

IN THE SUPREME COURT OF MISSISSIPPI

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

APPELLANT

v.

NO. 2009-TS-00603

**MISSISSIPPI BAPTIST MEDICAL SYSTEMS, INC., a/k/a
Mississippi Baptist Medical Center a/k/a Baptist Medical Center;**

MISSISSIPPI BAPTIST MEDICAL CENTER, INC.;

BAPTIST BEHAVIORAL HEALTH SERVICES;

WILLIAM S. COOK, JR., M.D., P.A.;

**WILLIAM S. COOK, JR., M.D., INDIVIDUALLY and/or in his capacity as an employee
of Mississippi Baptist Medical Systems, Inc., and/or in his capacity as an employee of
Mississippi Baptist Medical Center, Inc., and/or in his capacity as Medical Director of
Baptist Senior Behavioral Health Services;**

KHARI A. OMOLARA, P.C.;

**KHARI A. OMOLARA, M.D., INDIVIDUALLY and/or in his capacity as an employee of
Mississippi Baptist Medical Systems, Inc., and/or in his capacity as an employee of
Mississippi Baptist Medical Center, Inc., and/or in his capacity as an employee of Baptist
Behavioral Health Services;**

**GRACE SCOTT, R.N., INDIVIDUALLY and/or in her capacity as an employee of
Mississippi Baptist Medical Systems, Inc., and/or in her capacity as an employee of
Mississippi Baptist Medical Center, Inc., and/or in her capacity as an employee of Baptist
Behavioral Health Services;**

**TIFFANY PARKER, L.S.W., INDIVIDUALLY and/or in her capacity as an employee of
Mississippi Baptist Medical Systems, Inc., and/or in her capacity as an employee of
Mississippi Baptist Medical Center, Inc., and/or in her capacity as an employee of Baptist
Behavioral Health Services;**

**BECKY IVEY, O.T., INDIVIDUALLY and/or in her capacity as an employee of
Mississippi Baptist Medical Systems, Inc., and/or in her capacity as an employee of
Mississippi Baptist Medical Center, Inc., and/or in her capacity as an employee of Baptist
Behavioral Health Services;**

**S. INMAN, R.N., INDIVIDUALLY, and/or in her capacity as an employee of Mississippi
Baptist Medical Systems, Inc., and/or in her capacity as an employee of Mississippi Baptist**

Medical Center, Inc., and/or in her capacity as an employee of Baptist Behavioral Health Services;

STACEY ASHLEY, INDIVIDUALLY and/or in her capacity as an employee of Mississippi Baptist Medical Systems, Inc., and/or in her capacity as an employee of Mississippi Baptist Medical Center, Inc., and/or in her capacity as an employee of Baptist Behavioral Health Services;

AND JOHN DOES 1 THROUGH 10

APPELLEES

REPLY BRIEF OF APPELLANT

**APPEAL FROM THE CIRCUIT COURT OF
HINDS COUNTY, MISSISSIPPI**

ORAL ARGUMENT NOT REQUESTED

COUNSEL FOR APPELLANT:

**MARCIE T. SOUTHERLAND
MSB# [REDACTED]**

**1120 Jackson Street
Vicksburg, Mississippi 39183
Telephone: 601-636-1930
Facsimile: 601-636-1563**

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
REPLY.....	1
CONCLUSION.....	13
CERTIFICATE OF SERVICE.....	15

