IN THE SUPREME COURT OF THE
STATE OF MISSISSIPPI
NO. 2009CA-00268

SHELIA REGAN **APPELLANT**

VS.

SOUTH CENTRAL REGIONAL MEDICAL CENTER **APPELLEES**

APPEAL FROM THE CIRCUIT COURT OF
JONES COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

COMES NOW the Appellant, Shelia Regan, by and through counsel of record, and files her Reply Brief, as follows:

ARGUMENT IN REPLY

A. Does "without prejudice" not mean without prejudice. Did Regan have a right to rely upon the trial court's order clarifying its dismissal as being without prejudice?

The Court must not loose site of the fact that with advise of counsel, Mrs. Regan chose to forego an appeal of Regan I in April 2008. She did not negligently miss her 30 day deadline to file an appeal under Rule 4. Instead, Regan had the legal right to choose to rely upon the trial court's order clarifying that the dismissal was "without prejudice." (R.E. 22). Thus, prior to the reversal of *Walker v. Whitfield Nursing Center*, Inc., 931 So.2d 583 (Miss. 2006), the prudent legal option was simply to file another identical Regan Complaint within the days remaining on her statute of limitations. Without question, had the trial judge ruled that his dismissal was "with prejudice", then an appeal under Rule 4 would have been timely filed in Regan I. (See Motion To Clarify, R.E. 21 and Order, R.E. 22).

The Complaint in Regan I *tolled* the statute of limitations since it was properly filed

and timely served. Thereafter, Regan III was properly filed within the days remaining on her statute of limitations after the trial court ruled on the Rule 59(e) motions, finally dismissing Regan I "without prejudice". There was no need to appeal Regan I, as it was not a final judgment on the merits. *Price v. Clark, M.D. et al*, 21 So.3d 509, ¶ 31 (Miss. 2009, rehearing denied Dec. 3, 2009); *Owens v. Mai*, 891 So.2d 220, 223 (Miss.2005); *Watters v. Stripling*, 675 So.2d 1242 (Miss.1996); *Erby v. Cox*, 654 So.2d 503 (Miss.1995); and *5 MS Prac. Encyclopedia MS Law* §44:22.

Given that the dismissal of Regan I for not strictly complying with the *unconstitutional* procedural portion of MCA §11-58-1 was "without prejudice", it is a mis-characterization for the Hospital to argue that the subject Rule 60(b) Motion to Set Aside was a "substitute for an out-of-time appeal". Simply put, there was no reason to pursue an appeal herein, where it was clarified to be "without prejudice" just inside the 30 day window. Nor, was there any reason to consider a Rule 60 motion until after the Mississippi Supreme Court decided *Wimley v. Reid*, 991 So.2d 135 (Miss., September 18, 2008). *Wimley* announced both the reversal of *Walker* and its prodigy, and the *unconstitutionally* of the procedural portion of MCA §11-58-1. Less than two weeks later, Regan timely filed the subject Rule 60(b) Motion to Set Aside seeking post-judgment relief. Under subparts (4), (5) and (6), a Rule 60(b) motion need only be filed within a reasonable time.

I am not sure, who was more surprised by the reversal of *Walker*, the Hospital or Mrs. Regan. One thing is certain, in April 2008, wrangling head-on with *Walker* via an appeal was not an attractive option, though viable. Given the "without prejudice" dismissal of

Regan I, it made significantly more sense to simply file Regan III. However, only after *Walker* was reversed did consideration of filing a Rule 60(b) motion arise. For the record, Mrs. Regan filed her Rule 60(b) Motion to Set Aside on October 1, 2008, only 13 days after *Wimley* was decided. Though it was not absolutely necessary because Regan III was already pending, undersigned counsel decided it was the proper thing to do, so as to give the trial judge the opportunity to correct his earlier erroneous ruling based on prior precedent, *the Walker case* and to do justice. Regan's wishful thinking at the time was that if the judgment in Regan I was set aside, the parties could then agree to a voluntary dismissal of Regan III without prejudice.

A law that is *unconstitutional* is always unconstitutional. We as officers of the court should never do anything to promote or defend the application of an unconstitutional law to deny a claimant their day in court. This honorable appeals court should find that Regan's Rule 60(b) motion seeking post judgment relief is proper and not a "belated attempt to circumvent the appeals process all together," as characterized by the Hospital.

