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

SHELIA REGAN **APPELLANT**

VS.

SOUTH CENTRAL REGIONAL MEDICAL CENTER **APPELLEES**

BRIEF OF APPELLANT

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

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ORAL ARGUMENT REQUESTED

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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 representatives are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

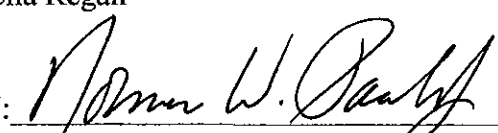
1. Mrs. Sheila Regan
   Appellant
   3907 N. 7th Street
   Laurel, MS 39440

2. Richard O. Burson
   Gholson Burson Entrekin & Orr, PLLC
   P. O. Box 1289
   Laurel, MS 39441-1289

3. Norman W. Pauli, Jr.
   MSB 4064

4. Hon. Billy Joe Landrum
   Circuit Court Judge
   P. O. Box 685
   Laurel, MS 39441-0685

Respectfully submitted,
Sheila Regan

BY: 
NORMAN W. PAULI, JR.
MSB[redacted]

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APPELLANT'S BRIEF

COMES NOW the Appellant, Shelia Regan, by and through counsel of record, to request additional time within which to file her principal brief. In support thereof, Appellant would show the following:

This is the appeal of a medical negligence case, where Mrs. Regan's colon was punctured by a nurse in the Emergency Department. The case was dismissed without prejudice on a "matter of form" via summary judgment and not on the merits. Therefore, post-judgment relief via a Rule 60(b) motion was denied.

I. ISSUES ON APPEAL:

1. Whether the Plaintiff is entitled to have the Judgment of Dismissal (without prejudice) set aside (a) under Rule 60(b)(4) because the order Granting Summary Judgment and the order denying the Rule 59(e) Motion for Reconsideration are *void*; (b) under 60(b)(5) because the prior judgment it was based on has been *reversed*; and/or (c) via the catchall provision of 60(b)(6), "*for any other reason justifying relief from the judgment*".

2. Stated differently, whether the trial judge erred in ruling that Plaintiff was not entitled to Rule 60(b) relief from a Judgment of Dismissal without prejudice that was granted in reliance upon the *Walker* case, that was subsequently *reversed* and upon the *unconstitutional* procedural portion of MCA §11-1-58, i.e., requiring the complaint be accompanied by an attorney's certificate of consultation when filed. It is axiomatic that something that is "unconstitutional" was always *unconstitutional.*

II. HISTORY AND PROCEDURAL BACKGROUND

1. Everyone should agree that the Plaintiff in this medical negligence case did everything she and her attorney were required to do under the MTCA and under the common law, except that the attorney's certificate of expert consultation was inadvertently not attached to the Complaint when it was filed on March 10, 2005. That is, (a) the pre-filing notice of claim to the Defendant was done; (b) the Plaintiff waited the prescribed period of time before filing the Complaint; (c) the Plaintiff's attorney consulted with a qualified medical expert before filing the Complaint; (d) the Complaint was filed within the applicable statute of limitations; (e) the Complaint otherwise states a claim upon which relief may be granted; and (f) service of process upon the Defendant was done within 120 days of filing the Complaint. Further, Plaintiff attempted to cure the *unconstitutional* statutory procedural defect of not attaching the certificate to the Complaint, about 31 days after the Complaint was served. More particularly, the Plaintiff immediately filed the missing certificate with the Clerk of Court and provided a copy to the Defendant's attorney of record only one (1) day after the Defendant filed a Rule 12 (b)(6) Motion to Dismiss for violation of MCA §11-1-58.

2. The Appellate Court should take judicial notice that the Complaint was filed on March 10, 2005 (R.E. 11); service of process was obtained on June 21, 2005 (R.15-16); the Motion to Dismiss was filed on July 20, 2005 (R.E. 12); and the letter of transmittal to the Clerk and the Certificate of Consultation were filed on June 21, 2005 (R.E.13). Further, during the November 7, 2005 hearing on Defendant's Motion to Dismiss for violation of MCA §11-1-58, the trial court conducted an *in camera* review of the faxed letter report of Plaintiff's

expert, Dr. Paul Blaylock, that was dated and faxed on March 5, 2005 to undersigned counsel, some five (5) days before the filing of the Complaint herein on March 10, 2005 (T. Pgs. 5-6); and during said hearing, counsel for the Defendant stated to the Court:

> "It was done by - - I think inadvertence by some of his staff that it just wasn't attached. And we don't dispute that". (T. Pg. 3).
> "We think its just a clerical mistake". (T. Pg. 7).

The trial court's Order Denying Motion to Dismiss, dated November 7, 2005, (R.E.14), found among other things, that the Plaintiff's attorney had in fact consulted with a medical expert five (5) days before the Complaint was filed.

3. The Complaint, hereinafter referred to as the Complaint filed in "Regan I", was timely filed and timely served, *albeit* a complaint that was wanting of an accompanying certificate of consultation. Thus, it still served to *toll* the statute of limitations until April 2, 2008, when there was an Order by the trial court denying Plaintiff's (2) two, Rule 59(e) Motions for Reconsideration. See, Exhibit "1", Order of April 2, 2008[1]. *Price v. Clark, M.D. et al*, 2009 WL 2183271, ¶ 31 (Miss.), not yet released for publication; *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.

4. One Rule 59(e) motion (R.E. 16) sought reconsideration of the trial court's Order of November 27, 2007, (R.E. 15) denying Plaintiff's Motion for Leave to Amend the Complaint by attaching an attorney's certificate, that had already been on file with the Clerk for over

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1. The Order of April 2, 2008, was not made part of the record excerpts due to the oversight of the undersigned counsel.

two years. (R.66-85). The other Rule 59(e) motion (R.E. 18) sought reconsideration of the trial court's Order of November 27, 2007, (R.E. 17), granting Defendant's Motion for Summary Judgement and Judgment of Dismissal (without prejudice).

