IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2009-CA-00603

THELMA KOESTLER AND
LEO C. (MICKEY) KOESTLER,
DECEASED, BY AND THROUGH
THELMA R. KOESTLER — APPELLANT

VS.

MISSISSIPPI BAPTIST MEDICAL SYSTEMS, INC.
A/K/A MISSISSIPPI BAPTIST MEDICAL CENTER
A/K/A BAPTIST MEDICAL CENTER, ET AL. — APPELLEES

BRIEF OF APPELLEES 2
MISSISSIPPI BAPTIST MEDICAL CENTER, INC., MISSISSIPPI BAPTIST HEALTH SYSTEMS, INC., BAPTIST BEHAVIORAL HEALTH SERVICES, GRACE SCOTT, R.N., BECKY IVEY, O.T., AND STACEY ASHLEY

Appeal from the Circuit Court of the First Judicial District
of Hinds County, Mississippi, 251-08-85-CIV

ORAL ARGUMENT NOT 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 representations 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. **Appellant**: Thelma R. Koestler.

2. **Counsel for Appellant**: Marcie T. Southerland and Branan P. Southerland.

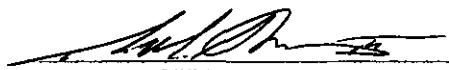
3. **Appellees**: Mississippi Baptist Medical Center, Inc., Mississippi Baptist Health Systems, Inc., Baptist Behavioral Health Services, Grace Scott, R.N., Becky Ivey, O.T., and Stacey Ashley; William S. Cook, Jr., M.D., and William S. Cook, Jr., M.D., P.A.; Khari A. Omolara, M.D., and Khari A. Omolara, P.C.

4. **Counsel for Appellees Mississippi Baptist Medical Center, Inc., Mississippi Baptist Health Systems, Inc., Baptist Behavioral Health Services, Grace Scott, R.N., Becky Ivey, O.T., and Stacey Ashley**: Eugene R. Naylor and Rex M. Shannon III.

5. **Counsel for Appellees William S. Cook, Jr., M.D., and William S. Cook, Jr., M.D., P.A.**: Clifford B. Ammons and Anastasia G. Jones.

6. **Counsel for Appellees Khari A. Omolara, M.D., and Khari A. Omolara, P.C.**: Whitman B. Johnson, III.

7. **Circuit Court Judge**: Hon. W. Swan Yerger.



REX M. SHANNON III

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATUTES

RULES

STATEMENT OF ISSUES

I. Whether the trial court appropriately granted summary judgment in favor of Appellees on the grounds that Appellant's claims were time-barred by the governing statute of limitations.

II. Whether the trial court appropriately granted summary judgment in favor of Appellees on the grounds that Appellant was judicially estopped from asserting the claims alleged in her Complaint.

III. Whether the trial court appropriately granted summary judgment in favor of Appellees on the grounds that Appellees enjoyed statutory immunity from liability.

STATEMENT OF THE CASE

I. Nature of the Case and Course of Proceedings.

On January 30, 2008, Appellant Thelma R. Koestler ("Ms. Koestler") filed a Complaint[1] on behalf of herself and her deceased husband against Mississippi Baptist Medical Center, Inc., and affiliates and other medical defendants.[2] R. 4, R.E. Tab 1. Ms. Koestler's Complaint alleged the following causes of action against all defendants: (1) false imprisonment, (2) assault, (3) battery, (4) invasion of privacy, (5) intentional infliction of emotional distress, and (6) loss of consortium (on behalf of her deceased husband). R. 9-18, R.E. Tab 1. These claims were alleged to have arisen from Ms. Koestler's October 2, 2006, self-admission to Senior Behavioral Health Services at Mississippi Baptist Medical Center. R. 9-10, R.E. Tab 1.

In her Complaint, Ms. Koestler alleged that she was "suffering from mild depression caused by the imminent death of her husband of over 50 years," and that she went to Mississippi Baptist Medical Center at the urging of two of her children to get some rest. R. 9, R.E. Tab 1.

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[1] As will be discussed *infra*, this Complaint was the refiling of a previous complaint filed by Ms. Koestler on October 1, 2007, and subsequently dismissed on January 29, 2008. *Brief of Appellant* at 12.

[2] These defendants included the following: William S. Cook, Jr., M.D., and William S. Cook, Jr., M.D., P.A.; Khari A. Omolara, M.D., and Khari A. Omolara, P.C.; Grace Scott, R.N.; Becky Ivey, O.T.; and Stacey Ashley.

She further alleged that while she initially signed a consent form, her son completed the remaining admission paperwork. R. 10, R.E. Tab 1. Ms. Koestler alleged that she retracted her consent to admission and treatment on October 2, 2006, and that her request to leave the hospital on October 10, 2006, was denied. R. 10-11, R.E. Tab 1. She further alleged that she was never informed of her discharge plan, which she alleged included commitment to the Mississippi State Hospital at Whitfield. R. 16, R.E. Tab 1. All of Ms. Koestler's claims are predicated on her alleged unlawful detention at Mississippi Baptist Medical Center in October 2006 and intentional torts subject to a one-year statute of limitations. R. 9-12, R.E. Tab 1, ¶¶ 21-37; R. 12, R.E. Tab 1, ¶ 40; R. 13-14, R.E. Tab 1, ¶¶ 47-48; R. 15, R.E. Tab 1, ¶ 56; R. 17, R.E. Tab 1, ¶ 65.

On June 6, 2008, the Mississippi Baptist Medical Center entities[3] and their defendant-employees[4] (hereinafter "MBMC") filed separate answers denying any and all liability in the cause. R. 48, R.E. Tab 2; R. 60, R.E. Tab 3. Previously, on May 30, 2008, Appellees Khari A. Omolara, M.D., and Khari A. Omolara, P.C., ("Dr. Omolara") had moved for summary judgment on statute of limitations grounds, which motion MBMC joined on September 3, 2008. R. 44, 73, 76, R.E. Tabs 4, 5, 6. Appellees William S. Cook, Jr., M.D., and William S. Cook, Jr., M.D., P.A., ("Dr. Cook") filed a similar summary judgment motion on September 11, 2008. R. 79, R.E. Tab 7. Ms. Koestler filed her response to the appellees' summary judgment motions on November 3, 2008. R. 83, R.E. Tab 8. On November 6, 2008, Dr. Omolara filed his rebuttal brief re-urging appellees' statute of limitations defense and asserting judicial estoppel arguments. R. 92, R.E. Tab 9. Dr. Cook filed a separate rebuttal brief on November 7, 2008, re-urging appellees' statute of limitations defense. R. 149, R.E. Tab 10.

