IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2011-CA-00171

GARLAND K. MILNER, ET AL. — APPELLANTS

VS.

MARIA L. POWELL — APPELLEE

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

OF COUNSEL:

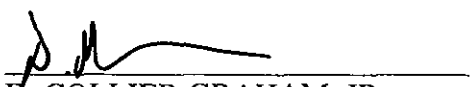
D. COLLIER GRAHAM, JR. (MSB [redacted]4)
REX M. SHANNON III (MSB [redacted])
WISE CARTER CHILD & CARAWAY, P.A.
600 HERITAGE BUILDING
401 EAST CAPITOL STREET
POST OFFICE BOX 651
JACKSON, MISSISSIPPI 39205-0651
TEL: (601) 968-5500
FAX: (601) 944-7738

ATTORNEYS FOR APPELLANT MISSISSIPPI BAPTIST MEDICAL CENTER, INC.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record 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:

1. Mississippi Baptist Medical Center, Inc., Appellant.
2. D. Collier Graham, Jr., and Rex M. Shannon III, Counsel for Appellant.
3. Maria L. Powell, Appellee.
4. Trent Walker, Jesse V. Harris, Chaka Smith, and Jane E. Tucker, Counsel for Appellee.
5. Jackson Anesthesia Associates, Garland K. Milner, M.D., and Derek Marshall, M.D., Appellants.
6. Chris J. Walker and John L. Hinkle, IV, Counsel for Appellants.
7. Premier Medical Group of Mississippi, LLC, Jackson Medical Clinic, LLC, William Causey, M.D., Edwin Dodd, Jr., M.D., Shapard Pryor, M.D., Michael Byers, M.D., Albert Koury, M.D., Rick Cavett, M.D., Tim Cannon, M.D., Hursie Davis-Sullivan, M.D., and Sullivan Family Medical Clinic, Defendants.
8. Hon. Malcolm Harrison and Hon. William Gowan, Circuit Court Judges.



D. COLLIER GRAHAM, JR.

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STATEMENT OF ISSUES

I. Whether the trial court erred as a matter of law in granting Plaintiff/Appellee Maria L. Powell ("Powell") relief under MRCP 60(b)(6) where Powell failed to take an appeal and failed to pursue relief under the provisions of MRCP 77(d) and MRAP 4(h).

II. Whether the trial court abused its discretion in granting Powell relief under MRCP 60(b)(6) where the court failed to apply the correct legal standards governing MRCP 41(b) and pertinent statutory provisions as a predicate for its ruling and based its ruling on insufficient evidence.

STATEMENT OF THE CASE

I. Nature of Case and Course of Proceedings.

This appeal arises from an outgoing Circuit Court judge's eleventh-hour order breathing life back into an action he previously dismissed with prejudice and over which he had no further jurisdiction as a matter of law. After the court finally and effectively dismissed the instant action with prejudice pursuant to MRCP 41(b) on March 18, 2010, Powell failed to timely appeal or diligently seek relief under the tandem remedy of MRCP 77(d) and MRAP 4(h). Powell filed the instant action and then proceeded to ignore it—failing to diligently pursue it, failing to monitor its status, indeed never realizing the trial court had dismissed it, with prejudice, until Defendant Mississippi Baptist Medical Center, Inc., ("MBMC") pursued its res judicata defense in Plaintiff's subsequently filed action predicated on the same facts. Rather than diligently monitor the proceedings below and seek relief via the procedural vehicle provided for by MRCP 77(d) and MRAP 4(h) within 180 days of the dismissal with prejudice, Powell instead sought relief seven (7) months later under MRCP 60(b)(6)—relief the trial court had no jurisdiction to contemplate as a matter of Mississippi law and no substantive basis to award in any event.

Hanging in the balance is the ultimate fate of the second pending action predicated upon identical facts. In a desperate effort to avoid res judicata preclusion of her medical malpractice claims against MBMC and others in the second suit, Powell successfully sought to have the court below alter its previously-entered Final Judgment of Dismissal herein to make it "without prejudice," thereby destroying its finality for res judicata purposes. It is from the court's orders granting such relief, and that court's successor's denial of MBMC's subsequent motion to reconsider, that MBMC now appeals.

II. Statement of Facts.

On or about January 22, 2007, Powell, through counsel, served a notice of claim upon MBMC in an attempt to comply with the pre-suit notice requirements of MISS. CODE ANN. § 15-1-36(15). R. 96, R.E. 11. Powell thereafter filed her original complaint in this action alleging medical malpractice on November 28, 2007; she filed an amended complaint on January 30, 2008.[1] R. 4, 12. On June 17, 2008, Powell's counsel filed an incomplete application for admission pro hac vice on behalf of Illinois attorney Jesse V. Harris, Esq. R. 21. Powell thereafter took no further action of record in the court below, resulting in the trial court's calling the matter up for a February 18, 2010, status hearing and docket call. Despite receiving notice of the docket call and the trial court's warning that failure to appear would result in dismissal for

[1] It was undisputed in the court below that Maria Powell is the mother of the patient at issue, Jervia Powell. Maria Powell brought the instant action as Jervia Powell's next friend as permitted by MRCP 17(c). Her amended complaint alleges that various medical providers, including MBMC, committed malpractice in the care and treatment provided to Jervia Powell between February 2004 and December 2005, thereby allegedly resulting in injury to Jervia Powell. R. 13-18. In addition to Appellants MBMC, Jackson Anesthesia Associates, P.A., Garland K. Milner, M.D., and Derek Marshall, M.D., Powell's amended complaint in the instant action also included as named defendants Premier Medical Group of Mississippi, LLC, Jackson Medical Clinic, LLC, William Causey, M.D., Edwin Dodd, Jr., M.D., Shapard Pryor, M.D., Michael Byers, M.D., Albert Koury, M.D., Rick Cavett, M.D., Tim Cannon, M.D., Hursie Davis-Sullivan, M.D., and Sullivan Family Medical Clinic. However, only MBMC, Jackson Anesthesia Associates, P.A., Garland K. Milner, M.D., and Derek Marshall, M.D., were named as defendants in the second action, and thus are the parties who raised a res judicata defense and opposed Powell's attempt to collaterally attack the Final Judgment of Dismissal in that action.

failure to prosecute, a fact which Powell never disputed in the court below, Powell's counsel nevertheless failed to appear at the status hearing and docket call on February 18, 2010.

After waiting to no avail for thirty (30) additional days for Powell to take some action to prosecute her case, the trial court on March 18, 2010, entered its Final Judgment of Dismissal for failure to prosecute pursuant to MRCP 41(b). R. 25, R.E. 1. The Final Judgment of Dismissal expressly noted Powell's "clear record of delay" in prosecuting her case (*viz.*, "no action in this matter for the past year") and the trial court's authority to dismiss the action for failure to prosecute pursuant to MRCP 41(b) upon consideration of the factors set forth in *Hensarling v. Holly*, 972 So. 2d 716 (Miss. Ct. App. 2007), *cert. denied*, 973 So. 2d 244 (Miss. 2008). *See id.* In accordance with the express provisions of MRCP 41(b), the Final Judgment of Dismissal was necessarily with prejudice because the court did not specify otherwise.[2] *See id.*

The day after the court entered its Final Judgment of Dismissal, the Circuit Clerk of Hinds County forwarded to Powell's counsel of record notice of entry of the Final Judgment of Dismissal in accordance with MRCP 77(d).[3] R.1, R.E. 2. Thereafter, Powell did not file any

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[2] MRCP 41(b) states the following, in pertinent part: "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision . . . operates as an adjudication upon the merits." MISS. R. CIV. P. 41(b). The comment to MRCP 41 goes on to state 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." MISS. R. CIV. P. 41 cmt. (emphasis added). *See also Marshall v. Burger King*, 2 So. 3d 702, 707-08 (Miss. Ct. App. 2008) (stating same); *Hensarling v. Holly*, 972 So. 2d 716, 719-20 (Miss. Ct. App. 2007) (stating same). *See also Nagle v. Lee*, 807 F.2d 435, 442-43 (5th Cir. 1987) (holding that dismissal for failure to prosecute under analogous FRCP 41(b), where order of dismissal did not state whether dismissal was with or without prejudice, was final judgment on merits); *Bierman v. Tampa Elec. Co.*, 604 F.2d 929, 930-31 (5th Cir. 1979) (holding that where suit was dismissed for failure to prosecute under analogous FRCP 41(b), and order did not state whether dismissal was with or without prejudice, and plaintiff neither appealed nor sought reinstatement, then dismissal was adjudication on merits). Powell has never disputed that the Final Judgment of Dismissal was, for the reasons stated *supra*, entered "with prejudice."