5. It is important to note, that as of the April 2, 2008 ruling, (Exhibit "1" hereto) the Plaintiff still had eight (8) days remaining on her statute of limitations to file another complaint on this same cause of action against the same Defendant. This is because the dismissal was "without prejudice", even though initially, the Judgment of Dismissal via the granting of summary judgment did not state whether it was "with" or "without" prejudice. Further, Regan I has never been litigated on the merits. Rather, it was dismissed without prejudice on a "matter of form".

6. On April 3, 2008, the Plaintiff filed another, nearly identical Complaint in Cause No.: 2008-873-CV4 for this same cause of action against this same Defendant. The only difference is that an attorney's Certificate of Consultation was indeed attached, when it was filed. That case is affectionately known as "Regan III." It is still pending, though a Rule 59(e) Motion to Amend Order and Judgment of Dismissal, that dismissed same on a tolling of statute of limitations issue is stayed (T. Pgs. 50-51), awaiting desired direction from the court herein in Regan I [2,3].

2

Please note, briefly there was a Regan II, Cause No. 2007-248CV11, which was filed prematurely before the aforementioned Rule 59 motions for reconsideration were ruled on, so it was voluntarily dismissed without prejudice and is of no consequence to the matters now before the court.

3

Granting the Rule 60(b) post-judgment relief will allow Mrs. Regan to seek a voluntary dismissal without prejudice of the Complaint filed in Regan III, now pending, but stayed. On the contrary, a denial of post-judgment relief

7. The granting of Summary Judgment on November 27, 2007, was preceded by a hearing held on November 5, 2007. At the hearing, counsel for the hospital pointed out that since the court last ruled on this issue in favor of the Plaintiff, (i.e., November 2005) (R.E. 14), the Supreme Court had handed down a decision in *Walker v. Whitfield Nursing Center*, 931 So.2d 583 (Miss.2006), adopting the strict compliance standard as to the mandatory requirements for filing suit under 11-1-58. Counsel for the hospital, also argued that under the *Walker* decision, this case should be dismissed because the trial court doesn't have any discretion not to dismiss it, where there was a failure to strictly comply with the statute. (T. Pg 13). Counsel asked for the "retroactive" application of the *Walker* decision to this case and for the granting of summary judgment. (T. Pg. 15). Regan argued *interalia* that the earlier denial of the hospital's Motion to Dismiss on the same issue was the "law of the case." (R.E. 14; T. Pg 14).

8. Despite valiant efforts to distinguish Regan I from the *Walker* case and to urge the court to allow leave to amend, Regan was unsuccessful. The contrasting distinguishing features are set out in ¶'s 8 and 9 of her Response to Defendant's Motion for Summary Judgment. (R.E. 19, at 90-92). Leave to amend was sought on the basis that the court should treat the Defendant's Rule 56 motion, as a second Rule 12(b)(6) motion to dismiss or a Rule

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herein, will all but guaranty an appeal of Regan III, where the basis for the trial court's granting of hospital's Rule 12(b)(6) Motion to Dismiss and Judgment of Dismissal on September 10, 2008 is that Regan I, though dismissed without prejudice, it was not appealed, thus, it was a nullity without an accompanying statutory certificate of consultation when filed, that did not toll the statute of limitations. Currently, a Rule 59(e) Motion to Amend Order and Judgment of Dismissal informing the trial court of the reversal of *Walker* and the *unconstitutionality* of MCA §11-1-58 is pending, but stayed in Regan III.

12(c) motion on the pleadings, then, even if granted, leave to amend shall be granted under Rule 15(a). Needless to say, the trial court granted summary judgment and denied the Plaintiff's Motion for Leave to Amend. It follows, that in due course, the trial court also denied the respective Rule 59(e) motions that were timely filed. (R.E.'s 16 and 18). It is crystal clear, that the only reason the Defendant's Motion for Summary Judgment ®. 41-63) was granted, was because of the retroactive application of the *Walker* decision to the instant case. On the other hand, it is likewise crystal clear that the only reason the Rule 60(b) Motion to Set Aside Judgment (R.E. 3) was denied was because of the trial court's refusal to give the *Wimbly* case retroactive application, without more guidance from the Supreme Court.

9. It is noteworthy, that in her Response to Defendant's Motion for Summary Judgment, the Plaintiff argued to the court that the statute, MCA §11-1-58 is invalid and unenforceable, as it is in conflict with Rules 8, 10, and 11, because it adds a procedure to the filing of a complaint not required by the Mississippi Rules of Civil Procedure. (R.E. 19 at 93-94). She also argued that the procedural portion of the statute is *unconstitutional*. (R.E. 19 at 95). On October 23, 2007, the Attorney General of the state of Mississippi was placed on notice of the Plaintiff's *constitutional challenge* of the procedural aspects of MCA §11-1-58. (R.E. 20).

10. Being ever mindful of the requirement to file an appeal within 30 days, if a final judgment is "with prejudice", the Plaintiff, out of an abundance of caution filed a Motion to Clarify Judgment on April 23, 2008. (R.E. 21). As mentioned above, when the Order

Granting Summary Judgment and Judgment of Dismissal was initially entered, it did not state whether the dismissal was "with prejudice" or "without prejudice". In paragraph 5 of the Motion to Clarify Judgment, the Plaintiff informed the court and the Defendant:

> "Since Plaintiff is considering commencing an **appeal**, (within 30 days from April 2, 2008), there exists a real need for Plaintiff to have this Motion to Clarify heard on an emergency or expedited basis. Thus, Plaintiff asks the Court to advance this matter, so it can be heard either in person or telephonically prior to May 2, 2008."