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[3] Mississippi Baptist Medical Center, Inc.; Mississippi Baptist Health Systems, Inc. (erroneously referred to in Complaint as "Mississippi Baptist Medical Systems, Inc."); and Baptist Behavioral Health Services (a non-entity).

[4] Grace Scott, R.N., Becky Ivey, O.T., and Stacey Ashley.

On November 10, 2008, Ms. Koestler filed her response to Dr. Omolara's rebuttal brief. R. 155, R.E. Tab 11. That same day, a hearing was held on the aforesaid motions in the Circuit Court of Hinds County, Honorable Swan Yerger presiding, whereupon the trial court took the motions under advisement. On December 1, 2008, Ms. Koestler filed a second response to Dr. Omolara's rebuttal brief, to which she attached her own affidavit. R. 159, 165, R.E. Tabs 19, 20. On December 4, 2008, Dr. Omolara filed his second rebuttal brief, re-urging appellees' statute of limitations and judicial estoppel arguments and asserting good faith immunity pursuant to MISS. CODE ANN. § 41-21-67(5).

Thereafter, on March 19, 2009, a final judgment of dismissal with prejudice was entered in favor of all appellees, along with the trial court's supporting opinion. R. 173, 174, R.E. Tabs 14, 15. In its opinion, the trial court set out three independent bases supporting its grant of summary judgment to all appellees, to-wit: (1) Ms. Koestler was judicially estopped from asserting the claims in her Complaint; (2) all appellees were immune from liability pursuant to MISS. CODE ANN. § 41-21-67(5); and (3) Ms. Koestler's claims were time-barred by the one (1)-year statute of limitations of MISS. CODE ANN. § 15-1-35. R. 174, R.E. Tab 15.

Following the trial court's grant of summary judgment to MBMC and all other appellees, Ms. Koestler filed a motion for reconsideration on March 27, 2009. R. 179, R.E. Tab 16. On March 31, 2009, the court below denied Ms. Koestler's motion for reconsideration. R. 185, R.E. Tab 17. On April 14, 2009, Ms. Koestler filed her notice of appeal. R. 186, R.E. Tab 18.

II. Statement of Facts.

Ms. Koestler does not dispute that her claims accrued, if at all, for statute of limitations purposes on October 2, 2006, and are subject to the one (1)-year statute of limitations codified at MISS. CODE ANN. § 15-1-35. *Brief of Appellant* at 11-12. Ms. Koestler filed her original complaint on October 1, 2007, with one (1) day remaining in the one (1)-year statute of

limitations period. *Brief of Appellant* at 11-12. Pursuant to MISS. R. CIV. P. 4(h), the 120-day period in which to serve process expired on January 29, 2008. *Brief of Appellant* at 12. On January 29, 2008, the last day of the 120-day period for service of process, Ms. Koestler voluntarily dismissed her complaint and refiled it the next day (on January 30, 2008). *Brief of Appellant* at 11; R. 4, R.E. Tab 1. Ms. Koestler has never explained on the record why she waited until the very last day of the 120-day service of process period to dismiss her compliant, only to refile it one day later, nor has she explained why she never attempted to serve process or never sought an extension of time to serve process.

In response to the appellees' motions for summary judgment, Ms. Koestler produced her own affidavit as the only summary judgment evidence offered in support of her various claims. R. 165, R.E. Tab 13. In her affidavit, Ms. Koestler asserted that she "*proceeded with a voluntary admission*" to Mississippi Baptist Medical Center but that "*[d]uring the admission process*, [she] told Dr. Khari Omalara [sic] that [she] wanted to leave the hospital" and thereby "withdrew [her] consent for admission and treatment." R. 165, R.E. Tab 13, ¶¶ 5, 6 (emphasis added).

Contrary to Ms. Koestler's present claim that she did not complete the admissions process and did not voluntarily admit herself to Mississippi Baptist Medical Center, Ms. Koestler previously represented to the Mississippi Court of Appeals that her admission to Mississippi Baptist Medical Center was voluntary. On appeal of her involuntary commitment to the State Hospital at Whitfield, Ms. Koestler stated in her brief to the Court of Appeals that "On October 2, 2006, *Thelma Koestler . . . admitted herself to Mississippi Baptist Medical Center – Senior Behavioral Health Services . . . .*" R. 106, R.E. Tab 9 (emphasis added). Moreover, the Court of Appeals adopted Ms. Koestler's statement of fact and incorporated it into its published opinion. *Koestler v. Koestler*, 976 So. 2d 372, 374 (Miss. Ct. App. 2008) (stating that "[Ms. Koestler]

admitted herself in the Senior Behavioral Health Services wing of the Mississippi Baptist Memorial [sic] Hospital (Baptist)" (emphasis added)). *See also* R. 137, R.E. Tab 9.

The summary judgment evidence of record in this case is limited to the following items: (1) the parties' pleadings, including Ms. Koestler's Complaint, R. 4-20, R.E. Tab 1; and (2) Ms. Koestler's own affidavit, R. 165, R.E. Tab 13.[5] Ms. Koestler's Complaint makes no allegation of bad faith on the part of MBMC or other appellees, nor does her summary judgment affidavit speak to conduct evidencing bad faith. R. 4-20, R.E. Tab 1; R. 165, R.E. Tab 13. In point of fact, the scant summary judgment submission adduced by Ms. Koestler is wholly incapable of creating a fact issue on any of her three assignments of error.

SUMMARY OF THE ARGUMENT

This appeal stems from the trial court's grant of summary judgment to all appellees herein. At the outset, it should be noted that the judgment of the court below is predicated *not* on a solitary basis for dismissal, but rather on *three (3) independent grounds* each warranting summary judgment in its own right. *Any one* of the trial court's stated grounds for summary judgment supports affirmance of the order of the trial court.[6]

Summary judgment was appropriate in this case because pursuant to controlling case law, all of Ms. Koestler's claims were time-barred by the governing one (1)-year statute of limitations. Ms. Koestler's claims accrued, if at all, on October 2, 2006. She filed her first complaint on October 1, 2007, with one (1) day remaining in the statute of limitations period. The 120-day period for service of process thereupon began to run. On January 29, 2008—the last day of the 120-day service of process period—Ms. Koestler voluntarily dismissed her complaint without prejudice, only to refile it the next day (January 30, 2008, the sole day

[5] *See infra*, note 15.

