IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2011-CA-00171

GARLAND K. MILNER **APPELLANTS**

V.

MARIA L. POWELL **APPELLEE**

APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

BRIEF OF THE APPELLANTS JACKSON ANESTHESIA ASSOCIATES; GARLAND K. MILNER, M.D.; AND DEREK MARSHALL, M.D.

ORAL ARGUMENT REQUESTED

CHRIS J. WALKER - [redacted]
MARKOW WALKER, P.A.
P.O. Box 13669
Jackson, MS 39236
Telephone: (601) 853-1911
Facsimile: (601) 853-8284
E-mail: cwalker@markowwalker.com

JOHN L. HINKLE, IV - [redacted]
MARKOW WALKER, P.A.
265 N. LAMAR BLVD., STE. I
Post Office Drawer 50
Oxford, Mississippi 38655
Telephone: (662) 234-9899
Facsimile: (662) 234-9762
E-mail: jhinkle@markowwalker.com

COUNSEL FOR APPELLANTS, JACKSON ANESTHESIA ASSOCIATES; GARLAND K. MILNER, M.D.; AND DEREK MARSHALL, M.D.

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I. CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record for the Appellants, Jackson Anesthesia Associates; Garland K. Milner, M.D.; and Derek Marshall, M.D., certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

a. Maria L. Powell, Appellee;

b. Jervia Powell, Appellee;

c. Jackson Anesthesia Associates, Appellant;

d. Garland K. Milner, M.D., Appellant;

e. Derek Marshall, M.D., Appellant;

f. Mississippi Baptist Medical Center, Inc., Appellant;

g. Trent Walker, Counsel for Appellee;

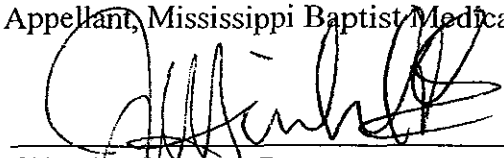
h. Jesse Harris, with the Harris Law Firm, Counsel for Appellee;

i. Chaka Smith, with the Law Office of Chaka Smith, Counsel for Appellee;

j. Jane E. Tucker, Counsel for Appellee;

k. John L. Hinkle, IV, and Chris J. Walker, with the law firm of Markow Walker, P.A., Counsel for Appellants, Jackson Anesthesia Associates; Garland K. Milner, M.D.; and Derek Marshall, M.D.;

l. D. Collier Graham, Jr. and Rex M. Shannon, III, with the law firm of Wise Carter Child & Caraway, P.A., Counsel for Appellant, Mississippi Baptist Medical Center, Inc.



CHRIS J. WALKER
JOHN L. HINKLE, IV
Attorney of Record for Appellants, Jackson Anesthesia Associates; Garland K. Milner, M.D.; and Derek Marshall, M.D.

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IV. STATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion in granting Powell's Rule 60(b) Motion to Clarify when JAA Defendants were not provided a opportunity to be heard in violation of their due process rights?

2. Whether Powell timely asserted her Rule 60(b) Motion given that Powell failed to comply with the specific requirements set forth in Rule 60(b)?

3. Whether Powell was precluded from asserting a Rule 60(b) Motion as she failed to pursue other procedural remedies?

4. Whether the trial court abused its discretion in granting Powell's Rule 60(b) Motion to Clarify in light of the requirements of Rule 60(b) and Powell's failure to pursue other procedural remedies?

V. STATEMENT OF THE CASE

At the outset, it is important to note that there are two (2) essentially identical cases at issue. Given the complex and overlapping issues between the cases, for the sake of clarity, we will address them as "Powell I" and "Powell II" in this brief.

On November 28, 2007, Powell filed her Complaint in the Circuit Court of Hinds County, Mississippi ("Powell I") (**R., at 4-10**). The original Complaint did not include Jackson Anesthesia Associates; Garland K. Milner, M.D. or Derek Marshall, M.D. (hereinafter "JAA Defendants") as named defendants. On January 30, 2008, Powell filed her First Amended Complaint in Powell I, adding Jackson Anesthesia Associates as a defendant. (**R., at 20**).[1] JAA Defendants were never served with this First Amended Complaint in Powell I. On February 18, 2010, the Circuit Court entered a Final Judgment of Dismissal pursuant to Rule 41(b) of the Mississippi Rules of Civil Procedure for failure to prosecute the case (**R., at 25**). This order was signed by Judge Harrison because the case was on his docket.

On May 19, 2010, Powell filed an identical action in the same circuit court ("Powell II")(**R., at 129-36**). This "new" case was assigned to the docket of Judge Winston Kidd. On July 29, 2010, Powell filed an Amended Complaint at Law in Powell II (**R., at 138-44**). On October 18, 2010, JAA Defendants filed a Motion for Summary Judgment in Powell II (**R., at 100-160**). It was not until after JAA Defendants filed their Motion for Summary Judgment in Powell II on Judge Kidd's docket, and over seven (7) months after the Final Judgment of Dismissal had been entered in Powell I on Judge Harrison's docket, that Powell filed her Rule

[1]While the header of the First Amended Complaint did not include Garland K. Milner, M.D. or Derek Marshall, M.D., as named defendants, the body of the First Amended Complaint included Drs. Milner and Marshall as defendants.

