IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2009-CA-00081

BILLY NELSON AND GAYNELLE NELSON, INDIVIDUALLY AND AS PARENTS AND NEXT FRIENDS OF JUSTIN NELSON, A MINOR, AND AS REPRESENTATIVES OF ALL WRONGFUL DEATH BENEFICIARIES OF BOBBY NELSON, DECEASED **APPELLANTS/PLAINTIFFS**

VS.

BAPTIST MEMORIAL HOSPITAL-NORTH MISSISSIPPI, INC.; WILLIAM E. HENDERSON, JR., M.D. GENERAL PARTNER; OXFORD CLINIC FOR WOMEN, A PARTNERSHIP; IRA LAMAR COUEY, M.D., GENERAL PARTNER; R. BLAKE SMITH, M.D., GENERAL PARTNER; AND JOHN DOES 1 THROUGH 10 **APPELLEES/DEFENDANTS**

ON APPEAL FROM THE CIRCUIT COURT OF LAFAYETTE COUNTY, MISSISSIPPI

SUPPLEMENTAL BRIEF OF APPELLEES/DEFENDANTS WILLIAM E. HENDERSON, M.D.; IRA LAMAR COUEY, M.D.; R. BLAKE SMITH, M.D.; AND OXFORD CLINIC FOR WOMEN

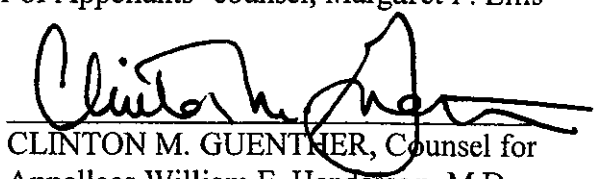
CLINTON M. GUENTHER
UPSHAW, WILLIAMS, BIGGERS & BECKHAM, LLP
POST OFFICE DRAWER 8230
GREENWOOD, MISSISSIPPI 38935-8230
TEL: (662) 455-1613
FAX: (662) 455-7884

COUNSEL FOR APPELLEES/DEFENDANTS WILLIAM E. HENDERSON, M.D., IRA LAMAR COUEY, M.D., R. BLAKE SMITH, M.D. AND OXFORD CLINIC FOR WOMEN

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have or may have an interest in the income of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Billy Nelson, Appellant
2. Gaynelle Nelson, Appellant
3. Margaret P. Ellis, Counsel for Appellants
4. Roderick D. Ward, III, Counsel for Appellants
5. William E. Henderson, M.D., Appellee
6. Ira Lamar Couey, M.D., Appellee
7. R. Blake Smith, M.D., Appellee
8. Oxford Clinic for Women, Appellee
9. Clinton M. Guenther, Counsel for Appellees Henderson, Couey, Smith and Oxford Clinic for Women
10. Tommie Williams, Counsel for Appellees Henderson, Couey, Smith and Oxford Clinic for Women
11. Walter Alan Davis, Counsel for Baptist Memorial Hospital-North Mississippi, Inc.
12. Honorable Henry L. Lackey, Circuit Judge
13. Honorable John A. Gregory, Circuit Judge
14. Honorable James W. Kitchens, Justice, Mississippi Supreme Court; former counsel for Appellants and former law partner of Appellants' counsel, Margaret P. Ellis



CLINTON M. GUENTHER, Counsel for
Appellees William E. Henderson, M.D.;
Ira Lamar Couey, M.D.; R. Blake Smith, M.D.;
Oxford Clinic for Women

TABLE OF CONTENTS

TABLE OF AUTHORITIES
CASES

RULES

In addition to their Brief filed herein, and in addition to the arguments made and cases cited to the Court in their Motion for Rehearing, Response to Plaintiff's Motion for Rehearing, Petition for Writ of Certiorari, and Response to Plaintiffs' Petition for Writ of Certiorari, Appellees/Defendants William E. Henderson, M.D.; Ira Lamar Couey, M.D.; R. Blake Smith, M.D.; and Oxford Clinic for Women (hereinafter "the doctors") submit this, their Supplemental Brief, pursuant to M.R.A.P. 17(h), and in support hereof state to the Court:

RESTATEMENT OF THE ISSUES FOR DETERMINATION:

1. That the doctors were not served with process before the statute of limitations expired.

2. That the dismissal without prejudice was of no consequence to the doctors, on whom process was not served before the statute of limitations expired.

