Jr., Attorney-at- Law, Hattiesburg, MS.

3) Defendant, South Central Regional Medical Center, Laurel, Jones County, Mississippi.

4) Attorneys for Petitioner/Defendant, Richard O. Burson and Grayson Lacey, Gholson Burson Entrekin & Orr, PA, 535 W. 5th Street, P.O. Box 1289, Laurel, MS 39441-1289.

5) Honorable Billy Joe Landrum, Circuit Court Judge, Jones County, Mississippi.



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## STATEMENT OF THE ISSUES

Appellee, South Central Regional Medical Center, restates Appellant's description of the issues raised in Appellant's brief as follows:

I. ***Whether Plaintiff can use a Rule 60(b)(6) Motion to Set Aside to revive a dismissed case several months after the appeal deadline expired with no appeal having been taken.***

II. ***Whether Plaintiff has demonstrated sufficient "extraordinary and compelling circumstances" to warrant setting aside the trial court's summary judgment, of which Plaintiff did not commence an appeal.***

III. ***Whether Plaintiff may argue for the first time on appeal that she is entitled to relief under Rule 60(b)(4) and (5) when she did not raise either provision at the trial court level.***

## STATEMENT OF THE CASE

This is a medical negligence action arising out of the care and treatment of Plaintiff, Sheila Regan, at South Central Regional Medical Center ("the Hospital") on or about December 5, 2003.[1] The Plaintiff filed her Complaint styled *Shelia Regan v. South Central Regional Medical Center*, Cause No. 2005-48-CV3 ("Regan I") on or about March 10, 2005, but failed to attach a certificate of expert consultation, as required under Miss. Code Ann. § 11-1-58. [R3;RE11].[2]

The Hospital timely filed its Answer on or about July 20, 2005. [R31]. The Hospital also filed a Motion to Dismiss on the same day, citing Plaintiff's non-compliance with Miss. Code Ann. § 11-1-58 by failing to attach a certificate of expert consultation with Plaintiff's Complaint. [R17;RE12]. Based on the binding authority from the Mississippi Supreme Court available to it at the time, the trial court denied the Hospital's Motion to Dismiss on November 7, 2005. [R40;RE14]. Following the Supreme Court's decision in *Walker v. Whitfield Nursing Center, Inc.*, 931 So.2d 583 (Miss. 2006), the Hospital filed its Motion for Summary Judgment on September 21, 2006, arguing that according to the Supreme Court's holding in *Walker*, Plaintiff failed to comply with Miss. Code Ann. § 11-1-58, and therefore, her Complaint failed to state a claim upon which relief could be granted. [R41]. On November 27, 2007 the trial court entered its Order Granting Summary Judgment and Judgment of Dismissal in Regan I due to Plaintiff's failure to strictly comply with Miss. Code Ann. § 11-1-58.

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[1] It should be noted that the Hospital vehemently denies Plaintiff's claim that her "colon was punctured by a nurse in the Emergency Department." (See Br. of Appellant at page 1).

[2] In order to avoid bombarding the Court with voluminous, duplicative record excerpts, the Hospital has elected not to file a separate set of record excerpts. The Hospital will simply refer to Plaintiff's Record Excerpts where applicable.

The very next day, November 28, 2007, Plaintiff filed a second complaint styled *Shelia Regan v. South Central Regional Medical Center*, Cause No. 2007-248-CV11 ("Regan II"). Plaintiff's Complaint in Regan II was substantially identical to the one filed in Regan I. On December 6, 2007 Plaintiff filed a Rule 59(e) Motion for Reconsideration regarding the summary judgment entered in Regan I. [R145;RE18].

After having been served with the Summons and Complaint in Regan II, the Hospital timely filed its Answer and its Rule 12(b)(6) Motion to Dismiss Regan II on the grounds that the statute of limitations had expired on Plaintiff's claims and that the principles of priority jurisdiction prohibited Plaintiff from simultaneously pursuing two identical causes of action against the Hospital – Regan I and Regan II.

The trial court entered an Order Denying Plaintiff's Rule 59(e) motion in Regan I on April 2, 2008, effectively commencing Plaintiff's thirty (30) day period to appeal the Court's dismissal of Regan I. [R2-A]. The next day, April 3, 2008, Plaintiff voluntarily dismissed her Complaint in Regan II and immediately filed a third complaint against the Hospital styled *Shelia Regan v. South Central Regional Medical Center*, Cause No. 2008-873-cv4 ("Regan III"). Approximately three weeks later on April 22, 2008, Plaintiff filed a Rule 60 Motion to Clarify Judgment in Regan I. [R204;RE21]. The trial court entered its Order Clarifying Judgment in Regan I on May 1, 2008. [R211;RE22]. Plaintiff never appealed the trial court's dismissal of Regan I.

On May 22, 2008, the Hospital filed its Rule 12(b)(6) Motion to Dismiss in Regan III on the grounds that Plaintiff's claims were barred by the expiration of the statute of limitations. After reviewing the parties' briefs and hearing the parties' arguments, the trial court entered an Order Granting the Hospital's Motion to Dismiss in Regan III on

September 10, 2008. Nine (9) days later, Plaintiff filed a Rule 59(e) Motion to Amend in Regan III, which the trial court subsequently denied.

Despite having chosen not to pursue a timely appeal of the trial court's dismissal of Regan I, Plaintiff filed a Rule 60 Motion to Set Aside in Regan I on October 1, 2008. [R214;RE3] The trial court denied Plaintiff's Motion to Set Aside in Regan I on December 15, 2008. [R248;RE6]. The trial court also denied Plaintiff's subsequent Motion for Reconsideration regarding the trial court's Order Denying Plaintiff's Motion to Set Aside in Regan I. [R289;RE8] The instant appeal of the trial court's post-judgment rulings in Regan I followed.

## SUMMARY OF THE ARGUMENT

Rule 60(b) motions to set aside judgments are not to be used as substitutes for appeal. *Briney v. USF&G Co.*, 714 So.2d 962, 968 (Miss. 1998). Accordingly, since Plaintiff elected not to pursue an appeal of the trial court's dismissal in Regan I, this Court should affirm the trial court's refusal to grant Plaintiff's belated Rule 60(b) Motion to Set Aside its dismissal of Regan I.