Thankfully, on April 30, 2008, the trial judge signed an Order Clarifying Judgment that was entered by the Clerk on May 1, 2008, which clarified that the judgment was a dismissal "without prejudice". (R.E. 22). The order was "Read and Agreed" by the parties. After getting it clarified that the dismissal of Regan I was "without prejudice", Plaintiff decided it was not necessary to file an appeal in Regan I. For judicial economy reasons, she decided it would be more prudent to begin working her case in Regan III.

11. Next, to Plaintiff's pleasant surprise, the Supreme Court, on September 18, 2008, decided the case of *Wimley v. Reid*, 991 So.2d 135. The *Wimley* Court proclaimed that the *Walker* decision and its prodigy were overruled and that the procedural portion of MCA §11-1-58 was *unconstitutional*, for all the same reasons that Plaintiff had argued against the Defendant's Motion for Summary Judgment in Regan I. Feeling vindicated and believing she would be somewhat remise, if she did not file a motion for post-judgment relief, the Plaintiff, on September 29, 2008 mailed the Clerk (filed on October 01, 2008), a Rule 60(b) Motion to Set Aside the Order Granting Summary Judgment and Judgment of Dismissal

(without prejudice) in Regan I herein. (R.E. 3). See also, the Reply in Support of Plaintiff's Rule 60(b) Motion in Regan I (R.E. 5).

12. At the hearing conducted on November 3, 2008, the trial court was informed of the material recent developments in the law, as a result of the Supreme Court's significant announcement in the *Wimley* case. In particular, the trial court was informed that the Supreme Court in *Wimley* had expressly overruled the very *Walker* decision and struck down, as *unconstitutional*, the very statutory procedural requirement for an attorney's certificate in medical negligence complaints, that had wrongfully turned this case on its head. Most importantly, the trial court was informed that the Supreme Court stated in *Wimley* at ¶16:

> "Accordingly, we hold that a complaint, otherwise properly filed, may not be dismissed, and need not be amended, simply because the plaintiff failed to attach a certificate or waiver. To the extent *Walker* and *its progeny* hold otherwise, they are hereby **overruled**." (Emphasis added.)

Further, Regan argued that an appeal is not a *prerequisite* to filing a Rule 60(b) motion for relief from a previous order or judgment. (R.E. 5; T. 44). Nevertheless, at the hearing of November 3, 2008, the trial judge voiced that he would not rule on this issue without some guidance from the Supreme Court, by letting "them decide all the issues." (T. 49). More particularly, Judge Landrum instructed the parties to find away to take it up on a joint interlocutory appeal or he would rule so someone could take it up. (T. 49-50).

> "Now the Supreme Court comes back and [says] that they're going to relax that requirement. In my opinion if I went forward and said that

> since the Supreme Court had the authority and the desire, I guess you could say, to change and give someone some relief in this regard, why should this person be denied that opportunity because a bunch of lawyers and judges made mistakes? I mean, after all, you need to consider the parties and the merits of the case and not throw it out just because we can't get settled law. And sometimes it's frustrating. I don't want to see any injustice done because we made some mistake in the law or deciding the law or using judicials discretion, whatever the case might be.
>
> I don't know how to get it to the Supreme Court, but I'm not going to try it until it goes to the Supreme court and let them decide all the issues. So y'all can take it up either way you want to on a joint interlocutory appeal, which would be my request, or I can make a ruling and let one of you appeal it. Y'all get together and discuss it and I'll rule on it in that regard." (T. 49-50).

The trial judge was informed via post-hearing letters from respective counsel, that a "ruling" would be required for an interlocutory appeal or a regular appeal. (R.E. 9). More importantly, counsel for the hospital informed the trial judge that "the only viable option for guaranteeing an appeal at this time is for the Court to enter an Order Denying Plaintiff's Motion to Set Aside." (R.E. 10). Thus, on December 15, 2008, the trial court entered an order submitted by counsel for the hospital denying Plaintiff's Motion to Set Aside Judgment.

13. On December 24, 2008, Plaintiff filed a Motion For Reconsideration under Rule 59(e) to alter or amend the Order of December 15, 2008 denying relief from judgment under Rule 60(b). (R.E. 7). In particular, ¶ 1 thereof, "An Order is *improper*, if it is based on an *unconstitutional* statute," referring to the fact that the Order Granting Summary Judgment and Judgment of Dismissal (without prejudice) (R.E. 17) and the April 2, 2008 Order denying Plaintiff's Rule 59(e) Motion for Reconsideration, (Exhibit "1" hereto) was based

on the *unconstitutional* procedural portion of MCA §11-1-58. For purposes of this appeal, "improper" and "void" are synonymous in the context in which they were used in Regan's motion. Further, Regan argued that "It is never proper to dismiss a case based on an *unconstitutional* statute and the Plaintiff timely raised the issue of the *statutes's constitutionality.*" This is the equivalent of arguing that the order is **void** under Rule **60(b)(4)**.

14. Additionally, the December 24, 2008, Rule 59(e) Motion for Reconsideration (R.E. 7) set forth the names and cites of five cases that provided ample guidance from the appellate courts of this state, directing that a complaint may not be dismissed, when the complaint is filed without an accompanying attorney's certificate of consultation. That is,

a. *Ellis v. Mississippi Baptist Medical Center, Inc.*, 2008 WL 5220823, Miss. App., December 16, 2008 (No. 2007-CA-01315-COA)

b. *Thomas v. Warden*, 2008 WL 5174087, Miss., December 11, 2008 (Nos 2006-CA-01703-SCT, 2007-CA-00821-SCT).

c. *Forest Hill Nursing Center et al. V. Brister*, 992 So.2d 1179, (Miss., October 23, 2008).

d. *McClain v. Clark*, 992 So.2d 636 (Miss., October 16, 2008).

e. *Wimley v. Reid,* 991 So.2d 135 (Miss. September, 18, 2008).