[3] There is no basis to dispute that when the clerk's office distributed the notice of entry of judgment, the copy mailed to Trent Walker, Plaintiff's then-counsel of record, was directed to the address he occupied at the time Powell filed her complaint and amended complaint: 5255 Keele Street, Suite A, Jackson, Mississippi, 39206 (*viz.*, the address specified in Powell's complaint and first amended complaint). *See* R. 10, 20. Of course, notice would not have been sent to Powell's out-of-state counsel, Jesse Harris, because he had not been properly admitted pro hac vice as counsel of record.

timely motion to alter or amend the Final Judgment, nor did she appeal the Final Judgment within the time permitted by MRAP 4(a). *See id.*

On May 19, 2010, Powell filed a second action against MBMC, Jackson Anesthesia Associates, P.A., Garland K. Milner, M.D., and Derek Marshall, M.D., asserting essentially the same claims as the action now on appeal. R. 129. That action was also filed in the Hinds County Circuit Court and bears Cause No. 251-10-378. *Id.* Relying on the preclusive effect afforded the trial court's Final Judgment of Dismissal under Mississippi law in the instant action, MBMC raised the affirmative defenses of res judicata and statute of limitations in the subsequent proceeding and thereafter moved for summary judgment on res judicata and statute of limitations grounds in that proceeding on October 4, 2010, and October 29, 2010, respectively. *See* R. 29, R.E. 3.

Seventeen (17) days later, on October 21, 2010, Powell filed in the instant action in the court below a "Rule 60(b) Motion to Clarify" the trial court's Final Judgment of Dismissal entered March 18, 2010, to specify that the dismissal was "without prejudice." R. 26, R.E. 3. Notwithstanding that the Circuit Clerk's certified docket sheet reflects that the Final Judgment of Dismissal entered by the trial court was mailed to "Atty Trent Walker," Powell's attorney of record herein, on March 19, 2010 (R. 1, R.E. 2)—just one day after it was entered—Powell claimed that her attorney did not receive notice from the Circuit Clerk of the entry of judgment and only became aware of the same upon MBMC's October 4, 2010, filing for summary judgment on res judicata grounds in Powell's subsequent action.[4] R. 29, R.E. 3. Despite this claim, Powell presented no evidence to the trial court that either she or her attorney at any time undertook to make diligent inquiry into the status of her first lawsuit in the 28-month period between her last action of record in the court below and the filing of MBMC's summary

[4] As alluded to *supra*, MBMC raised the affirmative defense of res judicata in its amended answer filed in the subsequent action on September 28, 2010.

judgment motion in Cause No. 251-10-378. *See id.* Furthermore, Powell made no allegation, and certainly presented no evidence, that she was at any time misled by inaccurate information disseminated by the Circuit Clerk's office. *See id.* Powell's "Rule 60(b) Motion to Clarify" marked the first action of record in the court below in almost two and one-half years. *See* Certified Docket Sheet, Ex. "D". Significantly, not only did Powell not appeal the Final Judgment of Dismissal within the original time permitted by MRAP 4(a), but she did not timely seek relief within the 180-day "outer limit" period permitted by MRCP 77(d) and MRAP 4(h).

On December 1, 2010, MBMC filed its opposition to Powell's "Rule 60(b) Motion to Clarify," setting forth controlling case law demonstrating that the trial court had no jurisdiction to revisit its Final Judgment of Dismissal entered March 18, 2010, and no substantive basis for granting Powell's motion in any event. R. 41, R.E. 4. Powell's motion was set to be heard before Judge Malcolm Harrison on December 2, 2010. R. 86A, R.E. 5. It is undisputed that at time of the scheduled hearing, Judge Harrison declined to consider Powell's motion and advised from the bench that the court would defer consideration and disposition of the motion to its successor, Judge William Gowan.

On December 16, 2010, MBMC unexpectedly received from the Circuit Clerk a copy of an order dated December 15, 2010, yet apparently entered one day earlier (*viz.*, December 14, 2010), wherein Judge Harrison essentially granted Powell's "Rule 60(b) Motion to Clarify," awarding her the relief she sought therein and permitting her "to re-file within the statute of limitations." R. 87, R.E. 6. That same day, MBMC filed a motion to reconsider the trial court's order of December 14, 2010, and diligently pursued the trial court for a hearing prior to Judge Harrison's departure from the bench, to no avail. R. 88, R.E. 7. It remains unclear what prompted Judge Harrison to rule on the motion following his previous statement of intention to defer consideration of the motion to Judge Gowan.

On December 28, 2010, Judge Harrison entered an undated order *nunc pro tunc* December 14, 2010, which order was otherwise identical to his order entered December 15, 2010. R. 161, R.E. 8. Additional efforts to obtain a hearing before Judge Harrison proved fruitless. MBMC thereafter requested a hearing on its motion to reconsider from Judge Harrison's successor, Judge Gowan, who also declined to hear the motion. On January 7, 2011, Judge Gowan entered an order effectively denying MBMC's motion to reconsider on the grounds that he would "not reconsider an issue that his predecessor has already considered twice." R. 163, R.E. 9. This order further held that "this matter is ripe for appeal." *Id.* MBMC timely noticed its appeal of all three orders on January 11, 2011. R. 164, R.E. 10.

SUMMARY OF THE ARGUMENT

This appeal stems from the trial court's error in awarding MRCP 60(b)(6) relief on facts that preclude such relief as a matter of law. At the outset, it should be noted that the ruling of the court below is erroneous on two independent grounds: (1) as a matter of law, the court had no jurisdiction under MRCP 60(b)(6) to revisit and alter its Final Judgment of Dismissal entered pursuant to MRCP 41(b) to make it "without prejudice"; and (2) assuming for the sake of argument that the court did have jurisdiction to revisit its previous judgment, the court's purported substantive basis for its ruling—that the statute of limitations had not yet run at the time of its dismissal of this action with prejudice—finds no support in the record or in Mississippi case law, and therefore the trial court abused its discretion in granting such relief in any event. A finding of error in relation to *either* of these grounds mandates that the cause be reversed and rendered.

Under Mississippi law, the court below had no authority to grant Powell relief from its Final Judgment of Dismissal with prejudice under MRCP 60(b)(6) where she failed to take and perfect an appeal via the procedural mechanism provided in MRCP 77(d) and MRAP 4(h).

Powell does not dispute that she sought relief predicated on MRCP 60(b)(6) exclusively. Mississippi law is crystal clear that MRCP 60(b)(6) cannot be used as an "escape hatch" for parties who had other procedural opportunities available to them and who, without cause, failed to avail themselves of such opportunities. Mississippi law is equally clear that MRCP 60(b)(6) cannot be used as a substitute for appeal.

Powell argued in the court below that she was unable to take and perfect a timely appeal for one reason and one reason only, *viz.*, the Circuit Clerk allegedly failed to notify her counsel of the trial court's entry of final judgment. Assuming for the sake of argument that Powell's counsel did in fact fail to receive such notice through no fault of their own[5], one need look no further than this Court's own rules to identify the procedural remedy designed to accommodate this very contingency: the tandem provisions of MRCP 77(d) and MRAP 4(h). MRCP 77(d) and its comment expressly prohibit a trial court from granting any relief to a party claiming lack of notice from the clerk unless such relief is sought pursuant to MRAP 4(h). In turn, MRAP 4(h) establishes a hard cap, outer time limit of 180 days to appeal a judgment in instances where the clerk fails to give notice. Litigants thus have a period of six (6) months in which Mississippi law anticipates that the ordinary attention and diligence of the parties and their counsel to the status of pending actions will yield the discovery of any clerk notification issues. Together, MRCP 77(d) and MRAP 4(h) thus provide the exclusive procedure for remedying the precise circumstances Powell claims she encountered in the court below. Put differently, Mississippi law is clear that as a general rule, a trial court may not use MRCP 60(b)(6) as a vehicle to revisit a judgment where a party claiming lack of notice from the clerk fails to avail herself of the procedural avenue to appeal provided by MRCP 77(d)/MRAP 4(h).

[5] There was never a finding by the court below that a copy of the Final Judgment of Dismissal was not mailed to Powell's counsel or that her counsel did not actually receive a copy.