Having filed a trilogy of medical negligence lawsuits styled *Sheila Regan vs. South Central Regional Medical Center*, all three of which have been dismissed, Plaintiff finds herself in nothing short of a procedural quagmire which could have easily been avoided had Plaintiff timely appealed the summary judgment entered in the instant action, Regan I. Yet, she did not, and she must be bound by the consequences of such a decision, as Rule 4(a) of the Mississippi Rules of Appellate Procedure, which sets forth the thirty (30) day window for commencing an appeal, "is a hard-edged, mandatory rule which this Court strictly enforces." *Pruett v. Malone*, 767 So.2d 983, 985 (Miss. 2000)(internal quotations and citations omitted).

Aside from the fact that Plaintiff failed to timely pursue an appeal from the trial court's summary judgment, Plaintiff did not sufficiently demonstrate to the trial court that the summary judgment should be set aside pursuant to Rule 60(b)(6) of the Mississippi Rules of Civil Procedure. In order to succeed on a Rule 60(b)(6) motion to set aside, the moving party must make an adequate showing of "extraordinary and compelling circumstances." *Briney v. U.S. Fidelity & Guar. Co.*, 714 So.2d 962 , 966 (Miss. 1998)(citations omitted). Therefore, the only issues that were before the trial court in

Plaintiff's Motion to Set Aside and the only ones that were relevant to Plaintiff's Motion to Reconsider and, in turn, the instant appeal, is whether Plaintiff may utilize a Rule 60(b)(6) Motion to Set Aside to substitute for an out-of-time appeal, and if so, whether Plaintiff has demonstrated sufficient "extraordinary and compelling circumstances" to warrant setting aside the Court's dismissal of Regan I.

Although Plaintiff argues that the unconstitutionality of the statute which formed the basis for the trial court's summary judgment is sufficient "extraordinary and compelling circumstances," Plaintiff's argument in this regard is nothing more than a creative attempt to belatedly appeal the trial court's dismissal of Regan I. It is undisputed that Plaintiff's arguments regarding the constitutionality of Mississippi Code Annotated Section 11-1-58 were available to Plaintiff prior to the trial court's entry of summary judgment nearly a year prior to the filing of her Motion to Set Aside. In fact, Plaintiff raised the constitutionality of the statute at that time, yet Plaintiff chose not to pursue an appeal from the trial court's order granting summary judgment or the trial court's order denying Plaintiff's Motion for Reconsideration of the same. Plaintiff cannot now remedy her ill-advised decision to forego a timely appeal from the trial court's dismissal by pursuing a Motion to Set Aside in Regan I, which essentially amounts to a belated attempt to circumvent the appeals process all together. It is well-settled law that an intervening change in the law upon which a trial court based its dismissal originally is not sufficient to justify relief under Miss. R. Civ. P. 60(b)(6). Thus, the trial court properly denied Plaintiff's Rule 60(b) Motion to Set Aside.

While Plaintiff continues to argue the constitutionality of Mississippi Code Annotated Section 11-1-58, the status of the Supreme Court decisions interpreting the

same, and whether she complied with the statute when she filed her original Complaint in Regan I, the simple fact of the matter is that none of these issues remain, and are most certainly not properly before the Court in the instant appeal. Plaintiff's constitutional arguments should have been pursued through a timely appeal from the dismissal of Regan I. They were not, as Plaintiff failed to timely commence an appeal from the trial court's dismissal of Regan I. In denying Plaintiff's Motion to Set Aside and Motion for Reconsideration, the trial court correctly refused to allow Plaintiff to revisit the dismissal of Regan I, long after her appeal period expired.

Therefore, this Court must affirm the trial court's decision in this regard, because a reversal under the circumstances will establish a dangerous precedent that will encourage countless dismissed parties to ignore the time limitations of Rule 4 of the Mississippi Rules of Appellate Procedure, thereby ensuring that no judgment would ever be final.

## ARGUMENT

I. *Whether Plaintiff can use a Rule 60(b)(6) Motion to Set Aside to revive a dismissed case several months after the appeal deadline expired with no appeal having been taken.*

As the old saying goes: "if it looks like a duck, swims like a duck and quacks like a duck, then it probably is a duck." The Hospital submits that Plaintiff's *Rule 60 Motion to Set Aside Order Granting Summary Judgment and Judgment of Dismissal* ("Rule 60(b) Motion to Set Aside") [R214;RE3], which was filed with the trial court on or about September 29, 2008, is nothing more than a thinly-veiled attempt to circumvent the permanent consequences of her fateful decision not to pursue an appeal from the trial court's April 2, 2008 *Order Denying Plaintiff's Motion for Reconsideration or to Amend Order Under Rule 59(e) and Motion for Reconsideration Under Rule 59(e) or to Amend Order Granting Summary Judgment and Dismissing Case* ("the Appealable Order") [R2A]. Aggrieved from the Appealable Order, and having allowed her thirty (30) day appeal period to expire without commencing an appeal, Plaintiff sought judicial review of the same via her Motion to Set Aside. *If it looks like a duck...* Plaintiff used her Motion to Set Aside as a procedural vehicle in her efforts to reverse the trial court's entry of the Appealable Order and to revive her dismissed claims in Regan I. *Swims like a duck...* In her Motion to Set Aside, Plaintiff relied exclusively on the argument that the trial court's dismissal of Regan I was improper, because Miss. Code Ann. § 11-1-58 is unconstitutional. Notably, Plaintiff freely admits in her Brief that she raised this very argument in opposition to the Hospital's Motion for Summary Judgment prior to the entry of the Appealable Order. *Quacks like a duck...* Based on a review of the record, as

well as the arguments presented in support of the Motion to Set Aside, there is little doubt that Plaintiff filed her Motion to Set Aside as a substitute for an otherwise out-of-time appeal. *It probably is a duck.*