(R.E. 253).

Also, the unsuccessful Rule 59 Motion pointed out that in *Briney v. U. S. Fidelity & Guar. Co.*, 714 So.2d 962 (Miss.1998), the Supreme Court allowed *Briney* post-judgment relief under Rule 60(b)(6) about three (3) years after judgment was entered, though no appeal was

taken. (R.E. 7 at 254). And, a detailed *analysis* of the *Briney* factors abundantly supporting Regan's position were set out therein. (R.E. 7 at 255-257). Nevertheless, on January 21, 2009, the trial court entered an Order Denying Motion For Reconsideration. (R.E. 8). Thereafter, feeling aggrieved, a Notice of Appeal (R . 290)was timely filed on February 17, 2009.

III. ARGUMENT

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.

> Miss. R. Civ. P. 60(b) states in pertinent part:
>
> (b) Mistakes; Inadvertence; Newly Discovered Evidence; Fraud, etc.
>
> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons:
>
> (4) the judgment is void;
>
> the motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than six months after the judgment, order, or proceeding was entered or taken.

The most important thing to remember in considering the merits of this appeal is that Regan timely argued that the procedural portion of MCA §11-1-58 was *unconstitutional.* Unlike the respective Plaintiffs in *Walker* and its prodigy, Mrs. Regan's attorney timely asserted a constitutional challenge and timely served notice on the state Attorney General inviting him to intervene. (R.E. 20). Regan timely argued its *unconstitutionality* in

opposition of the Hospital's Motion for Summary Judgment and in support of her Rule 60(b) Motion to Set Aside Judgment. Because the procedural portion of MCA §11-1-58 is *unconstitutional*, we know that she wrongfully lost on both fronts at the trial court level.

Under Rule 60(b)4, an order or judgment should be set aside when its is void. However, in fairness to the trial judge, when Judge Landrum granted Summary Judgment, he did not know that the Supreme Court would take up the issue of the unconstitutionality of the subject statute in *Wimbly v. Reid,* 991 So.2d 135 (Miss. 2008) and declare the procedural portion of the statute *unconstitutional*, thereby expressly overruling *Walker* and its prodigy. Likewise, in fairness to Regan's attorney, when he advised his client to focus on Regan III, rather than appealing Regan I, undersigned counsel did not know that the Supreme Court would reverse *Walker* and declare the procedural part of MCA §11-1-58 *unconstitutional*. In other words, evidence of the *unconstitutionality* of the statute was not available earlier.

But, once *Wimley* was decided, undersigned counsel had a duty to inform the trial court by filing a Rule 60(b) motion for post-judgment relief. And, once mandate issued in *Wimley* on October 9, 2008, the trial court had an obligation to the parties to seek justice by setting aside a void judgment founded on an *unconstitutional* statute. It was error arising to the level of an abuse of discretion for the trial court to deny Regan's Rule 60(b) Motion to Set Aside the Judgment herein.

An unconstitutional law is *void*, it is mere waste paper, and no valid act can be done

under it. *Pearl River County v. Lacey Lumber Co.,* 86 So. 755, (Miss. 1921). Section 112 of the state Constitution provides for equal and uniform laws for the assessing and valuation of property. A legislative act, chapter 475, Laws of 1916 specially authorizing Pearl River county to order a new assessment of real property was void. Where a tax levied under an unconstitutional law is paid under general protest, it may be recovered. Citing an earlier decision in, *Horton v. King*, 71 So. 9, (Horton I.), that an assessment was valid, *Pearl River* contended that it ordered its assessment during the time this announcement was in force and before it was reversed on suggestion of error in *Horton v. King*, 73 So. 871. (Horton II). It also urged, that having never been [previously] declared unconstitutional, that it stands as a valid statute until so declared to be unconstitutional. The Court held that neither of these contentions can be countenanced for the reason that an unconstitutional law is absolutely void. It is, in effect, mere waste paper, and no rights can accrue under it. *Pearl River* at 757.

In *Overbey v. Murray*, 569 So.2d 303 (Miss.1990), the trial court entered a default judgment for plaintiff, while unaware that the defendant had received an automatic stay by filing a bankruptcy petition because the petitioner had not given notice to the plaintiff or the court. The defendant never appealed the default judgment. Fifteen months later, the defendant filed a Rule 60(b) motion to set it aside, which was denied by the trial court. The denial of that motion was appealed assigning as error the lower court's granting of the default judgment, and the failure of the lower court to set aside the judgment. The Mississippi Supreme Court reversed holding that the default judgment was void for violation of an

automatic stay and reversed and remanded because the chancery court erred in failing to set aside the default judgment.

In *Overbey*, the defendant alleged in his Rule 60(b) motion to set aside the default judgment, that the default judgment had been entered as a result of a "mistake" and also, that it was "void". The trial court did not abuse its discretion in denying the motion as untimely on the basis that a Rule 60(b)(2) motion for a mistake must be filed within six months. However, there is no six-month time limit on a 60(b)(4) motion that the judgment is *void*. The only limitation is that the motion be made "within a reasonable time...." Miss. R. Civ. P. 60. Federal authority has interpreted this to mean that there is no effective time limit, with the rationale being that no amount of time or delay may cure a void judgment. 7 J. Moore & J. Lucas. Moore's Federal Practice ¶ 60.25[4] 2d ed. 1987. *Overbey*, 569 So.2d at 306.