60(b) Motion to Clarify in Powell I seeking to change the dismissal to one without prejudice (**R., at 26-30**). On December 1, 2010, JAA Defendants filed a response in opposition to Powell's Motion to Clarify in Powell I (**R., at 31-40**).[2]

The Motion to Clarify filed in Powell I was set for hearing on December 2, 2010 (**R., at 86A-86B**). On that date, Judge Harrison declined to hear arguments and indicated that the matter should be taken up with Judge Gowan, the recently elected judge who would be taking over the docket of Judge Harrison.

Strangely, without notice to JAA Defendants and without providing JAA Defendants with an opportunity to be heard, two (2) identical Orders were entered only two (2) weeks later by Judge Harrison on December 14, 2010 and December 15, 2010 (**R., at 87, 161**). In both Orders, Judge Harrison granted Powell's Motion to Clarify and amended the previous Final Judgment of Dismissal to make the dismissal without prejudice (**R., at 87, 161**). On December 16, 2010, Baptist filed a Motion to Reconsider (**R., at 88-96**). JAA Defendants promptly joined in Baptist's Motion to Reconsider (**R., at 97-160**). However, Judge Gowan declined to reconsider the ruling of the previous judge assigned to the case, Judge Harrison (**R., at 163**). Aggrieved, JAA Defendants have filed this timely appeal.

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[2]JAA Defendants entered a limited appearance for the purposes of contesting the Motion to Clarify.

VI. SUMMARY OF THE ARGUMENT

JAA Defendants were denied their opportunity to be heard on Powell's Motion to Clarify. Judge Harrison, after declining to hear Powell's Motion to Clarify, and without conducting a hearing or arguments on the issue, entered two (2) Orders granting Powell's Motion to Clarify. As JAA Defendants were deprived of their rights to be heard, their due process rights were violated under U.S. CONST. amend. XIV; MISS. CONST. art. III, §14; Miss. Const. art. III, §24; and MISS. CONST. art. III, §25, *inter alia*. As such, Judge Harrison abused his discretion in granting the Motion to Clarify without a hearing on the matter and affording JAA Defendants with an opportunity to be heard.

This lawsuit, Powell I, was dismissed by the Circuit Court of Hinds County, Mississippi, on March 18, 2010. The case was dismissed pursuant to Rule 41(b) of the Mississippi Rules of Civil Procedure for failure to prosecute. As the Final Judgment of Dismissal did not stipulate whether the dismissal was with prejudice or without prejudice, by operation of Rule 41(b), the dismissal operated as an adjudication on the merits and was with prejudice.

Following the dismissal with prejudice of Powell I, Powell never filed a Motion to Alter or Amend the Judgment pursuant to MISS. R. CIV. P. 59(e), never filed a Motion to Reconsider the ruling, and never appealed the final judgment. In fact, Powell did nothing until JAA Defendants filed a summary judgment motion in Powell II. Subsequently, over seven (7) months after the Final Judgment of Dismissal was entered in Powell I, Powell filed a Motion to Clarify in Powell I pursuant to Rule 60(b). Powell's Rule 60(b) motion was neither timely nor sanctioned under the Mississippi Rules of Civil Procedure. As Powell failed to file her Rule 60(b) motion within six (6) months and also failed to pursue the procedural/appellate remedies afforded by other rules, her Motion was not permissible and should have been denied.

Powell was clearly not entitled to relief under Rule 60(b). As such, the trial judge abused his discretion under the applicable rules and caselaw in amending the Final Judgment of Dismissal to change it from a dismissal with prejudice by law to a dismissal without prejudice.

VII. ARGUMENT

A. Standard of Review

"A trial judge's decision to grant relief under Rule 60(b) is subject to review under an abuse of discretion standard. Thus, we must defer to the trial judge's discretion, but note that consideration of a Rule 60(b) motion requires that an important balance be struck between granting a litigant a hearing on the merits with the need and desire to achieve finality." ***Hartford Underwriters Ins. Co. v. Williams***, 936 So. 2d 888, 892 (Miss. 2006). "Furthermore, 'an abuse of discretion standard does not mean a mistake of law is beyond appellate correction,' because a court abuses its discretion when it makes an error of law." ***Kirk v. Pope***, 973 So. 2d 981, 986 (Miss. 2007). Finally, relief under Rule 60(b) is not granted "simply because its entry may have resulted from incompetence or ignorance on the part of an attorney employed by the party seeking relief." ***Stringfellow v. Stringfellow***, 451 So. 2d 219, 221 (Miss. 1984).

