IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2011-CA-00171

GARLAND K. MILNER, ET AL. — APPELLANTS

VS.

MARIA L. POWELL — APPELLEE

REPLY BRIEF OF APPELLANT MISSISSIPPI BAPTIST MEDICAL CENTER, INC.

Appeal from the Circuit Court of the First Judicial District of Hinds County, Mississippi, Hon. Malcolm Harris and Hon. William Gowan Presiding Cause No. 251-07-1195CIV

ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

Appellant Mississippi Baptist Medical Center, Inc., ("MBMC") submits that oral argument of this appeal is appropriate pursuant to the standard set forth in MISS. R. APP. P. 34(a). The issues presented on appeal involve the application of well-established law to the particular facts of this case. The Court will undoubtedly wish to explore the trial court's misapplication of settled law. Additionally, the Court will likely wish to inquire into Appellee Maria Powell's ("Powell") asserted jurisdictional basis for MRCP 60(b)(6) relief now that she has abandoned her sole asserted jurisdictional basis for such relief in the court below. Particularly in light of Powell's retreat from the only "cause" she ever asserted in the trial court for failing to file an appeal, namely her alleged lack of notice from the clerk of entry of judgment, the decisional process would be significantly aided by oral argument, though the arguments are also well presented in the briefs.

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INTRODUCTION

This Court should reverse and render because Powell has failed to overcome controlling authority divesting the trial court of jurisdiction to revisit its Final Judgment of Dismissal on the record before this Court. Confronted in MBMC's principal brief with the tandem remedy of MRCP 77(d)/MRAP 4(h), of which she undeniably failed to avail herself, Powell has now abandoned her lack-of-notice-from-the-clerk argument, her sole asserted jurisdictional basis for MRCP 60(b)(6) relief in the court below. She now fails to show this Court any cause whatsoever for her failure to appeal the trial court's Final Judgment of Dismissal for failure to prosecute. Therefore, pursuant to this Court's holding in *Doll v. BSL, Inc.*, discussed *infra*, the trial court unquestionably had no jurisdiction to revisit its final judgment under MRCP 60(b)(6).

Even if the Court for some reason declines to find *Doll* controlling, the trial court nevertheless had no jurisdiction to revisit its final judgment where Powell fails to overcome the balance of equities weighing in MBMC's favor. Powell seeks to capitalize on her own dilatoriness and disregard for this Court's rules to achieve a de facto extension of the two (2)-year statute of limitations. Once she invoked the power of the trial court to resolve her claims, Powell assumed a commensurate responsibility under Mississippi law to abide by the court's procedural rules. Rather than prosecute her cause of action or ensure its orderly dismissal under MRCP 41(a), Powell simply abandoned it altogether. As a result of her inattention in the court below and the trial court's erroneous ruling, MBMC now faces the prospect of defending claims that arose from events occurring over five (5) years before it was ever hailed into court. The court below had no jurisdiction to revisit its final judgment under MRCP 60(b)(6) where Powell filed a complaint, took no action of consequence, ignored the court's warning of impending dismissal, and sat idly by for seven (7) months following dismissal without objection, only to

seek relief at her convenience when the final judgment threatened to terminate her second-filed action.

Given Powell's failure to cite any authority vesting the trial court with jurisdiction to revisit its final judgment under MRCP 60(b)(6) on this record, the Court need not even reach Powell's remaining arguments. However, even if the Court for some reason does find that the trial court had jurisdiction to revisit its final judgment, Powell has pointed to no substantive basis supporting the court's award of MRCP 60(b)(6) relief on this record. Powell argues that since her complaint was never served, the instant action was a nullity that could only be dismissed "without prejudice" under MRCP 4(h). In actuality, both state and federal case law recognize the prejudice inherent in a plaintiff's failure to serve process, authorizing dismissals with prejudice under MRCP 41(b) [FRCP 41(b)] notwithstanding that an MRCP 4(h) [FRCP 4(m)] dismissal may also be proper. The trial court erred to the extent it concluded otherwise in modifying its final judgment.

Powell further argues that she had no standing to file this lawsuit because she had not yet been appointed her son's conservator and had not yet obtained court approval. Powell wholly ignores that MRCP 17(c) expressly authorized her to file this action as her son's next friend. Thus, even if the court below had modified its final judgment based on some perceived lack of standing, which it did not, it would have been error to do so. Additionally, even assuming for the sake of argument that Powell's son was in fact of unsound mind at any time pertinent to this litigation, Powell cites no authority saving her case from the statute of limitations where Mississippi law provides that the statute of limitations began running pursuant to MISS. CODE ANN. § 15-1-53 at the time she gave notice of claim as her son's next friend. The trial court erred in concluding otherwise, and MBMC preserved the issue in its motion for reconsideration.

Any way this Court considers it, the court below erred in modifying its Final Judgment of Dismissal entered seven (7) months previously. Powell has not and cannot point to any authority to the contrary. For these reasons and those set forth herein, this Court should reverse and render this action dismissed with prejudice.

ARGUMENT

I. POWELL FAILS TO OVERCOME CONTROLLING AUTHORITY DIVESTING THE TRIAL COURT OF JURISDICTION TO REVISIT ITS FINAL JUDGMENT OF DISMISSAL PURSUANT TO MRCP 60(b)(6) ON THE RECORD BEFORE THIS COURT.