TABLE OF AUTHORITIES

Case Law

<i>Bacon v. Bacon</i> , 76 Miss. 458, 24 So.968, 969 (1899).....	9
<i>Barner v. Gorman</i> , 605 So.2d 805 (Miss. 1992).....	1
<i>Bass v. Parkwood Hosp.</i> , 180 F.3d 234 (5 th Circuit 1999).....	2
<i>Carrington v. Methodist Medical Center, Inc.</i> , 740 So.2d 827 (Miss. 1999).....	8
<i>Erby v. Cox</i> , 654 So.2d 503 (Miss. 1995).....	10
<i>Fox v. Smith</i> , 594 So.2d 596 (Miss. 1992).....	1
<i>Holmes v. Coast Transit Authority</i> , 815 So.2d 1183, 1185 (Miss. 2002).....	10, 12
<i>Johnson v. Memorial Hosp. at Gulfport</i> , 732 So.2d 864 (Miss. 1998).....	12
<i>King v. American RV Centers, Inc.</i> , 862 So.2d 558 (Miss.Ct.App. 2003).....	10, 11
<i>Koestler v. Koestler</i> , 976 So.2d 372 (Miss.Ct.App. 2008).....	7, 8
<i>McQueen v. Williams</i> , 587 So.2d 918 (Miss. 1991).....	13
<i>Manning v. State</i> , 929 So.2d 885 (Miss. 2006).....	12
<i>Marchbanks v. Borum</i> , 806 So.2d 278 (Miss.Ct.App. 2007).....	1
<i>Marshall v. Kansas City Southern Railways Co.</i> , 7 So.3d 210 (Miss. 2009).....	12
<i>Morgan v. Greenwaldt</i> , 786 So.2d 1037 (Miss. 2001).....	1, 2
<i>Parmley v. Pringle</i> , 976 So.2d 422 (Miss.Ct.App. 2008).....	12
<i>Rigdon v. Mississippi Farm Bureau Federation</i> , 22 So.3d 321 (Miss.App.Ct. 2009).....	12
<i>Thornhill v. Wilson</i> , 504 So.2d 1205 (Miss. 1987).....	2
<i>Watters v. Stripling</i> , 675 So.2d 1242 (Miss. 1996).....	10
<i>Whitten v. Cox</i> , 799 So.2d 1 (Miss. 2000).....	2, 9

Court Rules

Mississippi Rule of Civil Procedure 4(h).....	10
Mississippi Rule of Civil Procedure 41(a)(1)(I).....	11

Statutes

Miss. Code Ann. § 15-1-35.....	10
Miss. Code Ann. § 15-1-69.....	12
Miss. Code Ann. § 41-21-61 (Rev. 2000).....	5, 7
Miss. Code Ann. § 41-21-67 (Rev. 2000).....	6, 7, 8
Miss. Code Ann. § 41-21-105.....	8

Other Authorities

<u>Black's Law Dictionary</u> 693 (6 th ed. 1990).....	8
---	---

REPLY OF APPELLANT

1. **Judicial estoppel does not apply in this matter. Although Thelma Koestler initially presented herself for treatment at Baptist, she withdrew her consent and was held against her will at Baptist by Dr. Omolara, Dr. Cook, and the staff of Baptist.**

Thelma has never denied that she presented herself for admittance to the Senior Behavioral Health Services. Thelma voluntarily presented herself (at the insistence of her children) for admittance to Baptist, began the admissions process, and then withdrew her permission for consent to treatment. (R.E. 20). Thelma's husband of over 50 years was dying of cancer, and Thelma was depressed, as any grieving soon-to-be widow would be. Thelma wanted to be home with her husband while he was dying. (C.P. 161).

It seems that the Baptist, Dr. Omolara, Dr. Cook, and the other appellees believe that once someone consents to treatment by a physician or hospital, that person's consent cannot be withdrawn. This is patently untrue. "Mississippi adheres to the basic belief that a patient is 'master of his/her own body.'" *Marchbanks v. Borum*, 806 So.2d 278, 288 (Miss.Ct.App. 2007)(citing *Fox v. Smith*, 594 So.2d 596, 604 (Miss. 1992)). Regarding consent, "[s]igned waivers do not always determine a patient's consent. ... A form signed by the patient does not always indicate that a patient's consent was informed consent." *Barner v. Gorman*, 605 So.2d 805, 808 (Miss. 1992). As our Supreme Court has stated, the issue of consent, whether given or withdrawn, turns on the facts of the case. *Morgan v. Greenwaldt*, 786 So.2d 1037, 1043 (Miss. 2001). If there is a material dispute as to the issue of consent, as is the case here, the question should be decided by a jury. *Id.*

In *Morgan*, Morgan signed a consent for mental health treatment. Morgan, who had an extensive history of mental illness and treatment, was placed in isolation after becoming violent with staff and other patients. Morgan sued the hospital, arguing, among other things, that she was falsely imprisoned by the hospital. *Id.* at 1042-1043. The trial court granted a directed verdict in favor of

defendants, which was affirmed on appeal. Morgan and the case *sub judice* are factually distinguishable. Thelma, unlike Morgan, had no history of mental illness. Thelma had never been admitted to treatment in a behavioral health unit, unlike Morgan. Thelma did not realize she would be held in a locked ward, unlike Morgan. Even though both Morgan and Thelma initially gave consent to treatment, Thelma immediately and repeatedly withdrew her consent and repeatedly asked to leave Baptist. Morgan, however, did not. Morgan did not attempt to withdraw her consent or leave the hospital. *Id.* Because there is material dispute regarding Thelma's consent to treatment as well as her withdrawal of consent, this matter should have been left for the jury. *Id.* Thelma respectfully requests this Court reverse the trial judge's ruling that Thelma is judicially estopped from pursuing her claims against the appellees.