The Fifth Circuit makes no exceptions to this general rule in interpreting Mississippi's federal rule counterparts; Mississippi makes only one, and it is not applicable here. This Court has affirmed MRCP 60(b)(6) relief in cases involving lack of notice from the clerk on only two occasions. In *both* cases, the clerk disseminated incorrect information to the movants' counsel, thereby frustrating the parties' diligent efforts to maintain vigil over the status of the pertinent orders from which they were ultimately forced to seek relief. As set forth *infra*, neither case is applicable here, where Powell presented no evidence, and indeed has never even *contended*, that either she or her counsel made diligent periodic inquiries of the status of the court file in the period of over two (2) years in which this case lay dormant prior to its dismissal with prejudice. It remains undisputed that the court's Final Judgment of Dismissal with prejudice was properly docketed in the clerk's file had Powell or her counsel merely bothered to look for it or otherwise exercised any ordinary diligence in pursuing the action.[6]

Because Powell finds no help in either the general rule or its exception, she was not entitled to MRCP 60(b)(6) relief as a matter of law, and the court below erred in holding otherwise. Therefore, this Court should reverse and render this matter dismissed with prejudice.

Because Mississippi law prohibited the trial court from revisiting its Final Judgment of Dismissal in the first place, this Court need not even reach the second issue on appeal. However, should the Court for some reason find that the trial court was empowered to revisit its judgment, it nevertheless erred in altering the judgment to make it "without prejudice." The court's rationale for destroying the finality of its Final Judgment of Dismissal lay in its conclusion that

[6] It should be noted that, ordinarily, MBMC would be protected by statute from having to defend itself against stale medical malpractice claims that allegedly arose more than-two (2) years previously. MISS. CODE ANN. § 15-1-36(2). As a result of the trial court's erroneous ruling, however, Powell 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 a second lawsuit filed in May 2010. R. 129. Not until the second lawsuit filed in May 2010 did Powell serve process on MBHS or any other defendant. Thus, at the end of 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 sidestep the statute of limitations to the detriment of MBMC's rights thereunder.

dismissals with prejudice under MRCP 41(b) are only applicable to actions in which the statute of limitations has expired, and that in this case "the statute of limitations is extended due to 'unsoundness of mind.'" This conclusion finds no support in either Mississippi case law or the in the record before this Court. Powell presented no authority that actually supports her argument that expiration of the statute of limitations is a prerequisite to dismissal with prejudice under MRCP 41(b). Nor did Powell present anything beyond mere assertion of counsel that Jervia Powell was in fact of unsound mind at any time relevant to this proceeding or that the statute of limitations had not otherwise expired due to the representation of Jervia Powell's interests by his mother as next friend pursuant to MRCP 17(c). Thus, this record is devoid of any evidence supporting the trial court's finding that the statute of limitations had not run at the time of dismissal on March 18, 2010.

Moreover, even assuming for the sake of argument that the statute of limitations *was* extended for a time by the disability savings statute, it nevertheless expired approximately eight (8) months prior to the court's entry of its Final Judgment of Dismissal pursuant to the provisions of MISS. CODE ANN. § 15-1-53. Section 15-1-53 provides that once an incompetent's right in action is in the hands of one legally authorized to pursue and protect his interests, the disability savings statute no longer applies to toll the governing statute of limitations. As early as January 22, 2007, Jervia Powell's mother, Maria Powell, unquestionably began acting as his next friend as she was legally authorized to do pursuant to MRCP 17(c). That was the date she caused attorneys to serve a notice of claim letter that ultimately led to the filing of the action on appeal. Because Jervia Powell's right in action was undeniably in the trust of his mother and next friend on January 22, 2007, the disability savings statute ceased to operate on that date, and the statute of limitations began to run pursuant to § 15-1-53. Over 300 days passed before Maria Powell filed suit, tolling the statute of limitations for 120 days. Because Powell failed to effect service

within 120 days, the statute of limitations began running again on March 27, 2008, with the balance running out on July 21, 2009. Therefore, Powell's claims were time-barred approximately eight (8) months prior to the trial court's entry of its Final Judgment of Dismissal, and the court abused its discretion in relieving Powell of the judgment's finality. Even if the Court were to find that Maria Powell's representation of Jervia Powell's interests did not begin until she filed the instant action on November 28, 2007, the statute of limitations nevertheless expired on March 27, 2010—more than eight (8) months prior to the trial court's MRCP 60(b)(6) order permitting Powell to refile within the statute of limitations.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING POWELL'S MOTION BECAUSE IT LACKED JURISDICTION TO REVISIT ITS FINAL JUDGMENT OF DISMISSAL UNDER MRCP 60(b)(6), WHICH CANNOT BE USED AS A SUBSTITUTE FOR APPEAL AND CANNOT APPLY WHERE THE MOVANT FAILS TO SHOW SOMETHING MORE THAN A MERE LACK OF NOTICE FROM THE CLERK.

STANDARD OF REVIEW APPLICABLE TO PART I: Whether the circuit court has jurisdiction to hear a particular matter is a question of law requiring a **de novo** standard of review. *Sanderson Farms, Inc. v. Gatlin*, 848 So. 2d 828, 841 (Miss. 2003); *Entergy Miss., Inc. v. Burdette Gin Co.*, 726 So. 2d 1202, 1204-05 (Miss. 1998).

A. Powell's motion to clarify sought relief under MRCP 60(b)(6) exclusively.

Powell's motion to clarify was predicated exclusively on MRCP 60(b), which states the following, in pertinent part:

> 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; [or]
>
> (6) any other reason justifying relief from the judgment.
>
> The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than six months after the judgment . . . was entered or taken.

MISS. R. CIV. P. 60(b).

Powell's motion failed to specify which subsection of MRCP 60(b) she asserted was applicable in this instance; however, for reasons set forth in note 7, *infra*, Powell necessarily sought relief under MRCP 60(b)(6) exclusively.[7] It is well-settled that relief under MRCP 60(b)(6) "is reserved for **exceptional and compelling circumstances**." *Am. States Ins. Co. v. Rogillio*, 10 So. 3d 463, 474 (Miss. 2009) (emphasis added). While MRCP 60(b)(6) is a "grand reservoir of equitable power to do justice in a particular case," *Porter v. Porter*, 23 So. 3d 438, 450 (Miss. 2009), the party seeking relief must "demonstrate both injury and circumstances beyond his control that prevented him from proceeding with the prosecution . . . of the action in a proper fashion." *Regan v. S. Cent. Reg'l Med. Ctr.*, 47 So. 3d 651, 655 (Miss. 2010). Only in cases inhering "extraordinary circumstances" will the "balance of equities" tilt in favor of the

[7] Because Powell presented no evidence or allegation of misconduct, accident, mistake, newly discovered evidence, satisfaction, release, or the existence of any prior judgment, subsections (1), (2), (3), and (5) have and can have no application here. Subsections (1), (2), and (3) are further inapplicable because Powell did not file her motion to clarify until October 21, 2010, more than six (6) months after the trial court's entry of the Final Judgment of Dismissal on March 18, 2010. R. 26, R.E. 3, R. 25, R.E. 1. Furthermore, because Powell sought to have the trial court "clarify" its order, and not altogether vacate it, she did not contend the judgment was void, and subsection (4) is therefore likewise inapplicable. *See Overbey v. Murray*, 569 So. 2d 303, 306 (Miss. 1990) (reaffirming well-settled rules that (1) judgment is void only if rendering court lacked subject matter or personal jurisdiction, or acted in manner inconsistent with due process of law; and (2) if judgment is void, it must be set aside).

party seeking MRCP 60(b)(6) relief. *Harrison v. McMillan*, 828 So. 2d 756, 774 (Miss. 2002). Where such "extraordinary and compelling circumstances" were found to be absent, this Court has not hesitated to reverse a trial court's grant of an MRCP 60(b)(6) motion. *See Med. Assurance Co. of Miss. v. Myers*, 956 So. 2d 213, 216 (Miss. 2007).

B. Powell alleged that the Circuit Clerk failed to notify her of the entry of the trial court's Final Judgment of Dismissal.

In her MRCP 60(b)(6) motion to clarify, Powell claimed that her "counsel was unaware that the March 18, 2010, Order [i.e. the Final Judgment of Dismissal] had been entered until Defendant [MBMC] filed a motion to dismiss the 2010 complaint based on *res judicata*." [8] R. 29, R.E. 3. Powell went on to remark in her motion that "the Circuit Clerk of Hinds County was recently held in contempt for failing to send orders to counsel in Hinds County cases as required by M.R.C.P. 77(d)," citing *In re Dunn*, No. 2010-CS-00323-SCT, 2010 WL 3785384 (Miss. Sept. 30, 2010). *Id.* To the extent Powell sought to imply that the Hinds County Circuit Clerk failed to mail her attorney a copy of the trial court's Final Judgment of Dismissal immediately upon its entry, the Circuit Clerk's records unequivocally indicate otherwise. The Circuit Clerk's certified docket sheet reflects that the Final Judgment of Dismissal was mailed to "Atty Trent Walker," Powell's attorney of record herein, on **March 19, 2010**—just one day after it was entered. R. 1, R.E. 2. Powell failed to point out that in *Dunn*, the docket sheet contained a similar entry noting the mailing of an order to "Atty Michael S. Allred," who **did indeed receive the order at issue** in that case.[9] *Dunn*, 2010 WL 3785384 at *2.