A. Because Powell has now abandoned the only "cause" she ever asserted in the trial court for failing to file an appeal, this Court should reverse and render pursuant to *Doll v. BSL, Inc.*

As set forth in MBMC's principal brief, Powell's sole asserted jurisdictional basis for MRCP 60(b)(6) relief in the trial court was the Circuit Clerk's purported failure to notify her attorney of the entry of final judgment rendered March 18, 2010. R. 29, R.E. 3. Pursuant to the controlling authority discussed in detail in MBMC's principal brief, the record below does not support the trial court's jurisdiction to contemplate MRCP 60(b)(6) relief on this basis where Powell failed to (1) timely appeal the Final Judgment of Dismissal[1]; (2) timely seek relief within the 180-day "outer limit" period permitted by MRCP 77(d) and MRAP 4(h); or (3) demonstrate that she (or her counsel) made diligent inquiry of the status of her cause of action and that such inquiry was frustrated by misinformation disseminated by the clerk's office.

[1] Powell asserts that when the court below entered its Final Judgment of Dismissal, "there was nothing to appeal," and that the court "was correct to dismiss the case inasmuch as the defendants had not been served within 120 days as required by M.R.C.P. 4(h)." Powell's Brief at 15. She further asserts that it "only became necessary for [her] to act" when MBMC sought to rely on the finality of the judgment in her second-filed proceeding. *Id.* The Final Judgment of Dismissal was expressly predicated on MRCP 41(b), not MRCP 4(h). R. 25, R.E. 1. Regardless, for Powell to contend that a litigant may wait and pursue relief from a trial court's final judgment at any future time when it may ultimately suit her purposes is utterly absurd. If she felt aggrieved by the Final Judgment of Dismissal, she had thirty (30) days from March 18, 2010, to perfect an appeal to this Court. MISS. R. APP. P. 4(a). *See also Doll v. BSL, Inc.*, 41 So. 3d 664, 669-70 (Miss. 2010); *Pruett v. Malone*, 767 So. 2d 983, 985-86 (Miss. 2000). She obviously failed to do so.

In a tacit acknowledgment of the futility of her position on appeal, Powell has now abandoned her lack-of-notice-from-the-clerk argument, which is nowhere mentioned in her brief. Her retreat from the only basis even *arguably* supporting the trial court's jurisdiction (provided the record had borne out the requisite diligence and clerk-related frustration thereof, which it does not) makes this an even easier case. Absent any notice issue, jurisdiction was unquestionably lacking here under this Court's holding in *Doll v. BSL, Inc.*, 41 So. 3d 664 (Miss. 2010). As discussed at pages 13-14 of MBMC's principal brief, pursuant to *Doll*, MRCP 60(b)(6) relief is not available to a plaintiff whose action was dismissed with prejudice pursuant to MRCP 41(b) where the plaintiff, **without cause**, failed to pursue other procedural remedies, namely a **timely appeal**. *Id.* at 669-70. *See also Pruett v. Malone*, 767 So. 2d 983, 985-86 (Miss. 2000). Once the alleged notice issue is removed from the equation, Powell stands bare before the Court "without cause" for her failure to perfect a timely appeal, and *Doll* controls the outcome of this case.

Rather than address *Doll's* application as controlling precedent precluding jurisdiction[2], Powell cites three Mississippi cases, two of which actually support MBMC's jurisdictional argument and one of which is wholly inapposite to the issue before the Court. Powell first quotes *Mitchell v. Nelson* for the proposition that MRCP 60(b)(6) is a "catch[-]all provision" allowing relief "when equity demands." *Mitchell v. Nelson*, 830 So. 2d 635, 639 (Miss. 2002). What she fails to point out is that in *Mitchell*, this Court reaffirmed the jurisdictional limitations attending MRCP 60(b)(6), holding that equity did *not* demand relief under MRCP 60(b)(6) where the plaintiffs, like Powell, failed to exercise due diligence in the court below. *Id.* Powell

[2] Powell actually cites *Doll* in passing for the very proposition that precluded the court below from revisiting its final judgment under MRCP 60(b)(6). *See* Powell's Brief at 16 n.8. Rather than explain to this Court why *Doll* does not result in reversal, she merely makes the conclusory assertion that "this is not a case where 60(b) relief is being used in lieu of what should have been an appeal." *Id.* at 16. In actuality, pursuant to this Court's own analysis in *Doll*, this is *exactly* that kind of case.

next discusses this Court's approval of MRCP 60(b)(6) relief in *Carpenter v. Berry*, 58 So. 3d 1158 (Miss. 2011). However, Powell fails to overcome or even address the key distinguishing feature of *Carpenter* set out at pages 22-23 of MBMC's principal brief, namely that unlike Powell, the plaintiffs in *Carpenter* had no other procedural avenue to equitable relief ***but*** MRCP 60(b)(6). Powell ***did*** have an avenue to relief in the tandem remedy of MRCP 77(d)/MRAP 4(h); she merely failed to avail herself of it. Finally, Powell cites *Miss. Dep't of Mental Health v. Hall* for the proposition that the court below had jurisdiction to "clarify" its Final Judgment of Dismissal at any indefinite time after the fact if it was "the right thing to do." The jurisdictional issue in *Hall*, however, was *not* whether the trial court had jurisdiction to revisit its judgment in its own right under MRCP 60(b)(6). Rather, this Court in *Hall* merely waived as harmless the trial court's ostensible invasion of *this* Court's jurisdiction to make an order comply with a statutory mandate following a motion predicated on MRCP 60(a). *Miss. Dep't of Mental Health v. Hall*, 936 So. 2d 917, 929-30 (Miss. 2006). None of these authorities vests the court below with jurisdiction to revisit its Final Judgment of Dismissal under MRCP 60(b)(6) on this record.[3]

B. <u>Even if the Court for some reason declines to find *Doll* controlling, the trial court nevertheless had no jurisdiction to revisit its final judgment where Powell fails to overcome the balance of equities weighing in MBMC's favor.</u>

