

**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**

**BRIEF OF APPELLANT**

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

**ORAL ARGUMENT NOT REQUESTED**

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## **CERTIFICATE OF INTERESTED PERSONS**

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

1. Thelma Koestler, Appellant
2. Mississippi Baptist Medical Systems, Inc., a/k/a Mississippi Baptist Medical Center  
a/k/a Baptist Medical Center
3. Mississippi Baptist Medical Center, Inc.
4. Baptist Behavioral Health Services
5. William S. Cook, Jr., M.D., P.A.
6. 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
7. Khari C. Omolara, P.C.
8. Khari C. 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
9. 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
10. 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
11. 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

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### **STATEMENT OF CASE**

On October 1, 2007, Appellant Thelma Koestler (hereinafter known as "Thelma") filed a civil suit against the above named appellees for her false imprisonment, assault and battery, invasion of privacy, intentional infliction of emotional distress, and loss of consortium on behalf of herself and her dying husband of over 50 years, Leo "Mickey" Koestler (hereinafter known as "Mickey"). On January 30, 2008, Thelma voluntarily dismissed her complaint pursuant to Rule 41 of the Mississippi Rules of Civil Procedure. On January 30, 2008, Thelma refiled her complaint and service was had on the defendants.

While discovery was underway, Dr. Khari Omolara (hereinafter known as "Dr. Omolara") filed a motion for summary judgment which was joined by Dr. William Cook, Jr., (hereinafter known as "Dr. Cook"), Baptist Hospital (hereinafter known as "Baptist"), and other defendants. A hearing was held in the matter wherein the trial court granted summary judgment in favor of all defendants. (C.P. 173). It is from this judgment that Thelma appeals.

### **STATEMENT OF FACTS**

On October 2, 2006, Plaintiff Thelma Koestler (hereinafter known as "Thelma") voluntarily presented herself for admission to Mississippi Baptist Medical Center - Senior Behavioral Health Services (hereinafter known as "Baptist"). Thelma was suffering from mild depression caused by the imminent death of her husband of over 50 years, Leo "Mickey" Koestler (hereinafter known as "Mickey").

Once Thelma realized that she would be held in a locked unit against her will, Thelma immediately informed Defendant Dr. Khari Omolara (hereinafter known as "Dr. Omolara") that she wanted to leave the hospital. (C.P. at 165). Dr. Omolara informed Thelma that if she attempted to leave the hospital, the authorities would be contacted. *Id.*

Thelma was involuntarily held at Baptist from October 2, 2006, until she was released to the Mississippi State Hospital at Whitfield (hereinafter known as “Whitfield”) on October 24, 2006, as the result of an involuntary commitment. During the time that Thelma was held against her will at Baptist, Thelma was also treated by Dr. William Cook, Jr., (hereinafter known as “Dr. Cook”). On numerous occasions, Thelma repeatedly requested of Dr. Cook that she be released from Baptist. On every occasion, her release was denied.

On November 3, 2006, Thelma was released from Whitfield when Dr. Sharon Martin found that Thelma should never have been involuntarily committed in the first place. Since that time, Thelma successfully appealed her involuntary commitment to this Court.

From the time Thelma first voiced her request to leave Baptist, and Dr. Omolara, Dr. Cook, and the staff of Baptist refused to allow her to leave, any treatment rendered by Dr. Omolara, Dr. Cook, and the staff of Baptist 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 dying husband of 50 years.

Thelma filed her original suit against Dr. Omolara, Dr. Cook, Baptist, and Baptist’s staff alleging false imprisonment, assault and battery, invasion of privacy, intentional infliction of emotional distress upon Thelma, and loss of consortium as to Thelma and Mickey on October 1, 2007. (R.E. 1). The original complaint was dismissed pursuant to Rule 41 of the Mississippi Rules of Civil Procedure on January 30, 2008. (R.E. 17). Thelma then refiled her complaint on January 31, 2008. (C.P. at 4).

Before discovery had been completed, Dr. Omolara filed his Motion for Summary Judgment which was joined by all defendants. (C.P. at 44, 73, 76). A hearing was had on the matter, after



which the Chancellor granted summary judgment in favor of all defendants. (C.P. at 174). It is from this order that Thelma appeals.

### **STANDARD OF REVIEW**

In reviewing the grant of summary judgment, this Court must apply the *de novo* standard of review. *Fletcher v. Lyles*, 999 So.2d 1271, 1276 (Miss. 2009). Summary judgment should only be granted if there is “no genuine issue as to any material fact” and the “moving party is entitled to a judgment as a matter of law.” *Id.* (Citing Miss. R. Civ. P. 56(c)). All evidence must be viewed in the light most favorable to the nonmoving party. *Id.* The moving party has the burden to prove that there is no genuine issue as to any material fact. *Id.*

### **STATEMENT OF ISSUES**

- I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS IN FINDING THAT:**
  - A. THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFF IS JUDICIALLY ESTOPPED FROM THE CLAIMS PRESENTED IN PLAINTIFF’S COMPLAINT.**
  - B. THE TRIAL COURT ERRED IN FINDING THAT DEFENDANTS ARE IMMUNE FROM LIABILITY PURSUANT TO MISS. CODE ANN. § 41-21-67.**
  - C. THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFF’S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS FOUND IN MISS. CODE ANN. § 15-1-35.**