In defining a void judgment, this Court has repeated the federal rule, which states that "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." *Bryant Inc. v. Walters*, 493 So.2d 933, 938 (Miss.1986). The trial court has no discretion in dealing with a void judgment. If the judgment is void, it must be set aside. *Walters*, 493 So.2d at 937; and *Sartain v. White*, 588 So.2d 204, 211 (Miss. 1991) citing *Overbey v. Murray*, 569 So.2d 303, 306 (Miss. 1990).

In *McLaurin v. Burnley*, 279 F. Supp. 220 (N.D. Miss. 1967), the petitioner McLaurin filed a writ of habeas corpus against the custodian of the Greenville City Jail. The petitioner

alleged that his state court conviction for breach of peace and resisting arrest was under an unconstitutional state statute. Though the court ruled that the statute was constitution, it stated:

> "If this position is well taken, the foundation of the whole proceedings are affected, for 'an unconstitutional law is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment'.

McLaurin, 279 F. Supp. At 224.

In the instant case, Regan filed a Rule 60(b) motion for post-judgment relief. Once Regan supported said motion with competent evidence that the procedural portion of MCA §11-1-58 was *unconstitutional*, then she was entitled to have the trial court find that its prior order granting summary judgment and a judgment of dismissal was *void*. Rule 60(b)(4) is a sub-section of the rule that stands alone. We should not have been drawn into the requirement making an adequate showing of extraordinary and compelling circumstances, peculiar to the rule's catchall subsection (b)(6).

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 <u>REVERSED</u>.

Miss. R. Civ. P. 60(b) states in pertinent part:
(b) Mistakes; Inadvertence; Newly Discovered Evidence; Fraud, etc.

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons:
>
> **(5)** the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise

> vacated, or it is no longer equitable that the judgment should have prospective application;
>
> the motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than six months after the judgment, order, or proceeding was entered or taken.

In Rule (b)(5), we are asking ourselves whether anything has happened that will justify us now in changing an order or judgment, such that it is no longer equitable for the judgment to have prospective application.

In Regan I, since the judgment has not been "satisfied, released or discharged" that first clause of Rule (b)(5) does not apply. However, the second clause most definitely applies, because the erroneous judgment of the trial court was based on a prior judgment within the meaning of Rule 60(b)(5) that has been reversed. That is, the prior *Walker* judgment was a necessary element of the decision giving rise to the hospital's successful defense, that Regan did not strictly comply with MCA §11-1-58, as mandated by *Walker v. Whitfield Nursing Center, Inc.*, 931 So.2d 583, 589 (Miss. 2006). All one must do to confirm this fact is to read paragraphs 5, 6 and 7 of the Order Granting Summary Judgment and Judgment of Dismissal. (R.E. 17). This was explicitly pointed out to the trial court in Regan's Rule 60(b) Motion to Set Aside (R.E. 3) and her Reply in support of same (R.E. 5 at ¶4). The same motion and reply adequately informed the Court that *Walker* and its prodigy had been reversed and that the procedural portion of MCA §11-1-58 was *unconstitutional.*

Additionally, under the given circumstances of this cause of action, the third clause of subsection (b)(5), that "it is no longer equitable that the judgment should have prospective

application", applies as well. As mentioned hereinabove in ¶'s 5-6 and footnote 3 of this brief, once it was clarified by order, that the dismissal was without prejudice, Regan filed another identical Complaint, Regan III. However the Hospital, thus far has launched a successful statute of limitations defense on the basis that the filing of the Complaint in Regan I without an accompanying certificate of consultation rendered Regan I a "nullity", which did not toll the statute of limitations. On September 10, 2008, the trial court entered an Order Granting SCRMC Rule 12(b)(6) Motion to Dismiss and Judgment of Dismissal. Regan's Rule 59(e) Motion is pending, but stayed awaiting guidance from this Honorable Court in Regan I. Thus, Regan believes unless this court reverses the trial court in Regan I and reinstates Regan I on the active court docket in Jones County Circuit Court, that the subject judgment will have "prospective application" to defeat Mrs. Regan's cause of action in Regan III. That would be highly *inequitable*. This would amount to a windfall to the hospital, as it would use the without prejudice dismissal of Regan I, (not heard on the merits), as a sword to defeat Regan III, an otherwise meritorious cause of action. We cannot allow such a great injustice to happen.

In *Farm Credit Bank of Texas v. Guidry*, 240 F. Supp. 2d 585 (M.D. La. 2002), the district judge granted a motion for post-judgment relief under Fed. Rules Civ. Proc. Rules 60(b)(5), to return the proceeds of an annuity to a judgment debtor. A judgment had been entered allowing Farm Credit to seize annuity proceeds from the Lorita Guidry Irrevocable Trust pursuant to a Fifth Circuit decision holding that an annuity contract was not exempt

from seizure under Louisiana law. The Guidry's filed a Rule 60(b)(5) motion to vacate and asked that the proceeds of the annuity be returned after the Fifth Circuit Court of Appeals rendered an *en banc* decision, expressly overruling the prior controlling decision, that the district court had previously relied upon in allowing the seizure of annuity proceeds by a judgment creditor.

> "The Court also finds that this case is one in which **Rule 60(b)(5)** and (6) is clearly applicable. The facts surrounding the history of this case and the recent *en banc* opinion of the Fifth Circuit mandate and justify the Court's decision to grant the motion for relief from judgment pursuant to **Rule 60(b)(5)** and (6). It is clear that this is a case in which the judgment upon which the prior decision was based has been "**reversed**, or otherwise vacated, or is no longer equitable."

240 F. Supp.2d at 589.

The *Guidry* Court believes that the return of proceeds of this annuity to the Guidrys is the only legal, fair, and equitable solution considering the clarification made by the Fifth Circuit as to what the law is, and was, at the time of the initial litigation and seizure of the Guidry annuity. 240 F.Supp. 2d at 590.