[3] Perhaps recognizing the absence of any controlling authority authorizing MRCP 60(b)(6) jurisdiction on this record, Powell vainly attempts to bolster her response to MBMC's jurisdictional argument with a hodgepodge of non-binding authorities that avail her nothing. Each of these authorities is readily distinguishable from the case at bar. In *Aczel v. Labonia*, the Second Circuit gave the district court *explicit permission* to revisit its earlier ruling. *Aczel v. Labonia*, 584 F.3d 52, 62 (2d Cir. 2009). That was not the case here. In *Kramer v. Gates*, the D.C. Circuit expressly stated that no jurisdictional issues were implicated where a district court employed MRCP 60(b)(6) *not* to grant any additional relief but merely to clarify its order to ensure a party's unconditional compliance with it. *Kramer v. Gates*, 481 F.3d 788, 793 (D.C. Cir. 2007). *Kramer* is inapplicable here, where it is undisputed that the Court below did in fact employ MRCP 60(b)(6) to grant relief not contained in its Final Judgment of Dismissal. *Ariz. v. Manypenny*, a Ninth Circuit case, does not even remotely address Rule 60(b). *Ariz. v. Manypenny*, 672 F.2d 761 (9th Cir. 1982). Finally, Powell cites three U.S. Supreme Court cases addressing the power of federal appeals courts to recall their mandates. None of these cases addresses the issue before this Court.

The consistent and calculated theme of Powell's brief is that the court below "did the right thing" in modifying its Final Judgment of Dismissal to destroy its finality.[4] She asks this Court to adopt an air of dismissive indifference toward the instant action she filed in Judge Malcolm Harrison's court, as if the suit was a casual and inconsequential undertaking that never happened and meant nothing—as if the *second* suit filed in Judge Winston Kidd's court is the "real" lawsuit where the focus should now be.[5] In support of this theme, Powell relies heavily on the oft-stated preference for a trial on the merits, painting MBMC as some sort of bad actor out to rob her of her day in court. This Court should not permit itself to be so blatantly misdirected from what Powell really seeks to accomplish here. If this Court affirms, it allows Powell to capitalize on her own dilatoriness and disregard for this Court's rules to achieve a de facto extension of the two (2)-year statute of limitations. MBMC should not be compelled to suffer such unfair prejudice on the record before this Court.

This Court has consistently enforced the duty of litigants to comply with its procedural rules and the duty of courts to enforce those rules. In 2008, the Court put it this way:

> [T]he Mississippi Rules of Civil Procedure are not mere suggestions or recommendations. **Compliance is a requirement toward the end of "secur[ing] the just, speedy, and inexpensive determination of every action."** Miss. R. Civ. P. 1. Furthermore, ensuring compliance therewith is necessary, as "**[a] rule which is not enforced is no rule.**" [Citations omitted.]

Ill. Cent. R.R. Co. v. Moore, 994 So. 2d 723, 726 (Miss. 2008) (emphasis added). Just last month, this Court reaffirmed that a party's failure to comply with procedural rules may eviscerate its right to a trial on the merits:

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[4] No less than four (4) times in her brief, Powell asserts that the trial court's modification order was "the right thing to do." Powell's Brief at 10, 13, 14.

[5] Powell filed both actions in the Circuit Court of the First Judicial District of Hinds County. The instant action presently before this Court was assigned to Judge Harrison and bears Cause No. 251-07-1195CIV. The second-filed action was assigned to Judge Kidd and bears Cause No. 251-10-378CIV.

> For certain, all courts, counsel, and litigants would rather see cases decided on the merits. But **this aspirational goal carries with it a commensurate responsibility imposed upon all to abide by the Rules** and the decisions of our courts, **as opposed to seeking a benevolent decision from a trial judge**. [Citations omitted.] But for [the plaintiff's] conduct (or lack thereof), perhaps that goal could have been achieved in this case.

Young v. Smith, No. 2010-CA-00079-SCT, 2011 WL 3333915, at *7 (Miss. Aug. 4, 2011) (emphasis added). As the Court stated in *Young*, *supra*, the duty of litigants to comply with procedural rules is "imposed upon all." *Id.* *See also* MISS. R. CIV. P. 1 cmt. (noting that "[t]he rules apply irrespective of the nature of the parties to the action"). Indeed, even *pro se* litigants are held to the Court's rules of procedure. *Buckel v. Chaney*, 47 So. 3d 148, 153 (Miss. 2010).

As set forth in detail in Part II.B., *infra*, Powell unquestionably had authority to file this action as Jervia Powell's next friend pursuant to MRCP 17(c). Once she did, this litigation commenced as a pending civil action notwithstanding Powell's failure to effect service. *See* MISS. R. CIV. P. 1 (stating that "[a] civil action is commenced by filing a complaint with the court"). The moment she invoked the power of the court to resolve her claims, Powell assumed a "commensurate responsibility," see *Young*, *supra*, to comply with the court's procedural rules. If, for some reason, she felt she had filed her suit in haste, or simply wished to re-file and potentially proceed before a different judge and/or against different defendants, a voluntary dismissal under MRCP 41(a) was the proper course under the *Mississippi Rules of Civil Procedure*. Had Powell voluntarily dismissed the instant action under MRCP 41(a), the statute of limitations (triggered by her notice of claim, see Part II.C., *infra*) would never have been tolled, thereby obviating any unfair prejudice to MBMC as a result of Powell's "misfire," as it were, vis-à-vis the instant action. *Koestler v. Miss. Baptist Health Sys., Inc.*, 45 So. 3d 280, 283 (Miss. 2010) (holding that filing of complaint does not toll statute of limitations where plaintiff voluntarily dismisses suit). Rather than voluntarily dismiss this lawsuit and lose the benefit of

120 days' worth of its tolling power, however, Powell allowed it to remain on the trial court's docket as a place-marker, ultimately abandoning it altogether as a result of sheer inattention, or worse, conscious disregard.