### **SUMMARY OF THE ARGUMENT**

The trial court erred in granting summary judgment in favor of the defendant appellees. Judicial estoppel only applies if a litigant takes a position that is clearly inconsistent with a previous position. Thelma Koestler presented herself for treatment at Baptist Hospital. She then withdrew

her consent for treatment and requested that she be released. Once Thelma withdrew her consent, any action taken by defendant appellees amounted to the intentional torts of false imprisonment, assault and battery, invasion of privacy, intentional infliction of emotional distress, as well as loss of consortium.

Miss. Code Ann. § 41-21-67(5) requires that any physician undertaking treatment of an individual alleged to be mentally ill use good faith in treating that individual. Drs. Cook and Omolara, as well as the staff of Baptist, failed to use good faith in treating Thelma once she withdrew her consent for treatment.

Mississippi jurisprudence has consistently ruled that the filing of a complaint tolls the running of the statute of limitations for 120 days to allow for service of process under Rule 4 of the Mississippi Rules of Civil Procedure. Once that 120 days lapses and no service has been made, the statute of limitations begins to run again. The original complaint must be dismissed and the complaint refiled before the lapse of the statute of limitations. Such was the case *sub judice*.

## **ARGUMENT**

### **I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS IN FINDING THAT:**

#### **A. THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFF IS JUDICIALLY ESTOPPED FROM THE CLAIMS PRESENTED IN PLAINTIFF'S COMPLAINT.**

The trial court erred in finding that Thelma is judicially estopped from asserting the claims represented in her complaint: false imprisonment, assault, battery, invasion of privacy, intentional infliction of emotional distress, and loss of consortium. The trial court's ruling found that because Thelma voluntarily presented herself for admittance to Baptist, she could not allege that Baptist

falsely imprisoned her, assaulted and battered her, invaded her privacy, intentionally inflicted emotional distress upon her and caused loss of consortium between Thelma and her husband of some 50 years who was terminally ill. (C.P. 176).

In order for Thelma to be judicially estopped from asserting the torts of false imprisonment, assault, battery, invasion of privacy, intentional infliction of emotional distress, and loss of consortium, all appellees must show that 1) Thelma is taking a position that is clearly inconsistent with a previous position; 2) that the Court accepted the previous position; and 3) that the nondisclosure of the position was not inadvertent. *Kirk v. Pope*, 973 So.2d 981, 991 (Miss. 2007.)

**1) That Thelma was falsely imprisoned by the appellees is not inconsistent with the fact that she initially voluntarily presented herself for treatment at Baptist.**

In *Koestler v. Koestler*, 976 So.2d 372, 374 (Miss.Ct.App. 2008), the Court of Appeals stated that “Thelma admitted herself into the Senior Behavioral Health Services wing of the Mississippi Baptist Memorial Hospital.” Thelma agrees: she did voluntarily present herself for admittance to Baptist, completed the admissions process, and then withdrew her permission for consent to treatment. (R.E. 20). There has never been any dispute that, on October 2, 2006, Thelma voluntarily presented herself, with the insistence of her children, to Baptist for treatment of mild depression resulting from the imminent death of her husband of more than fifty years. However, what Baptist, Dr. Omolara, and Dr. Cook fail to recognize is that Thelma retracted her consent to treatment when she discovered that she was about to be held against her will in a locked unit at Baptist for an undetermined amount of time. Thelma’s husband of over fifty years was dying, and Thelma wanted to be home with him. (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. 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.*

Because Thelma is not taking a position that is clearly inconsistent with a previous position, there is no need to address elements two and three of judicial estoppel. Thelma respectfully requests this Court reverse the trial judge’s ruling that Thelma is judicially estopped from pursuing her claims against the appellees.

B. THE TRIAL COURT ERRED IN FINDING THAT DEFENDANTS ARE IMMUNE FROM LIABILITY PURSUANT TO MISS. CODE ANN. § 41-21-67.

The trial court erred in finding that Baptist, Dr. Omolara, Dr. Cook, and the other appellees are immune from liability pursuant to Miss. Code Ann. § 41-21-67(5).

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.) In order for this statute to confer immunity upon Dr. Omolara, Dr. Cook, Baptist and its staff, they 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)..." *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).*

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 the admission assessment conducted by Nurse Scott on October 2, 2006, Thelma's legal status was considered **voluntary**. (R.E. 24). In addition, 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).

In the admission assessment conducted by OTR Ivy on October 2, 2006, it was 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.

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.*

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.

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).

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 (6<sup>th</sup> ed. 1990). Both Dr. Omolara and Dr. Cook grossly failed to be faithful to their duties and obligations as physicians. Both doctors ignored statutory mandates regarding their detention and treatment of Thelma.

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 on the part of the appellees.