[6] A reversal will require the Court to find in favor of Ms. Koestler on all three assignments of error.

remaining in the statute of limitations period). Because Ms. Koestler voluntary dismissed her complaint on January 29, 2008, the filing of her first complaint did not toll the one (1)-year statute of limitations, which continued to run from the time of accrual (October 2, 2006) and accordingly expired as to all of Ms. Koestler's claims on October 2, 2007. Since the instant action was not filed until January 30, 2008, all of Ms. Koestler's claims sought to be maintained herein are time-barred as a matter of law, and the trial court's grant of summary judgment was correct.

Because the statute of limitations issue is dispositive of this action, the Court need not reach the remaining issues raised on appeal. However, in the alternative, Ms. Koestler is judicially estopped from asserting the claims alleged in her complaint because they are "clearly inconsistent" with representations she previously made to the Mississippi Court of Appeals. In her prior appeal of her involuntary commitment to the Mississippi State Hospital at Whitfield, Ms. Koestler represented to the Court of Appeals that she *voluntarily admitted herself* to Senior Behavioral Health Services at Mississippi Baptist Medical Center. The Court of Appeals adopted this statement of fact and incorporated it into its opinion.

Contrary to her previous position that she voluntarily completed the admission process at Mississippi Baptist Medical Center, Ms. Koestler now claims that she began the admission process but withdrew her consent during the admission process and never completed it. Because her latter position is clearly inconsistent with her former position, Ms. Koestler is judicially estopped from now claiming that her admission to Mississippi Baptist Medical Center was not voluntary. Since all of Ms. Koestler's claims are predicated on her purported unlawful (non-consensual) detention at Mississippi Baptist Medical Center, none of her claims is sustainable as a matter of law.

In the further alternative, pursuant to MISS. CODE ANN. § 41-21-67(5), MBMC is statutorily immune from liability for all of Ms. Koestler's claims. Section 41-21-67(5) provides that "[p]ersons acting in good faith in connection with the detention of a person believed to be mentally ill shall incur no liability, civil or criminal, for those acts." The summary judgment record adduced in this case contains *no evidence whatsoever* that MBMC or any other appellee acted in bad faith at any time herein, nor does Ms. Koestler *even allege as much* in her complaint. MBMC was accordingly entitled to the grant of statutory immunity contained in § 41-21-67(5), and summary judgment was thereby further appropriate on this basis.

Each of the aforementioned grounds provides independent support for the judgment of the court below. Because the statute of limitations issue is dispositive, the Court need not reach the remaining issues of judicial estoppel and immunity. Nevertheless, a finding of propriety as to any one (1) of the trial court's three (3) bases supporting summary judgment must result in an affirmance of the judgment entered below.

ARGUMENT

I. PURSUANT TO CONTROLLING CASE LAW, MS. KOESTLER'S CLAIMS ARE TIME-BARRED BY THE GOVERNING STATUTE OF LIMITATIONS.

This Court has repeatedly held that a voluntary dismissal without prejudice ***"[does] not have the effect of excepting from the period prescribed by the statute of limitations, the time during which [the] suit was pending***." *Marshall v. Kansas City S. Rys. Co.*, 7 So. 3d 210, 213 (Miss. 2009) (reaffirming *Smith v. Copiah County*, 232 Miss. 838, 844, 100 So. 2d 614, 616 (1958); *W.T. Raleigh Co. v. Barnes*, 143 Miss. 597, 597, 109 So. 8, 9 (1926)), *reh'g denied*, May 7, 2009 (emphasis added).

When a plaintiff voluntarily dismisses her action, its original filing will not be deemed to have tolled the statute of limitations, and if refiled outside of the limitations period, the suit is

time-barred, "unless saved pursuant to Section 15-1-69 [the one-year savings statute] of the Mississippi Code"—that is, unless the dismissal is "for any matter of form." *Id.* at 214. With the *single exception* of suits voluntarily dismissed *for lack of subject matter jurisdiction*, a voluntary dismissal without prejudice is not a dismissal for a "matter of form" within the ambit of MISS. CODE ANN. § 15-1-69. *Id.* at 214 (citing *Barnes*, 109 So. at 9). *See Crawford v. Morris Transp., Inc.*, 990 So. 2d 162, 171-74 (Miss. 2008).

In *Marshall*, the plaintiffs' cause of action accrued on July 10, 1998. *Marshall*, 7 So. 3d at 213. The plaintiffs filed their complaint in state court on July 20, 1998, well within the three-year statute of limitations period. *Id.* Following removal of the action to federal court, the plaintiffs on September 30, 2003, voluntarily dismissed their complaint from the federal district court based on the district court's purported lack of subject matter jurisdiction. *Id.* at 213, 216. On August 16, 2004, *more than three (3) years after their cause of action accrued*, the plaintiffs refiled their complaint in state court. *Id.* at 212. The state court ultimately dismissed the second complaint as time-barred, and the plaintiffs appealed. *Id.* at 213.

On appeal, this Court reaffirmed the general rule that **a voluntary dismissal without prejudice precludes any tolling of the statute of limitations that would otherwise be triggered by the filing of an original complaint**. *See id.* at 213. The Court further determined that the plaintiffs' claim was indeed time-barred *unless* saved by Mississippi's saving statute, MISS. CODE ANN. § 15-1-69—that is, *unless* the plaintiffs' dismissal was for a "matter of form." *Id.* at 214. The Court likewise reaffirmed the general rule that a voluntary dismissal without prejudice is not a dismissal for a "matter of form" within the meaning of § 15-1-69. *Id.* at 214.