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[8] This motion was filed in Cause No. 251-10-378, Hinds County Circuit Court, on October 4, 2010, and was served on Powell's counsel by e-mail and U.S. Mail that same day. MBMC raised the affirmative defense of res judicata in its amended answer filed in that action on September 28, 2010.

[9] It was the attorneys to whom notice of mailing was not reflected on the docket sheet who failed to receive a copy of the order in *Dunn*. *Dunn*, 2010 WL 3785384 at *2.

C. Powell sought to use MRCP 60(b)(6) for a purpose not permitted by Mississippi law: to effectuate a de facto appeal after failing to avail herself of the provisions of MRCP 77(d) and MRAP 4(h), which operate in tandem as an exclusive remedy designed to accommodate instances of failed notification by the clerk.

Assuming for the sake of argument that Powell's counsel did *not* in fact receive a copy of the trial court's Final Judgment of Dismissal upon its entry, MRCP 60(b)(6) nevertheless had and could have no application here as a matter of law. Pursuant to controlling case law, 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 failed to pursue other procedural remedies, namely a **timely appeal**. *See Doll v. BSL, Inc.*, 41 So. 3d 664, 669-70 (Miss. 2010). As set forth *infra*, Powell's attempt to effectuate a de facto appeal of the trial court's Final Judgment of Dismissal via MRCP 60(b)(6) is prohibited as a matter of law, and the trial court erred in granting relief thereunder.

In *Doll*, the trial court entered a "Final Judgment" of dismissal with prejudice pursuant to MRCP 41(b). *Id.* at 665-66. The plaintiffs thereafter filed an MRCP 60(b)(6) motion for relief from the Final Judgment, contending that dismissal with prejudice was improper. *Id.* at 667. The trial court denied the motion on the grounds that the "proper avenue of relief would have been [an] appeal," and that in failing to perfect an appeal from an appealable judgment, the plaintiffs failed "to avail themselves of the opportunities afforded by the Rules." *Id.* at 668. On appeal of the trial court's denial of the plaintiffs' MRCP 60(b)(6) motion, this Court held that the time for appeal commenced with the entry of the trial court's final judgment of dismissal with prejudice and that the plaintiffs failed to perfect a timely appeal. *Id.* at 668-69. Because the availability of an appeal constituted an alternative procedural remedy that the plaintiffs failed to pursue in seeking relief from an appealable judgment, this Court held that the plaintiffs were **not** entitled to relief under MRCP 60(b)(6). *Id.* at 669. The Court reasoned as follows:

> Under the facts presented, Rule 60(b) relief is unwarranted. "**Rule 60(b) is not an escape hatch for litigants who have procedural opportunities afforded under other rules and who without**

> **cause failed to pursue those procedural remedies**." [Citations omitted.] ("[T]he Rule 60(b) motion is **not to be used as a substitute for appeal** . . . .") . . . . [T]he Mississippi Rule of Civil Procedure 60(b) relief sought by the [plaintiffs] is nothing more than an "escape hatch" after failing to pursue other available procedural remedies, and/or an improper "substitute for appeal."

Id. (emphasis added). *See also Estate of Pope ex rel. Payne v. Delta Health Group, Inc.*, 55 So. 3d 1080, 1082 (Miss. 2011) (holding that dismissal with prejudice of complaint, whether right or wrong, remained unchallenged because plaintiff never appealed from the order). Therefore, the Court affirmed the trial court's denial of the plaintiffs' MRCP 60(b)(6) motion as well as its dismissal of the action with prejudice pursuant to MRCP 41(b). *Id.* at 669-70.

As in *Doll*, Powell's action was dismissed with prejudice pursuant to MRCP 41(b). R. 25, R.E. 1. Furthermore, as will be set forth *infra*, Powell, like the plaintiffs in *Doll*, failed to avail herself of the procedural mechanism providing for appellate review of the trial court's appealable judgment in the very contingency she contends she encountered here. The sole reason alleged by Powell for failing to take timely action to challenge the trial court's Final Judgment of Dismissal was her attorney's purported lack of notice of the entry of an appealable judgment by the Circuit Clerk as provided for in MRCP 77(d). R. 29, R.E. 3. Powell failed to acknowledge the avenue to appellate review expressly provided for in MRCP 77(d) in instances where the clerk fails to provide a party with timely notice of entry of an appealable judgment. MRCP 77(d) states the following, in pertinent part:

> **Lack 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 Appellate Procedure**.

MISS. R. CIV. P. 77(d) (emphasis added). The comment to MRCP 77 reveals that the only proper avenue to obtain relief from an appealable judgment for a party who allegedly fails to receive timely notice from the clerk of entry of such judgment is Rule 4(h), *Mississippi Rules of*

Appellate Procedure. MISS. R. CIV. P. 77 cmt. *See also Payne v. Magnolia Healthcare, Inc.*, 984 So. 2d 290, 294 (Miss. Ct. App. 2007) (acknowledging availability of MRAP 4(h) in context of "lack of notice" scenario contemplated by MRCP 77(d)); *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199, 1201-02 (5th Cir. 1993) (acknowledging that federal rule equivalent of MRAP 4(h)—FRAP 4(a)(6)—"was specifically designed to deal with cases of late notice" contemplated by Rule 77(d)).

MRAP 4(h) provides the following:

> **Reopening Time for Appeal.** 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.

MISS. R. APP. P. 4(h) (emphasis added).[10]

The provisions of MRCP 77(d) and MRAP 4(h)/FRAP 4(a)(6) provide a carefully-crafted exclusive procedure that balances the inequity of foreclosing appeals by parties who do not receive actual notice of a dispositive order against the need to protect the finality of judgments. *See Vencor Hosps. v. Standard Life & Acc. Ins.*, 279 F.3d 1306 (11th Cir. 2002). These provisions provide a party who did not actually receive notice of entry of judgment in time to notice an appeal with a limited opportunity to seek relief from the judgment provided the party is vigilant. Even in the absence of notice of entry of judgment, the party must be diligent in monitoring the status of the case as the opportunity to seek relief is limited to the shorter of the period of 180 days from the date judgment is entered or seven (7) days from the date the party actually received notice by whatever means. MRAP 4(h)/FRAP 4(a)(6) thus "establishes an

[10] MRAP 4(h) was adopted in 1997 and is patterned on FRAP 4(a)(6), which was added in 1991. *See* MISS. R. APP. P. 4(h) cmt. and FED. R. APP. P. 4(a)(6) cmt. *See also* MISS. R. CIV. P. 77(d) cmt.

outer time 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." MISS. R. APP. P. 4 cmt. (emphasis added). *See also Payne*, 984 So. 2d at 293.

In *Payne*, the Mississippi Court of Appeals held that the 180-day period of MRAP 4(h) could not be extended despite the clerk's failure in that case to notify the would-be appellant of the entry of the appealable order at issue. *Payne*, 984 So. 2d at 293-94. In so holding, the court construed the 180-day period as a hard cap on a litigant's right to appellate review in situations involving lack of notice of an appealable judgment occasioned by the clerk's failure to notify, acknowledging that "our rules of appellate 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.* (emphasis added). The court further acknowledged that the burden lies with counsel for the would-be appellant to remain diligent in ensuring availment of MRAP 4(h) within the 180-day period provided for therein. *See id.* at 294 (holding that burden remains on counsel for would-be appellant to ensure awareness of entry of appealable order within 180-day period notwithstanding clerk's failure to provide notice of entry of such order).

This Court has dealt with claims for MRCP 60(b)(6) relief predicated on MRCP 77(d) clerk notification deficiencies on only two occasions. As set forth *infra*, in both instances, the Court effectively held that *something more* than a mere lack of notice from the clerk is required to effect relief from judgment under MRCP 60(b)(6)—that 'something more' being **the reasonable efforts of litigants and their counsel to make diligent inquiry of the status of ongoing proceedings**. Precisely because Powell failed to make any such efforts here, the holdings of both cases are distinguishable from the facts of the case at bar.