2. Dr. Omolara, Dr. Cook, and the staff at Baptist falsely imprisoned Thelma Koestler.

"Mississippi courts have long recognized that actions for false imprisonment may arise out of an unlawful civil commitment." *Bass v. Parkwood Hosp.*, 180 F.3d 234 (5th Circuit 1999).

This court has stated that false imprisonment consists of two elements which, in this case, are: (1) the detention of Thelma Koestler and (2) that such detention of Thelma Koestler was unlawful. *Whitten v. Cox*, 799 So.2d 1, 9 (Miss. 2000). "The second element turns on whether looking at the totality of the circumstances, the actions of the defendant were 'objectively reasonable in their nature, purpose, extent and duration.'" *Id.* (quoting *Thornhill v. Wilson*, 504 So.2d 1205, 1208 (Miss. 1987)). "It is the reasonableness of the [defendant's] actions, not his intent that matters." *Id.*

There has been no dispute as to whether Thelma was detained at Baptist. Thelma was admitted to Baptist on October 2, 2006. Thelma was held in a locked ward with no way to

communicate with the outside world. She was held at Baptist despite repeated, numerous requests to be allowed to leave. Obviously Thelma was detained by Dr. Omolara, Dr. Cook, and the staff of Baptist.

Dr. Omolara makes much ado about the fact (as he states it) that “Ms. Koestler remained at the hospital and *made no actual attempts to exit, signifying that her consent remained in place.*” (*Brief of Appellant Omolara at p.19.*) Thelma signed an affidavit that she withdrew her consent, leaving her son to sign the admission papers. (*Baptist Record Excerpts at p. 165*). Thelma stated unequivocally that she withdrew her consent to treatment when she realized that she would be held in a locked unit. *Id.* Thelma also stated that she told Dr. Omolara that she was refusing treatment and that she wished to leave the hospital, at which time Dr. Omolara informed her that if she attempted to leave, the authorities would be called. *Id.* Anyone would interpret that statement to mean that Thelma would be arrested if she attempted to leave. *Id.* Of course, Thelma did not attempt to leave. Thelma is over 70 years of age, has never had any dealings with a mental health facility, her husband of 50 years was dying, and she was threatened with arrest if she attempted to leave.

It is interesting that the record excerpts of Dr. Cook only contain the consent forms initialed and signed by Thelma. Once Thelma realized what her children had done, she immediately withdrew her consent as is evidenced by the further admittance forms initialed and signed by her son Carl Koestler. *See Appendix A.* Incidentally, Carl Koestler did not have a valid power of attorney covering Thelma and did not have any legal authority to sign those forms on behalf of Thelma.

Thelma’s detention was unlawful. Were the actions of Dr. Omolara, Dr. Cook, and the staff of Baptist reasonable? When one looks at the totality of the circumstances surrounding the actions

of Dr. Omolara, Dr. Cook and the staff of Baptist, there is no doubt that the actions of these two doctors and numerous staff were not reasonable under the circumstances.

Dr. Omolara's physician orders dated October 2, 2006, make no mention of any threat made by Thelma to harm herself or anyone else, nor was there any mention that Thelma was unable to care for herself. (R.E. 23) He felt she simply suffered from a "depressive disorder." *Id.*

In addition, the admission assessment conducted by Nurse Scott on October 2, 2006, stated that Thelma's legal status was considered **voluntary**. (R.E. 24). Thelma was suffering from no hallucinations or delusions, and her mental condition was considered alert. (R.E. 28). Thelma was also considered appropriately dressed, coherent in her speech, and calm and cooperative with clear thought processes. (R.E. 27).

Further, the admission assessment conducted by OTR Ivy on October 2, 2006, specifically noted that Thelma suffered from no suicide risk or homicide risk. (R.E. 33). Ivy specifically noted that Thelma was independent in grooming activities, toileting activities, and all transfer activities. (R.E. 34). Thelma was able to care for herself. **In fact, Thelma told Ivy that her goal was to get out of Baptist.** (R.E. 34).