C. THE TRIAL JUDGE ERRED IN NOT AFFORDING REGAN RULE 60(b)(6) RELIEF UNDER THE CATCH-ALL PROVISION FOR ANY OTHER REASON JUSTIFYING RELIEF.

> Miss. R. Civ. P. 60(b) states in pertinent part:
> **(b)** Mistakes; Inadvertence; Newly Discovered Evidence; Fraud, etc.
>
> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons:
>
> **(6)** any other reason justifying relief from judgment.

> the motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than six months after the judgment, order, or proceeding was entered or taken.

This Honorable Court should find, that sufficient reasons exist to justify relief from judgment herein, alternatively, via Rule 60(b)(6)'s catchall, "any other reason justifying relief from judgment". The procedural history of Regan I overwhelmingly dictates that this is one of those exceptional cases, that to do justice at all, so requires relief be granted herein. It is undeniable that Regan had consulted with a medical expert at least five days prior to filing the Complaint in March 2005, and that the Complaint, when read together with her interrogatory responses setting forth the opinions of her medical expert, it more than makes out a *prima facia* case on the merits. *But* for, the wrongful enforcement of an *unconstitutional* statute, MCA §11-1-58 by the trial court[4], Regan would have already had her day in court on the merits.

The record reflects, that Regan did make out more than an adequate showing of the existence of "extraordinary and compelling circumstances", entitling her to post-judgment relief under Rule 60(b)(6). Most compelling are the facts that the trial court first ruled that Regan had complied with MCA §11-1-58 by denying the hospitals Motion to Dismiss on this same issue. The Hospital did not take an interlocutory appeal of that ruling. Ordinarily this would be considered the law of the case. Than, a short time later *Walker* comes out

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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.

encouraging the Hospital to file an identical motion, though titled a Motion for Summary Judgment. Believing he had no discretion, but to grant it, the trial judge reversed himself by given *Walker* retroactive effect against Regan. Then, a few months later, *Wimley v. Reid*, 991 So. 2d 135, comes out, where the Supreme Court expressly overruled *Walker* and its prodigy and declared that MCA §11-1-58 was unconstitutional. But, this time the trial judges does not give Regan the benefit of applying *Wimley* retroactively in favor of Regan. Had the trial court done so, as it should have, there would be no reason for an appeal by either party because the *Wimley* court made it clear, "that a complaint otherwise properly filed, may not be dismissed and need not be amended." And, counting *Wimley*, there are now at least five appellate cases denouncing *Walker's* strict compliance with the unconstitutional procedural requirements of MCA §11-1-58.

Having the Supreme Court reverse itself only about two years later and declare unconstitutional, a statute fostering tort reform is highly unusual. That is certainly a compelling factor supporting a finding that this case is extraordinary with compelling circumstances in favor of providing Rule 60(b)(6) relief. In accord is *Overbee v. Van Waters & Rogers,* 765 F. 2d 578, (6th Cir. 1985). Plaintiff originally filed a products liability action in Ohio state court seeking recovery in strict liability and negligence for injuries received by Mr. Overbee in an industrial accident. The case was subsequently removed to federal court pursuant to diversity jurisdiction. Plaintiff's requested an instruction on comparative negligence, however, the court instructed the jury on contributory negligence. The jury

returned a verdict in favor of the defendants on the issue of negligence. All motions were denied and a first appeal was filed. The plaintiff lost the first appeal because the Court followed an Ohio case that held that Ohio's recent comparative negligence statute only applied to causes of actions which accrued after June 20, 1980. Thereafter, while the case was on remand for another issue, the Ohio Supreme Court had reversed itself holding that the comparative negligence act applied to all actions tried after June 20, 1980. Consequently, the plaintiffs filed a Rule 60(b)(6) motion for relief from judgment requesting a new trial in order that the jury might be instructed on comparative negligence, which was denied. In the second appeal, the Court of Appeals, granted relief by reversing the District Court. Among other things, the Court held, we think this case presents extraordinary circumstance justifying relief from the judgment. The action of the Ohio Supreme Court in reversing itself within one year is certainly an unusual occurrence. *Overbee* at 580. In our opinion justice would not be served by penalizing plaintiffs for the actions of the Ohio Supreme Court. *Overbee* at 581.

Regan's procedural history reveals that Regan's counsel immediately accomplished cure, as soon as he learned the attorney's certificate had inadvertently not been attached to the complaint due to clerical error when filed. Regan asked the trial court to conduct an *in camera* review of her expert's written report to prove that Regan's counsel had in fact consulted with Dr. Blaylock before filing the Complaint. Regan answered interrogatories setting forth Dr. Blaylock's expert opinions. Regan took the deposition of Mr. Brett Tucker,

the Hospital's Claim's Administrator to show that there was no prejudice to the hospital's defense of the claim caused by the brief delay in subsequently filing the certificate of consultation. Regan won the Hospital's Motion to Dismiss on the issue in November 2005, which was pre-*Walker*.

Throughout her Response to the Hospital's Motion for Summary Judgment, Regan maintained that MCA §11-1-58 must be *unconstitutional* because the Mississippi Rules of Civil Procedure determine what constitutes a complaint and that this statute improperly adds an additional burden not required by the rules. Regan timely placed the state Attorney General on notice and invited him to intervene. Regan filed a Motion for Leave to Amend to avail herself of the procedural remedy afforded by Rule 15(a), which provides that amendments shall be liberally allowed, when justice so requires.