In *Hartford Underwriters Ins. Co. v. Williams*, 936 So. 2d 888 (Miss. 2006), the defendant failed to file its post-trial motions within the ten-day limitations period prescribed by

rule. *Id.* at 894. The trial court subsequently granted the defendant's MRCP 60(b) motion to vacate and re-enter the judgment at a later date so that the defendant could timely file those motions. *Id.* at 893. On appeal, this Court acknowledged that the defendant did not receive written notice of entry of the judgment from the clerk's office as required by MRCP 77(d). *Id.* at 894. However, the Court further observed as follows:

> **Even more important** is evidence that [the defendant] **made several inquiries to the circuit clerk** before and after the entry of the judgment and **was informed each time that no judgment had been entered**.

Id. (emphasis added). The Court went on to note with approval the Fifth Circuit's acknowledgement of "the importance of an **attorney's diligent inquiry** when deciding to grant or deny a [Rule] 60(b) motion." *Id.* (emphasis added). In that same vein, the Court approvingly quoted the Fifth Circuit's admonition that "underlying [Rule 60(b)] is the **implicit burden on the party and counsel to make 'periodic inquiries' into the course of the proceedings**." *Id.* (quoting *Jones v. Estelle*, 693 F.2d 547 (5th Cir. 1982)) (emphasis added). Because the defendant had demonstrated that it undertook to make the diligent inquiry required for relief under MRCP 60(b)(6), the Court affirmed the trial court's order vacating the judgment. *Id.* at 894-95.

In *Cucos, Inc. v. McDaniel*, 938 So. 2d 238 (Miss. 2006), the clerk entered a motion to dismiss the plaintiffs' action for want of prosecution and sent notice to the parties. *Id.* at 240. The plaintiffs responded with a letter to the clerk requesting that the action not be dismissed; however, the clerk failed to place the letter in the court file and failed to notify the trial court of its receipt. *Id.* The trial court thereafter entered an order of dismissal; however, **the clerk failed to place the correct docket number on the order** and failed to notify the parties of its entry. *Id.* On appeal of the trial court's grant of the plaintiffs' MRCP 60 motion to set aside the order of dismissal, this Court noted the various errors on the part of the clerk. *See id.* at 245. Citing

Hartford, supra, the Court reasoned that not only was the order never sent to the plaintiffs, but that as in *Hartford*, "incorrect information was provided by the clerk regarding the status of the case since the judgment was labeled with the incorrect docket number." *Id.* at 246. The plaintiffs were accordingly "**unable to reasonably find the dismissal themselves because it was labeled with the incorrect docket number**." *Id.* (emphasis added). In large part because the clerk's failure to properly docket the order frustrated any efforts of the plaintiffs to make diligent inquiry of the status of the proceedings, see *Hartford, supra*, this Court affirmed the trial court's grant of relief pursuant to MRCP 60(b). *Id.* at 246-47. Thus, MRCP 60(b)(6) relief was available because MRAP 4(h) procedures were not available. That is, even diligence by the plaintiffs in monitoring the status of the case would have not permitted the plaintiffs to pursue the relief afforded during the 180-day period allowed.

This Court's holdings in *Doll*, *Hartford*, and *Cucos* are directly in line with federal precedent interpreting analogous FRCP 60(b)(6), which precedent Mississippi courts consider persuasive in construing MRCP 60(b)(6). *See Regan*, 47 So. 3d at 655. Federal courts addressing this issue have held that relief from a final judgment or dispositive order is simply not available under FRCP 60(b) based on the claim that notice of entry of such judgment or order was not provided by the clerk in accordance with FRCP 77(d). These courts have recognized that the exclusive avenue of relief for such claim is that provided under FRAP 4(a)(6) (*viz.*, the federal equivalent of MRAP 4(h)), and that where a party has failed to timely pursue such procedure, relief under Rule 60(b) is unavailable. *See Vencor Hospitals*, 279 F.3d at 1311 (holding that FRAP 4(a)(6) provides exclusive method for extending party's time to appeal for failure to receive actual notice that judgment or order has been entered and that FRCP 60(b) cannot be used to circumvent 180-day limitation set forth in FRAP 4(a)(6)); *Clark v. Lavallie*, 204 F.3d 1038, 1040-41 (10th Cir. 2000) (holding that FRAP 4(a)(6) "trumps" FRCP 60(b));

Servants of the Paraclete v. Does, 204 F.3d 1005, 1009-10 (10th Cir. 2000) (same); *In re Stein*, 197 F.3d 421, 425-26 (9th Cir. 1999) (same); *Zimmer St. Louis, Inc. v. Zimmer Co.*, 32 F.3d 357, 360 (8th Cir. 1994) (same); *In re Sealed Case (Bowles)*, 624 F.3d 482, 485-88 (D.C. Cir. 2010) (same). *See also* 16A FEDERAL PRACTICE & PROCEDURE §3950.6.

Thus, consistent with Mississippi jurisprudence, it is settled law that FRCP 60(b)(6) is "**not to be used as a substitute for appeal** or as a means of extending the time for appeal," and that relief under the rule is unavailable where a litigant, through her own lack of ordinary diligence, "fails to take and prosecute an appeal." *Williams v. New Orleans Pub. Serv., Inc.*, 728 F.2d 730, 736 (5th Cir. 1984) (emphasis added). *Accord Hess v. Cockrell*, 281 F.3d 212, 216 (5th Cir. 2002); *Fackelman v. Bell*, 564 F.2d 734, 737 (5th Cir. 1977).

Moreover, the Fifth Circuit has expressly held that "Rule 60(b) affords no relief . . . . to a party that . . . failed to receive notice of the entry of a judgment in time to file an appeal." *Latham*, 987 F.2d at 1204. To be relieved of a judgment pursuant to Rule 60(b), "a party must show **more than mere reliance on the clerk to give notice** of a judgment." *Id.* (emphasis added). In discussing the interplay between Rule 77(d) and Rule 60(b)(6), the Fifth Circuit has enunciated the governing rule as follows:

> Rule 77(d) makes one exception to Rule 60(b)(6)'s grant of equitable power—**the reason cannot be the clerk's failure to notify**. . . . **[W]e have consistently rejected the use of Rule 60(b) to provide relief for parties complaining of lack of notice**.

Id. at 1205 (emphasis added). The **only time** this rule does not apply is when counsel for the party seeking relief acts diligently to inquire about the status of the case and in the process is misled in some form or fashion by the clerk's office (as was the case in *Hartford* and *Cucos*). *Id.* Where there is nothing in the record to indicate that the party's counsel made any inquiry into the status of the case, the party has "failed to 'show more than mere reliance on the clerk to give notice,'" and a Rule 60(b)(6) motion "**must be denied**." *Id.* (emphasis added).

All of the authority heretofore discussed leads inescapably to the conclusion that Powell was **not** entitled to MRCP 60(b)(6) relief notwithstanding any alleged failure of the clerk to notify her attorney of the entry of trial court's Final Judgment of Dismissal. The trial court entered its Final Judgment of Dismissal on March 18, 2010. R. 25, R.E. 1. Pursuant to *Doll*, the time for perfecting an appeal ran from that date.[11] Like the plaintiffs in *Doll*, Powell sought to use MRCP 60(b)(6) as a vehicle to relief from an MRCP 41(b) dismissal on the grounds that a dismissal with prejudice was improper—the very same use of MRCP 60(b)(6) the Court of Appeals forbade as an "improper 'substitute for appeal'" in *Doll*. Like the plaintiffs in *Doll*, Powell failed to avail herself of the alternative procedural remedy of appellate review—a remedy which, given her attorney's alleged lack of notice from the clerk, remained open and available to her for a maximum of 180 days from March 18, 2010,[12] pursuant to MRCP 77(d), MRAP 4(h), and *Payne*. The availability of this alternative remedy, coupled with Powell's undisputed failure to pursue it, precludes relief under MRCP 60(b)(6) pursuant to *Doll* and the plethora of federal authority stacked decidedly against Powell on this issue.

Nor does Powell find any help in *Hartford* or *Cucos*, both of which are readily distinguishable from the facts before this Court. As a preliminary matter, *Hartford* is distinguishable for the simple yet material fact that, unlike *Doll* and unlike the case at bar, the *Hartford* defendant did not seek relief that was the effective equivalent of an appeal. *See Hartford, supra*. Rather, in *Hartford*, the defendant merely sought to have the judgment entered at a later date to accommodate timely filing of its post-trial motions. *Id.* Powell sought more—namely, an "escape hatch," see *Doll, supra*, to effect a de facto appeal she failed to pursue in the

[11] Needless to say, Powell failed to take or perfect an appeal. *See* R. 1-3, R.E. 2.