ARGUMENT

1. Now that the Mississippi Supreme Court has granted their petition for writ of certiorari, the doctors ask this Court to resolve the outcome-determining issue surrounding service of process, and the lack thereof, on them.[1] That necessarily takes the appeal of this, Plaintiffs' second lawsuit on this same cause of action, all the way back to the early days of Plaintiffs' original Complaint and lawsuit, referred to as *Nelson I*, when and where the issue first arose.

2. With the Mississippi Court of Appeals' having rendered two decisions concerning the Nelsons' lawsuit, first in *Nelson v. Baptist Memorial Hospital,* 972 So.2d 667 (Miss. App. 2007), then herein on September 21, 2010, and with subsequent and interim decisions having been rendered by the Mississippi Supreme Court, the doctors no longer argue that the Nelsons' filing of the original Complaint without compliance with statutory prerequisites failed to toll the statute of limitations.

---

[1] There was no issue as to service of process on the defendant hospital. The hospital's arguments for dismissal had to do only with Plaintiffs' failure to comply with statutory prerequisites to filing the Complaint.

Decisions rendered by this Court between the decisions rendered in the first and this second appeal have resolved any dispute, that even though the Nelsons failed to comply with the statutorily mandated prerequisites of providing presuit written notice and consultation with an expert witness, the Nelsons nevertheless did toll the two year statute of limitations (which began to run on July 14, 2001 with the [alleged wrongful] death of Bobby Nelson) with five days remaining in it, when they filed their original Complaint on July 9, 2003.

3. In the first appeal, although it was raised, the Mississippi Court of Appeals declined to consider the issue and argument regarding service of process. Then as now, the doctors argued that despite whether or not the statute of limitations had been tolled, the statute of limitations had begun to run again and then ultimately expired against them, because Plaintiffs never served them with process. The Nelsons argue that the Court of Appeals' reversal of the trial court's dismissal, making it one without prejudice, and the Court of Appeals' failure to address the issue of insufficiency of service of process on the doctors, entitled them to begin their lawsuit anew within the remaining five days of the statute of limitations. However, Plaintiffs also argue that the Court of Appeals' dismissal without prejudice gave them a "second bite at the apple" of service of process on the doctors.

4. Therefore, after having provided written notice of intent to sue, in March, 2008 Plaintiffs filed a second Complaint, served process [again] on the hospital, and then, that time, personally served process on each of the doctors. The doctors responded to the second Complaint, arguing to the Circuit Court that the suit should be dismissed with prejudice, because [in addition to and] all other arguments and issues aside, the statute of limitations had expired as against them in 2004, several years before the Nelsons filed their second Complaint, when and because they were not served with process of the first Complaint in 2004. The Circuit Court's ruling that service of process had not been effected on the doctors in Plaintiffs' first Complaint has remained the law of the case

throughout this matter, and the subsequent dismissal without prejudice did not revive the already expired statute of limitations. *University of Mississippi Medical Center v. Robinson*, 876 So.2d 337, 340 ¶ 11 (Miss. 2004).

5. The issue of lack of service of process on the doctors of the Nelsons' first complaint was again placed squarely before the appellate court in this, Plaintiffs' second appeal, when the Nelsons dedicated five pages of their brief (pages 36-40) to extensive argument of why the appellate court should rule that service of process on the doctors had been effective and was proper with regard to their first Complaint, in *Nelson I.* Plaintiffs even quote testimony of the doctors' office manager from a hearing that was held on that very issue on May 24, 2004 in *Nelson I.*

6. Because of that, and since the transcript of that hearing had not been made a part of the record in this second appeal, the doctors moved to amend the record in this appeal to include the entire transcript of the abovementioned hearing. In granting that motion, by Order of December 2, 2009, this Court took judicial notice of the entire record in *Nelson I*, which includes the transcript of the abovementioned hearing and evidentiary proceeding held on May 24, 2004 on the issue of service of process on the doctors in *Nelson I.*