B. Timeline of Powell I and Powell II

Given the rather convoluted litigation history of the two (2) overlapping and identical causes of action, Powell I and Powell II, JAA Defendants have provided an undisputed time line of the course of litigation below:

10/30/2007	JAA Defendants receive Notice of Claim Letter from Jesse V. Harris, attorney for Powell (**R., at 109**).
11/27/2007	JAA Defendants receive a second Notice of Claim Letter from Jesse V. Harris, attorney for Powell (**R., at 110**).
11/28/2007	Powell files Powell I in the Circuit Court of Hinds County, MS, First Judicial District. JAA Defendants were not named in the suit (**R., at 111-17**).
01/30/2008	Powell files First Amended Complaint in Powell I adding JAA Defendants (**R., at 119-27**).
03/18/2010	Powell I is dismissed for failure to prosecute (**R., at 128**).
07/29/2010	Powell files Powell II in the Circuit Court of Hinds County, MS, First Judicial District. JAA Defendants are named in the suit (**R., at 129-36**)

07/29/2010	Powell files Amended Complaint at Law in Powell II (**R., at 138-44**).
10/18/2010	JAA Defendants file Motion for Summary Judgment in Powell II (**R., at 100-60**).
10/21/2010	Powell files a Rule 60(b) Motion to Clarify in Powell I (**R., at 26-30**).
12/01/2010	JAA Defendants file their Response to Motion to Clarify in Powell I (**R., at 31-40**)
12/02/2010	Hearing set for Powell's Motion to Clarify in Powell I (**R., at 86A-86B**)
12/14/2010	Judge Harrison enters Order granting Powell's Motion to Clarify in Powell I (**R., at 87**)
12/28/2010	Judge Harrison enters second identical Order in Powell I Granting Powell's Motion to Clarify (**R., at 161**)
12/21/10	JAA Defendants file Joinder in Mississippi Baptist Medical Center's Motion to Reconsider in Powell I (**R., at 97-160**).
01/07/2011	Judge Gowan denies JAA Defendants' Motion to Reconsider (**R., at 163**)

C. Dismissal for Failure to Prosecute

It is undisputed that on March 18, 2010, the Circuit Court of Hinds County, Mississippi, entered a Final Judgment of Dismissal in Powell I (**R., AT 25**). The Order did not specify whether the dismissal was with or without prejudice.

1. Miss. R. Civ. P. 41(b)

The Final Judgment of Dismissal at issue in the present action was entered pursuant to Rule 41(b) of the Mississippi Rules of Civil Procedure. Rule 41(b) provides, in pertinent part, "[u]nless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any other dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, ***operates as an adjudication on the merits***" (emphasis added).

The fact that Rule 41(b) operates as a dismissal with prejudice in this instance has been upheld by caselaw. The Mississippi Court of Appeals stated in ***Marshall v. Burger King***, 2 So. 3d 702, 707-708 (Miss. Ct. App. 2008) that "[u]nless otherwise specifically ordered by the court,

an involuntary dismissal under Rule 41(b) ordinarily operates as an adjudication upon the merits and is with prejudice." **See also *Hensarling v. Holly***, 972 So. 2d 716, 719-20 (Miss. Ct. App. 2007).

As the Final Judgment of Dismissal did not specify whether the dismissal was with prejudice or without prejudice, it operated as an adjudication on the merits and is with prejudice.

2. Miss. R. Civ. P. 4(h)

When Powell filed her Motion to Clarify in Powell I , she oddly cited cases applying Rule 4(h) of the Mississippi Rules of Civil Procedure. However, Powell's reliance on 4(h) and accompanying case law was misplaced. JAA Defendants concede that Powell was correct in her assertion that the language of Rule 4(h) allows for dismissal of a claim where service of process has not been effectuated within 120 days after filing of the Complaint (**R. at 3**). Further, Powell was also correct that if an action was dismissed pursuant to Rule 4(h), it should be dismissed without prejudice (**R., at 3**).

However, for Rule 4(h) to apply, the plaintiff must have an opportunity to show good cause for failing to effect services of process within the 120-day period. ***Webster v. Webster***, 834 So. 2d 26, 29 (Miss. 2002). Thus, in order for the Court to dismiss the complaint, notice must be afforded to the plaintiff of the dismissal under Rule 4(h). ***Id.*** This provides the plaintiff with the opportunity to file a response to the dismissal, such as filing a motion for additional time. ***Id.***

Webster explained the reasoning behind such application of Rule 4(h):

> The comments state that the complaint will be dismissed 'unless good cause can be shown as to why service could not be made.' The rule therefore provides that the plaintiff will have an opportunity to show good cause after the 120-day period has elapsed. 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. A motion for additional time is an appropriate response to

the notice.

Id.

Clearly, despite Powell's interpretation of Rule 4(h), it does not automatically mandate dismissal for failure to serve process. Rather, in order to dismiss the lawsuit pursuant to Rule 4(h), the Court would have had to provide notice to Powell and afford her the opportunity to respond. This procedure was not accomplished.