[12] Powell's time to seek relief under MRAP 4(h) expired September 14, 2010; moreover, even if the 180-day "outer limit" had not expired, Powell's motion for relief from judgment would still be untimely under MRAP 4(h) because she waited more than seven (7) days after she unquestionably had actual notice of the existence of the final judgment to seek relief.

first instance notwithstanding the provision made for her purported circumstances (*viz.*, lack of notice from the clerk) by MRCP 77(d) and MRAP 4(h).

Moreover, both *Hartford* and *Cucos* are distinguishable for the critical reason that Powell presented no evidence whatsoever that either she or her attorney at any time undertook to make diligent inquiry into the status of proceedings which she herself initiated. Powell filed her original complaint on November 28, 2007. R. 4. On January 30, 2008, she filed an amended complaint. R. 12. On June 17, 2008, Powell's counsel filed an incomplete application for admission pro hac vice on behalf of Jesse V. Harris, Esq. R. 21. These three filings mark the totality of activity in this cause prior to its dismissal with prejudice for failure to prosecute on March 18, 2010. *See* R. 1, R.E. 2. Powell took no further action of record in the court below until she filed her MRCP 60(b)(6) motion to clarify on October 21, 2010. *See id.* Had she (or her attorney) diligently checked the court file within the 180-day period provided by MRAP 4(h), she would have indisputably been able to discover the trial court's Final Judgment of Dismissal because it was both noted on the docket and in the court file. *See id.*

Unlike the defendant in *Hartford*, Powell presented no evidence, and indeed *did not even contend*, that she made "periodic inquiries," see *Hartford*, *supra*, into the status of these proceedings in the **28-month period** between her last action of record and the filing of MBMC's summary judgment motion in Cause No. 251-10-378. More critically, unlike the plaintiffs in *Cucos*, Powell failed to demonstrate any clerk-related frustration of her efforts to make diligent inquiry regarding the status of her own cause of action. Indeed, since its entry on March 18, 2010—and certainly throughout the entirety of the MRAP 4(h) 180-day motion window—the trial court's Final Judgment of Dismissal was properly docketed in the correct court file for the review of anyone who cared to peruse it, including Powell or her attorney. *See* R. 25, R.E. 1, bearing book and page numbers of the Hinds County Circuit Clerk. Unlike *Cucos*, this is **not** a

case where Powell could not *possibly* have become apprised of the judgment no matter how hard she or her attorney looked in the court file. Put differently, Powell failed to take notice of the Final Judgment of Dismissal *not* because it was not properly docketed in the correct court file, but because neither she nor her attorney[13] ever bothered to look.[14] Nor was there any allegation, and certainly no evidence, in the court below that either Powell or her attorney was misled by inaccurate information disseminated by the Clerk's office.[15]

As a final consideration, it should be noted that the facts of the instant case are distinguishable from those recently before this Court in *Carpenter v. Berry*, No. 2009-CA-01200-SCT, 2011 WL 448642 (Miss. Feb. 10, 2011). In *Carpenter*, a plurality of this Court affirmed a chancellor's grant of relief pursuant to MRCP 60(b)(6) to set aside a minor's settlement at the request of the minor's guardians upon their discovery of an insurance policy they alleged was never disclosed to them or the chancellor prior to settlement. *Carpenter*, 2011 WL 448642 at *2. The guardians also argued that their previous counsel had been dilatory in conducting discovery. *Id.* In holding that MRCP 60(b)(6) relief was warranted on these facts, this Court cited the constitutionally derived duty of the Chancery Court to "act with constant care and solicitude towards the preservation and protection of the rights of infants and persons non compos mentis." *Id.* at *4 (quoting *Union Chevrolet Co. v. Arrington*, 162 Miss. 816, 826-27,

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[13] "Neither ignorance nor carelessness on the part of any attorney will provide grounds for relief [under MRCP 60(b)]." *In re Dissolution of Marriage of De St. Germain*, 977 So. 2d 412, 416 (Miss. Ct. App. 2008).

[14] Where this Court's rules of procedure require plaintiff's counsel to exercise a measure of ordinary attention and diligence to the conduct of his client's proceedings at the risk of dismissal with prejudice, this Court has not hesitated to enforce its rules to effect such a result where counsel has failed to deliver. *See, e.g., Copiah County Sch. Dist. v. Buckner*, No. 2010-IA-00343-SCT, 2011 WL 1886535 at ¶¶ 18-21, 32-33 (Miss. May 19, 2011).

[15] Given the notation on the Clerk's docket sheet, R.1, R.E. 2, notice of entry of the Final Judgment of Dismissal was in all likelihood actually mailed to Powell's attorney of record, and Powell simply failed to pursue an appeal on the mistaken belief that she could re-file a second action.

138 So. 593, 595 (1932)). As further support for its holding, the Court cited the chancellor's failure to comply with court rules governing minors' settlement proceedings in Chancery Court. *Id.* at *5. Notably, the MRCP 60(b)(6) movants in *Carpenter* did not discover information regarding the existence of the settling defendant's insurance policy until approximately three (3) years after the chancellor entered his order approving settlement. *See id.* at *2. Thus, in *Carpenter*, **the *only* avenue to equitable relief from the trial court's previous order was via MRCP 60(b)(6)**.

Unlike the movants in *Carpenter*, Powell **did** in fact have a procedural avenue to relief: the tandem remedy of MRCP 77(d) and MRAP 4(h) discussed in detail *supra*. She merely failed to avail herself of it. It matters not whether Jervia Powell was of unsound mind at the time of dismissal. His interests were then fully protected by Maria Powell, his "next friend" representative pursuant to MRCP 17.[16] *See* Part II, *infra*. Because Powell **did** in fact have a procedural avenue to remedy the inequity alleged in the case at bar, *viz.*, the clerk's purported failure to notify her of the trial court's order, the equitable concerns informing the Court's reasoning in *Carpenter* are not implicated here. Put differently, the movants in *Carpenter* never had any procedural remedy but MRCP 60(b)(6). Thus, the Court could not overlook the chancellor's duty to protect the minor's interests in that case and permit MRCP 60(b)(6) to be employed in the manner it was intended to be—when filing a timely appeal was *never* a possibility. This was not the situation in the case at bar, where Powell had a clear avenue to appellate relief for 180 days prescribed by this Court's rules, yet she failed to take it.

[16] In her motion, Powell also appeared to imply that she was not authorized to file the original complaint herein as Jervia Powell's "representative" because she had not yet been appointed his conservator. R. 26-27, R.E. 3. Powell utterly ignored MRCP 17(c), which expressly authorized Maria Powell to file the instant lawsuit, as follows: "If an infant or incompetent person does not have a duly appointed representative, he may sue by his next friend." MISS. R. CIV. P. 17(c) (emphasis added).

That Powell's attorney failed to exercise the diligence required of him pursuant to *Payne* during the 180-day MRAP 4(h) period[17] tilts the balance of equities markedly out of Powell's favor. Having failed to avail herself of the procedural mechanism for perfecting an appeal in the absence of notice, Powell cannot, based on lack of notice and nothing more, use MRCP 60(b)(6) as a substitute for appeal. Pursuant to MRCP 77(d), MRAP 4(h), *Doll*, *Payne*, and highly persuasive federal authority on point, MRCP 60(b)(6) has and can have no application here as a matter of law, and the trial court had no jurisdiction to revisit its Final Judgment of Dismissal. Because the trial court's grant of Powell's motion constituted an error of law as set forth herein, the court erred in granting Powell's motion, and this Court should reverse and render.[18]

II. EVEN IF THE TRIAL COURT DID HAVE JURISDICTION TO REVISIT ITS FINAL JUDGMENT OF DISMISSAL, THE COURT NEVERTHELESS ABUSED ITS DISCRECTION IN FAILING TO APPLY THE CORRECT LEGAL STANDARDS GOVERNING MRCP 41(b) AND MISS. CODE ANN. § 15-1-53 AND IN BASING ITS RULING ON INSUFFICIENT EVIDENCE.

STANDARD OF REVIEW APPLICABLE TO PART II: When considering the grant of an MRCP 60(b)(6) motion, this Court employs an abuse of discretion standard of review. *Briney v. U.S. Fid. & Guar. Co.*, 714 So. 2d 962, 966 (Miss. 1998). Under this standard, the Court first determines **whether the trial court applied the correct legal standard**, then considers whether the court's ruling was one of several reasonable rulings that could have been

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[17] Not only did Powell fail to avail herself of the procedural opportunity to seek relief from the Final Judgment of Dismissal within 180 days of its entry on March 18, 2010, but she also failed to seek relief within seven (7) days from the date she admitted getting actual notice of the Final Judgment of Dismissal via service of MBMC's motion for summary judgment in Cause No. 251-10-378 on October 4, 2010. Powell did not file her motion to clarify until October 25, 2010. R. 26, R.E. 3. As set forth hereinabove, not having timely pursued relief under MRAP 4(h), no other relief is available to Powell under MRCP 60(b).