On October 2, 2006, when Thelma discovered that she would be held in a locked unit for an undetermined amount of time, she immediately told Dr. Omolara she wanted to leave Baptist; however, Dr. Omolara told Thelma that if she attempted to leave the hospital, the "authorities" would be called. (C.P. 161, 165). Why? At this time every assessment done stated that Thelma could care for herself and that she was not a danger to herself or anyone else.

Thelma requested twice on October 2, 2006, to be released from Baptist. Both requests were denied. Once Thelma told Dr. Omolara and Ivy she wanted to leave the hospital, Dr. Omolara was

under an obligation to allow her to leave. Dr. Omolara's statement that he would call the authorities if Thelma attempted to leave falsely imprisoned Thelma. Further, any action taken by Dr. Omolara or the staff at Baptist before Dr. Omolara was replaced by Dr. Cook as Thelma's physician after Thelma's request to leave constituted an assault and battery upon Thelma, invaded Thelma's privacy, intentionally inflicted emotional distress upon Thelma, and caused the loss of consortium between Thelma and Mickey, her husband of over fifty years who was dying.

Dr. Omolara, Dr. Cook, and staff at Baptist attempt to avail themselves of immunity found in Miss. Code Ann. § 41-21-67(5). This statute is not applicable in this matter. However, assuming *arguendo* that it does apply, Thelma will address the statute.

Not until October 3, 2006, did Dr. Omolara mention any involuntary hospitalization. Even then, Dr. Omolara failed to certify in writing why Thelma should be held involuntarily at Baptist. Dr. Omolara failed to follow the statutory mandate of Miss. Code Ann. § 41-21-67(5). On Dr. Omolara's Psychiatric Evaluation/Consult dated October 3, 2006, it states under the Mental Status Evaluation that Thelma is "depressed" but she denies thoughts of harming herself or others. (R.E. 39). However, Dr. Omolara then contradicts himself and states that Thelma has an inability to care for self with an increased risk of self-harm. (R.E. 40). This last observation is in direct contrast to assessments previously conducted by other staff: one more question of fact for the jury.

On October 3, 2006, for whatever reason, Thelma's care was transferred to Dr. Cook. (R.E. 41). That same day, Licensed Social Worker Parker finished the initial assessment begun the day before. Overnight it seems that Thelma had gone from being an alert, independent woman to one who suffers from a major personality disorder who will be discharged to Whitfield for further treatment. (R.E. 36). This "discharge plan" was approved by her family. *Id.*

In addition, nowhere in writing does Dr. Cook comply with Miss. Code Ann. § 41-21-67(5) and certify in writing specifically why he felt Thelma should be held involuntarily at Baptist. Nowhere does Dr. Cook specify he believes Thelma is unable to care for herself, or that she is a danger to herself or others, as is required by Miss. Code Ann. § 41-21-67(5) until his discharge summary dated October 24, 2006. (R.E. 21). Even then there was never a certified writing as required by statute

The trial court erred in finding that Baptist, Dr. Omolara, Dr. Cook, and the other appellees are immune from liability for good faith action pursuant to Miss. Code Ann. § 41-21-67(5). Miss. Code Ann. § 41-21-67(5), by its specific language, is only invoked **during the actual commitment process.**

Miss. Code Ann. §41-21-67(5) reads:

(5) 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. Such 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 such acts.

(Emphasis added.) Neither Dr. Omolara nor Dr. Cook were certified by the court in this matter to perform an examination on Thelma pertaining to the involuntary commitment process. In fact, a Dr. Packer and a Dr. Powers had been certified and appointed by the court to examine and assess

Thelma. *Koestler v. Koestler*, 976 So.2d 372, 375 (Miss.App.Ct. 2008). As such, neither Dr. Omolara nor Dr. Cook can avail themselves of the immunity offered in this statute.

Assuming *arguendo* that this immunity did apply, Dr. Omolara, Dr. Cook, Baptist and its staff, must “...have [had] reason to believe that [Thelma] pose[d] an immediate substantial likelihood of physical harm to [herself] or others or [was] gravely disabled and unable to care for [herself] by virtue of mental illness, as defined in Section 41-21-61(e)...” before being able to hold Thelma against her will. *Id.*

According to Miss. Code Ann. § 41-21-61(e), a mentally ill person must have a:

“substantial psychiatric disorder of thought, mood, perception, orientation, or memory which grossly impairs judgment, behavior, capacity to recognize reality, or to reason or understand, which (I) is manifested by instances of grossly disturbed behavior or faulty perceptions; and (II) poses a substantial likelihood of physical harm to [herself] or others as demonstrated by (A) a recent attempt or threat to physically harm [herself] or others, or (B) a failure to provide necessary food, clothing, shelter or medical care for [herself], as a result of the impairment.