However, the entire argument of Powell in regard to Rule 4(h) is academic because Powell's lawsuit was not dismissed pursuant to Rule 4(h). Rather, this action was dismissed under Rule 41(b). Thus, the cases cited by the Plaintiff are completely inapposite to the dismissal at issue in this case.

As Powell presented no reason why it was inappropriate for the Court to dismiss her lawsuit with prejudice by operation of Rule 41(b), we must now turn to Powell's arguments for relief pursuant to Rule 60(b) of the Mississippi Rules of Civil Procedure.

D. Powell's Motion to Clarify

1. Interplay Between Rule 60(b) and Rule 59(e)

As discussed more fully below, Powell's Motion to Clarify was misplaced and an unfit vehicle to address the Final Judgment of Dismissal pursuant to Rule 41(b).

First, prior to Powell's pursuit of a Rule 60(b) motion, Powell had other procedural options which could have addressed her concerns about the dismissal with prejudice. Following the Final Judgment of Dismissal, Powell could have filed a motion to alter or amend the judgment pursuant to Rule 59(e) of the Mississippi Rules of Civil Procedure. Under Rule 59(e), Powell had ten (10) days from the entry of the judgment to file such a motion. However, Powell did not exercise this option. Rather, seven (7) months after the judgment had been entered in

Powell I, and only after a pending summary judgment motion had been brought in Powell II, Powell finally sought relief under Rule 60(b).

At the outset, MISS. R. CIV. P. 60(b) and MISS. R. CIV. P. 59(e) are similar in their use and application. However, there are important distinctions between the two (2) Rules. In ***Bruce v. Bruce***, 587 So. 2d 898, 903 (Miss. 1991), the Court stated that the difference between the two (2) Rules was more than academic. The Court succinctly stated the differences:

> Rule 59(e) motions go to the heart of the matter to those issues predicate to a decision on the merits. Rule 60(b) is for extraordinary circumstances, for matters collateral to the merits, and affords a much narrower range of relief than Rule 59(e). Rule 60(b) specifies certain limited grounds upon which final judgments may be attacked. . . . An appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review.
>
> Rule 60(b) provides for extraordinary relief which may be granted only upon an adequate showing of exceptional circumstances, and that neither ignorance nor carelessness on the part of an attorney will provide grounds for relief. . . . Additionally, it has been said that a party is not entitled to relief merely because he is unhappy with the judgment, but he must make some showing that he was justified in failing to avoid mistake or inadvertence; gross negligence, ignorance of the rules, or ignorance of the law is not enough.
>
> No doubt there is overlap between the rules--we know of no grounds for relief within Rule 60 that are not also grounds for relief under Rule 59(e), if only they be timely sought--but, fundamentally, Rule 60(b) is not an escape hatch for lawyers and litigants who had procedural opportunities afforded under other rules and who without cause failed to pursue those procedural remedies. Rule 60(b) is designed for the extraordinary, not the commonplace.
>
> Third, the movant under Rule 59 bears a burden considerably lesser than a movant under Rule 60(b). When hearing a motion under Rule 59(e), a trial court proceeds de novo, if not ab initio. Recognizing that to err is human, Rule 59(e) provides the trial court the proverbial chance to correct its own error to the end that we may pretermit the occasion for a less than divine appellate reaction. Rule 60(b) motions, on the other hand, proceed on the assumption that the trial court has entered a valid and enforceable judgment which has become final. When considering such a motion, the trial court proceeds under Rule 60(b)'s mandate that finality considerations

> be balanced against any equities movant may assert. ***Finality of judgments as a policy reason for denial is not nearly so strong when the motion is under Rule 59(e) as when Rule 60(b) is invoked. Put otherwise, the trial court has considerably broader discretionary authority under Rule 59(e) to grant relief than it does under Rule 60(b)*** (emphasis added).

Id. at 903-904. The fact that Powell chose not to pursue a Rule 59(e) Motion is important in the Court's evaluation of her use of Rule 60(b). Rule 60(b) motions proceed with the assumption that the trial court entered a valid and enforceable judgment which has become final. The trial court has less discretion to grant relief under Rule 60(b) than under Rule 59(e). Further, a Rule 60(b) Motion is "extraordinary relief" which may be granted only under exceptional circumstances. Carelessness, mistake, inadvertence, gross negligence, and ignorance do not qualify for relief under Rule 60(b). As discussed more fully below, Powell has wholeheartedly failed to establish any showing that requires "extraordinary relief" under Rule 60(b).

2. Avenues Available Under Rule 60(b)

Powell chose to pursue Rule 60(b) as her only avenue for modification of the Final Judgment of Dismissal in Powell I. Specifically, Powell contended that the Final Judgment of Dismissal should have been "without prejudice", rather than "with prejudice."

Rule 60(b) of the Mississippi Rules of Civil Procedure provides relief as follows:

> (b) **Mistakes; Inadvertence; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons:
>
> (1) fraud, misrepresentation, or other misconduct of an adverse party;
>
> (2) accident or mistake;
>
> (3) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

(6) any other reason justifying relief from the judgment.