As a result of Powell's inattention in the court below and the trial court's erroneous grant of her MRCP 60(b)(6) motion, MBMC risks losing any and all protection to which it is entitled under the two (2)-year statute of limitations of MISS. CODE ANN. § 15-1-36(2). Powell does not dispute that her cause of action is predicated on events occurring in 2004-05. As set forth in detail in Part II.C., *infra*, and in MBMC's principal brief, pursuant to MISS. CODE ANN. § 15-1-53 and this Court's recent holding in *Kimball Glassco*, the two (2)-year statute of limitations began running on Powell's claims on January 22, 2007, when she gave notice of claim, and certainly no later than November 28, 2007, when she filed the instant action. R. 4. Had Powell voluntarily dismissed this lawsuit, the statute of limitations would have run—***at the very latest***—on November 28, 2009 (having never been tolled by the filing of her complaint).[6] *See Koestler*, *supra*. In that event, Powell's second lawsuit, filed May 19, 2010, see R. 129, would unquestionably have been time-barred.

Instead, Powell allowed the instant action to linger without serving process, thereby tolling the statute of limitations for 120 days. Even so, the statute of limitations had nevertheless run against Powell's claims on the date the court entered its Final Judgment of Dismissal. *See* Part II.C., *infra*. However, as a result of the court's erroneous conclusion to the contrary, Powell has succeeded in filing an action in November 2007 predicated on events occurring in 2004-05, ignoring that action for over two (2) years (indeed, longer than the entire statute of limitations period), and further sustaining her claims in her second lawsuit filed May 19, 2010. R. 129. Not until the second lawsuit filed in May 2010 did Powell serve process on MBMC or any other

[6] This assumes Jervia Powell suffered from "unsoundness of mind" as Powell alleges. There is certainly no admissible evidence in this record to that effect.

defendant. Thus, at the end of the day, on a record devoid of any evidence of Jervia Powell's alleged "unsoundness of mind," the trial court's erroneous ruling allowed Powell to completely sidestep the statute of limitations to the detriment of MBMC's rights thereunder.

As a result of Powell's dilatoriness and the court's erroneous ruling, and certainly through no fault of its own, MBMC now faces the prospect of defending a claim in litigation that arose out of events occurring over five (5) years before it was ever hailed into any court in the premises. The "balance of equities" cannot swing in Powell's favor where she commenced litigation in the trial court only to abandon her cause of action without explanation. It is axiomatic that once Powell commenced this action, she had two options under the *Mississippi Rules of Civil Procedure*: (1) serve process on the defendants pursuant to MRCP 4 and proceed to litigate this suit or (2) ensure its orderly dismissal pursuant to MRCP 41(a). She did neither.[7]

There are no "mulligans" in litigation of civil claims. There are no false starts or test runs or do-overs. Filing a lawsuit has real consequences that count. A plaintiff cannot simply file a complaint, take no action of consequence, ignore the trial court's warning of impending dismissal, sit idly by for seven (7) months following dismissal without objection, and then expect a trial court or this Court to find that equity rekindles jurisdiction under MRCP 60(b)(6) (even if such jurisdiction *could* be rekindled given Powell's failure to appeal, see *Doll, supra*). As this Court has held on multiple occasions, "**[e]quity aids the vigilant and not those who slumber on their rights**." *In re Last Will & Testament of Winding v. Estate of Winding*, 783 So. 2d 707, 711 (Miss. 2001) (emphasis added). For all these reasons, the equities weigh decidedly against Powell and in favor of MBMC. The trial court erred to the extent it concluded otherwise.

[7] This Court has consistently reaffirmed the valuable right accorded by statutes of limitations in our judicial system. *E.g., Miss. Dep't of Pub. Safety v. Stringer*, 748 So. 2d 662, 665 (Miss. 1999). Statutes of limitations reflect the legislative prerogative to compel the exercise of a right of action within a reasonable time, before evidence is lost, memories fade, witnesses become unavailable, or facts become incapable of production due to the lapse of time. *Id. See also* MBMC's principal brief at 31 n.27.

Because Powell can point this Court to no authority vesting the court below with jurisdiction to grant MRCP 60(b)(6) relief on this record, the Court need not even consider Powell's remaining arguments. Pursuant to the authorities cited *supra* and the authorities cited in MBMC's principal brief, the trial court lacked authority to revisit its final judgment as a matter of law. This Court should accordingly reverse and render this action dismissed with prejudice.

II. EVEN IF THE COURT BELOW DID HAVE JURISDICTION TO REVISIT ITS FINAL JUDGMENT, WHICH IT DID NOT, POWELL CAN POINT TO NO VALID SUBSTANTIVE BASIS SUPPORTING THE COURT'S MODIFICATION OF ITS FINAL JUDGMENT UNDER MRCP 60(b)(6).

A. Powell's assertion that since her complaint was never served, it could only be dismissed via MRCP 4(h), is erroneous as a matter of law.

Powell argues that an action never served is a nullity and can only be dismissed via MRCP 4(h), and that unless the statute of limitations has run, such dismissal must be "without prejudice." As set forth *infra*, this is simply ***not the law*** in Mississippi, and Powell's complaint was properly and independently dismissed with prejudice pursuant to MRCP 41(b).

In Mississippi, the delay occasioned by a plaintiff's failure to serve process within the 120-day period permitted by MRCP 4(h) may be sufficiently prejudicial to support dismissal with prejudice for failure to prosecute pursuant to MRCP 41(b). *See Hensarling v. Holly*, 972 So. 2d 716, 720-22 (Miss. Ct. App. 2007). In *Hensarling*, the plaintiff failed to serve a defendant within the 120-day period permitted by MRCP 4(h). *Id.* at 718-19. The court subsequently dismissed the case with prejudice for failure to prosecute, finding that, in addition to otherwise failing to diligently prosecute his case, the plaintiff had failed to show proof that service of process was perfected within 120 days of filing the complaint. *Id.* at 719, 722.