Unfortunately for Plaintiff, it has long been the law in Mississippi that a "Rule 60(b) motion is not to be used as a substitute for appeal," especially where, as here, the movant fails to commence a timely appeal.[3] After all, the thirty (30) day period to commence an appeal under Rule 4(a) of the Mississippi Rules of Appellate Procedure "is a 'hard-edged, mandatory' rule which this Court 'strictly enforces.'"[4]

It is undisputed that Plaintiff never commenced an appeal from the dismissal of Regan I until now.[5] After she raised and argued the constitutionality of Miss. Code Ann. § 11-1-58 in opposition to the Hospital's Motion for Summary Judgment in Regan I, "Plaintiff decided it was not necessary to file an appeal." (*See* Br. of Appellant at p. 7). Instead, despite having been put on notice via the Hospital's previously filed Rule 12(b)(6) Motion to Dismiss in Regan II that the Hospital is of the position that any subsequently filed actions are time-barred, she elected to re-file her complaint, thereby commencing Regan III.[6] Only after Regan III had been dismissed by the trial court as

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[3] *Briney v. United States Fid. & Guar. Co.*, 714 So. 2d 962, 968 (Miss. 1998)(citations and quotations omitted).

[4] *Pruett v. Malone*, 767 So. 2d 983, 985 (Miss. 2000))(quoting *Ivy v. General Motors Acceptance Corp.*, 612 So. 2d 1108, 1116 (Miss. 1992)).

[5] Since Plaintiff did not timely file a notice of appeal from the dismissal of Regan I, this Court is precluded from reviewing the correctness of the trial court's original dismissal of Regan I in the instant appeal. This Court is without jurisdiction to review such issues and Plaintiff's appeal should be dismissed to the extent that Plaintiff attempts to seek appellate review of such issues. See, Miss. R. App. P. 2 and 4.

[6] The Hospital respectfully reminds the Court that the instant appeal is from the trial court's December 15, 2008 denial of Plaintiff's belated Rule 60 Motion to Set Aside the summary judgment that was entered in Regan I over a year earlier on November 27, 2007. Any issues

time-barred and only after the Supreme Court held in *Wimley v. Reid*, 991 So.2d 135 (Miss. 2008), that the procedural requirement of Miss. Code Ann. § 11-1-58 is unconstitutional, effectively overruling *Walker v. Whitfield Nursing Center*, 931 So.2d 583 (Miss. 2006) and its progeny, did Plaintiff decide to seek judicial review of the basis for the trial court's dismissal of Regan I.

To that end, Plaintiff served her Rule 60(b) Motion to Set Aside in Regan I on September 29, 2008, some five months after her thirty (30) day appeal period had expired. [R214;RE3] Not surprisingly, the sole issue raised in her Motion to Set Aside – whether Plaintiff's complaint which was filed without a certificate of expert consultation should have been dismissed pursuant to Miss. Code Ann. § 11-1-58 – is the same issue that was before the trial court when it originally granted the Hospital's Motion for Summary Judgment and dismissed Regan I. [R26;RE19] Presumably, it is also the same dispositive issue that would have been raised by Plaintiff had she commenced a timely appeal of the trial court's dismissal of Regan I. Therefore, regardless of its title or the court in which it was filed, Plaintiff's Motion to Set Aside is clearly an untimely attempt to appeal the trial court's dismissal of Regan I.

As stated above, however, Plaintiff's "proper avenue for relief from the [dismissal of Regan I] was by way of appeal, not a Rule 60 motion."[7] Since Plaintiff did not appeal the dismissal of Regan I, the dismissal became final and unappealable thirty-one days

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raised by the parties or considered by the trial court in Regan III, including statute of limitations and/or tolling, are not presently before the Court on appeal. Plaintiff's threat of an appeal arising out of Regan III should be ignored as the outcome of Regan III is irrelevant to the issues presently before the Court on appeal in Regan I.

[7] *Pruett*, 767 So. 2d at 986.

after the Appealable Order, or on May 3, 2009.[8][R2-A] Plaintiff's "failure to timely appeal the order bars any further reconsideration of the case."[9] Thus, Plaintiff was properly denied the opportunity to relitigate via her Rule 60(b) Motion to Set Aside the same issues that were previously argued prior to the dismissal of Regan I, as such issues had been rendered final and unappealable by Plaintiff's failure to commence a timely appeal following the dismissal of Regan I.[10]

In addition, since Regan I has reached a final disposition, the doctrine of collateral estoppel (also commonly known as "issue preclusion"), as well as the public policy interest in affording a conclusive effect to a final disposition, preclude Plaintiff from later revisiting the issues ruled upon therein. The doctrine of collateral estoppel promotes the public's interest in "judicial economy by limiting cases or issues from being re-litigated."[11] Collateral estoppel "preclude[s] relitigation of a specific issue actually litigated, determined by, and essential to the judgment in the former action, even if the two suits involve a different cause of action."[12] Four requirements must exist in order for collateral estoppel to apply in Mississippi civil actions: "(1) identity of the subject matter of the action, (2) identity of the cause of action, (3) identity of the parties to the cause of action, and (4) identity of the quality or character of the person against whom the claim is

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8 *Id.* at 985; *See also*, Miss. R. App. P. 4.

9 *Pruett*, 767 So. 2d at 985;

10 In its *Order Denying Plaintiff's Motion to Set Aside Order Granting Summary Judgment and Judgment of Dismissal*, the trial court held that "in the interest of preserving the finality of this Court's previous order, from which no appeal was ever taken, this Court finds that Plaintiff's Motion to Set Aside is not well-taken and should be denied."

11 *Glover v. Jackson State Univ.*, 755 So.2d 395, 398 (Miss. 2000).