7. In its decision rendered in *Nelson I,* the Court of Appeals rightly recognized and expressly acknowledged that "**Assuming proper service of process,** filing a complaint tolls the statute of limitations until a suit's dismissal." *Nelson I*, 972 So.2d 667, 671 ¶ 9 (Miss. App. 2007) (**emphasis** added). Yet with regard to the Nelsons' lawsuits against the doctors, service of process cannot be assumed, because the Lafayette County Circuit Court ruled almost seven years ago that service of process had not been affected on the doctors. Further, although the filing of a Complaint ordinarily does toll the applicable statute of limitations for 120 days, if the plaintiff fails to serve process on the defendant within that time period, the statute of limitations [again] begins to run when that time

period expires. *Copiah County School Dist. and Kenneth Funches v. Charles Buckner*, p. 11 ¶ 22 (citations omitted), Mississippi Supreme Court Cause No. 2010-IA-00343-S.Ct., May 19, 2011.

8. At the beginning of this matter, after filing their original Complaint on July 9, 2003, Plaintiffs made no attempt to serve process on any of the defendants within the original 120 day period. On November 3, 2003, just prior to the expiration of that 120 days, Plaintiffs sought and were granted an additional 90 days in which to serve process. During that 90-day period, which expired on February 4, 2004, the hospital was served with process, but not the doctors. When process was not served on the doctors by February 4, 2004, the statute of limitations began to run again, expiring five days later, on February 9, 2004. For those reasons, on June 18, 2004, the Lafayette County Circuit Court entered its Order sustaining Defendants' Motions to Dismiss, dismissing the Complaint with prejudice for several reasons, but expressly including the reasons that Plaintiffs had not served the doctors with process, and that the statute of limitations had subsequently expired . *Nelson I, supra.*, at 670 ¶ 15; (Record herein pp. 117-119). Therefore, not only was dismissal with prejudice of Plaintiffs' first lawsuit against the doctors proper, even more so was dismissal with prejudice of the Nelsons' second lawsuit, filed several years later and several years after the statute of limitations had expired.

9. In any civil suit where there has been a dismissal for any reason, and when the statute of limitations has expired, dismissal with prejudice is warranted. *Tolliver v. Mladineo*, 987 So.2d 989, 996-997 (Miss. 2007). In *Watters v. Stripling*, 675 So.2d 1242, 1244 (Miss. 1996), this Court held that although a dismissal pursuant to M.R.C.P. 4(h) for failure to serve process required dismissal without prejudice, and that although the filing of the lawsuit had tolled the applicable statute of limitations, the statute of limitations was tolled only for the period of service of process; and that "**The fact that the action is now** [time] **barred is of no consequence.**" (**Emphasis** added). That

is, because the statute of limitations had subsequently expired, the dismissal of the suit without prejudice was "of no consequence"; it did nothing to change the fact that the statute of limitations had expired, and the dismissal without prejudice did not revive the [expired] statute of limitations. (*See* also *Stringer v. American Bankers Ins. Co. of Florida,* 822 So.2d 1011, 1014-15 (Miss. App. 2002).

10. Likewise, the dismissal without prejudice in *Nelson I* did not allow the Nelsons five days, or any amount of time, to turn back time, revive an already expired statute of limitations, and do what they had not done in the first place in their first lawsuit - serve process on the doctors prior to the expiration of the statute of limitations. Therefore, the Lafayette County Circuit Court was correct when it dismissed with prejudice the Nelsons' second Complaint against the doctors, the subject of this appeal. The record in this appeal is replete with instances where the doctors, time after time, by pleading, motion and at hearings in oral argument, reminded the Circuit Court of its ruling that the statute of limitations had expired, thus time-barring the second Complaint against the doctors, because service of process was not effected on them in the first place, in the first lawsuit. The Circuit Court had already agreed with the doctors, and it never changed its ruling thereon.