The *Marshall* Court went on to acknowledge *Crawford's* narrow exception excluding from the sweep of the general rule voluntary dismissals predicated on lack of subject matter jurisdiction. *Id.* at 215. Because the plaintiffs' complaint in *Marshall* was voluntary dismissed

on the basis of the district court's purported lack of subject matter jurisdiction, the Court concluded that the dismissal was for a "matter of form" pursuant to *Crawford*, thereby affording the plaintiffs the protections of § 15-1-69. *Id.* at 216. Because the plaintiffs filed their second complaint within one year of the subject-matter-jurisdiction-based dismissal of their first complaint, the Court found that the action was timely filed pursuant to § 15-1-69. *Id.* at 216. *On this basis alone*, the Court reversed the trial court's dismissal of the second complaint as time-barred. *Id.*

In the instant case, *Marshall* and the authorities cited therein (*viz.*, *Smith* and *Barnes*) mandate the dismissal of Ms. Koestler's claims as time-barred. It is undisputed that the totality of Ms. Koestler's claims are governed by the one-year statute of limitations of MISS. CODE ANN. § 15-1-35. *Brief of Appellant* at 11. It is further undisputed that the totality of Ms. Koestler's claims accrued on October 2, 2006, and that the one-year statute of limitations period would thereby have expired on October 2, 2007. *See Brief of Appellant* at 12. Ms. Koestler filed her original complaint on October 1, 2007, with one (1) day remaining in the statute of limitations period. *Brief of Appellant* at 11-12. Pursuant to MISS. R. CIV. P. 4(h), the 120-day period for service of process expired on January 29, 2008. *Brief of Appellant* at 12. On January 29, 2008 (the *last day* of the 120-day period for service of process), Ms. Koestler voluntarily dismissed her complaint *and refiled it the next day* (on January 30, 2008). *Brief of Appellant* at 11; R. 4, R.E. Tab 1.

Unlike the plaintiffs in *Marshall*, Ms. Koestler has never even so much as *alleged* that her voluntary dismissal was predicated on any lack of subject matter jurisdiction. It defies reason even to suggest as much, as Ms. Koestler's complaint (alleging various intentional torts) was, by her choosing, filed in circuit court, the court of general jurisdiction in this state. In actuality, Ms. Koestler has *never* explained on the record *why* she waited until the very last day

of the 120-day service of process period to dismiss her complaint, only to refile it the next day, nor has she explained her failure to attempt service of process. Whatever reasons propelled her to do so, they unquestionably had nothing to do with subject matter jurisdiction. Hence, pursuant to *Marshall* and *Crawford*, Ms. Koestler's voluntary dismissal cannot and does not constitute a dismissal for a "matter of form" pursuant to § 15-1-69, and the savings statute accordingly has and can have no application here.

Since the savings statute does not apply here as a matter of law, Ms. Koestler's claims are subject to the general rule of *Marshall*, *Smith*, and *Barnes* negating the tolling effect of a complaint that is ultimately dismissed voluntarily. Because Ms. Koestler voluntarily dismissed her complaint on January 29, 2008, **the statute of limitations was never tolled** by the filing of her original complaint on October 1, 2007, which by Ms. Koestler's own admission was the next-to-the-last day of the one (1)-year statute of limitations period. *Brief of Appellant* at 12. Consequently, the statute of limitations continued to run from the time of accrual on October 2, 2006, and extinguished *all* of Ms. Koestler's claims on October 2, 2007. Since the instant action was not filed until January 30, 2008, all of Ms. Koestler's claims were time-barred.

In its opinion granting summary judgment, the court below relied principally upon the case of *Parmley v. Pringle*, 976 So. 2d 422 (Miss. Ct. App. 2008), wherein the Court of Appeals expressed its concern that permitting a plaintiff to file a second complaint one day after dismissing her first complaint "would extend a statute of limitations exponentially if it were a repeated process."[7] *Parmley*, 976 So. 2d at 425 n.3. While *Parmley* contained no discussion of

[7] The Court of Appeals' protective stance relative to the statute of limitations is neither unwarranted nor unprecedented. This Court has consistently reaffirmed the "well established" nature and important purpose of statutes of limitations in our judicial system. *E.g., Miss. Dep't of Pub. Safety v. Stringer*, 748 So. 2d 662, 665 (Miss. 1999). Statutes of limitations reflect the legislative prerogative to compel the exercise of a right of action within a reasonable time, before evidence is lost, memories fade, witnesses become unavailable, or facts become incapable of production due to the lapse of time. *Id.* Limitations periods are founded upon the "general experience of society that valid claims will be promptly pursued

either *Smith* or *Barnes*, the valid concerns raised by the Court of Appeals are squarely allayed by the law set forth years ago in both opinions. Moreover, this Court's recent opinion in *Marshall* unequivocally reaffirmed that the rules delineated *supra* are still the law in this state.

Ms. Koestler invites this Court to disregard the *obiter dicta* of the "inferior" Court of Appeals in *Parmley* and to comply with the interpretation of law "as handed down by the Mississippi State Supreme Court." *Brief of Appellant* at 14. However, she premises the bulk of her argument on *King v. Am. RV Ctrs., Inc.*, 862 So. 2d 558 (Miss. Ct. App. 2003), a Court of Appeals case which this Court overruled on other grounds in *Wilner v. White*, 929 So. 2d 315 (Miss. 2006). Moreover, she fails to apprise this Court of its own controlling precedent of *Marshall*, a precedent which mandates dismissal of her entire cause of action as time-barred.[8] For the reasons set forth above, the court below was correct in its dismissal with prejudice of Ms. Koestler's action as time-barred by MISS. CODE ANN. § 15-1-35.

II. MS. KOESTLER IS JUDICIALLY ESTOPPED FROM ASSERTING THE CLAIMS ALLEGED IN HER COMPLAINT BECAUSE THEY ARE "CLEARLY INCONSISTENT" WITH REPRESENTATIONS SHE PREVIOUSLY MADE TO THE MISSISSIPPI COURT OF APPEALS.