Further, this Rule 4 appeal of the erroneous denial of Regan's Rule 60(b) motion has been brought because on November 3, 2008, the trial judge, the Honorable Judge Landrum made it clear that he did not want to rule in this area of unsettled law without guidance from the Supreme Court before allowing this case to go to trial for several days and put everybody to the expense of bringing experts in and then have it go to the Supreme Court. A joint interlocutory appeal was the judge's request. (T. 49-50). Only after both sides informed the court, that a ruling was necessary to get this matter up on either an interlocutory or direct

appeal did the judge deny the motion, effectively setting up this appeal.

Also, please note that there were two motions noticed for November 3, 2008, however at the close of the hearing on the first motion, Judge Landrum stated he was not going to hear the other motion in the other case, that is, Plaintiff's Rule 59(e) Motion to Amend Order and Judgment of Dismissal in Regan III. In response to questions from Plaintiff's counsel, the judge ruled from the bench that said motion in Regan III was stayed until [after] Regan I went up or I could take Regan III up along with it, if I wanted. Needless to say, Plaintiff's Rule 59(e) Motion to Amend Order and Judgment of Dismissal in Regan III was not heard that day. This is mentioned only to point out that the Hospital incorrectly states on page 4 of the Appellee's Responsive Brief, that the trial court subsequently denied the Plaintiff's Rule 59(e) Motion to Amend Order in Regan III. That is just not correct. See (T. 50-51).

Oddly, the Hospital does not acknowledge or mention anywhere in the red brief, that the dismissal of Regan I via summary judgment was "without prejudice". There is only one reason why a defendant would ignore such a material fact. That is, it would be harder for the Hospital to argue with a straight face, for example, that the court already rendered a final judgment on the merits of the issue of whether the dismissal of a complaint for failure to comply with procedural portion of MCA §11-1-58 is constitutional; that an appeal herein should have been filed within the 30 day window, rather than a refiling of the case within the statute of limitations; the sanctity of finality of judgments; and that res judicata or collateral estoppel attach, when a dismissal via summary judgment herein was not timely appealed. However, none of these apply, if the dismissal was "without prejudice" and was <u>not on the</u>

merits, as we have here. Yet, this Hospital righteously advances all of these inapplicable merit less arguments without addressing or even attempting to distinguish the fact that the dismissal of Regan I via summary judgment was "without prejudice" and was not a final judgment on the merits.

As if filing an appeal is a prerequisite to filing a Rule 60 motion, the Hospital repetitively argues that the Appellant is not entitled to Rule 60(b) relief because Regan did not file a Rule 4 appeal. That would be illogical on its face because the time allowed to file a Rule 60(b) motion is at least six (6) times longer than the 30 day window for Rule 4. The Hospital improperly persists advancing this argument by ignoring the Comment's clarifying language immediately following the rule. That is, that Rule 60 relief applies:

> "even after the normal procedures of motions for new trial and appeal are no longer available."

Regan pointed this out to both the trial court and the Hospital during the hearing of November 3, 2008. (T. 44).

B. Res judicata and collateral estoppel do not apply where a final judgment is not on the merits.

Not all final judgments are "on the merits" for the purposes of res judicata and collateral estoppel. For example, a voluntary dismissal under Fed. R. Civ. P Rule 41(a)(2) was not on the merits and so would not be given preclusive effect under Mississippi's doctrines of res judicata and collateral estoppel. *Stewart v. Guaranty Bank and Trust Company of Belzoni*, 596 So.2d 870 (Miss. 1992). Also, a dismissal without prejudice of

state law claims by a federal court refusing to assert pendent jurisdiction over those state claims following dismissal with prejudice of the federal claims that provided subject-matter jurisdiction to the federal court, is not a dismissal on the merits which would bar refiling of those state claims in a state court. *Norman v. Bucklew*, 684 So.2d 1246 (Miss. 1996); same holding, *Boston v. Hartford Accident and Indemnity Co.*, 822 So.2d 239 (Miss. 2002), federal court's dismissal without prejudice of state law claims did not have res judicata or collateral estoppel effect. Quoting *Boston* at 249, as follows:

> "Likewise in *Harris v. Board of Trustees*, 731 So.2d. 588, 589-90 (Miss. 1999), this Court found that collateral estoppel is inapplicable to state law claims that have been dismissed without prejudice in federal court. Therefore, the trial court erred in dismissing Boston's state claims based upon the doctrines of res judicata or collateral."