11. Plaintiffs also had already sought the Circuit Court's reconsideration of its ruling on that issue. Yet, again, the Circuit Court never reversed, altered or amended its ruling that service of process had not been effected on the doctors, and that that fact had resulted in the expiration of the statute of limitations, which applies not only to the first lawsuit but also to this second lawsuit. There is/was but one statute of limitations applicable to this cause of action, and it expired against the doctors more than four years before Plaintiffs filed their second complaint.

12. As the Court recognized and held in *Miller v. Myers*, 38 So.3d 648, 655 ¶ 24 (Miss. App. 2010), "Pre-suit notice issue aside, when a civil suit is dismissed for any reason and the statute of

limitations has expired, **dismissal with prejudice is warranted.**" (citing *Watters v. Stripling, supra.* and *Tolliver v. Mladineo, supra.*). (**Emphasis** added). This Court also recognized in *Owens v. Mai*, 891 So.2d 220, 221 ¶ 2 (Miss. 2005) this "...**important, determining issue**" (**emphasis** added) that the Court of Appeals failed to address in *Owens,* and in this case - that being [the fact] that the statute of limitations had expired before the first suit had been dismissed for failure to serve process.

13. Exactly as in *Owens*, in the Nelsons' case, when the Nelsons filed their second Complaint, the Lafayette County Circuit properly dismissed it as time-barred, because the doctors had not been served with process before the statute of limitations expired. Just as this Court's ruling in *Owens v. Mai* did not revive the statute of limitations, neither did the Mississippi Court of Appeals' ruling in *Nelson I* revive the statute of limitations, so as to allow the Nelsons to "go back" and effectively serve the doctors with process, as if the statute of limitations had not expired. Service of process on the doctors of the second Complaint was, therefore, also of no consequence.

14. Not only is the issue (of lack of service of process on the doctors) before this Court one of the very same issues addressed by this Court in *Owens,* the pertinent facts regarding service of process in the Nelsons' lawsuit against the doctors are virtually identical to the facts regarding service of process in another decision rendered by this Court, *Johnson v. Rao*, 925 So.2d 151 (Miss. 2007). In *Rao*, this Court examined the evidence to determine whether or not service of process on the doctor's receptionist was sufficient for service of process on the doctor. The *Rao* Court noted: "**Although much controversy exists regarding the events surrounding** Deputy Payne's **delivery of the summons and complaint, it is undisputed that he served process upon Dr. Rao's receptionist**...", and not on Dr. Rao. *Id.* at 153 ¶ 2. (**Emphasis** added). That same set of facts exists here in the Nelsons' case against these doctors. Yet "[w]here there is conflicting evidence, this Court must give great deference to the trial judge's findings." *City of Jackson, MS, v. Estate of Otha*

Stewart, #2008-CA-01997-S.Ct., p. 7 ¶ 13. Otherwise, the appellate court would be [merely] replacing the trial court's judgment with theirs. *Id.* at p. 8 ¶ 14.

15. In *Rao*, the doctor's receptionist testified at a hearing that: (1) she was not authorized to accept service of process; (2) she was not aware that the documents she was given regarded a lawsuit against the doctor; (3) she had never accepted process on behalf of the doctor; (4) the deputy had not asked to see the doctor; and (5) the deputy did not inform the receptionist he was there to serve the doctor with summons and complaint. In this case, the doctors' office manager, Candace Hogue, testified at the abovementioned hearing on May 25, 2004 and provided undisputed testimony which established that: (1) she had never accepted process on behalf of any of the doctors or the clinic, nor was she authorized to; (2) it was not at any time her custom and/or practice to accept process for the clinic and/or any of the doctors; (3) she had never seen the unidentified person who left unidentified documents with her at the clinic; and (4) she did not know what the documents were that had been left with her until the unidentified person had left the clinic. (Transcript of May 24, 2004 hearing, pp. 29-33).