Miss. Code Ann. § 41-21-61(e).

Assuming *arguendo* that Dr. Cook had authority to hold Thelma in the locked unit at Baptist (which he did not), such authority ended upon the expiration of the statutory seventy-two (72) hours prescribed in Miss. Code Ann. § 41-21-67(5). According to medical records, Dr. Cook took over treatment of Thelma around 7:30 a.m. on October 3, 2006. Dr. Cook would have been able to legally hold Thelma for treatment until 7:30 a.m. on October 6, 2006. No Application and Affidavit for Commitment of Thelma was filed until October 11, 2006, some nine (9) days after the beginning of Thelma’s false imprisonment. At the very least, Dr. Cook’s authority to hold Thelma ended on October 6, 2006, and Dr. Cook falsely imprisoned Thelma from the morning of October 6, 2006, until the filing of the Affidavit for Involuntary Commitment on October 11, 2006. At least twice after the 72-hour period ended and before the Application and Affidavit for Involuntary Commitment

was filed, Thelma asked to leave Baptist. (R.E. 37, 38). Both times Thelma was refused in direct contravention to Miss. Code Ann. § 41-21-67(5).

Dr. Cook argues that immunity granted by Miss. Code Ann. § 41-21-105 applies to any treatment rendered to Thelma after the initial 72 hours after admission. Dr. Cook is mistaken. Miss. Code Ann. § 41-21-105 states:

- (1) 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.
- (2) No civil suit of any kind whatsoever shall be brought or prosecuted against the board, any member thereof, any director or employee for acts committed within the scope of their employment, except for wilful or malicious acts or acts of gross negligence.

(Emphasis added.)

Miss. Code Ann. § 41-21-105 only immunizes “good faith actions taken during the actual commitment process.” *Carrington v. Methodist Medical Center, Inc.*, 740 So.2d 827, 829 (Miss. 1999). In addition, “[i]t speaks to wrongful commitment, unlawful detention, battery (based on non-consensual treatment) and the like” *Id.* On March 4, 2008, the Court of Appeals for the State of Mississippi ruled that the commitment of Thelma Koestler was a wrongful commitment. The Court of Appeals reversed and rendered the commitment of Thelma Koestler. *Koestler v. Koestler*, 976 So.2d 372 (Miss.Ct.App. 2008).

Miss. Code Ann. § 41-21-67(5) does not provide immunity from liability for someone who is not acting in good faith. Good faith is described by Black’s Law Dictionary as “being faithful to one’s duty or obligation.” Black’s Law Dictionary 693 (6th ed. 1990). Both Dr. Omolara and Dr. Cook grossly failed to be faithful to their duties and obligations as physicians.

Dr. Omolara, as well as OTR Ivy, were told by Thelma that she wanted to leave the hospital. At those times, neither Dr. Omolara or OTR Ivy had made any finding that Thelma could not care for herself or was capable of harming herself or anyone else. By law, Dr. Omolara and OTR Ivy had both a duty and obligation to Thelma to release her from the locked unit at Baptist. Both failed to do so.

Dr. Cook and his staff were told by Thelma that she wanted to leave the hospital. Dr. Cook and his staff were under a duty and obligation to release Thelma from the locked unit at Baptist. Thelma was ignored by both her treating physician and his staff.

All appellees ignored statutory mandates regarding persons being held against their will for mental health treatment. Those statutory mandates were passed by our legislature to ensure the safety and treatment of the citizens of Mississippi. Surely repeatedly and wilfully ignoring these statutes constitutes bad faith, not good faith, on the part of the appellees. As stated earlier, “[t]he second element turns on whether looking at the totality of the circumstances, the actions of the defendant were ‘objectively reasonable in their nature, purpose, extent and duration.’” *Whitten at 9*, (quoting *Thornhill v. Wilson*, 504 So.2d 1205, 1208 (Miss. 1987)). “It is the reasonableness of the [defendant’s] actions, not his intent that matters.” *Id.* The actions of Dr. Omolara, Dr. Cook, and the staff at Baptist were not reasonable.