12 *Id.* at 399 (citing *Dunaway v. W.H. Hopper & Assocs., Inc.*, 422 So.2d 749, 751 (Miss.1982).

made."[13] Furthermore, a final decision of an issue on its merits is a necessary prerequisite to the application of the doctrine of collateral estoppel in a subsequent action.[14]

Collateral estoppel applies equally to issues of fact as well as issues of law.[15] Indeed, collateral estoppel has been applied it to preclude the "relitigation of issues of constitutional law."[16] In *State ex rel. Moore v. Molpus* the Supreme Court of Mississippi explained that collateral estoppel protects the strong public policy interest in the finality of judgments, even if the initial judgment was erroneously decided:

> The public interest in stability and repose is so paramount that collateral estoppel protects competent judgments which are subsequently thought to be erroneous. Where the elements of estoppel have been satisfied, the court's inquiry is not whether the court's order was erroneous, but only that it was the final judgment of the case. Our law rebuffs subsequent attempts to impeach or attack the initial judgment even where, for example, (a) additional evidence has been discovered; (b) the substantive law was incorrectly decided and applied; or, as noted above, (c) where constitutional questions have been erroneously decided.

*Id.* at 642 (emphasis added)(citations and quotations omitted).[17]

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13 *Id.* at 398-99 (citing *Dunaway,* 422 So.2d at 751).

14 *State ex rel. Moore v. Molpus*, 578 So.2d 624, 640 (Miss. 1991).

15 *Id.* (citing *Montana v. United States*, 440 U.S. 147, 162-63 (1979)).

16 *Id.* (citing *Love v. Mayor & Board of Alderman of Yazoo City*, 138 So. 600, 603 (Miss. 1932)).

17 Mississippi is not alone in this regard as several other jurisdictions apply the doctrine of collateral estoppel despite the fact that a prior judgment was based on an erroneous interpretation of the law or a subsequently overruled legal principle. See, e.g., *Gowan v. Tully*, 379 N.E.2d 177, 179-80 (N.Y. 1978)("It is settled law, however that the conclusive effect of a final disposition is not to be disturbed by a subsequent change in decisional law...That the change in legal doctrine is constitutional in nature does not, automatically, dictate a different result.")(citations and quotations omitted); *Precision Air Parts, Inc., v. Avco Corp.*, 736 F.2d 1499, 1503 (11th Cir. 1984)("The general rule in this circuit, and throughout the nation, is that changes in the law after a final judgment do not prevent the application of res judicata and collateral estoppel, even though the grounds on which the decision was based are subsequently overruled"); *U.S. ex rel. Garibaldi v. Orleans Parish School Bd.*, 397 F.3d 334, 340 (5th Cir. 2005)("We conclude that the great desirability of preserving the principle of finality of judgments preponderates heavily over any claim of injustice in this case. Disturbing the sanctity of the final judgment in this case would implicate the doctrine of res judicata in many other cases in which litigants may seek to reap the benefit of a change in decisional law after the judgments against them have become final"); see also, *Blue Diamond Coal Co. v. Trustees of UMWA Combined Ben. Fund*, 249 F.3d 519, 524-25

All of the elements of collateral estoppel are present in the instant action with respect to the issue of whether the dismissal of a complaint for failure to comply with Miss. Code Ann. § 11-1-58 is constitutional. Of significant importance is the fact that this Court has already rendered a final judgment on the merits of the issue of whether the dismissal of a complaint for failure to comply with Miss. Code Ann. § 11-1-58 is constitutional. Despite having raised the constitutionality of Miss. Code Ann. § 11-1-58 and its procedural consequences, Plaintiff made the conscious decision not to appeal the trial court's dismissal of Regan I. Thus, Regan I became a final unappealed judgment, by which, the parties and this Court are now bound pursuant to the doctrine of collateral estoppel. Allowing Plaintiff to now revive Regan I in order to relitigate these issues simply because of an intervening change in decisional law would fly in the face of the public policy interests of finality of judgments on the merits, the long-standing doctrine of collateral estoppel, and the rules limiting a litigant's opportunity to continue to pursue certain issues through the proper appellate channels following an adverse decision on the merits.

Furthermore, it can also be said that when Plaintiff chose not to appeal the trial court's dismissal of Regan I and allowed her appeal period to expire, she effectively abandoned and/or waived the right to reassert the arguments that were addressed by the trial court in its dismissal of Regan I (i.e. the constitutionality of Miss. Code Ann. § 11-1-58 and whether it could be applied to dismiss Plaintiff's Complaint in Regan I). The Supreme Court recently addressed a similar issue regarding waiver resulting from the

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(6th Cir. 2001)(Sixth Circuit Court of Appeals reversed trial court's granting of motion for relief from judgment, holding instead that a change in decisional law is usually not, by itself, an extraordinary circumstance meriting relief from judgment, regardless of the fact that the law was invalidated on state or federal constitutional grounds).

delay in the pursuit of a particular right in *Stuart v. Univ. of Miss. Med. Ctr.*, 2009 Miss. LEXIS 396 (Miss. Aug. 20, 2009), in which the Court held that the defendant hospital had waived its right to an affirmative defense due to its failure to pursue the same for two and a half years after initially asserting the defense. The Supreme Court reasoned that "waiting for that length of time and doing nothing to prevent the case from proceeding is unreasonable and inexcusable." As will be discussed in greater detail in the next section, the doctrine of collateral estoppel (also commonly known as "issue preclusion") should operate to prevent Plaintiff from reasserting the same arguments several months after her appeal period had expired, regardless of any change in state decisional law.

Although Plaintiff's original argument raised prior to the dismissal of Regan I – that § 11-1-58 was unconstitutional and her non-compliance with the same does not require dismissal – is not a "defense" in the same sense as the hospital's defense in *Stuart*, the same reasoning supporting a finding of waiver should apply. After all, Plaintiff's arguments in this regard were certainly "defenses" to the Hospital's dispositive Motion for Summary Judgment in Regan I. Even though Plaintiff pursued them initially, she later abandoned them in favor of filing Regan III.[18] Consequently, Plaintiff should be precluded from reasserting such arguments several months after having abandoned the same regardless of whether case law that is potentially favorable to Plaintiff's original arguments has been handed down by the Supreme Court in the interim.