On appeal of the dismissal, the Court of Appeals reaffirmed trial courts' "inherent power" to dismiss actions with prejudice for failure to prosecute pursuant to MRCP 41(b). *Id.* at 719. In

considering the grounds for dismissal, the court found telling the plaintiff's failure to ***timely serve the defendant*** or even to ***act diligently in attempting service***, concluding that such dilatoriness constituted a "clear record of delay" supporting dismissal under MRCP 41(b). *Id.* at 720-21. Accordingly, the court affirmed the lower court's dismissal for failure to prosecute. *Id.* at 722-23. Significantly, the court affirmed the dismissal **with prejudice—not** because the statute of limitations had indeed run at the time of dismissal, but solely because the delay occasioned by the failure of timely service was prejudicial to the defendant. *See id.* at 722.

Like Mississippi, the Fifth Circuit has recognized that the prejudice inherent in a plaintiff's failure to timely serve a defendant can warrant dismissal with prejudice for failure to prosecute. *See Porter v. Beaumont Enter. & Journal*, 743 F.2d 269, 271-73 (5th Cir. 1984); *Fournier v. Textron, Inc.*, 776 F.2d 532, 534 (5th Cir. 1985).

In *Porter*, the plaintiff filed suit in March 1982 and failed to timely serve process. *Porter*, 743 F.2d at 271. In February 1983, the district court threatened to dismiss the case for failure to prosecute. *Id.* Five weeks later, in March 1983, the plaintiff finally effected service. *Id.* Finding that the plaintiff's delay in effecting service was "an inordinate delay justifying dismissal," the district court dismissed the case with prejudice for failure to prosecute. *Id.* at 270-71. On appeal, the plaintiff argued that the dismissal should have been predicated on FRCP 4(j)[8] and thus should have been entered "without prejudice." *Id.* at 271. While the court declined to consider the applicability of FRCP 4(j) [MRCP 4(h)] since the statute of limitations had expired, the court nevertheless recognized the propriety of a dismissal for failure to prosecute predicated on failure to timely serve process in lieu of an alternative FRCP 4(j) [MRCP 4(h)] dismissal. *Id.* at 273. Holding that a "delay between filing a complaint and service

[8] FRCP 4(j) is the predecessor to FRCP 4(m), the current federal rule equivalent of MRCP 4(h). FRCP 4(j) and MRCP 4(h) are identical. *Compare* MISS. R. CIV. P. 4(h) *with* FED. R. CIV. P. 4(j) as quoted in *Porter*, 743 F.2d at 273 n.5.

of process is viewed as a **critically prejudicial delay**," the court affirmed dismissal with prejudice for failure to prosecute. *Id.* at 272-73 (emphasis added).

Fournier likewise emphasized the "necessity for prompt service of process." *Fournier*, 776 F.2d at 534. In *Fournier*, the Fifth Circuit affirmed the dismissal (apparently "with prejudice") of the plaintiffs' complaint where the plaintiffs failed to have process issued for 32 months after filing suit. *Id.* at 533-34. In reaching its holding, the court rejected the plaintiffs' argument that no prejudice resulted from the delay, noting that "[j]ustification for delaying the issuing of process and the prejudice necessary to support dismissal for want of prosecution are inevitably related inquiries." *Id.* at 534.

The most factually analogous case found on this point hails from the Seventh Circuit and fully supports *Hensarling*, *Porter*, and *Fournier*. *See O'Rourke Bros. Inc. v. Nesbitt Burns, Inc.*, 201 F.3d 948 (7th Cir. 2000). In *O'Rourke*, the plaintiffs filed suit and never served the defendants. *Id.* at 949. Following the plaintiffs' failure to heed the magistrate's warning that the case would be dismissed for failure to prosecute absent completion of service, the district court dismissed the complaint with prejudice for failure to prosecute. *Id.* The plaintiffs thereafter made no effort to have the judgment "transformed into one without prejudice" pursuant to FRCP 59, nor did they appeal. *Id.* at 950. In fact, they did nothing at all[9] until seven (7) months following entry of the judgment. *Id.* At that time they sought relief under FRCP 60, claiming they were unaware of entry of the judgment with prejudice and arguing that dismissal should have been "without prejudice" pursuant to FRCP 4(m)[10]. *Id.* Following the district court's

[9] As the Seventh Circuit aptly observed, "Let's just say that the O'Rourkes' side did not seem to be paying much attention to this case . . . ." *O'Rourke*, 201 F.3d at 949.

[10] FRCP 4(m) is the current federal rule equivalent of MRCP 4(h). *Compare* FED. R. CIV. P. 4(m) *with* MISS. R. CIV. P. 4(h).

denial of their FRCP 60 motion and several subsequent motions for post-judgment relief, the plaintiffs appealed. *Id.*

On appeal, the plaintiffs argued that the district court was without power to dismiss their complaint for failure to prosecute under FRCP 41(b) when the underlying problem was a failure to serve process. *Id.* In deciding the issue, the Seventh Circuit reasoned as follows:

> **The short answer to the precise question we face – whether a dismissal with prejudice for failure to prosecute when the defendant has not been served is an order beyond the court's power – is *no*.** Even when Rule 4(m) clearly applies, dismissal for failure to prosecute is sometimes ordered.
>
> . . . .
>
> In certain circumstances, a plaintiff's dereliction in not obtaining service may lead beyond Rule 4 and head off into territory covered by Rule 41(b). . . . **Once a plaintiff has gone beyond a failure to serve and has also failed to adhere to the orders of the court, the situation may transform itself from a simple failure to obtain service to a failure to prosecute the action.**

Id. at 952-53 (emphasis added). Accordingly, the court affirmed the dismissal of the plaintiffs' complaint with prejudice for failure to prosecute predicated on failure to serve. *Id.* at 953.