For over 100 years, it has been law in this state that “all who united in procurement of the illegal commitment are equally liable in an action for false imprisonment.” *Bacon v. Bacon*, 76 Miss. 458, 24 So. 968, 969 (1899). This was an illegal commitment as was determined by the Court of Appeals, and all who participated in this illegal commitment are equally liable for false imprisonment.

3. Thelma's claims are not barred by the statute of limitations.

The trial court erred in finding that Thelma's claims are barred by the statute of limitations found in Miss. Code Ann. § 15-1-35. On October 1, 2007, Thelma filed an action against the appellees for false imprisonment, assault, battery, invasion of privacy, intentional infliction of emotional distress, and loss of consortium. The filing of this action on October 1, 2007, tolled the one year statute of limitations for the duration of the 120-day period for service of process pursuant to Miss.R.Civ.P. 4(h) which states:

If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

The 120-day period ended on January 29, 2008, triggering the one day remaining on the statute of limitations. Thelma had one day to dismiss and refile her complaint, which she did. Thelma voluntarily dismissed the original complaint, and then filed her new complaint on January 30, 2008, within the applicable statute of limitations. It is undisputed that the applicable statute of limitations for intentional torts and the derivative actions is one year. *Miss. Code Ann. § 15-1-35*.

The Mississippi State Supreme has ruled that the filing of a complaint tolls the statute of limitations for 120 days. *Erby v. Cox*, 654 So.2d 503, 504-505 (Miss. 1995); *Watters v. Stripling*, 675 So.2d 1242, 1244 (Miss. 1996) (the filing of a complaint tolls the statute of limitations for the 120-day service period); *King v. American RV Centers, Inc.*, 862 So.2d 558, 561 (Miss.Ct.App. 2003) (*overruled on other grounds*) (holding that the statute of limitation automatically begins to run again after the 120 day service period expires). If service is not completed within the 120 day period, the plaintiff "must either re-file the complaint before the statute of limitations ends or show good cause for failing to serve process on the defendant within that 120 day period." *Holmes v. Coast*

Transit Authority, 815 So.2d 1183, 1185 (Miss. 2002). In *King*, King filed an original complaint that he failed to serve. After the 120-day period for service of process ended and before the statute of limitations ran, King filed an amended complaint. The trial court dismissed the action. The Court of Appeals reversed and remanded the case stating:

In our case, King did not serve or attempt to serve the initial complaint. Having failed to do so, he could have, ***and should have***, taken a voluntary dismissal pursuant to Rule 41(a)(1)(i) of the Mississippi Rules of Civil Procedure and then filed a new complaint instead of an amended complaint. Since he could not file an amended complaint but could file a new complaint, should his filing of a new complaint labeled amended complaint be tossed? We think not.

King v. American RV Centers, Inc., 862 So.2d 558, 563 (Miss.Ct.App. 2003) (*overruled on other grounds*) (*emphasis added*).

The original complaint in this matter was filed on October 1, 2007. The applicable statute of limitations period would have expired on October 2, 2007, one year from the date of the beginning of Thelma's false imprisonment. As this Court has ruled, once Thelma's complaint was filed, the statute of limitations was tolled for 120 days to allow for service of process. One day remained on the statute of limitations when Thelma filed her original complaint. The statute of limitations, thus, was tolled on October 1, 2007, with one day remaining in the limitations period.

The 120-day period for service of process ended on January 29, 2008. Thelma voluntarily dismissed her original complaint under Rule 41(a)(1)(i) of the Mississippi Rules of Civil Procedure. The ending of the 120-day period for service of process triggered the running of the remainder of the statute of limitations: in this case, one day. Thelma then re-filed the complaint on January 30, 2008, before the expiration of the statute of limitations, thereby preserving her right to proceed against the appellees in this matter, exactly as the Court in *King* instructed. *King* at 561. "In order to further toll the statute of limitations, the plaintiff must then refile the complaint before

the statute of limitations ends...” *Holmes* at 1200. Neither *King* nor *Holmes* have been overruled by the Supreme Court as to this point of law.

As the law stood at the time of the events in the case *sub judice*, counsel followed stated law: law as was handed down by the Mississippi State Supreme Court. As Presiding Judge Lee so eloquently stated “regardless of whether or not we think the current interpretation frustrates the purpose of Rule 4(h), we must follow the analysis set out by the supreme court in applying the tolling period in Rule 4(h).” *Parmley v. Pringle*, 976 So.2d 422, 427 (Miss.App.Ct.. 2008). Presiding Judge Lee is correct.