After Regan lost the Hospital's Motion for Summary Judgment, which really was nothing more than another Rule 12(b)(6) motion on this same issue, that did not go to the merits, Regan timely filed a Rule 59(e) motion within ten days. And, when she lost her motion for reconsideration, Regan filed a Motion to Clarify that the Judgment of Dismissal was "without prejudice". Importantly, the Motion to Clarify was very pointed. It expressly informed the court that the motion needed to be expedited or advanced on the motion calender, and ruled on prior to May 2, 2008, because Regan was considering filing an appeal, if the judgment of dismissal was "with prejudice". Thankfully, the trial court ruled it was "without prejudice" and Regan, based on advise of counsel decided she could forego filing

an appeal in Regan I. Not knowing that *Walker* would be expressly overruled in about 4-5 months on September 18, 2008, it was thought to be more prudent to focus on working up her case in Regan III, rather than engage the machinery of an appeal on a case that had been dismissed without prejudice. Since it was dismissed on a *matter of form*, there was no res judicata or collateral estoppel downside to simply filing another identical lawsuit, so long as she still had time left on her statute of limitations. She did, because Regan III was filed on April 3, 2008, when she still had eight (8) days left on her statute of limitations.

The procedural history of this case abundantly evidences that, short of an appeal, Regan pursued all other procedural remedies available to her under the rules of civil procedure and she had a perfectly sound legal and economic reasons for not appealing at the time. Regan does not now avail herself of Rule 60(b) post-judgment relief, because she sat on her laurels and without cause did not take advantage of other procedural remedies afforded by the rules of civil procedure. Nothing could be further from the truth and anyone who advances such an argument would not be doing so in good faith. In other words, Regan is not using this Rule 60(b) motion for relief, as an escape hatch because she failed without cause to pursue other procedural remedies.

In *Kirk v. Pope*, 973 So.2d 981, 988 (Miss.2007), the Supreme Court held that Pope had properly pursed all other remedies prior to requesting the exceptional relief afforded under Rule 60(b). In that case, Polk first filed a Motion for Judgment Notwithstanding the Verdict, or in the Alternative for a New Trial, then after the trial court denied same, Polk

timely filed a Motion for Reconsideration and requested a stay. On May 24, 2005, the trial court entered an order denying Pope's Motion for Reconsideration and lifting all injunctions. No appeal was taken by either party with 30 days of May 24, 2005. On September 14, 2005, Pope resorted to filing his Motion for Relief from Judgment pursuant to Rule 60(b). The trial court ultimately granted Pope's Motion for Relief from Judgment pursuant to Rule 60(b)(4), holding the final judgment "null and void." On appeal, the case was reversed and remanded on other grounds, but it is good law for the position, that when a party pursues the other procedural remedies provided by the rules of civil procedure, without filing an appeal, he or she may properly seek relief from judgment via Rule 60(b).

During the motion hearing of November 3, 2008, Regan informed the trial court that the Comment to Rule 60(b) specifies certain limited grounds upon which final judgments may be attacked - - and pointed out the important part - - "even after the normal procedures of motions for new trial and appeal are no longer available." (T. 44). Further, it only stands to reason, that a party, who does not appeal within 30 days is not foreclosed from seeking post-judgment relief under Rule 60(b), where the rule itself expressly provides that a motion must be filed within a reasonable time and for subparts (1), (2) and (3), not more than six months. And, the case law has interpreted that Rule 60(b) allows more than six months under subparts (4), (5) and (6), when reasonable. It is obvious, that the drafters of the rules intended to allow parties, when appropriate, who did not seek an appeal, to bring a motion for relief under Rule (60)(b) because they provided a period in which to bring such a motion

that is at least six times longer than the period to file an appeal.

In *Heirs-at-Law and Beneficiaries of Gilbert v. Dresser Ind. Inc.,* 158 F.R.D. 89 (N.D. Miss., Dec 1993), District Judge, Neal Biggers, Jr. held that relief from judgment was warranted under Rule 60(b)(6) by extraordinary circumstances consisting of clarification of state decisional law. Summary judgment was granted in Dresser's favor, finding that the "consumer expectations" test for products actions, as applied in Mississippi precluded recovery. This judgment was affirmed by the Fifth Circuit. Subsequently *Sperry-New Holland v. Prestage*, 617 So.2d 248 (Miss.1993) clarified that Mississippi applied the "risk-utility" analysis. Since, *Sperry-New Holland* merely clarified, rather than reversing any prior decision, Fed. R. Civ. P. (60)(b)(5) does not apply. Nonetheless, in the opinion of this court, Rule 60(b)(6) provides relief to the plaintiff under these facts. *Gilbert* at 93.

The Order of December 15, 2008, which was the subject of a Rule 59(e) motion, relied on *Briney v. USF&G Co.*, 714 So.2d 962 (Miss. 1998). See paragraph 6 thereof. However, *Briney* actually favors Regan. In *Briney*, the Supreme Court allowed post-judgment relief under Rule 60(b)(6) sought three years after judgment was entered thought no appeal was taken.

> ¶11. "As pointed out by *Briney*, simply because the time for appeal has expired, Rule 60 recognizes that relief may be sought **after the time for appeal has expired** given the right circumstances citing *Accredited Surety & Casualty Company v. Bolles*, 535 So.2d 56, 58-59 (Miss. 1988)." *Briney* at 966.

Briney lists **factors** that should be balanced, when deciding if relief should be granted

under Rule 60(b). They are as follows:

(1) That final judgments should not lightly be disturbed;

(2) that the Rule 60(b) motion is not to be used as a substitute for appeal;

(3) that the rule should be liberally construed in order to achieve substantial justice;

(4) whether the motion was made within a reasonable time;

(5) [relevant only to default judgments];

(6) whether-if the judgment was rendered after a trial on the merits-the movant had a fair opportunity to present his claim or defense;

(7) whether there are intervening equities that would make it inequitable to grant relief; and

(8) any other factors relevant to the justice of the judgment under attack.