In the case at bar, Powell's assertion that MRCP 4(h) precluded dismissal with prejudice pursuant to MRCP 41(b) is erroneous as a matter of law. It is undisputed that the court below dismissed Powell's action exclusively on the grounds of failure to prosecute pursuant to MRCP 41(b).[11] The court's order, entered March 18, 2010, stated the following:

> On or about February 18, 2010, the above referenced matter was called for status at a **duly noticed and publicized mandatory**

[11] Powell cites *In re Holtzman*, 823 So. 2d 1180, 1182 n.1 (Miss. 2002), for the proposition, as stated by her, that "[t]he only time a court is entitled to dismiss a case for failure to serve **with prejudice** is where the uncontested facts show that the statute of limitations has passed and the filing of a new lawsuit would be futile." Powell's Brief at 7 (emphasis in original). Powell fails to point out that the dismissal in *In re Holtzman* was predicated exclusively on MRCP 4(h), **not** on MRCP 41(b) as was the case in the court below.

> **docket call** for all cases in the first judicial district that were not previously set for trial. At that time counsel for the parties failed to answer the call **after previously being warned that failure to appear would result in this matter being dismissed for failure to prosecute**. The Court after taking note that there has been no action in this matter for the past year and as such, **the Court has authority to dismiss cases where there is a clear record of delay in the prosecution of the matter**. [Footnote citing *Hensarling v. Holly*, 972 So. 2d 716 (Miss. Ct. App. 2007), omitted.] Therefore, pursuant to M.R.C.P. 41(b) this matter is dismissed *sua sponte*.

R. 25, R.E. 1. (emphasis added). The court actually cited *Hensarling* in its final judgment as the authority on which its judgment was predicated. *Id.*

Not unlike the plaintiffs' dilatoriness in *Hensarling*, *Porter*, and *Fournier*, Powell's failure to timely serve the defendants with process contributed to a delay of approximately two (2) years between the end of the 120-day period for service of process (March 27, 2008) and the date of dismissal (March 18, 2010). Where a delay of eight (8) months in effecting service was deemed a "critically prejudicial delay" supporting dismissal with prejudice for failure to prosecute in *Porter*, certainly Powell's two (2)-year delay in effecting service supported the trial court's dismissal on the same grounds.[12]

Furthermore, because an action does not stand automatically dismissed pursuant to MRCP 4(h) when 120 days pass without service of process,[13] Powell's action was still alive and

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[12] That the court did not expressly articulate lack of timely service as a contributing factor in the delay is irrelevant where, as here, it is "clear from the record that the delay was the result of the plaintiff's failure to prosecute [her] claim." *See Jackson Pub. Sch. Dist. v. Head ex rel. Russell*, No. 2009-IA-02022-SCT, 2011 WL 3505304, at *3 (Miss. Aug. 11, 2011).

[13] *See, e.g., Cross Creek Prods. v. Scafidi*, 911 So. 2d 958, 960 (Miss. 2005) (stating that a complaint is merely "subject to dismissal" once the 120-day period has elapsed) (emphasis added). This Court has held that a complaint may not be dismissed pursuant to MRCP 4(h) unless and until two prerequisites are satisfied: (1) the plaintiff has an opportunity to show good cause for failing to effect service within the 120-day period and (2) the plaintiff receives notice of such an opportunity. *Webster v. Webster*, 834 So. 2d 26, 27 (Miss. 2002). *See also Stutts v. Miller*, 37 So. 3d 1, 4 (Miss. 2010). In *Webster*, the Mississippi Supreme Court stated the following:

> [MRCP 4(h)] therefore provides that *the plaintiff will have an opportunity to show good cause after the 120-day period has elapsed.*

pending before the trial court in February 2010, when the court noticed the case for docket call. Thus, whether she had served the defendants or not, Powell was unquestionably still subject to the trial court's docket-control notices and the consequences of disregarding those notices. As was the case in both *Porter* and *O'Rourke*, the court below actually warned Plaintiff that her cause of action would be dismissed for failure to prosecute absent specified action her part. Once Powell failed to appear at the court's mandatory docket call, despite being warned of the penalty for nonattendance, her dilatoriness went "beyond a failure to serve," see *O'Rourke*, *supra*, and "into territory covered by Rule 41(b)," thereby "transform[ing] [the situation] from a simple failure to obtain service to a failure to prosecute the action."

Powell's conduct in the court below was remarkably similar to that of the plaintiffs in *O'Rourke*. Not only was Powell warned of the penalty for noncompliance with the court's instructions, but like the *O'Rourke* plaintiffs, Powell (1) made no timely effort to have the dismissal transformed into one "without prejudice"; (2) failed to appeal the dismissal; and (3) waited seven (7) months following entry of the order of dismissal to seek relief under Rule 60 predicated, no less, on a purported failure to receive notice of entry of the order. Moreover, Powell makes the same flawed legal argument regarding MRCP 4(h) that the court rejected as erroneous as a matter of law in *O'Rourke*.

Powell points this Court to no authority contravening the well-settled principles set forth *supra*. She merely seeks to expand MRCP 4(h)'s use of the word "shall" beyond its proper context to apply preemptively in a manner that is quite obviously not contemplated by the rule

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> Why else does Rule 4(h) require that notice be given to the plaintiff before the court can dismiss the complaint? The requirement of notice being given contemplates a response to the notice.

Webster, 834 So. 2d at 29 (italics in original, underscore added). This Court went on to hold that a motion for additional time in which to serve process may be filed after the 120-day time period has expired. *Id.*

when read in conjunction with the foregoing authorities. Pursuant to *Hensarling*, *Porter*, *Fournier*, and *O'Rourke*, trial courts are fully authorized under MRCP 41(b) to dismiss cases with prejudice for failure to prosecute notwithstanding a lack of timely service of process, regardless of whether time remains in the governing statute of limitations period.[14] The trial court erred to the extent it concluded otherwise in modifying its Final Judgment of Dismissal.