At the outset, the Mississippi Supreme Court has stated that "Rule 60(b) is not an escape hatch for litigants who had procedural opportunities afforded under other rules and who without cause failed to pursue those procedural remedies. Rule 60(b) is designed for the extraordinary, not the common place." ***City of Jackson v. Jackson Oaks L.P.***, 860 So. 2d 309, 313 (Miss. 2003).

Similarly, the Mississippi Court of Appeals in ***Guinn v. Wilkerson***, 963 So. 2d 555, 558 (Miss. Ct. App. 2006), stated "As a general rule, the 'extraordinary relief' provided for by Rule 60(b), will be granted 'only upon an adequate showing of exceptional circumstances,' and gross negligence, ignorance of the rules, ignorance of the law, or carelessness on the part of the attorney will not provide sufficient grounds for relief. ***Rule 60(b) is not an escape hatch for litigants who had procedural opportunities afforded under other rules and who without cause failed to pursue those procedural remedies***" (emphasis added). **See also *Ray v. Ray***, 963 So. 2d 20, 24 (Miss. Ct. App. 2007).

While Powell's Motion did not stipulate which of the 60(b) avenues she was seeking to utilize, it appears, based on the pleadings in Powell I, only Rule 60(b)(2) or Rule 60(b)(6) would be applicable in this instance. Thus, we must examine these two (2) specific sections of Rule 60(b) to assess their applicability to the present situation.

a. *RULE 60(B)(2)*

Rule 60(b) provides that such a Motion "**shall** be made within a reasonable time and for reasons (1), (2) and (3) **not more than six months** after the judgment, order, or proceeding was entered or taken" (emphasis added). As Powell's Motion to Clarify was filed beyond the six (6) months time frame enumerated in the Final Judgment of Dismissal, this motion for relief was time barred by the plain language of Rule 60(b).

In regard to this six (6) month time frame, the Mississippi Court of Appeals has specifically held that "where the grounds of [Rule 60(b)(1), (2) and (3)] are the basis for action, ***the court is without authority if the motion is not made within the six-month time period***" (emphasis added.) ***Jenkins v. Jenkins***, 757 So. 2d 339, 343 (Miss. Ct. App. 2000). **See also *R. N. Turnbow Oil Invs. v. McIntosh***, 873 So. 2d 960, 965 (Miss. 2004); ***Burkett v. Burkett***, 537 So. 2d 443, 445 (Miss. 1989).

Thus, the plain language of Rule 60(b)(2), along with established case law, is that if Powell was seeking to utilize Rule 60(b)(2), she **must** have filed her request for clarification within six (6) months of the entry of the Final Judgment of Dismissal. As the Final Judgment of Dismissal was entered on March 18, 2010, Powell was required to file her Motion to Clarify by September 19, 2010. However, Powell did not file her Motion until October 21, 2010. As such, said Motion was untimely from the perspective of 60(b)(2), and this avenue of relief was not available to Powell.

b. *RULE 60(B)(6)*

As Rule 60(b)(2) was not available to Powell, we must examine the applicability of Rule 60(b)(6). In regard to Rule 60(b)(6), the Mississippi Supreme Court has stated that "[a] Rule 60(b)(6) motion should only be granted in exceptional circumstances...This provision of the rule

is a catch all provision to allow relief when equity demands. ***Use of Rule 60(b)(6) must be based on some reason other than the first five enumerated clauses of the rule***" (emphasis added). ***Mitchell v. Nelson***, 830 So. 2d 635, 639 (Miss. 2002). **See also *Trim v. Trim***, 33 So. 3d 471, 475 (Miss. 2010); ***Walton v. Snyder***, 984 So. 2d 343, 351 (Miss. Ct. App. 2007).

As stated by Rule 60(b)(6), said motion must be filed within a reasonable time. Further, the Courts in ***Mitchell, Trim,*** and ***Walton*** have stated that relief is only awarded based on "exceptional circumstances." Finally, in order to properly bring a Rule 60(b)(6) Motion, it must be based on some circumstance other than the first five (5) enumerated clauses of the Rule. As Powell is clearly alleging that there was a mistake in the Final Judgment of Dismissal (ie. failure to state "without prejudice"), this should have properly been brought under Rule 60(b)(2). Given that Powell could have brought her motion pursuant to Rule 60(b)(2), she cannot bring it pursuant to Rule 60(b)(6). Further, the fact that Powell chose not to file her Rule 60(b)(2) motion for over seven (7) months, does not qualify as "exceptional circumstances." Gross negligence, ignorance of the rules, ignorance of the law, or carelessness on the part of Powell's attorney does not provide sufficient grounds for relief under this Rule.

Clearly, Powell could have brought her Rule 60(b) Motion under Rule 60(b)(1) - (3). Negligence, carelessness, and ignorance of the rules or law is not an excuse to permit a Rule 60(b)(6) Motion. Rule 60(b)(6) was not an avenue that was open to Powell. As such, the Motion to Clarify should have been denied.