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and not allowed to remain neglected"; they are designed to "suppress assertion of false and stale claims." *Id.* This Court has echoed these principles repeatedly. *See Mitchell v. Progressive Ins. Co.*, 965 So. 2d 679, 683 (Miss. 2007); *Harrison Enters., Inc. v. Trilogy Commc'ns, Inc.*, 818 So. 2d 1088, 1095 (Miss. 2002). *See also S. Win-Dor, Inc. v. RLI Ins. Co.*, 925 So. 2d 884, 888 (Miss. Ct. App. 2005). For these reasons, Mississippi courts have historically accorded statutes of limitations strict enforcement, see *Tandy Elecs., Inc. v. Fletcher*, 554 So. 2d 308, 311 (Miss. 1989), noting that "[t]he law is created for the watchful and not for the negligent." *Harrison Enterprises*, 818 So. 2d at 1095. Accordingly, even a *just* claim or one that rises to a *moral obligation* does not thereby exempt a nevertheless *time-barred* claim from the statute of limitations period. *Stringer*, 748 So. 2d at 665. Indeed, this Court has consistently held that statutes of limitations "apply with full force to all claims" and that "courts cannot refuse to give the statute effect merely because it seems to operate harshly in a given case." *Id.*; *Southern Win-Dor*, 925 So. 2d at 888. These concerns are particularly relevant here, where a reversal would effectively permit Ms. Koestler to flout the legislatively imposed statute of limitations with impunity, to the detriment of MBMC.

[8] Pending any rebuttal argument by Ms. Koestler that, notwithstanding the settled law of *Smith* and *Barnes*, she cannot be held to the Court's recent decision in *Marshall*, such a contention is wholly without merit, as *Marshall* applies retroactively. *See, e.g., Whitaker v. T & M Foods, Ltd.*, 7 So. 3d 893, 901 (Miss. 2009).

Although the statute of limitations issue is dispositive of this matter, summary judgment was nevertheless also appropriate on the basis of judicial estoppel. Judicial estoppel precludes a party who asserted a position in a prior action or pleading from subsequently asserting a contrary position to the detriment of a party opposite. *In re Mun. Boundaries of City of Southaven*, 864 So. 2d 912, 918 (Miss. 2003). The doctrine serves principally to protect the integrity of the judiciary. *Kirk v. Pope*, 973 So. 2d 981, 991 (Miss. 2007). This Court has delineated three requirements for the imposition of judicial estoppel to bar a party's claims: (1) the party's subsequent position must be "clearly inconsistent" with its previous position; (2) the court must have accepted the party's previous position; and (3) the non-disclosure must not have been inadvertent. *Id.* Ms. Koestler assigns error in the lower court's ruling *only as to the first element*. *Brief of Appellant* at 6. Hence, the only issue on appeal as to the trial court's ruling here is whether Ms. Koestler's position relative to her consent to hospitalization in the instant action is "clearly inconsistent" with representations she previously made to the Court of Appeals concerning the same subject.[9]

Mississippi appellate courts have applied the "clearly inconsistent" standard on at least two occasions. In 1985, this Court affirmed the striking of a party's affirmative defense on the grounds that it was clearly inconsistent with the party's position in previous litigation. *Daughtrey v. Daughtrey*, 474 So. 2d 598, 602 (Miss. 1985). In *Daughtrey*, a divorced husband sought to partition real property in the hands of his ex-wife. *Id.* at 599-600. In her answer, the ex-wife raised an affirmative defense challenging her ex-husband's title to the property. *See id.* at 601. However, in prior litigation of the parties' property interests, the ex-wife had taken the position that she and her husband each owned a one-half interest in the property in question. *Id.* at 602.

[9] *See infra*, note 12.

On these facts, the ex-husband contended that his ex-wife should be judicially estopped from pursuing her affirmative defense. *Id.* Because the ex-wife first contended (in the first litigation) that her husband owned a *one-half* interest in the subject property, then later contended (in the second litigation) that he owned *no* interest, the Court concluded that her positions were clearly inconsistent, thereby judicially estopping her from pursuing her affirmative defense. *See id.* Therefore, the Court affirmed the trial court's striking of the ex-wife's affirmative defense. *Id.*

More recently, the Court of Appeals applied the "clearly inconsistent" standard in affirming the judicial estoppel-based preclusion of claims brought against an individual involved in an automobile accident. *Scott v. Gammons*, 985 So. 2d 872, 877 (Miss. Ct. App. 2008). In *Scott*, the plaintiffs (injured in the automobile accident) brought claims against two insurance companies, alleging that one "Conway" was the driver of the other vehicle. *Id.* at 873. These claims were settled, and the plaintiffs executed releases in favor of the insurers. *Id.* Several months later, the plaintiffs filed a lawsuit against one "Gammons," alleging that she—and not Conway—was the driver of the other vehicle. *Id.* Gammons moved for summary judgment on grounds which included, *inter alia*, judicial estoppel of the plaintiffs' claims. *Id.* at 873-74. On appeal from the trial court's grant of summary judgment to Gammons, the Court of Appeals concluded that the plaintiffs' second position—that *Gammons* was the driver—was clearly inconsistent with their first position—that *Conway* was the driver. *Id.* at 877. Consequently, the court held that the plaintiffs were judicially estopped to assert claims against Gammons and accordingly affirmed the trial court's grant of summary judgment in Gammons' favor. *Id.*[10]

[10] *See also Hall v. GE Plastic Pac. PTE Ltd.*, 327 F.3d 391, 396-400 (5th Cir. 2003) (holding that plaintiff was judicially estopped from claiming that defendant was manufacturer of defective product when plaintiff had taken clearly inconsistent position in prior litigation that another party was manufacturer of such product).

In the case at bar, Ms. Koestler is judicially estopped from asserting the claims alleged in her complaint because she previously represented to the Mississippi Court of Appeals that she voluntarily admitted herself to Senior Behavioral Health Services at Mississippi Baptist Medical Center. Following the events alleged in the instant action, Ms. Koestler appealed her involuntary commitment to the State Hospital at Whitfield to the Mississippi Court of Appeals. In her appeal brief, she stated the following in her "Statement of Facts": "On October 2, 2006, ***Thelma Koestler . . . admitted herself to Mississippi Baptist Medical Center – Senior Behavioral Health Services*** . . . ." R. 106, R.E. Tab 9 (emphasis added). Not only did Ms. Koestler represent to the Court of Appeals that she voluntarily admitted herself to Senior Behavioral Health Services at Mississippi Baptist Medical Center, but the Court of Appeals adopted Ms. Koestler's statement of fact and incorporated it into its published opinion. *Koestler v. Koestler*, 976 So. 2d 372, 374 (Miss. Ct. App. 2008) (stating that "[Ms. Koestler] ***admitted herself*** in the Senior Behavioral Health Services wing of the Mississippi Baptist Memorial [sic] Hospital (Baptist)" (emphasis added)). *See also* R. 137, R.E. Tab 9.