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[18] It is anticipated that Plaintiff will argue in reply that she continued to pursue her arguments regarding the constitutionality of Miss. Code Ann. § 11-1-58 in Regan III. However, she did so only in response to the Hospital's Rule 12(b)(6) Motion to Dismiss in Regan III which was filed on statute of limitations grounds. Moreover, her arguments in this regard were improperly raised as her appeal period in Regan I had expired well before she re-asserted them in Regan III. Again, however, the Court need not consider such issues as they are not properly before the Court at present.

Such a ruling is not only consistent with the well-settled law regarding the timeliness of appeal under Rule 4(a) of the Mississippi Rules of Appellate Procedure, but it is also grounded in the sound public policy interest of finality, as well. The Supreme Court of Mississippi has succinctly described the underlying importance of finality in litigation:

> The time limit for perfecting an appeal should not be set or enforced so as to discourage or encourage appeals. The decision whether to appeal is one to be made by the unsuccessful litigant below and her lawyer, and the rule should allow time for them to consider their alternatives. On the other hand, we want appeals filed within a reasonable time. The successful litigant below is entitled to know with reasonable promptness whether he or she will be subject to further litigation and not to be left hanging for an inordinate period of time.

*Tandy Electronics, Inc. v. Fletcher*, 554 So. 2d 308, 309-10 (Miss. 1989)(emphasis added).[19]

The Court must affirm the trial court's denial of Plaintiff's Rule 60(b) Motion to Set Aside, if for no other reason, to preserve the finality of the trial court's previous dismissal of Regan I, which Plaintiff elected not to appeal. For instance, if the Court allows Plaintiff to revisit the dismissal of Regan I several months after the expiration of her appeal period in order to reargue issues previously addressed but unappealed, such a decision would have a judicially taxing ripple effect in courts across the state. It would set precedent allowing all cases previously impacted by case law or statutes that were later reversed or held to be unconstitutional to be reopened. Timely appeals would be virtually a thing of the past as aggrieved litigants would base the timing of their appeals not on the Mississippi Rules of Appellate Procedure, but instead on the status of the case

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[19] See also, *Pruett*, 767 So.2d at 985 ("The rules of this Court are designed to give finality to a judgment at a point which it has defined as 30 days after a final, appealable order or judgment").

law in existence at the time.[20] Such a result would have a chilling effect on finality and the duty of an unsuccessful litigant to pursue an adverse decision in a timely fashion on appeal.[21] In short, notwithstanding otherwise appropriate post-judgment motions filed pursuant to the Mississippi Rules of Civil Procedure, finality of unappealed judicial decisions is an essential component for maintaining judicial efficiency.

Again, notwithstanding otherwise appropriate post-judgment motions, by ensuring that unappealed judgments are rendered and remain final after the thirty (30) day appeal period expires with no appeal having been taken, the Court encourages the timely presentation of legal arguments and promotes judicial accuracy. This point can be illustrated by an example from page ten (10) of Plaintiff's Brief. In Paragraph 14, Plaintiff lists five (5) decisions rendered by the Supreme Court and Court of Appeals in 2008 that essentially hold that an otherwise properly filed complaint may not be dismissed due to the failure to attach a certificate of expert consultation pursuant to Miss. Code Ann. § 11-1-58. Obviously, Plaintiff has cited these cases to persuade the Court that Regan I was improperly dismissed.[22] In addition to the fact that each of these cases were decided well after Plaintiff's appeal period in Regan I expired, the instant action is fundamentally distinguishable from those cases, because unlike the aggrieved plaintiffs in

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[20] See, *Tandy Electronics, Inc*, 554 So. 2d at 309 ("The time limit for perfecting an appeal should not be set or enforced so as to discourage or encourage appeals").

[21] According to Plaintiff's reasoning, an aggrieved litigant need only refile her dismissed action with the trial court in order to extend her thirty (30) day appeal period indefinitely. Contrary to Plaintiff's argument, however, the thirty (30) day period to commence an appeal under Rule 4(a) of the Mississippi Rules of Appellate Procedure "is a 'hard-edged, mandatory' rule which this Court 'strictly enforces.'" *Pruett*, 767 So. 2d at 985 (quoting *Ivy.*, 612 So. 2d at 1116).

[22] This is yet another example of how Plaintiff improperly attempts to use Rule 60(b)(6) motion to substitute for an otherwise out-of-time appeal in order to rectify her ill-advised decision to forego a timely appeal of the trial court's dismissal of Regan I.

*Ellis*, *Thomas*, *McClain*, and *Wimley*, Plaintiff elected NOT to pursue her arguments through a timely appeal of the dismissal of her claims. What if other aggrieved litigants followed Plaintiffs' lead in this regard? While it would certainly lighten the overloaded appellate dockets, would justice truly be served as potentially meritorious or other innovative legal arguments are left unspoken?

Going a step further, Plaintiff is quick to criticize the Supreme Court on page nineteen of her Brief for its previous decisions regarding Miss. Code Ann. § 11-1-58. "In all do respect, the Supreme Court must also shoulder some responsibility in not sooner striking down, as unconstitutional, the procedural portion of MCA §11-1-58." (See Br. of Appellant at page 19, fn 4). However, what if the aggrieved plaintiff in *Wimley v. Reid* had taken Plaintiff's approach and decided to delay the filing of her appeal until the law changed, not knowing at the time that she would be the one to change it? Plaintiff cannot genuinely argue on one hand that the failure to timely pursue an appeal may be rectified by a subsequent change in this state's binding caselaw, and then on the other hand, admonish this state's highest judicial authority for not taking action sooner. The simple fact of the matter is that Plaintiff – not Hospital, not the trial court and certainly not the Supreme Court – is the sole architect of the procedural quagmire in which she finds herself today.

Therefore, in light of the fact that Plaintiff failed to commence a timely appeal from the dismissal of Regan I, the trial court correctly denied Plaintiff's belated Rule 60(b) Motion to Set Aside to the extent that Plaintiff attempts to relitigate the dispositive issue that was originally before the trial court at the time of dismissal – whether Plaintiff's complaint which was filed without a certificate of expert consultation should

be dismissed pursuant to Miss. Code Ann. § 11-1-58.[23] This Court should again find that Rule 60(b) motions are not to be used as substitutes for appeal, and in doing so, affirm the trial court's dismissal.