**C. THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFF'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS FOUND IN MISS. CODE ANN. § 15-1-35.**

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. 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 Supreme Court has ruled that:

While the filing of a complaint tolls the statute of limitations, if service is not made upon the defendant within 120 days as required by M.R.C.P. 4(h), the limitations period resumes running at the end of the 120 days.

*Owens v. Mai*, 891 So.2d 220, 223 (Miss. 2005). In addition, if “ . . . a plaintiff . . . files a complaint against a defendant but does not serve the complaint on the defendant within a 120 day period [the plaintiff] must . . . re-file a complaint before the statute of limitation runs.” *King v. American RV Centers, Inc.*, 862 So.2d 558, 561 (Miss.Ct.App. 2003).

In *King*, King filed an original complaint that he failed to serve. *King* at 561. After the 120-day period for service of process ended and before the statute of limitations ran, King filed an amended complaint. *Id.* 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 now.

*Id.* at 563 (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. *Owens* at 223. There was one day remaining 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. *Owens* at 223. 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. *King* at 561.

The trial court mistakenly relies on dicta in *Parmley v. Pringle*, 976 So.2d 422, 425 (Miss.Ct.App. 2008), in support of its ruling that Thelma's complaint is barred by the statute of limitations. Parmley filed a legal malpractice suit against Pringle but failed to serve the complaint during the 120-day time period. Without dismissing the original complaint, Parmley filed another complaint against Pringle asserting the same causes of action. Parmley timely served the second complaint. Pringle filed a motion to dismiss both complaints which was granted. The first complaint was dismissed for the failure to serve under Rule 4, and the second complaint was dismissed for failure to file before the expiration of the statute of limitations. *Id.* at 423. The Court of Appeals affirmed the dismissal of both complaints, contrary to the rule of law as stated by the Mississippi Supreme Court in *Triple "C" Transport, Inc. v. Dickens*, 870 So.2d 1195, 1199-1200 (Miss. 2004).

The trial judge, in his opinion, quoted *Parmley* stating:

The Mississippi Court of Appeals has addressed this scenario and relied on the Supreme Court's reasoning that "labeling failure of service as a 'matter of form,' under the savings statute 'would essentially allow Plaintiffs who fail to serve process under Rule 4 to utilize the savings statute to preserve their claim(s) and/or extend the life of their claim(s), and 'to allow otherwise would circumvent the effect and purpose of statutes of limitations.'" *Parmley v. Pringle*, 976 So.2d 422, 425 (Miss.Ct.App. 2008) (quoting *Owens v. Mai*, 891 So.2d 220, 223 (Miss. 2005).

What the trial court relies upon in *Parmley* is *obiter dictum*. *Obiter dictum* is defined as "[w]ords of an opinion entirely unnecessary for the decision of the case ... Such are not binding as precedent." Black's Law Dictionary 1072 (6<sup>th</sup> ed. 1990); *Lee v. Memorial Hosp. at Gulfport*, 999 So.2d 1263, 1266 (Miss. 2008). The above quote from *Parmley* has absolutely nothing to do with determining

if the second complaint was filed before the statute of limitations ran. It is simply the judges of the Court of Appeals disagreeing with the interpretation of law as 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).” *Id.* at 427. Presiding Judge Lee is correct. The Court of Appeals, which is a legislative creature, is an inferior court to the Mississippi State Supreme Court, a constitutional court. “[T]he decisions of the Court of Appeals are subject to limited certiorari by the Supreme Court. It is thus clear that a court is an ‘inferior court’ when subject to the controlling authority or review of a constitutionally created court.” *Marshal v. State*, 662 So.2d 566, 572 (Miss. 1995).

### **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 nonmovant.” *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 judically 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.

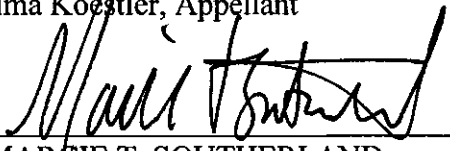
The trial court also erred in ruling that appellees were granted immunity by Miss. Code Ann. § 41-21-67(5). Both Dr. Omolara and Dr. Cook, as well as the staff of Baptist, ignored Thelma’s

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.

Mississippi jurisprudence is clear that the statute of limitations is tolled during the 120-day period for service as allowed by Rule 4 of the Mississippi Rules of Civil Procedure. The trial court erred in ruling that the statute of limitations had run when Thelma filed her complaint on January 31, 2008.

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

RESPECTFULLY SUBMITTED,  
Thelma Koestler, Appellant

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**CERTIFICATE OF SERVICE**

I certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellant together with accompanying Appellant's Record Excerpts to the following persons:

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Honorable Barbara Dunn  
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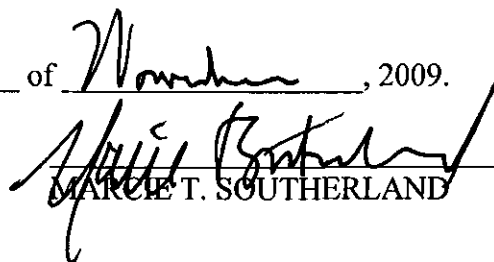
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MARCE T. SUTHERLAND