Despite her prior representation to the Court of Appeals, Ms. Koestler now asserts that she withdrew her consent for admission *during the admission process*, before her admission was complete. In the **sole summary judgment submission** produced by Ms. Koestler, her own affidavit of November 24, 2008, she stated that she "***proceeded with a voluntary admission***" **but** that "***[d]uring the admission process***, [she] told Dr. Khari Omalara [sic] that [she] wanted to leave the hospital" and thereby "withdrew [her] consent for admission and treatment." R. 165, R.E. Tab 13, ¶¶ 5, 6 (emphasis added).[11] That is, Ms. Koestler now claims **she never completed**

[11] In her brief in the instant appeal, Ms. Koestler attempts to convince this Court that her present and prior positions as to the voluntariness of her admission are not inconsistent because she "completed the admissions process, and then withdrew her permission for consent to treatment." *Brief of Appellant* at 5. While Ms. Koestler may *argue in her brief* that her admission was complete before she withdrew her consent, such is *not* the substance of her *affidavit*, which expressly states that she withdrew her consent

the admission process and **did not voluntarily admit herself to Mississippi Baptist Medical Center**.

Ms. Koestler's claim in the instant litigation that she withdrew her consent for admission *during the admission process* and *did not complete the admission process* is "clearly inconsistent" with her prior representation to the Court of Appeals that she voluntarily admitted herself into Mississippi Baptist Medical Center's Senior Behavioral Health Services. Like the defendant in *Daughtrey*, who previously contended that her ex-husband owned a one-half interest in certain property—only later to claim he owned no interest at all—Ms. Koestler now seeks to claim that she did *not* voluntarily complete the admission process, when she previously contended that she did so. Like the plaintiffs in *Scott*, who had previously alleged that the driver of a vehicle was Conway—only later to claim it was Gammons—Ms. Koestler's present position is diametrically opposed to her previous position. Because she previously submitted to the Court of Appeals that her completed admission to Mississippi Baptist Medical Center was effectuated voluntarily, it is patently contradictory for her now to claim it was not. For these reasons, her prior and present positions are "clearly inconsistent" under Mississippi law, and all three elements of the judicial estoppel doctrine are satisfied.[12]

Because Ms. Koestler is judicially estopped from denying her consent to admission to Mississippi Baptist Medical Center, the totality of her intentional tort claims (and her husband's

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"[d]uring the admission process," a position that is wholly inconsistent with her prior representation to the Court of Appeals that she voluntarily "admitted herself to Mississippi Baptist Medical Center." R. 106, R.E. Tab 9. Pursuant to well-settled Mississippi law, this Court is constrained to limit its review to facts in the record, as "reliance on facts only disclosed in the briefs is prohibited." *Miss. Care Ctr. of Greenville, LLC v. Hinyub*, 975 So. 2d 211, 217 (Miss. 2008). Consequently, Ms. Koestler's efforts to reconcile her inconsistent positions via unsubstantiated assertions in her brief avail her nothing.

[12] As noted *supra*, Ms. Koestler assigns no error to the trial court's disposition of the second and third elements of judicial estoppel, which are accordingly outside the scope of review on appeal. *Brief of Appellant* at 6. *See Weems v. Am. Sec. Ins. Co.*, 486 So. 2d 1222, 1227 (Miss. 1986). Regardless, (1) a prior court did accept her previous position and (2) there was no inadvertent non-disclosure, rather Ms. Koestler made affirmative disclosures intended to affect the court's ruling.

derivative loss of consortium claim[13]) predicated on her purported false imprisonment in Mississippi Baptist Medical Center fail as a matter of law. *See, e.g., State ex rel. Power v. Moore*, 252 Miss. 471, 475-76, 174 So. 2d 352, 354 (1965) (holding that no false imprisonment occurs unless one is confined *without her permission*). *See also Panama Canal Co. v. Wagner*, 234 F.2d 163, 167 n.6 (5th Cir. 1956) (acknowledging the well-settled common law intentional tort doctrine that "no wrong is done *to one who consents*" (emphasis added)). Since the doctrine of judicial estoppel bars Ms. Koestler from claiming herein that she did not voluntarily complete the admission process at Mississippi Baptist Medical Center, she cannot sustain an essential element of her false imprisonment claim, *viz.*, that her confinement was without her permission and therefore unlawful. *See Moore*, 174 So. 2d at 354. *See also Blake v. Wilson*, 962 So. 2d 705, 714 (Miss. Ct. App. 2007) (holding that unlawfulness of the alleged detention is an essential element of the tort of false imprisonment). Nor can Ms. Koestler sustain any of her remaining claims, all of which are premised upon her allegations of an involuntary detention at Mississippi Baptist Medical Center. *See Complaint*: R. 12, R.E. Tab 1, ¶ 40; R. 13-14, R.E. Tab 1, ¶¶ 47-48; R. 15, R.E. Tab 1, ¶ 56; R. 17, R.E. Tab 1, ¶ 65.

Because no genuine issue of material fact remained as to any of Ms. Koestler's claims once she was judicially estopped from denying her voluntary admission to Mississippi Baptist Medical Center, the court below correctly granted summary judgment in favor of MBMC.

[13] *See J & J Timber Co. v. Broome*, 932 So. 2d 1, 6 (Miss. 2006) (stating rule of law in Mississippi that loss of consortium claims are derivative, and that if underlying claim is disposed of, "loss of consortium claim cannot be maintained on its own").