## II. *Whether Plaintiff has demonstrated sufficient "extraordinary and compelling circumstances" to warrant setting aside the trial court's summary judgment, of which Plaintiff did not commence an appeal*

In denying Plaintiff's Rule 60(b) Motion to Set Aside, the trial court correctly found that Plaintiff had failed to demonstrate that the Supreme Court's decision in *Wimley*, holding the procedural portion of Miss. Code Ann. § 11-1-58 unconstitutional and overruling *Walker* and its progeny, constituted sufficient "extraordinary and compelling circumstances" entitling Plaintiff to relief under Rule 60(b)(6) of the Mississippi Rules of Civil Procedure. As discussed at great length in the preceding section, Plaintiff has missed any opportunity to challenge this Court's final judgment of dismissal in Regan I, and she cannot avoid the consequences of that decision by now pursuing a Rule 60(b) motion to set aside, regardless of any changes in decisional law, constitutional or otherwise.[24]

In order to succeed on a Rule 60(b)(6) motion to set aside, the moving party must make an adequate showing of "extraordinary and compelling circumstances."[25] Since Miss. R. Civ. P. 60(b) is almost identical to its federal counterpart, the Court may

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[23] See, *Pruett*, 767 So. 2d at 985; *See also* , *City of Jackson v. Jackson Oaks Ltd. Partnership*, 860 So.2d 309, 313 (Miss. 2003)(Rule 60(b) motions should be denied when they are merely an attempt to relitigate a case).

[24] See, *State ex rel. Miss. Bureau of Narcotics v. One (1) Chevrolet Nova Auto.*, 573 So.2d 787, 790 (Miss.1990)("Rule 60(b) is not an escape hatch for litigants who had procedural opportunities afforded under other rules and who without cause failed to pursue those procedural remedies")(citing *King v. King*, 556 So.2d 716 (Miss.1990)).

[25] *Briney v. U.S. Fidelity & Guar. Co.*, 714 So.2d 962 , 966 (Miss. 1998)(citations omitted).

consider federal constructions when analyzing Miss. R. Civ. P. 60(b) issues.[26] For example, in *Batts v. Tow-Motor Forklift Co.,* 66 F.3d 743 (5th Cir. 1995)the Fifth Circuit Court of Appeals held that an intervening change in state law following an *Erie* prediction is an insufficient basis to warrant relief under Rule 60(b), and a decision to the contrary would constitute an abuse of discretion.[27] Similarly, and directly on point is the Fifth Circuit's position that "changes in decisional law based on constitutional principles are not of themselves extraordinary circumstances sufficient to justify Rule 60(b)(6) relief."[28] Again, it can certainly be said that Plaintiff relies exclusively on "changes in decisional law based on constitutional principles" in her Rule 60(b) Motion to Set Aside, and that alone is insufficient to make a showing of "extraordinary circumstances."[29]

Still Plaintiff cannot avoid the fact that she had the opportunity, indeed the right, to pursue her constitutional arguments through a timely appeal from the trial court's dismissal of Regan I, and she chose not to do so. Now that the case law has changed and become more favorable to her position, Plaintiff is obviously using her Rule 60(b) Motion to Set Aside to pursue arguments that should have been pursued through a timely appeal. True enough, as the Supreme Court pointed out in *Briney v. United States Fid. & Guar. Co.*, 714 So. 2d 962, 966 (Miss. 1998), "Rule 60 recognizes that relief may be sought after the time for appeal has expired given the right circumstances." (emphasis added). Voluntarily electing to forego a timely appeal and abandoning specific

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26 *Id.*

27 *Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743, 750-51 (5th Cir. 1995).

28 *Id.* at 749 (citing *Collins v. City of Wichita,* 254 F.2d 837 (10th Cir.1958)).

29 *Id.*

constitutional arguments available and raised prior to the dismissal of an action, only to reassert the same once more favorable caselaw had been handed down, hardly seems to be "the right circumstances."

Nevertheless, assuming *arguendo* that Plaintiff's Rule 60(b) Motion to Set Aside timely sought the relief that it requested and is not barred by Plaintiff's ill-advised decision to forego an appeal, the relevant *Briney* factors weigh in favor of the trial court's denial of Plaintiff's Rule 60(b) Motion to Set Aside.

Factor (1) that "final judgments should not be lightly disturbed" weighs in favor of denial of Plaintiff's Rule 60(b) Motion to Set Aside as the dismissal of Regan I was rendered final and unappealable once Plaintiff's thirty (30) day appeal period expired. From that point forward, all issues addressed to the trial court regarding its dismissal of Regan I were conclusively established and no longer subject to judicial review on appeal.

Factor (2) that "the Rule 60(b) motion is not to be used as a substitute for appeal" weighs heavily in the Hospital's favor as does Factor (4) "whether the motion was made within a reasonable time." Again, Plaintiff did not timely pursue an appeal of the issues that she ultimately relies on in her Rule 60(b) Motion to Set Aside. Instead, she waited several months after her appeal period expired until more favorable caselaw had been handed down to continue to pursue her constitutional arguments via her Rule 60(b) Motion to Set Aside.

"Substantial justice" would not be the result of a liberal application of Rule 60(b)(6) under the circumstances either. For the reasons previously discussed, such an application would reward Plaintiff's ill-advised decision to forego an appeal and not timely pursue her arguments through the appropriate appellate channels and encourage

countless other aggrieved litigants to follow suit. Thus, contrary to Plaintiff's argument, Factor (3) also weighs in the Hospital's favor. For similar reasons, Factor (7) "whether there are any intervening equities that would make it inequitable to grant relief;" and Factor (8) "any other factors relevant to the justice of the judgment under attack" weigh heavily in favor of the Hospital, as well.