[18] Should this Court reverse and render, Powell (and consequently Jervia Powell) will not be left without recourse since she may seek to recover against her attorneys under a theory of legal malpractice. *See, e.g., Bennett v. Hill-Boren P.C.*, 52 So. 3d 364 (Miss. 2011) (reversing award of summary judgment to defendant attorneys in legal malpractice action predicated on attorneys' alleged failure to effect service of process on defendant hospital in underlying medical malpractice wrongful death action, resulting in dismissal of that action).

made. *Greater Canton Ford Mercury, Inc. v. Lane*, 997 So. 2d 198, 202 (Miss. 2008). In a case involving appellate review of a trial court's ruling on an MRCP 60(b) motion, this Court recently stated that the "'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) (emphasis added). Furthermore, "[w]here the exercise of the [trial] court's discretion is not supported by the evidence, [the appellate court] is obligated to find an abuse of discretion." *Smith v. City of Gulfport*, 949 So. 2d 844, 848 (Miss. Ct. App. 2007).

Both the original and the *nunc pro tunc* orders (of Judge Harrison) herein appealed from provide the following rationale underlying the trial court's grant of Powell's motion:

> The complaint was never served on the defendants. At docket call, it appeared the statute of limitations had expired; however, in this particular case the statute of limitations is extended due to "unsoundness of mind."

R. 87, R.E. 6; R. 161, R.E. 8. This constitutes the trial court's sole stated basis for its last-minute decision to rule on Powell's motion without a hearing and to modify its previous Final Judgment of Dismissal to make the dismissal "without prejudice." For the reasons set forth below, the aforementioned grounds find no support in Mississippi law or the record before this Court.

First of all, contrary to Powell's assertions in the court below, an action need not be time-barred as a prerequisite for its dismissal with prejudice under MRCP 41(b). In her motion to clarify, Powell erroneously relied upon *In re Holtzman*, 823 So. 2d 1180 (Miss. 2002), for the proposition, as stated by Powell, that "the only time a court is entitled to dismiss a case for failure to serve *or for want of prosecution* 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." R. 28, R.E. 3 (emphasis added). This proposition finds no support in Mississippi case law, and certainly none in *In re Holtzman*, which involved a dismissal predicated on MRCP 4(h), **not on**

MRCP 41(b) as was the case in the court below. *See* R. 25, R.E. 1. Powell cited no authority whatsoever that in fact supported her argument that a plaintiff's claims must be time-barred before a trial court can dismiss them with prejudice pursuant to MRCP 41(b).

Even if it *were* true that Powell's claims had to be time-barred as a precondition to dismissal with prejudice, there is no evidence of record before this Court (and certainly none was before the trial court) that the statute of limitations had **not** run in this case at the time of dismissal. In Powell's motion, she alleged that "in this case, the statute [of limitations] is extended because [Jervia Powell] suffers from the disability of 'unsoundness of mind' thereby giving him twenty-one years to file suit." R. 28, R.E. 3. Indeed, the trial court's stated rationale for granting Powell's motion was that the statute of limitations was tolled due to Jervia Powell's alleged "unsoundness of mind," R. 87, R.E. 6, R. 161, R.E. 8, a conclusion the trial court reached despite the complete absence of any admissible evidence in the record before this Court or the trial court that Jervia Powell in fact suffered from unsoundness of mind at any time pertinent to this litigation. Pursuant to *Smith, supra*, the trial court abused its discretion in granting Powell's motion where no evidence of record supported Powell's assertion that the statute of limitations had not run at the time of dismissal. On this basis alone, this Court should reverse.

Finally, even assuming for the sake of argument that on or about November 30, 2005, Jervia Powell came within the tolling protections of Mississippi's disability savings statutes[19] as Powell alleges, any such tolling ceased, and the statute of limitations commenced to run at the latest by January 22, 2007, pursuant to MISS. CODE ANN. § 15-1-53. Thus, for the reasons set forth below, even if this Court opts to overlook the absence of record evidence substantiating Jervia Powell's unsoundness of mind, the statute of limitations nevertheless ran on all of his

[19] MISS. CODE ANN. § 15-1-36(5) and/or § 15-1-59.

claims on July 21, 2009, rendering Powell's claim time-barred at the time of dismissal eight (8) months later.

MISS. CODE ANN. § 15-1-53 provides the following:

> When the legal title to property or **a right in action** is in an executor, administrator, guardian, **or other trustee**, the time during which any statute of limitations runs against such trustee shall be computed against the person beneficially interested in such property or right in action, **although such person may be under disability and within the saving of any statute of limitations; and may be availed of in any suit or actions by such person**.

MISS. CODE ANN. § 15-1-53 (emphasis added). Section 15-1-53 is predicated on the rationale that when there exists an individual who is legally authorized to pursue and protect an incompetent person's interests in a given matter, "there is no logical or equitable reason to prevent the running of statute of limitations." *See 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"). *See also McCain v. Memphis Hardwood Flooring Co.*, 725 So. 2d 788, 795 (Miss. 1998) (holding that statute of limitations runs against incompetent person during time in which his right in action is in guardian), *overruled on other grounds by Stockstill v. Gammill*, 943 So. 2d 35 (Miss. 2006).

Within the "other trustee" class of representatives set forth in § 15-1-53 is the "next friend" authorized to sue on behalf of incompetent persons under MISS. R. CIV. P. 17(c).[20] This Court has previously acknowledged the "**trust relation** existing between the [incompetent person] and the next friend." *See Smith v. Strickland*, 103 So. 782, 786 (Miss. 1925) (emphasis

[20] MRCP 17(c) provides that "[i]f an infant or 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 cmt. (stating that "[i]nfants and persons under a legal disability may sue by their next friends").

added). Moreover, "trustee" has been defined as "[o]ne who stands in a fiduciary . . . relation to another." BLACK'S LAW DICTIONARY (9th ed. 2009). Mississippi case law has repeatedly held the following maxim of equity applicable to the "next friend" relationship: "a fiduciary will not be permitted any inducement to neglect the interest of his cestui que trust, unless the cestui que trust consents thereto." *Dendy v. Commercial Bank & Trust Co.*, 108 So. 274, 278 (Miss. 1926).[21] *See also Smith*, 103 So. at 785-86; *Memphis Stone & Gravel Co. v. Archer*, 82 So. 315, 316 (Miss. 1919). Because one acting as the "next friend" of an incompetent person stands in a fiduciary, trust relation to that person as a matter of law, such a "next friend" necessarily falls within the ambit of the "other trustee" catchall set out in § 15-1-53. Consequently, once an incompetent person's right in action is actively being pursued by a next friend, the statute of limitations begins to run on the incompetent person pursuant to § 15-1-53. *See Kimball Glassco Residential Ctr., Inc. v. Shanks*, No. 2009-IA-01617-SCT, 2011 WL 2237604, at *6 (Miss. June 9, 2011) (effectively holding that statute of limitations was not tolled with respect to individual alleged to be of unsound mind during period in which presumed next friend was actively pursuing individual's interests prior to filing suit).

In the case at bar, the statute of limitations began running on Jervia Powell's claims on January 22, 2007, when his right in action was undeniably in the trust of his mother and next friend, Maria Powell. On that date, Jesse V. Harris, Esq., in an effort to comply with the pre-suit notice requirements of MISS. CODE ANN. § 15-1-36(15), sent a notice of claim letter to MBMC indicating that his firm had "been retained to represent Jervia Powell with respect to his civil claim for damages" against MBMC arising out of alleged negligence in the misdiagnosis of Hodgkin's Lymphoma and alleged negligent provision of surgical and/or post-surgical care,

[21] A "cestui que trust" is the beneficiary in certain fiduciary relationships. *See* BLACK'S LAW DICTIONARY (9th ed. 2009).

which allegedly resulted in brain damage to Jervia Powell. R. 96, R.E. 11. Several months following this notice of claim letter, on November 28, 2007, Maria Powell filed suit "on behalf of the Estate of Jervia Powell," as she was legally authorized to do as Jervia Powell's "next friend" pursuant to MRCP 17(c).[22] R. 4. Since the claims addressed in Mr. Harris' January 2007 notice of claim letter culminated in the filing of a civil action by Maria Powell as Jervia Powell's next friend, Maria Powell was undoubtedly the person who "retained" Mr. Harris in her capacity as Jervia Powell's next friend on or before January 22, 2007.[23] Because Maria Powell was "fully authorized to employ attorneys . . . on [Jervia Powell's] behalf," see *Conservatorship of Melson, supra*, and did so employ Mr. Harris no later than January 22, 2007, Maria Powell began acting as Jervia Powell's next friend—the trustee of his right in action against MBMC—no later than **January 22, 2007**.