III. MBMC IS IMMUNE FROM LIABILITY HEREIN PURSUANT TO MISS. CODE ANN. § 41-21-67(5).

As an additional grounds supporting summary judgment in favor of MBMC, the court below relied on the immunity provision of MISS. CODE ANN. § 41-21-67. Section 41-21-67 states the following, in pertinent part:

> Whenever a licensed physician or psychologist certified to complete examinations for the purpose of commitment has reason to believe that a person poses an immediate substantial likelihood of physical harm to himself or others or is gravely disabled and unable to care for himself by virtue of mental illness, as defined in Section 41-21-61(e), then the physician or psychologist may hold the person or the physician may admit the person to and treat the person in a licensed medical facility, without a civil order or warrant for a period not to exceed seventy-two (72) hours or the end of the next business day of the chancery clerk's office. The person may be held and treated as an emergency patient at any licensed medical facility, available regional mental health facility, or crisis intervention center. The physician or psychologist who holds the person shall certify in writing the reasons for the need for holding. Any respondent so held may be given such treatment by a licensed physician as indicated by standard medical practice. ***Persons acting in good faith in connection with the detention of a person believed to be mentally ill shall incur no liability, civil or criminal, for those acts.***

MISS. CODE ANN. § 41-21-67(5) (emphasis added).

In her brief, Ms. Koestler principally argues that the good faith immunity provision of § 41-21-67(5) applies only if the party asserting it complied with the provisions of Subsection (5) preceding the immunity clause. *Brief of Appellant* at 7, 9-10. Put differently, Ms. Koestler contends that one cannot act in "good faith" under Subsection (5) without complying with the preceding provisions of Subsection (5). This erroneous interpretation of § 41-21-67(5) contravenes the bedrock principle of statutory construction—that courts must apply the *plain meaning* of unambiguous statutes. *See, e.g., Ameristar Casino Vicksburg, Inc. v. Duckworth*, 990 So. 2d 758, 760 (Miss. 2008).

No ambiguity exists in the language of the immunity provision of § 41-21-67(5) vis-à-vis its relationship to the remainder of the statute. The immunity provision simply states that ***"[p]ersons acting in good faith"*** in the detention of an individual believed to be mentally ill ***"shall incur no liability."*** § 41-21-67(5) (emphasis added). On its plain meaning, the immunity provision stands alone as an autonomous proposition free of any statutory conditions precedent. Its independence from the preceding provisions of Subsection (5) is further evidenced by its broader applicability to any and all "[p]ersons" and not merely to "physician[s]" and "psychologist[s]" to whom the preceding provisions of Subsection (5) apply exclusively. Indeed, if this Court were to accept Ms. Koestler's argument, the immunity provision could *only* apply to physicians and psychologists, as other "[p]ersons" are incapable of complying with the preceding provisions of Subsection (5) in any event. Furthermore, Ms. Koestler has cited no authority (and indeed there is no controlling authority) supporting her interpretation of § 41-21-67(5). In the absence of binding authority permitting a contrary construction of the unambiguous immunity provision, its plain meaning must govern. Therefore, the Court may reject Ms. Koestler's argument that the good faith immunity provision of § 41-21-67(5) is conditioned on compliance with other statutory provisions.[14,15] "Good faith" is, in and of itself, an independent inquiry.

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[14] *Cf. Tebo v. Tebo*, 550 F.3d 492, 505 (5th Cir. 2008) (affirming summary judgment in favor of defendant pursuant to analogous good faith immunity provision of MISS. CODE ANN. § 41-21-105(1), where plaintiff, in support of her position that defendant failed to act in good faith, relied on, *inter alia*, evidence that statutory procedures were not followed).

[15] In support of her argument, Ms. Koestler relies almost exclusively on medical records contained in her record excerpts but which do not appear in the record and most of which were never before the trial court. As a matter of law, this Court is precluded from considering such medical records and is bound to constrain its review to the evidence contained in the record. *LaCroix v. Marshall County Bd. of Supervisors*, No. 2008-CP-00477-COA, 2009 WL 2502086, at *1 n.2 (Miss. Ct. App. Aug. 18, 2009) (holding that appellate court cannot consider matter placed in "record excerpts" that is not, in fact, a part of the record on appeal). *See also Pratt v. Sessums*, 989 So. 2d 308, 309-10 (Miss. 2008) (holding that Supreme Court "cannot consider evidence that is not in the record"); *Miss. Care Ctr. of Greenville, LLC v. Hinyub*, 975 So. 2d 211, 217 (Miss. 2008) (holding that "[t]his Court is limited to consideration of the facts in the record"); *In re Enlargement of City of Clinton*, 955 So. 2d 307, 331 (Miss. 2007) (holding that "[t]his Court may not act upon or consider matters which do not appear in the record and must confine itself to what actually does appear in the record"); *Gen. Motors Corp. v. Pegues*, 738 So. 2d 746, 752 n.5

Mississippi courts have had little occasion to address § 41-21-67(5), and the application of the immunity provision contained therein has largely escaped judicial scrutiny. Nevertheless, helpful persuasive authority may be found in Fifth Circuit opinions construing the highly analogous immunity provision of MISS. CODE ANN. § 41-21-105, which states the following in pertinent part:

> ***All persons acting in good faith*** in connection with the preparation or execution of applications, affidavits, certificates or other documents; apprehension; findings; determinations; opinions of physicians and psychologists; transportation; examination; treatment; emergency treatment; detention or discharge of an individual, under the provisions of sections 41-21-61 to 41-21-107, ***shall incur no liability, civil or criminal, for such acts***.

MISS. CODE ANN. § 41-21-105(1) (emphasis added). Like the immunity provision of § 41-21-67(5), the immunity provision of § 41-21-105(1) provides that "persons acting in good faith in connection with" specified matters "shall incur no liability, civil or criminal, for such acts." *Id.* The pertinent language of both immunity provisions is almost verbatim; furthermore, both statutes deal with treatment of the mentally ill and are codified in the same title and chapter of the *Mississippi Code*. Given the highly analogous nature of these respective immunity provisions, authority construing the latter should be deemed decidedly persuasive as to the former.

In discussing the application of § 41-21-105(1), the Fifth Circuit held that the immunity provision contained therein is a grant of "qualified immunity" insulating eligible defendants from liability "absent any showing of bad faith." *Houser v. Duker*, 988 F.2d 1211, *1 (5th Cir. 1993). Finding the record "devoid of any indication that [the defendants] acted in bad faith," the court

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(Miss. Ct. App. 1998) (same); *Davis v. Christian Brotherhood Homes of Jackson, Miss., Inc.*, 957 So. 2d 390, 398 (Miss. Ct. App. 2007) (holding that appellate court cannot consider matters which are contained in the "record excerpts" but which do not appear in the official record and which do not appear to have been before the trial court). MBMC has accordingly joined in Dr. Cook's motion to strike pertinent pages of Ms. Koestler's record excerpts.

affirmed the district court's grant of summary judgment in favor of the defendants. *Id.* Where a plaintiff *specifically alleged in his complaint* that, *inter alia*, the defendant had acted in bad faith, the plaintiff survived the defendant's summary judgment motion predicated on § 41-21-105(1). *Bass v. Parkwood Hosp.*, 180 F.3d 234, 240, 246 (5th Cir. 1999).