3. Notice of Final Judgment of Dismissal

It is important to note that it is Powell's burden to demonstrate the presence of exceptional circumstances warranting relief. **See *Walker v. Epps***, 2008 U.S. Dist. LEXIS 39873 at *6 (N.D. Miss. May 16, 2008). **See also *Jernigan v. Young***, 2011 Miss. App. LEXIS 214 at

*6 (Miss. Ct. App. April 19, 2011).

However, the **only** explanation offered by Powell for her failure to timely file her Rule 60(b) Motion to Clarify is that she contends that she never received proper notice of the dismissal (**R., at 29**). However, this argument is specious.

First and foremost, the Circuit Clerk's Docket Sheet clearly reflects that Powell's attorney, Trent Walker, was mailed a copy of the Final Judgment of Dismissal on March 19, 2010, one (1) day after the Order was entered (**R., AT 84-85**). Thus, this argument does not hold water.

In ***Thames v. Smith Ins. Agency, Inc.***, 710 So. 2d 1213, 1216 (Miss. 1998), the Mississippi Supreme Court stated that "[t]here is a presumption that mail deposited, postage prepaid, and properly addressed is timely delivered to the person addressed." The Court stated that this presumption was necessary "lest the work of the court be unduly hampered by false and irrefutable claims of non-delivery." ***Id.***

In ***Holt v. Mississippi Employment Security Comm'n***, 724 So. 2d 466, 471 (Miss. Ct. App. 1998), the Mississippi Court of Appeals, in examining the issues raised by ***Thames***, stated "[w]hat is needed is sufficient evidence to convince a fact-finder that the specific document was never received. This is a difficult burden, but some specific evidence is needed or else the presumption is ephemeral and has no more weight than a statement that the notice was sent. There is a serviceable presumption that the vast majority of mail is properly and relatively timely delivered."

In ***Curtis v. Curtis***, 2011 Miss. App. LEXIS 176 at *11 (Miss. Ct. App. March 29, 2011), the plaintiff alleged that he never received notice of a contempt hearing in his divorce. The chancery clerk testified at the hearing that she mailed the notice of hearing to the plaintiff's

residence more than two (2) months prior to the hearing. ***Id.*** at *18. The Court stated that the United States Supreme Court has "repeatedly recognized that mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice." ***Id.*** at *17. The Court found that there was no evidence presented that the plaintiff ever notified the chancery clerk of any problems with mail delivery or requested use of another address. ***Id.*** at *18. As such, the Court ruled that the notice of hearing mailed to the plaintiff's last known address was reasonably calculated to apprise him of the hearing and provide him an opportunity to be heard. ***Id.***

In regard to Powell's claims that she never reviewed notice of the Final Judgment of Dismissal, the certified docket sheet of the Circuit Clerk of Hinds County reflects that the Final Judgment of Dismissal was mailed to Trent Walker, attorney for Powell. There has been no evidence presented by Powell that her attorney did not receive the Final Judgment of Dismissal, as reflected in the docket sheet, other than a general denial of receipt. This is insufficient as a matter of law to overcome the presumption that Powell received notice of the dismissal.

Secondly, if the Court were to take Powell's allegations as true that she never received notice, that would mean that she had no idea that Powell I was dismissed but went ahead and re-filed an identical action, Powell II, in the Circuit Court of Hinds County, Mississippi. This action is counterintuitive and defies logic. The far more logical explanation is that the Motion to Clarify was brought for the sole purpose of seeking to circumvent the summary judgment arguments presented in Powell II by JAA Defendants.

It is evident from the facts presented that Powell received notice of the dismissal and simply chose not to timely pursue a timely Rule 60(b) Motion. This does not amount to "exceptional circumstances" that would warrant relief. As such, her Motion to Clarify should

have been denied, and to grant it was an abuse of discretion which should be reversed.

4. Denial of JAA Defendant's Opportunity to Be Heard

Subsequent to Powell filing her Motion to Clarify, she set the Motion to be heard before Judge Harrison on December 2, 2010 (**R., at 86A-86B**). However, at the time of the hearing, Judge Harrison specifically declined to hear the Motion to Clarify and indicated that it should be taken up with Judge Gowan. Subsequently, without conducting a hearing or providing JAA Defendants with an opportunity to be heard on the issue, Judge Harrison entered two (2) Orders granting Plaintiff's Motion to Clarify (**R., at 87, 161**).

The Mississippi Supreme Court has stated that the "Unites States Constitution and our state constitution demand no less than full due process. In short, a defendant must be given a 'reasonable advance notice of a trial or hearing and a meaningful opportunity to be heard in response." ***McDaniel v. Ritter***, 556 So. 2d 303, 308 (Miss. 1989).