Finally, Factor (6) inquires as to "whether if the judgment was rendered after a trial on the merits the movant had a fair opportunity to present his claim or defense." Although it is true that there has been no trial on the merits of Plaintiff's claims against the Hospital, the reason for this is that all three of Plaintiff's identical causes of action against the Hospital have been fraught with multiple procedural and substantive deficiencies that are completely of Plaintiff's making. However, Plaintiff has had a fair opportunity to present her claims in accordance with the Mississippi Rules of Civil Procedure, the Mississippi Rules of Appellate Procedure, and Mississippi statute. She has not done so, and that is why the parties find themselves here today. Moreover, Plaintiff had a fair opportunity to present her constitutional arguments prior to the dismissal of Regan I, which she did, as well as a fair opportunity to pursue the same through an appropriate and timely appeal, which she did not.

Clearly, application of the *Briney* factors lead to only one conclusion: the trial court correctly denied Plaintiff's Rule 60(b) Motion to Set Aside. Since Plaintiff relies exclusively in her Rule 60(b) Motion to Set Aside on the same constitutional arguments previously raised prior to the trial court's dismissal of Regan I, which she effectively abandoned by not commencing a timely appeal from the dismissal of Regan I, the trial court did not abuse its discretion in finding that "extraordinary and compelling

circumstances" are not present. As the Court is well aware, Rule 60(b) motions should be denied when they are merely an attempt to relitigate a case.[30] Therefore, the Court should affirm the trial court's ruling in this regard.

## III. *Whether Plaintiff may argue for the first time on appeal that she is entitled to relief under Rule 60(b)(4) and (5) when she did not raise either provision at the trial court level.*

Plaintiff has improperly raised for the first time on appeal several issues regarding post-judgment relief under Miss. R. Civ. P. 60(b). Specifically, Plaintiff agues the following issues which were not raised at the trial court level:

> A. THE TRIAL JUDGE ERRED IN NOT AFFORDING REGAN RULE 60(b)(4) RELIEF BECAUSE AN ORDER/JUDGMENT BASED ON AN UNCONSTITUTIONAL STATUTE IS VOID.
>
> B. THE TRIAL JUDGE ERRED IN NOT AFFORDING REGAN RULE 60(b)(5) RELIEF WHERE AN ORDER/JUDGMENT BASED ON A PRIOR JUDGMENT HAS BEEN REVERSED.

(See Br. of Appellant at pages 11 and 15).

Plaintiff's Rule 60(b) Motion to Set Aside, the denial of which forms the basis of this appeal, effectively seeks relief under Rule 60(b)(6) only. [R214;RE3] Neither the Hospital nor Plaintiff ever argued the application of Rule 60(b)(4) or (5) at the trial court level. Not only were neither subsection's language ever cited at the trial court level, but neither subsection's number was ever mentioned either. Although Plaintiff's Rule 60(b) Motion to Set Aside did not refer to the catch-all provision by subsection number or text either, Plaintiff confirms in Plaintiff's Motion for Reconsideration that the Motion to Set Aside was brought pursuant to Rule 60(b)(6) only: "the only way to accomplish justice is to grant the relief requested under Rule 60(b)(6)..." [R257;RE7] Plaintiff then proceeds

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30 *City of Jackson v. Jackson Oaks Ltd. Partnership*, 860 So.2d 309, 313 (Miss. 2003).

to inform the trial court that "Rule 60(b)(6), the catch-all provision of this equitable rule, provides the Court the authority to set aside the Order of November 27, 2007." [R257;RE7] Again, despite specifically requesting relief pursuant to Rule 60(b)(6)'s catch-all provision, Plaintiff never sought relief at the trial court level pursuant to the provisions of Rule 60(b)(4) or (5). The Hospital submits that this is yet another belated attempt by Plaintiff to circumvent the Mississippi Rules of Appellate Procedure in order to compensate for an earlier decision as to which arguments to pursue.

Since Plaintiff did not raise these arguments at the trial court level, and therefore the trial court had no opportunity to address them, this Court is procedurally barred from considering the same for the first time on appeal. "[A] trial judge cannot be put in error on a matter which was never presented him for decision."[31] "This Court has long held that it will not consider matters raised for the first time on appeal."[32] To be thorough, however, the Hospital will briefly address each of these issues.

Plaintiff's reliance on Rule 60(b)(4) to save her from her decision to forego a timely appeal of the trial court's dismissal in Regan I is misplaced. The Court need look no further than Plaintiff's citation to *Bryant Inc. v. Walters,* 493 So.2d 933 (Miss. 1986), which Plaintiff relies upon for the definition of a "void judgment." "[A] judgment is void only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law."[33]

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31 *Cooper v. Lawson*, 264 So.2d 890, 891 (Miss. 1972).

32 *Triplett v. Mayor and Board of Aldermen of City of Vicksburg*, 758 So.2d 399, 401 (Miss. 2000)(citing *Shaw v. Shaw,* 603 So.2d 287, 292 (Miss.1992)).

33 *Walters*, 493 So.2d at 938 (emphasis added).

The trial court did not act in a "manner inconsistent with due process of law" when it dismissed Regan I. Plaintiff freely admits that she had raised and even briefed the argument that Miss. Code Ann. § 11-1-58 was unconstitutional in an effort to avoid the dismissal of Regan I. She was afforded a hearing on the issue upon sufficient and proper notice.[34] She was given proper notice of the trial court's ruling, and even permitted to file multiple post-judgment relief motions regarding the same, all of which were fully briefed and ruled upon in a timely manner. Most importantly, though, she had the right to appeal the trial court's adverse ruling to pursue her constitutional arguments or any other arguments properly raised at the trial court level, yet she elected not to do so. In short, the trial court cannot be said to have acted in a "manner inconsistent with due process of law" simply, because it applied binding precedent at that time to the facts of the case and followed the Mississippi Rules of Civil Procedure and the laws of this State in doing so. This is especially true in light of the fact that it was Plaintiff's decision, not the trial court's, to abandon her arguments against dismissal of Regan I and forego a timely appeal of the same.