Application of these rules in the case at bar supports the trial court's ruling. In deciding this issue, the trial court found that no genuine issue of material fact existed as to the appellees' exercise of good faith. *See* R.176-77, R.E. Tab 15. The summary judgment evidence of record consists of the following: the parties' pleadings,[16] including Ms. Koestler's Complaint, R. 4-20, R.E. Tab 1; and Ms. Koestler's affidavit,[17] R. 165, R.E. Tab 13.

Applying the persuasive authority of *Houser*, the burden lay with Ms. Koestler to overcome the appellees' grant of qualified immunity by making a showing of bad faith. First, Ms. Koestler does not even *allege* bad faith on the part of MBMC; moreover, no such showing was made in Ms. Koestler's affidavit, which merely stated that Dr. Omolara prevented Ms. Koestler from leaving the hospital and advised her that the authorities would be notified if she attempted to leave. R. 165, R.E. Tab 13, at ¶ 6.[18] Such actions on the part of Dr. Omolara are entirely consistent with a physician acting in good faith to confine a mentally ill patient within the bounds of the law. Furthermore, there was no fact presented supporting a claim of bad faith

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[16] See MISS. R. CIV. P. 56(c) (stating that "[t]he judgment sought shall be rendered forthwith if the pleadings . . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of a law"). *See also Stuckey v. The Provident Bank*, 912 So. 2d 859, 867 (Miss. 2005) (holding that on summary judgment, the trial judge "must consider the pleadings, whether they be sworn or unsworn").

[17] Ms. Koestler's affidavit (R. 165, R.E. Tab 13) was the sole competent summary judgment evidence produced by Ms. Koestler in response to the appellees' motions for summary judgment.

[18] In her brief, Ms. Koestler likewise states that she told Becky Ivy, an occupational therapist, and Dr. Cook (and his staff) that she wanted to leave the hospital. *Brief of Appellant* at 10-11. Because there is no support for these assertions in the record, they should be disregarded. *Miss. Care Ctr. of Greenville, LLC v. Hinyub*, 975 So. 2d 211, 217 (Miss. 2008) (holding that "[t]his Court is limited to consideration of the facts in the record" and that "reliance on facts only disclosed in the briefs is prohibited").

against MBMC. To find such actions sufficient to create a fact question precluding summary judgment on the immunity question would eviscerate the statutory immunity of § 41-21-67(5) in almost every instance in which it is asserted. Indeed, on such naked assertions as those set forth in Ms. Koestler's affidavit, *these are the very types of actions the statute is designed to immunize.* Nowhere in Ms. Koestler's affidavit does she set forth evidence identifying malicious, willful conduct indicative of "bad faith" sufficient to overcome appellees' grant of statutory immunity. *See Southland Enters., Inc. v. Newton County*, 940 So. 2d 937, 943 (Miss. Ct. App. 2006) (defining "bad faith" as "a refusal to fulfill a duty, not prompted by an honest mistake as to one's rights or duties, but *by some interested or sinister motive* . . . impl[ying] *conscious wrongdoing* because of *dishonest purpose or moral obliquity*") (emphasis added).

Even if the Court declined to limit its consideration of the summary judgment record to Ms. Koestler's affidavit the sole remaining MRCP 56(c) submission of record consists of the parties' pleadings, most notably Ms. Koestler's Complaint. Unlike the plaintiff's complaint in *Bass*, Ms. Koestler's Complaint contains no allegations of bad faith whatsoever, specifically or otherwise. In her brief, Ms. Koestler makes the conclusory assertion that "[b]oth Dr. Omolara and Dr. Cook grossly failed to be faithful to their duties and obligations as physicians." *Brief of Appellant* at 10. This assertion is unsupported by any record evidence whatsoever and may be disregarded as a matter of law. *Miss. Care Ctr. of Greenville, LLC v. Hinyub*, 975 So. 2d 211, 217 (Miss. 2008) (holding that "[t]his Court is limited to consideration of the facts in the record" and that "reliance on facts only disclosed in the briefs is prohibited"). Because the summary judgment record in the instant action contains no evidence to support a showing of bad faith on the part of appellees—and indeed is devoid even of any allegation to that effect—the ruling of the court below should be affirmed.

CONCLUSION

Pursuant to this Court's recent opinion in *Marshall* reaffirming the general rule of *Smith* and *Barnes*, Ms. Koestler's voluntary dismissal stripped her original complaint of any tolling effect it would otherwise have had. Consequently, the statute of limitations began to run upon accrual and never ceased running until it expired one (1) year later. Because Ms. Koestler refiled her complaint herein more than three (3) months after the statute of limitations expired, her claims are time-barred as a matter of law, and the court below correctly granted summary judgment in favor of MBMC. Furthermore, Ms. Koestler may not benefit from a chameleon-like change in her position from one proceeding to the next. She has once before engaged the courts to obtain the ends she seeks. Having convinced the Court of Appeals to accept her position, she may not now return to court, extolling the opposite position in an effort to secure different, additional relief. Finally, MRCP 56 is clear in its mandate regarding requisite evidence to oppose a motion for summary judgment. On their face, Ms. Koestler's allegations do not support a claim of bad faith, and her failure of proof warranted dismissal of her claims. For the reasons set forth herein, MBMC respectfully requests that this Court affirm the judgment of the Hinds County Circuit Court dismissing this action with prejudice as to MBMC.

THIS the 25th day of January, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, REX M. SHANNON III, one of the attorneys for appellees, Mississippi Baptist Medical Center, Inc., Mississippi Baptist Health Systems, Inc., Baptist Behavioral Health Services, Grace Scott, R.N., Becky Ivey, O.T., and Stacey Ashley, do hereby certify that I have this date caused to be mailed, U. S. Mail, postage pre-paid, a true and correct copy of the above and foregoing to the following:

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