Similarly, the Mississippi Court of Appeals has stated that "[n]otice and the opportunity to be heard are bedrock principles of our law. 'The fundamental requisite of due process of law is the opportunity to be heard.' The United States Supreme Court said that the right to be heard is worth little 'unless one is informed that the mater is pending and can choose for himself whether to appear or default, acquiesce or contest.'" ***Gober v. The Chase Manhattan Bank***, 918 So. 2d 840, 845 (Miss. Ct. App. 2005)

In the case at bar, JAA Defendants were advised of the hearing on Powell's Motion to Clarify. However, at said hearing, Judge Harrison declined to hear any arguments on the matter and declined to rule. Rather, he deferred to Judge Gowan to take up the matter when he ascended to the bench. Subsequently, without any further notice or hearing on the matter, Judge Harrison entered two (2) Orders granting Powell's Motion to Clarify.

Following Judge Harrison's ruling, Baptist Hospital filed a Motion to Reconsider, which JAA Defendants joined (**R., at 88-160**). It was specifically pointed out by Baptist that "[a]t the time of the scheduled hearing on December 2, 2010, this Court declined to consider the motion and advised from the bench that it would defer consideration and disposition of the motion to its successor, Judge Gowan" (**R., at 89**).

However, Judge Gowan declined to reconsider the issue stating "[t]he undersigned will not reconsider an issue that his predecessor has already considered twice" (**R., at 163**). Respectfully, Judge Gowan's assessment of the situation in the Motion to Reconsider was inaccurate. Judge Harrison never actually took up the issue of the Motion to Clarify and the subsequent arguments by JAA Defendants. In fact, JAA Defendants were **never** provided with a formal hearing on the matter or an opportunity to be heard. In fact, Judge Harrison specifically declined to hear the matter at all.

JAA Defendants were clearly denied their opportunity to be heard on this matter. As such, their due process rights were violated under U.S. CONST. amend. XIV; MISS. CONST. art. III, §14; Miss. Const. art. III, §24; and MISS. CONST. art. III, §25, *inter alia*. As such, Judge Harrison abused his discretion in granting the Motion to Clarify without a hearing on the matter and affording JAA Defendants with an opportunity to be heard.

E. Time for Appeal

Regardless of all other reasons for why Powell's Motion to Clarify should have been denied, it still remains an unavoidable truth for Powell that Rule 60(b) was not an avenue that was open to her if she could have pursued other procedural remedies. **See *City of Jackson v. Jackson Oaks, L.P.***, 860 So. 2d 309, 313 (Miss. 2003); ***Guinn v. Wilkerson***, 963 So. 2d 555, 558 (Miss. Ct. App. 2006). In fact, the Mississippi Supreme Court has specifically stated that

"***the Rule 60(b) motion is not to be used as a substitute for appeal***" (emphasis added). ***Briney v. United States Fid. & Guar. Co.***, 714 So. 2d 962, 968 (Miss. 1998).

In ***Doll v. BSL, Inc.***, 41 So. 3d 664, 667 (Miss. 2010), the plaintiffs failed to appeal a Motion to Reconsider, and instead, filed a Motion for Relief from Final Judgment pursuant to Rule 60(b)(6) of the Mississippi Rules of Civil Procedure. The Court held that the utilization by the plaintiffs of Rule 60(b)(6) was "nothing more than 'an escape hatch' after failing to pursue other available procedural remedies.'" ***Id.*** at 669. The Court stated that the plaintiffs should have appealed the dismissal of their lawsuit but failed to do so. ***Id.***

As stated above, Powell offered as her solitary excuse that she was not notified of the Final Judgment of Dismissal. Even if the Court were to accept this rather questionable argument as true, it does not absolve her of her duty to file a timely appeal. Rule 77(d) of the Mississippi Rules of Civil Procedure specifically states, in pertinent part, "[l]ack of notice of the entry by the clerk does not affect the time to appeal nor relieve, nor authorize the court to relieve, a party for failure to appeal within the time allowed, except as permitted by the Mississippi Rules of Civil Procedure." The Comment to Rule 77(d) states that "[t]he present strict rule imposes a duty on counsel to maintain contact with the court while a case is under submission."

The Mississippi Supreme Court, in interpreting this Rule, stated that Rule 77(d) "provides that lack of notice of an entry of an order by the clerk does not affect the time to appeal nor relieve [plaintiff] for failure to appeal within the time allowed." ***Harlow v. Grandma's House, Inc.***, 730 So. 2d 73, 76 (Miss. 1998). **See also *Pinkston v. The Mississippi Department of Transportation***, 757 So. 2d 1071, 1073 (Miss. Ct. App. 2000).