16. Hogue provided additional testimony, which went unrefuted by any witness, that she had never represented or held herself out to be a proper person to accept service of process on behalf of the clinic or any of the doctors, and that she did not do so on the date on which Plaintiffs' process server left with her a copy of the summons and complaint. (Transcript of May 24, 2004 hearing, pp. 34-37, 42-43). Hogue's undisputed testimony at that hearing was that she did not understand what had been left with her until after the process server had left the clinic, without having served any of the doctors or any agent for service of process of the clinic.

17. Also as in *Rao*, the doctors' receptionist in this matter was the only witness who testified at the hearing. In reviewing the trial court's fact-based findings, the *Rao* Court examined the

evidence to determine whether or not service on the doctor's receptionist was sufficient for service of process on the doctor. Finding that it was not, the *Rao* court affirmed that the trial court did not err in granting Rao's motion to dismiss the complaint due to insufficient service of process. Even further, the *Rao* Court went on to affirm that "...As the statute of limitations had expired, **the trial court did not err in dismissing the Complaint with prejudice.**" *Rao*, 952 So.2d at 158 ¶ 20. (**Emphasis** added). (*See* also *Copiah County School Dist. v. Buckner, supra.*, at 11 ¶ 22, citing *In re Holtzman*, 823 So.2d 1180, 1182 (Miss. 2002); and *Stutts v. Miller*, 37 So.3d 1, 6 FN5 and 7 ¶ 17 (Miss. 2010)).

18. In their decision in this [second] appeal, the Mississippi Court of Appeals, although again declining to address the issue, stated that the Circuit Court could reconsider the issue upon remand; yet there is nothing for the Circuit Court to reconsider. The Circuit Court considered all of the evidence and had the opportunity to observe the demeanor and live testimony of the doctors' office manager at the abovementioned hearing, and the Circuit Court made its decision with that advantage and from that perspective. (*See Brown v. Bond*, 768 So.2d 347, 350 (¶ 14) (Miss. App. 2000)). In addition, and as mentioned above, the Circuit Court has already reconsidered the issue, when it entertained the Nelsons' motion to reconsider before the Nelsons pursued their first appeal.

19. After reconsidering and taking the matter under advisement for more than another year, on September 27, 2005, and then after again reconsidering the issue, on December 17, 2008, the Circuit Court twice affirmed its earlier findings and ruling, including that process had not been served on the doctors. No new evidence or even any new argument has been offered by the Nelsons with regard to the issue of ineffective service of process on the doctors. There also has been no showing, or even argument, by the Nelsons that the Circuit Judge abused his discretion in making his determination and ruling that process was not served upon the doctors. The Circuit Court's

ruling in that regard should not have to be reconsidered, and it should be affirmed. (*See Stutts v. Miller, supra.)*

20. Ultimately at issue is whether or not the Circuit Court reached an incorrect result in dismissing with prejudice the Nelson's second (as well as first) lawsuit against the doctors. Even if the Circuit Court reached that result by a path with which issue may be taken (i.e. the reasons expressed in the order dismissing the second Complaint with prejudice), the result of dismissing the Nelsons' second Complaint with prejudice as to the doctors was correct. It was correct, because the Circuit Court's order dismissing *Nelson I* with prejudice as to the Doctors was also correct, for the reasons stated above: the doctors were not served with process, and the statute of limitations then expired, long before the second Complaint was filed. As this Court held in *Hickox by and through Hickox v. Holleman*, 502 So.2d 626, 635 (Miss. 1987):

> Appellate courts are not in the business of reversing a trial court when it has made a correct ruling or decision. **We are first interested in the result of the decision, and if it is correct, we are not concerned with the route - straight path or detour - which the trial court took to get there. ...An appellee is entitled to argue and rely upon any grounds sufficient to sustain the judgment below**. ...As this Court [has stated before]...: "The action of the trial judge is presumed to be correct, ..." and unless it is shown to be erroneous, our duty is to uphold it. (**Emphasis** added).

The judgment of the trial court should be affirmed by the appellate court, even if the trial court reached the result for the wrong reasons, so long as the result reached was a correct result. *Methodist Hospital of Hattiesburg, Inc. v. Richardson*, 909 So.2d 1066, 1070 (¶ 7) (Miss. 2005).