B. Powell had standing to file this action pursuant to MRCP 17(c), which she fails to address at all in her brief.

In a further effort to discredit the validity of the instant action, Powell wheels out the "standing" doctrine and erroneously asserts that she had no authority to file suit on behalf of her son in the first place. Lack of standing was not among the trial court's stated grounds for modifying its final judgment. *See* R. 161, R.E. 8. Nevertheless, as set forth in MBMC's principal brief and discussed further *infra*, Powell unquestionably had standing to file this action pursuant to MRCP 17(c). Tellingly, Powell has failed to provide this Court with any authority whatsoever undermining her standing to sue on her son's behalf under MRCP 17(c).

Powell's entire standing argument turns on the purported applicability of MISS. CODE ANN. § 93-13-27, which she incorrectly asserts precluded her from filing this action since she had not yet been appointed conservator and obtained court approval to file.[15] By its own terms, however, § 93-13-27 applies only to suits filed on behalf of a ward "***for whom a general guardian has been appointed.***" MISS. CODE ANN. § 93-13-27 (emphasis added). Under the

[14] Even if the Court were to disregard these authorities and conclude that the expiration of the statute of limitations period *is* a prerequisite to dismissal with prejudice on this record, the statute of limitations nevertheless *had* run on Plaintiff's claims as set forth in detail at pages 26-31 of MBMC's principal brief. *See also* Part II.C., *infra*.

[15] Powell also cites *Long v. McKinney*, 897 So. 2d 160 (Miss. 2004), and *Clark Sand Co. v. Kelly*, 60 So. 3d 149 (Miss. 2011), for the proposition that to have standing to file a wrongful death suit, a personal representative "must be formally appointed as such prior to filing the complaint for wrongful death." Powell's Brief at 9. These cases have no application here as they speak only to standing in wrongful death actions, which are governed by statute, and *not* to actions filed on behalf of living persons, such as those contemplated by the "next friend" provision of MRCP 17(c).

express terms of the statute, only *these* suits require court approval prior to filing. Powell does not dispute that at the time she filed the instant action, no guardian or conservator had been appointed on behalf of Jervia Powell.[16] Therefore, by its own terms, § 93-13-27 has and can have no application here.

MRCP 17(c) is not at all inconsistent with § 93-13-27. It provides that in cases where "an incompetent person does **not** have a duly appointed representative, **he may sue by his next friend**." MISS. R. CIV. P. 17(c) (emphasis added). *See also* MISS. R. CIV. P. 17(c) cmt. (stating that "persons under a legal disability may sue by their next friends"). Even if MRCP 17(c) were inconsistent with § 93-13-27, which it is not, it would nevertheless control pursuant to this Court's inherent power to promulgate procedural rules as set forth in *Newell v. State*, 308 So. 2d 71, 76 (Miss. 1975). For these reasons and those set forth in MBMC's principal brief, Powell had standing to file the instant action. Even if the court below *had* modified its final judgment based on some perceived lack of standing, it would have been error to do so.

C. Powell misconstrues *Kimball Glassco* and cites no authority that saves her case from the statute of limitations.

Powell has yet to point this Court to any admissible record evidence showing that Jervia Powell suffered from unsoundness of mind at any time pertinent to this litigation. Even assuming for the sake of argument that on or about November 30, 2005, Jervia Powell came within the tolling provisions of Mississippi's disability saving statutes, any such tolling ceased, and the statute of limitations commenced to run at the latest on January 22, 2007, pursuant to MISS. CODE ANN. § 15-1-53.[17] That was the date his right of action was undeniably in the hands

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[16] Whatever her status may have been later is apropos of nothing since standing is determined at the time suit is filed. *Delta Health Group, Inc. v. Estate of Pope ex rel. Payne*, 995 So. 2d 123, 126 (Miss. 2008).

[17] The application of MISS. CODE ANN. § 15-1-53 to the facts of the case at bar are set forth in detail at pages 26-31 of MBMC's principal brief.

of his mother and next friend, Maria Powell ("Powell" herein), who on that date caused her attorney to send a notice of claim letter to MBMC setting forth the claims at issue in the instant lawsuit, thereby signifying her active pursuit of Jervia Powell's legal interests in the matter.[18] R. 96, R.E. 11. As set forth in detail at pages 30-31 of MBMC's principal brief, the statute of limitations accordingly began running on Jervia Powell's claims on January 22, 2007, and expired on July 21, 2009—**eight (8) months prior to the trial court's entry of its Final Judgment of Dismissal** on March 18, 2010.[19] R. 25, R.E. 1.

This Court recently recognized that the statute of limitations commences to run against one of unsound mind when his next friend begins affirmatively pursuing his legal interests by initiating pre-suit notice of claim against potential defendants. *See Kimball Glassco Residential Ctr. v. Shanks*, 64 So. 3d 941, 948-49 (Miss. 2011). In *Kimball Glassco*, the plaintiff's mother was injured in an automobile accident that occurred on April 15, 2005. *Id.* at 943. At the instance of the plaintiff, acting on behalf of his mother, notice of claim was given to potential MTCA defendants on or about April 4, 2006. *Id.* at 944 n.2. The plaintiff ultimately filed suit on his mother's behalf (in a next friend capacity) on April 8, 2008. *Id.* at 943. The defendants thereafter sought dismissal on the grounds that the action was time-barred under the MTCA's one (1)-year statute of limitations. *Id.* The trial court denied the defendants' motion to dismiss on the basis of waiver and estoppel, and the defendants appealed. *Id.* at 944. On interlocutory appeal, this Court reversed and rendered, holding that the plaintiff's claims were time-barred under the one (1)-year statute of limitations. *Id.* at 949.