Moreover, to the extent that Plaintiff's arguments suggest that the trial court acted in a "manner inconsistent with due process of law" by dismissing Regan I based on a statute which was later held to be unconstitutional, this argument fails as well. As the Court is well aware, Miss. Code Ann. § 11-1-58, the statute relied upon by the trial court in its dismissal of Regan I, was rendered unconstitutional by the Supreme Court in *Wimley v. Reid*, 991 So.2d 135 (Miss. 2008). However, contrary to Plaintiff's argument, the Court held that the procedural portion only of Miss. Code Ann. § 11-1-58 was

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[34] If memory serves undersigned counsel correctly, one of the hearings was actually held in chambers at Plaintiffs' counsel's request.

unconstitutional, because its inclusion was a violation of the Separation of Powers Doctrine. There was no mention of the statute's impact on due process of law, other than the Court noting that "Wimley did not argue before the trial court that strict interpretation of this statute would unconstitutionally deprive her of her right to due process of law. Therefore, we do not address these arguments on appeal." *Id.* at 136. Regardless, Plaintiff does not argue a due process violation to the trial court in her Rule 60(b) Motion to Set Aside.[35] [R214;RE3] Thus, Plaintiff cannot say that trial court automatically acted in a "manner inconsistent with due process of law" simply because it reached the opposite decision of the Supreme Court in *Wimley* several months earlier, and she certainly cannot say that she argued this point in her Rule 60(b) Motion to Set Aside before the trial court.

Plaintiff's reliance on Rule 60(b)(5) to save her from her decision to forego a timely appeal of the trial court's dismissal in Regan I is also misplaced. As a threshold matter, Plaintiff argues on page twenty (20) of her Brief that "this time the trial judges {sic} does not give Regan the benefit of applying *Wimley* retroactively in favor of Regan." Of course, Plaintiff was alluding to the trial court's decision to give retroactive application to the *Walker* decision when granting the Hospital's Motion for Summary Judgment. [R135;RE17]. The trial court's decision to do so was entirely appropriate as "newly enunciated rules of law are applied retroactively to cases that are pending trial or that are on appeal, and not final at the time of the enunciation."[36] After all, the *Walker* decision was handed down while Regan I was "pending trial...and not final at the time of

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35 *Wimley* is yet another recent example of the Court refusing to consider such arguments that are raised for the first time on appeal.

36 *Thompson v. City of Vicksburg*, 813 So.2d 717, 721 (Miss. 2002)(emphasis added).

the enunciation." The *Wimley* decision, however, was not rendered until after the dismissal of Regan I and the expiration of Plaintiff's thirty (30) day appeal period. Since Regan I was no longer pending trial and was final due to Plaintiff's failure to commence a timely appeal of the trial court's dismissal, it would have been inappropriate for the trial court to apply *Wimley* to revive an otherwise final Regan I. Had Plaintiff timely commenced an appeal from the trial court's dismissal of Regan I, the case would have most likely still been on appeal at the time that *Wimley* was decided, thus, arguably allowing for retroactive application at that time.

In addition to the fact that Plaintiff cites no binding Mississippi authority in support of her argument that Rule 60(b)(5) post-judgment relief is appropriate when a prior judgment takes into consideration caselaw that is subsequently reversed, Plaintiff's reasoning in this regard is fundamentally flawed. If this were indeed the law, which it most certainly cannot be, there would be no incentive for appealing an adverse judgment. In fact, it would encourage aggrieved litigants to sit idly by and wait for any portion of the caselaw, upon which their adverse judgment was based, to be reversed, and then rush to the courthouse to resurrect their claims. Trial courts would rapidly take the place of appellate courts, however, no ruling would ever be final.[37] Furthermore, Plaintiff's position in this regard would allow all prior cases which were impacted by caselaw or statutes that were later reversed or held to be unconstitutional to be reopened as well. Even the most efficient trial courts' dockets would grind to a halt due to excessive volume under such a scenario.

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[37] Under such circumstances, the only way for a litigant to achieve finality would be by settlement and contractual release. This cannot be and is most certainly not the law.

Thankfully, Plaintiff did not address this issue at length in her Brief, or even at all at the trial court level for that matter. Perhaps, it is because Plaintiff's theory sounds plausible when reading a small excerpt of Rule 60(b)(5) out of context and in a vaccum, but in reality, it is nothing more than a recipe for disaster.

## CONCLUSION

Again, the only issues raised at both the trial court level and on appeal is whether a Rule 60(b) can be used as a substitute for appeal and if so, did the trial court err in finding that Plaintiff failed to make an adequate showing of "extraordinary and compelling circumstances" required for post-judgment relief under Rule 60(b)(6). Notably, Plaintiff does not dispute the issues raised in her Rule 60(b) Motion to Set Aside are the very same issues that the trial court considered when it dismissed Regan I several months earlier. Similarly, Plaintiff also does not dispute that she did not commence a timely appeal of the dismissal of Regan I, but rather she refiled her Complaint and only filed her Rule 60(b) Motion to Set Aside once more favorable caselaw was handed down by the Supreme Court. Consequently, the trial court's dismissal of Regan I, as well as the issues raised by Plaintiff prior to and in opposition of the same, became final and unappelable once Plaintiff's thirty (30) day appeal period expired. Thus, Plaintiff cannot now use her Rule 60(b) Motion to Set Aside as a procedural vehicle to rectify her ill-advised decision to forego a timely appeal of Regan I, regardless of whether more favorable caselaw has been decided in the interim. This is especially true in light of the fact that Plaintiff has asserted the very same arguments in her Rule 60(b) Motion to Set Aside that she raised prior to the dismissal of Regan I. The trial court recognized this and

denied the relief requested by Plaintiff. The Hospital respectfully requests that this Court AFFIRM the trial court's denial of Plaintiff's Rule 60(b)(6) Motion to Set Aside the trial court's order dismissing Regan I.

Respectfully submitted, this the 2nd day of December, 2009.

RICHARD O. BURSON
ATTORNEY FOR THE DEFENDANTS

## CERTIFICATE OF SERVICE

I, Richard O. Burson, hereby certify that I have this date served a true and correct copy of Appellee's Brief to the following via United States Mail, postage prepaid:

Honorable Billy Joe Landrum (via hand delivery)
Circuit Court Judge
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This the 2nd day of December, 2009.

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