The Hospital argues the requirements of the collateral estoppel doctrine beginning on page 11 of its brief. In particular at page 12, the Hospital states, "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.", citing the case of State ex rel. *Moore v. Molpus*, 578 So.2d 624, 640 (Miss. 1991). [1] Thus, it appears we agree in principle that the doctrine of collateral estoppel is applied only to final judgments on the merits. That is, before you analyze whether there exists the required factors of collateral estoppel: (1) the

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[1] In *Moore v. Molpus*, the Court applied the doctrine of collateral estoppel to prevent the re-litigation of the issue of whether the Initiative and Referendum Amendment was properly proposed and ratified, where it found that the issue had been decided in the case of *Power v. Robertson*, 130 Miss. 188, 93So. 769 (Miss. 1922)(En Banc.). Being an en banc decision of the Supreme Court leaves little doubt that the *Power* decision was a final judgment on the merits.

specific issue was actually litigated, (2) it was actually determined by, and (3) essential to the judgment in a former action, the threshold question is whether the former action resulted in a judgment on the merits. If not, then collateral estoppel does not apply and there should be no issue preclusion effect in the subsequent action.

Yet, all the while knowing that the Order Granting Summary Judgment and Judgment of Dismissal in Regan I was "without prejudice" and thus, not a final decision on the merits, the Hospital has the gall to argue that collateral estoppel applies herein to preclude Regan from arguing that the procedural portion of MCA §11-1-58, that the trial judge relied upon in granting summary judgment was unconstitutional. Further, the Hospital does not cite any authority purporting to hold that despite the prior action being dismissed "without prejudice" and the judgment not being on the merits, that its proper to apply the collateral estoppel doctrine to preclude this constitutionality issue. Moreover, the Hospital did not plead, raise and argue for the application of collateral estoppel during the trial court proceedings to any issue now before this appeals court. As such, even if the doctrine applied to an issue raised in the case of Regan I, which is denied, the Hospital would be procedurally precluded from raising it now for the first time on appeal. Additionally, the doctrine's applicability herein seems questionable at the outset, where a Rule 60(b) Motion to Set Aside is not a subsequent action.

The Hospital's argument on page 15 of its brief, that, "The successful litigant below is entitled to know with reasonable promptness whether he or she will be subject to further litigation and not be left hanging for an inordinate period of time" has no application to cases

dismissed without prejudice. That general argument is not applicable to the instant case for the additional reason that here, the Hospital absolutely knew that it was going to be subject to further litigation, as Regan III was filed even before the 30 day window to file an appeal in Regan I had run. Further, there is nothing belated about the filing of Regan's Rule 60 motion, as it was filed within two weeks of *Walker* being reversed; about five months after Regan III had been filed and less than (6) six months after the appeal time ran. And, it was filed within the "reasonable" time requirement of Rule 60(b) 4, 5 and 6.

C. Regan may receive post judgment relief from a dismissal without prejudice under Rule 60(b)(4), (5) or (6), even though she did not designate which subpart(s) of Rule 60(b) that she was relying upon when she filed her motion.

The objective of the liberal interpretation of the Mississippi Rules of Civil Procedure, including Rule 60, is to do substantial justice. This is not an instance, where Regan is attempting to use Rule 60 as an escape hatch. To the contrary, Mrs. Regan exhausted all procedural opportunities short of an appeal available to her including the refiling of her case within the statute of limitations. Regan I deserves to receive post judgment relief under Rule 60. It matters not whether the court decides that Mrs. Regan is entitled to relief under one subpart or another. Notwithstanding, in timely filing her Rule 60(b) motion albeit without designating a subpart(s), she has preserved her rights under all subparts that may be applicable. *Cuffee v. Wal-Mart Stores, Inc.*, 977 So.2d 1187, 1191, FN4 (Miss. App., 2007), where Cuffee did not specifically identify the subpart upon which she relies.....we will discuss the applicability of those subparts that conceivably may be relevant.

D. *Pruett v. Malone* is not on all fours with Regan I.

The Hospital relies heavily on the case of *Pruett v. Malone*, 767 So. D 983 (Miss. 2000), as it is cited on seven different pages of the red brief. But not once, did the Hospital inform the court of its most distinguishing characteristic. That is, Pruett is a final decision on the merits that was dismissed with prejudice. Also, there are other material differences distinguishing these two cases. Therefore, *Pruett v. Malone* is not controlling. In addition to being a final judgment of dismissal with prejudice, in contrast to Regan, the Plaintiff, Malone had a problem with not obtaining personal service upon Dr. Pruett within 120 days of filing the complaint and not obtaining an order extending the time to serve the Defendant under Rule 4(h). Therefore, after 120 days the statute of limitations began to run again and her claim became time barred. As a result Mrs. Malone's case was finally dismissed by the trial court on a statute of limitations issue. A timely Motion for Reconsideration was filed and denied eleven (11) months later. At that point Malone only had a 30 day window to appeal, which she did not. Thus, the court's Judgment of Dismissal became a final decision on the merits. Obviously, this is not on all fours with Regan I because we do not have a final decision on the merits, as it was dismissed on a matter of form and without prejudice.