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[18] Powell has never disputed (either in the court below or on appeal) that she was the person who initiated the notice of claim letter sent to MBMC on Jervia Powell's behalf on or about January 22, 2007.

[19] If this Court were to regard Powell's complaint as a nullity, as she would have it do, then the filing of her complaint on or about November 28, 2007, failed to toll the statute of limitations *at all*. *Garlock Sealing Techs., LLC v. Pittman*, 2008-IA-01572-SCT, 2010 WL 4009151, at *10 (Miss. Oct. 14, 2010) (holding that complaint deemed a nullity fails to toll statute of limitations). In that event, the statute of limitations expired on or about March 23, 2009.

While the interlocutory appeal was pending, the plaintiff moved this Court to remand for a determination of unsoundness of mind vis-à-vis his mother. *Id.* at 948. The plaintiff argued that if his mother was found to be of unsound mind on the date of her accident, then the MTCA's one (1)-year statute of limitations would not begin to run until the removal of her disability. This Court denied the plaintiff's motion in part because the plaintiff's mother's "competence to assert her rights in this lawsuit [was] not at issue" given the *plaintiff's* assertion of her rights in the matter. *Id.* at 948-49. In support of its holding, this Court cited *U.S. Fid. & Guar. Co. v. Conservatorship of Melson*, 809 So. 2d 647, 653-54 (Miss. 2002) (holding that § 15-1-53 precludes operation of disability savings statutes where guardian or conservator has been appointed for ward "inasmuch as that [individual] is fully authorized **to employ attorneys** and bring actions on their behalf") (emphasis added).

Powell attempts to brush aside *Kimball Glassco* as if this Court "refused to deal" with the disability savings issue at all. Powell's Brief at 16. In point of fact, this Court's holding in *Kimball Glassco* is significant for two (2) reasons, neither of which Powell addresses in her brief. First of all, it removes any doubt whatsoever (if indeed any ever existed) that the preclusive sweep of § 15-1-53 extends beyond claims being pursued by court-appointed representatives to encompass claims being pursued by ***next friends***. Secondly, and most importantly, it unequivocally establishes that the statute of limitations begins running on an alleged incompetent under § 15-1-53 when his next friend begins affirmatively pursuing his legal interests **by initiating pre-suit notice of claim** against potential defendants.

In *Kimball Glassco*, the plaintiff's cause of action accrued on April 15, 2005. *Kimball Glassco*, 64 So. 3d at 943. He gave notice of claim on or about April 4, 2006. Even assuming the potential defendants received such notice the same day, the plaintiff at that point had—at most—eleven (11) days remaining in the one (1)-year statute of limitations period. Assuming

the plaintiff received the *fullest possible benefit* of the MTCA notice and tolling provisions, his suit was time-barred—at the very latest—by mid-November 2006, well over a year before he ever filed suit. *See Copiah County Sch. Dist. v. Buckner*, 61 So. 3d 162, 169-70 (Miss. 2011). For this Court to have rendered the plaintiff's action time-barred by, *inter alia*, operation of § 15-1-53, the limitations period necessarily began running prior to suit being filed. The only logical trigger date is the date the plaintiff perfected notice of claim on behalf of his mother. For the reasons set forth *supra* and in MBMC's principal brief, § 15-1-53 and *Kimball Glassco* yield the same result here. Powell's claims were time-barred eight (8) months before the trial court entered its Final Judgment of Dismissal, and the court erred in concluding otherwise.

As a desperate parting shot, Powell mistakenly contends that MBMC has "waived any statute of limitations objection by failing to make the same below." Powell's Brief at 17. To the contrary, MBMC's statute of limitations argument was presented to the court below in its motion to reconsider filed December 16, 2010—just one (1) day after the court issued its order modifying its Final Judgment of Dismissal. R. 90-91, R.E. 7. As set forth *supra*, the trial court's Final Judgment of Dismissal was predicated exclusively on MRCP 41(b) and Powell's failure to prosecute this action. Whether Powell's action was likewise time-barred at the time of dismissal was never a pertinent issue in this litigation until the trial court, after deferring the disposition of the motion to his successor without hearing argument, unexpectedly entered its modification order from which MBMC appeals. That order was predicated in part on the court's assertion that at the time of the docket call in February 2010, the court was under the impression the statute of limitations had expired. R. 87, R.E. 6; R. 161, R.E. 8. Having immediately undertaken to advise the court of its erroneous conclusion of law via its motion to reconsider, MBMC fully preserved this issue for appeal. *See Graves v. Dudley Maples, L.P.*, 950 So. 2d 1017, 1021 (Miss. 2007) (noting that argument is not procedurally barred on appeal if raised in a motion to reconsider);

Howard v. Gunnell, 63 So. 3d 589, 597-98 (Miss. Ct. App. 2011) (same); *Curtis v. Curtis*, 59 So. 3d 623, 627-28 (Miss. Ct. App. 2011) (same). Powell's argument to the contrary is meritless.

For all these reasons, the court below had no substantive basis upon which to grant MRCP 60(b)(6) relief. Accordingly, even if the court had jurisdiction to consider such relief in the first place, which it did not, it erred in modifying its final judgment to make it "without prejudice."

CONCLUSION

For the reasons set forth herein and in MBMC's principal brief, this Court should reverse the December 2010 orders of the Hinds County Circuit Court and render this action dismissed with prejudice pursuant to the Final Judgment of Dismissal entered March 18, 2010.

THIS the 6TH day of September, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Rex M. Shannon III, one of the attorneys for Appellant Mississippi Baptist Medical Center, Inc., do hereby certify that I have this date caused to be served, via U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing to the following:

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THIS the 6TH day of September, 2011.

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