Briney at 968.

On balance, application of the factors to the instant Regan case overwhelmingly weigh in favor of granting Regan relief from the Court's Order of November 27, 2007. In particular:

Factor (1) no, there is no concern about disturbing a final judgment because we do not have a final judgment to disturb. Rather, ours is without prejudice:

Factor (2) no, it is not being used as a substitute for an appeal because the decision to seek relief under Rule 60 came after another identical cause of action was filed on April 3, 2008, it came after the decision to not appeal was made once the court clarified that its

dismissal of the instant case was without prejudice and it came only a few weeks after the Supreme Court reversed the *Walker* case and declared the procedural portion of MCA §11-1-58 unconstitutional;

Factor (3) yes, we must liberally construe this rule to achieve substantial justice. Mrs. Regan has not yet had her day in court. Her attorney properly conferred with a qualified physician and was satisfied that this case has merit before he filed the Complaint *albeit* without attaching his certificate of consultation due to clerical error. It is a gross miscarriage of justice not to allow this case to go forward on the merits, now that cure has long been achieved and the procedural statute has been found *unconstitutional*, thereby requiring the reversal of a good many cases;

Factor (4) yes, the motion was made about two weeks after the Supreme Court decided *Wimbly v. Reid*, the case that reversed *Walker* and announced its mandate that no case may be dismissed for failing to file a certificate with the complaint;

Factor (5) it is not applicable;

Factor (6) no, the Plaintiff has had no opportunity to present her case on the merits, because it was dismissed without prejudice on a procedural matter;

Factor (7) no, there are none. All equities and maxims favor a trial on the merits. There is no genuine prejudice to the defendant if the case is allowed to go forward in a normal fashion on the merits; and

Factor (8) yes, the court had previously denied a Motion to Dismiss on the same

grounds. But for the *Walker* decision holding that the statute had to be strictly construed, this case would have proceeded normally on its merits. After *Walker* came down, your honor felt compelled to follow *Walker* and strictly construe MCA §11-1-58. The Supreme Court has since reversed itself. It is unusual for the Supreme Court to reverse itself in such a short period of time. Now that it has reversed *Walker* and struck down the statute as *unconstitutional*, the only way to accomplish justice is to grant the relief requested under Rule 60(b)(6), which gives this court the authority to do justice after the time to appeal has run.

IV. CONCLUSION

An Order or Judgment is void, if it is based on an *unconstitutional* statute. On November 27, 2007, the trial court in reliance upon what has been determined to be an *unconstitutional* procedural statute, MCA §11-1-58, entered an Order Granting Summary Judgment and Judgment of Dismissal (without prejudice) because the Plaintiff failed to file a certificate of consultation with the Complaint. A Rule 59(e) motion to amend or alter the order was timely filed and in due course was wrongfully denied on April 2, 2008.

Subsequently a Rule 60(b) motion for relief was timely filed. It is never proper to dismiss a case based on an *unconstitutional* statute. The Plaintiff had timely raised the issue of the statute's constitutionality and properly noticed the state Attorney General to intervene before the trial court ruled on summary judgment.

A dismissal "without prejudice" on a procedural matter, means that the Judgment of

Dismissal of November 27, 2007 is not a "final judgment" on the merits. The fact that the November 27th dismissal order is not a final judgment on the merits, weighs heavily in favor of granting her relief now, when we look at the *Briney* factors above.

The Complaint in Regan I was otherwise properly filed on March 10, 2005. The sole reason for its dismissal was the pronouncement in *Walker v. Whitfield Nursing Ctr.*, 931 So.2d 583 (Miss. 2006), that the parties must comply strictly with the requirements of statutes, including the legislature's procedural requirement in MCA §11-1-58, that an attorney's certificate of consultation shall accompany the Complaint when filed.

Then in reversing *Walker*, the Supreme Court stated:

> However, this court has never required compliance - strict or otherwise - with unconstitutional statutory provisions.

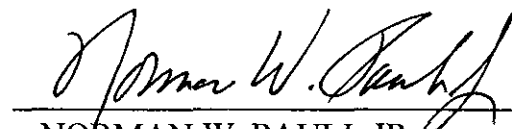
As such, *Walker* was reversed. Due to the Separation fo Powers Doctrine, a statute may not mandate that a certificate be filed in the Court with a complaint. *Wimley v. Reid*, 991 So.2d 135 (Miss. 2008). The decisional law of *Walker* and its progeny that was reversed, was not a mere change in the interpretation of a statute. Rather, it was much more. It was a declaration that the courts in this state will not require compliance with the *unconstitutional* procedural portion of MCA §11-1-58. This is a mandate that must be followed by the courts of this state. It should matter not, that this issue is timely raised via a Rule 60(b)(6) motion for post-judgment relief or via an appeal. What is important, is that the courts of this state do everything in their power to make certain that justice be done.

The reversal of five cases thus far, based on a mandate by the highest court of this state, that complaints filed without the statutory certificate of consultation "may not be dismiss", surely amounts to an adequate showing of "extraordinary circumstances" to justify Rule 60(b)(6) relief. Plaintiff's quest herein is not "merely an attempt to relitigate a case" because the Regan's cause of action has never been litigated on the merits.

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 adequate basis for relief, alternatively under subparts (4), (5) and (6). Regan has always argued correctly what the law is, and now this honorable court has the opportunity to do justice, nothing more- nothing less.

Respectfully submitted this the 8th day of September, 2009.

SHELIA REGAN, APPELLANT



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CERTIFICATE OF SERVICE

I, Norman W. Pauli, Jr., do hereby certify that I have this day **mailed** a true and correct copy of the above and foregoing pleading to the following addressees:

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