21. The doctors moved the Lafayette County Circuit Court for summary judgment and dismissal of Plaintiff's second Complaint against them on alternate grounds: that the applicable statute of limitations had expired if not because (1) the Nelsons filed suit without first complying with pre-suit requirements, then (2) because the Nelsons failed to serve process on them more than

four years earlier in the first Complaint, followed five days later by the expiration of the statute of limitations. Though the Mississippi Court of Appeals ruled that the Circuit Court was incorrect in dismissing with prejudice the Nelsons' second Complaint, against all the defendants because of failure to comply with pre-suit notice requirements, the result of the Circuit Court's dismissal of the Nelsons' second Complaint as against the doctors was correct. Because the Nelsons never served process on the doctors in the first place, in the first suit, the statute of limitations then expired, years before the Nelsons' second lawsuit was filed; meaning that a dismissal with prejudice as to the doctors was warranted. If the judgment of the Circuit Court in this appeal can be sustained for any reason as to the doctors, then it should be affirmed. *Brocato v. Mississippi Publishers Corp.*, 503 So.2d 241, 244 (Miss. 1987); *Patel v. Telerent Leasing Corp.*, 574 So.2d 3, 6 (Miss. 1990).

CONCLUSION

Plaintiffs' filing of their original Complaint in this matter on July 9, 2003 tolled the statute of limitations with five days remaining in it. When Plaintiffs did not effectively serve process personally upon the doctors and their clinic within the time allowed, the statute of limitations began to run again and expired five days later. That occurred in February, 2004, several months before the Circuit Court dismissed with prejudice Plaintiffs' first Complaint against the doctors in June, 2004. Dismissal with prejudice of that Complaint was proper, as was the Circuit Court's dismissal with prejudice of Plaintiffs' second Complaint, filed several years later, in 2008, long after the statute of limitations had expired. The Lafayette County Circuit Court's dismissals of Plaintiffs' first and second Complaints against the doctors and clinic should be affirmed.

RESPECTFULLY SUBMITTED, this the 31ST day of May, 2011.

CLINTON M. GUENTHER, MB[redacted]
Of Counsel to William E. Henderson, M.D.,

Ira Lamar Couey, M.D., R. Blake Smith, M.D.
and Oxford Clinic for Women

OF COUNSEL:

UPSHAW, WILLIAMS, BIGGERS
& BECKHAM, LLP
Post Office Drawer 8230
Greenwood, Mississippi 38935-8230
Telephone: 662/455-1613

CERTIFICATE OF SERVICE

I, Clinton M. Guenther, of counsel to defendant, hereby certify that I have this day mailed, with postage prepaid, a true and correct copy of the above and foregoing document unto:

Hon. Margaret P. Ellis
Attorney at Law
Post Office Drawer 1850
Jackson, MS 39215-1850

Honorable Henry L. Lackey
Circuit Judge
Post Office Box T
Calhoun City, Mississippi 38916

Hon. Roderick D. Ward, III
Stevens & Ward
1855 Lakeland Drive
Suite Q 200
Jackson, MS 39216

Honorable John A. Gregory
Circuit Judge
Post Office Box 466
Okolona, MS 38860

Hon. Walter Alan Davis
Dunbar Davis, PLLC
324 Jackson Avenue East, Suite A
Oxford, Ms. 38655

CERTIFIED this the 31st day of May, 2011.

CLINTON M. GUENTHER

CERTIFICATE OF FILING

I, Clinton M. Guenther, certify that I have this day hand delivered the original and ten copies of, and a CD containing the Supplemental Brief of Defendants/Appellees, WILLIAM E. HENDERSON JR., M.D., IRA LAMAR COUEY, M.D., R. BLAKE SMITH, M.D. AND OXFORD CLINIC FOR WOMEN, on May 31, 2011, to Ms. Kathy Gillis, Clerk, Mississippi Supreme Court, Gartin Justice Building, Jackson, MS 39205-0249

CERTIFIED this the 31st day of May, 2011.

CLINTON M. GUENTHER, MB [redacted]