Likewise, another eight (8) months later, when Malone filed her Second Motion for Reconsideration, under Rule 60(b), she presented the same arguments she had presented eighteen (18) months prior in her first Motion to Reconsider. Again, this is obviously not on all fours with the instant case. In Regan I, when she filed her Rule 60(b) motion, Mrs. Regan was able to show for the first time, new evidence that the precise case law and the procedural

portion of the statute used to dismiss her case without prejudice had just been reversed and struck as unconstitutional.

CONCLUSION

Regan's Rule 60(b) Motion to Set Aside is not a substitute for an appeal nor merely an attempt to re-litigate a case [on its merits] because Regan I was never decided on its merits. It is an independent post-judgment procedural vehicle allowed by MRCP to achieve justice when appropriate after the time to seek an appeal under Rule 4 has run. Giving Mrs. Regan her day in court in Regan I, via Rule 60(b) will not open the flood gates to an unlimited number of litigates, who did not pursue a Rule 4 appeal. Rule 60(b) relief is granted on a case by case basis. It is rather unusual and extraordinary for a party to defeat a Motion to Dismiss for a technical violation of §11-58-1, then after the change in the law announced in *Walker* have a Motion for Summary Judgment granted for the same technical violation, but later, not have the dismissal without prejudice via summary judgment set aside, when the law changes back favorably for Mrs. Regan. The change back in the law was brought about by the unexpected reversal of *Walker* and the unexpected striking down as *unconstitutional*, the precise procedural portion of the statute reluctantly used by the trial judge to dismiss her case without prejudice instead of applying the law of the case doctrine to deny summary judgment. As such, it was an abuse of discretion for the trial court to not apply the "law of the case" doctrine, as a basis for granting Regan's Rule 60(b) motion.

Even under void unconstitutional law, the dismissal for a failure to attach the attorney's certificate of consultation to the complaint when filed is "without prejudice".

Thus, the Complaint, together with an attorney's certificate of consultation could be refiled, so long as it was refiled within the time remaining on the statute of limitations. As was done herein. With the advent of *Walker's* reversal, a complaint wanting for an attorney's certificate of consultation need not be amended and shall not be dismissed. *Wimley v. Reid*, supra. Then, it stands to reason that Regan I should be reversed and remanded to be reinstated on the trial court's docket, where Plaintiff timely filed a Rule 60(b) motion for post judgment relief, which she did. By the time *Walker* was decided it was too late to file a Rule (4) appeal, but it was not too late to file a Rule 60(b) motion for post judgment relief under the Mississippi Rules of Civil Procedure.

FOR THE FOREGOING REASONS, Regan timely filed a Rule 60(b) motion for relief from judgment. It matters not that she mislabeled or did not label, which subpart she was proceeding under. The facts make out an unusual and extraordinary basis for relief, alternatively under subparts (4), (5) and (6) for this case, which was dismissed "without prejudice" via summary judgment on an unconstitutional statutory procedural matter of form and not on the merits. Regan has always argued correctly what the law is, and now this honorable appeals court has the opportunity to do justice, nothing more- nothing less. As such, Regan I herein should be reversed and remanded to the active trial docket.

Respectfully submitted this the 20th day of January, 2010.

SHELIA REGAN, APPELLANT

NORMAN W. PAULI, JR.
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

The undersigned counsel of record to the Appellant Shelia Regan hereby certifies that the original and three copies (four total) of the above and foregoing reply brief, together with the electronic copy, have been personally deposited by the undersigned into the United States mail, priority postage prepaid, to the Clerk of the Court, and that true and correct paper copies have been deposited into the United States mail, first class postage prepaid, to the following addressees:

Honorable Billy Joe Landrum
Circuit Court Judge
P.O. Box 685
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Richard O. Burson
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SO CERTIFIED this the 20th day of January, 2010.

Norman W. Pauli, Jr.