This Court, in *Marshall v. Kansas City Southern Railways Co.*, did rule that the statute of limitations is not tolled when a complaint is voluntarily dismissed. *Marshall v. Kansas City Southern Railways Co.*, 7 So.3d 210, 213 (Miss. 2009). However, the Court of Appeals, on November 3, 2009, affirmatively stated that the filing of a complaint tolls the statute of limitations for 120 days, and that at the expiration of the 120-day period, the statute of limitation automatically begins to run again. *Rigdon v. Mississippi Farm Bureau Federation*, 22 So.3d 321, 324 (Miss.App.Ct. 2009). It would be patently unfair to deny Thelma her day in court because of the lack of uniformity regarding this matter.

To retroactively apply this “matter of form” argument with regards to the savings statute, Miss. Code Ann. § 15-1-69, to Thelma’s complaint would be fundamentally unfair. As this Court has stated, “the application of retroactivity should be balanced with a recognition of possible unfairness where certain events transpired under the former rule.” *Johnson v. Memorial Hosp. at Gulfport*, 732 So.2d 864, 865 (Miss. 1998). In addition, this Court, in *Manning v. State*, 929 So.2d 885, 900 (Miss. 2006), stated that this Court would, in the future, apply the “very limited retroactive application” of “judicially enunciated rules of law.”

CONCLUSION

The parties were still in the discovery process when the motion for summary judgment was granted. “Justice is served when a fair opportunity to oppose a motion is provided-because consideration of a motion for summary judgment requires a careful review by the trial court of all pertinent evidence in a light most favorable to the non-movant.” *McQueen v. Williams*, 587 So.2d 918, 924 (Miss. 1991).

The trial court erred in granting summary judgment in favor of the appellees. Thelma is not judicially estopped from asserting the claims in her complaint. Mississippi has long held that a patient may withdraw consent for treatment. Thelma was perfectly within her right to withdraw her consent for treatment at Baptist.

The trial court also erred in ruling that appellees were granted immunity by Miss. Code Ann. § 41-21-67(5). Both Dr. Omolara and Dr. Cook, as well as the staff of Baptist, ignored Thelma’s repeated requests to discontinue treatment at Baptist and her repeated requests to leave. Such bad faith on the part of the appellees removes them from any immunity.

The trial court erred in ruling that the statute of limitations had run when Thelma filed her complaint on January 30, 2008. There is a division that exists regarding the tolling of the statute of limitations during the 120-day period for service as allowed by Rule 4 of the Mississippi Rules of Civil Procedure. At the time Thelma refiled her complaint on January 30, 2008, the law was followed as set out in *King*. To apply any other application of law would be unfair to Thelma.

Appellant Thelma Koestler respectfully requests that this Court reverse and remand this matter for trial.

RESPECTFULLY SUBMITTED,
Thelma Koestler, Appellant

By: Marcie T. Southerland
MARCIE T. SOUTHERLAND

MARCIE T. SOUTHERLAND,,MSB# [REDACTED]
SOUTHERLAND & SOUTHERLAND, PLLC

1120 Jackson Street
Vicksburg, Mississippi 39183
Telephone: 601-636-1930
Facsimile: 601-636-1563

CERTIFICATE OF SERVICE

I certify that I have this day mailed, postage prepaid, a true and correct copy of the above
and foregoing Reply Brief of Appellant to the following persons:

Honorable W. Swan Yerger
Hinds County Circuit Judge
P.O. Box 22711
Jackson, Mississippi 39225

Honorable Barbara Dunn
Circuit Clerk for Hinds County, Mississippi
P.O. Box 327
Jackson, Mississippi 39205-0327

Clifford B. Ammons, Esq.
Watkins & Eager
P.O. Box 650
Jackson, Mississippi 39205-0650

Whitman B. Johnson, III, Esq.
Currie Johnson Griffin Gaines & Myers, PLLC
P.O. Box 750
Jackson, Mississippi 39205-0750

Eugene R. Naylor, Esq.
Wise Carter Child & Caraway
P.O. Box 651
Jackson, Mississippi 39205-0651

SO CERTIFIED this the 10 of February, 2010.


MARCIE T. SOUTHERLAND