However, in conjunction with Rule 77(d), Rule 4(h) of the Mississippi Rules of Appellate Procedure provides:

> The trial court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

As evidenced above, Rule 77(d) clearly states that lack of notice is not an excuse for failure to timely appeal. Rule 4(h), on the other hand, provides an "out" where lack of notice is claimed. However, as the Comment to Rule 4(h) states, "This provision establishes an **outer limit** of 180 days for a party who fails to receive timely notice of entry of a judgment or order to seek additional time to appeal...." Specifically, in terms of the 180 day and seven (7) day windows, the Mississippi Court of Appeals has stated "[w]e find no authority to suspend the rules to permit out-of-time appeal after those deadlines. The 180 day and 7 days are exceptions to the normal requirements. To suspend those requirements would create exceptions to exceptions. ***Instead, we conclude that these deadlines form boundaries for the judicial discretion that can be exercised***" (emphasis added). ***Badger v. State of Mississippi***, 826 So. 2d 777, 779 (Miss. Ct. App. 2002).

In ***Payne v. Magnolia Healthcare, Inc.***, 984 So. 2d 209, 291 (Miss. Ct. App. 2007), the plaintiff denied that she ever received the denial of her Motion to Reconsider. The plaintiff argued that the 180 day window expired through no fault of her own and urged the Court to "fashion a Rule 4(h) reopening" of the claim. ***Id.*** at 293. The Court stated that "[w]e acknowledge that the circuit clerk failed to notify the parties of the March 11 order as required by M.R.C.P. 77(d). In this regard, we sympathetically received [plaintiff's plea]. However, our rules of procedure prove to be very unforgiving of a party who fails to timely file a notice of appeal, notwithstanding the clerk's failure to give notice." ***Id.*** at 293-94.

Further, in ***Mold Pro, Inc. v. Alford***, 52 So. 2d 1260, 1261 (Miss. Ct. App. 2011), the defendant stated that it did not receive the order from the circuit court affirming the Commission's decision. Under Rule 77(d), the Court found that the defendant had failed to file a timely appeal. ***Id.*** The defendant argued that it should be allowed to file an out-of-time appeal due to its failure to receive notice. ***Id.*** However, the plaintiff had failed to file the motion to reopen the time for appeal within the seven (7) days outlined in Rule 4(h). ***Id.*** at 1262. The Court stated that "[t]he requirements of M.R.A.P. 4(h) are **obligatory** rather than permissive. Timely notice of appeal is jurisdictional; where the appellant has not given proper notice this Court lacks jurisdiction to address the appeal" (emphasis added). ***Id.***

If the Court were to accept that Powell did not receive the Final Judgment of Dismissal until October 4, 2010, the date that the separate defendant Baptist filed its Motion to Dismiss in Powell I, Powell was still outside the outer limit of the 180 days outlined in Rule 4(h). Further, even if Powell had some argument for use of the seven (7) day period outlined in Rule 4(h), she was still outside of even this time period.

Thus, even her time to appeal the Final Judgment of Dismissal has passed under Rule 4(h). As Rule 60(b) motions are no substitute for the time to appeal, and the time to appeal has lapsed, Powell's Rule 60(b) motion is inappropriate and should have been denied.

VIII. CONCLUSION

JAA Defendants were denied their opportunity to be heard on Powell's Motion to Clarify. As such, their due process rights were violated under U.S. CONST. amend. XIV; MISS. CONST. art. III, §14; Miss. Const. art. III, §24; and MISS. CONST. art. III, §25, *inter alia*. Judge Harrison abused his discretion in granting the Motion to Clarify without a hearing on the matter and affording JAA Defendants with an opportunity to be heard.

CHRIS J. WALKER - [redacted]
MARKOW WALKER, P.A.
P.O. Box 13669
Jackson, MS 39236-3669
Telephone: (601) 853-1911
Facsimile: (601) 853-8284
E-mail: cwalker@markowwalker.com

JOHN L. HINKLE, IV - [redacted]
MARKOW WALKER, P.A.
Post Office Drawer 50
Oxford, Mississippi 38655
Telephone: (662) 234-9899
Facsimile: (662) 234-9762
E-mail: jhinkle@markowwalker.com

CERTIFICATE OF SERVICE

I, John L. Hinkle, IV, do hereby certify that a copy of the above and foregoing Brief of Appellants Jackson Anesthesia Associates; Garland K. Milner, M.D.; and Derek Marshall, M.D. has this day been sent, via United States mail, postage pre-paid, to:

Trent L. Walker, Esq.
135 Bristol Blvd.
Jackson, MS 39204

Chaka Smith, Esq.
Attorney at Law
P.O. Box 1820
Cleveland, MS 38732

Jane E. Tucker, Esq.
235 Melbourne Rd.
Jackson, MS 39206
Counsel for the Appellee, Maria L. Powell

D. Collier Graham, Jr., Esq.
Rex M. Shannon, Esq.
Wise Carter Child & Caraway, P.A.
401 E. Capitol St., Ste. 600
Jackson, MS 39205
Counsel for Appellant, Mississippi Baptist Medical Center

Honorable William A. Gowan
Hinds County Circuit Court Judge
P.O. Box 22711
Jackson, MS 39225

This, the 13th day of June, 2011.

CHRIS J. WALKER
JOHN L. HINKLE, IV