It is well settled that "[t]he purpose of the savings statute is to protect the legal rights of those who are unable to assert their own rights due to disability." *Brumfield v. Lowe*, 744 So. 2d 383, 387 (Miss. Ct. App. 1999). Jervia Powell's rights were fully protected by Maria Powell, his next friend, no later than January 22, 2007, when Mr. Harris notified MBMC in writing of Jervia Powell's claim, thereby signifying Maria Powell's active pursuit of Jervia Powell's legal interests in the matter. Because Maria Powell became the trustee of Jervia Powell's right in action no later than January 22, 2007, the governing statute of limitations began running against her—and, pursuant to MISS. CODE ANN. § 15-1-53, **against Jervia Powell**—that same day.

In light of the foregoing and pursuant to MISS. CODE ANN. § 15-1-36(2) and controlling case law, the statute of limitations accordingly ran on all of Jervia Powell's claims on **July 21, 2009**, months before the trial court dismissed this action for failure to prosecute.

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[22] *See supra*, notes 1 and 20.

[23] Powell never disputed this in the court below.

It is well settled in Mississippi that the "[f]iling of a complaint tolls the applicable statute of limitations 120 days, but if the plaintiff fails to serve process on the defendant within that 120-day period, the statute of limitations automatically begins to run again when that period expires." *Triple "C" Transport, Inc. v. Dickens*, 870 So. 2d 1195, 1200 (Miss. 2004). *See also Miller v. Myers*, 38 So. 3d 648, 652 (Miss. Ct. App. 2010). The filing of an amended complaint, however, does not give the plaintiff an additional 120 days to effect service of process. *Webster v. Webster*, 834 So. 2d 26, 29 n.3 (Miss. 2002).

In the case at bar, the statute of limitations began running on Jervia Powell's claims on January 22, 2007, and expired on July 21, 2009. For the reasons set out in detail *supra*, any disability savings tolling mechanisms ceased to operate, and the statute of limitations commenced to run on Jervia Powell's claims, on **January 22, 2007**. Exactly 310 days later, on **November 28, 2007**, Maria Powell filed her original complaint, thereby tolling the statute of limitations for 120 days. R. 4. Since she never served MBMC with process, the statute of limitations automatically resumed running as a matter of law 120 days later, i.e., on **March 27, 2008**. At that point, 481 days remained in the statute of limitations period[24], which remaining period expired **July 21, 2009**—eight (8) months prior to the trial court's entry of its Final Judgment of Dismissal on March 18, 2010. R. 25, R.E. 1. Thus, even erroneously assuming for the sake of argument that Mississippi law *does* require an action to be time-barred as a prerequisite to dismissal with prejudice under MRCP 41(b), Powell's claims *were in fact time-*

[24] As set forth *supra*, the statute of limitations began to run on January 22, 2007. All things remaining equal, the statute of limitations would have expired two calendar years and sixty (60) days (a total of 791 days) later pursuant to *Scaggs v. GPCH-GP, Inc.*, 931 So. 2d 1274, 1277 (Miss. 2006). Subtracting the 310 days that ran prior to suit being filed from the 791 total days leaves 481 days in the governing statute of limitations period as of March 27, 2008.

barred in any event at the time of dismissal on March 18, 2010.[25] Because the trial court failed to apply the correct legal standards governing MRCP 41(b) dismissals and the interpretation of pertinent statutory provisions (namely §§ 15-1-36 and 15-1-53), and further failed to base its ruling on sufficient evidence,[26] the court abused its discretion in granting Powell's motion, and this Court should reverse and render.[27]

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[25] Should the Court for some reason find that Maria Powell's service of her notice of claim letter on January 22, 2007, was insufficient to trigger the running of the statute of limitations, Jervia Powell was nevertheless *unquestionably* removed from the protection of any disability savings statute (pursuant to MISS. CODE ANN. § 15-1-53) on November 28, 2007, the date Maria Powell filed her complaint as Jervia Powell's next friend as permitted by MRCP 17(c). R. 4. On that date, any tolling provisions ceased to operate pursuant to § 15-1-53, and the statute of limitations was simultaneously tolled for 120 days pursuant to *Triple "C" Transport, Inc., supra.* One hundred twenty (120) days later, on March 27, 2008, the two (2)-year statute of limitations of MISS. CODE ANN. § 15-1-36(2) began to run pursuant to *Triple "C" Transport, Inc., supra,* Powell having failed to serve process on any defendant by that date. The statute thus expired two (2) years later on March 27, 2010. The court below did not enter its order granting MRCP 60(b)(6) relief until on or about December 14, 2010. R. 87, R.E. 6. Thus, by the time Judge Harrison entered the aforementioned order permitting Plaintiff "to re-file within the statute of limitations," *id.*, the statute of limitations had in fact already expired. Any way this Court considers it, the trial court abused its discretion in granting Powell's motion even assuming it had jurisdiction to consider it in the first place.

[26] As set forth *supra,* Powell presented no evidence whatsoever to the court below to substantiate her allegation that Jervia Powell suffered from "unsoundness of mind" at any time pertinent herein. Because this assertion finds no evidentiary support in the record yet nevertheless served as a basis for the trial court's ruling, this Court is bound for this additional reason to find an abuse of discretion pursuant to *City of Gulfport, supra.*

[27] This Court has consistently reaffirmed the "well established" nature and important purpose of 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.* Limitations periods are founded upon the "general experience of society that valid claims will be promptly pursued and not allowed to remain neglected"; they are designed to "suppress assertion of false and stale claims." *Id.* This Court has echoed these principles repeatedly. *See Mitchell v. Progressive Ins. Co.,* 965 So. 2d 679, 683 (Miss. 2007); *Harrison Enters., Inc. v. Trilogy Commc'ns, Inc.,* 818 So. 2d 1088, 1095 (Miss. 2002). *See also Southern Win-Dor, Inc. v. RLI Ins. Co.,* 925 So. 2d 884, 888 (Miss. Ct. App. 2005); *Albertson v. T.J. Stevenson & Co.,* 749 F.2d 223, 232 (5th Cir. 1984); *Williams v. S. Pac. Transp. Co.,* 813 F. Supp. 1227, 1234 (S.D. Miss. 1992) (citing *United States v. Kubrick,* 444 U.S. 111, 117 (1979)). For these reasons, Mississippi courts have historically accorded statutes of limitations strict enforcement, see *Tandy Elecs., Inc. v. Fletcher,* 554 So. 2d 308, 311 (Miss. 1989), noting that "[t]he law is created for the watchful and not for the negligent." *Harrison Enterprises,* 818 So. 2d at 1095. Accordingly, even a just claim or one that rises to a moral obligation does not thereby exempt a nevertheless time-barred claim from the statute of limitations period. *Stringer,* 748 So. 2d at 665. Indeed, this Court has consistently held that statutes of

CONCLUSION

Neither this Court's rules nor Mississippi case law vested the trial court with the authority to relieve Powell of the finality of the Final Judgment of Dismissal entered pursuant to MRCP 41(b). Notwithstanding her alleged lack of notice from the Circuit Clerk, Powell's sole avenue of attack on this judgment was to avail herself of MRAP 4(h) and pursue an appeal within 180 days of March 18, 2010. This she failed to do. Accordingly, pursuant to controlling Mississippi case law and concurring federal authority on point, Powell was not entitled to relief under MRCP 60(b)(6), and the trial court erred as a matter of law in holding otherwise. Even if MRCP 60(b)(6) could have properly applied on the facts before this Court, which it could not, Powell's asserted substantive grounds for relief were baseless in any event, finding no support in the law or the record, and the trial court abused its discretion in destroying the finality of its previous judgment. For the reasons set forth herein, MBMC respectfully requests that this Court would 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 20th day of June, 2011.

Respectfully submitted,

MISSISSIPPI BAPTIST MEDICAL CENTER, INC., APPELLANT

BY: _____

D. COLLIER GRAHAM, JR. [redacted]

REX M. SHANNON III ([redacted])

limitations "apply with full force to all claims" and that "courts cannot refuse to give the statute effect merely because it seems to operate harshly in a given case." *Id.*; *Southern Win-Dor*, 925 So. 2d at 888.

OF COUNSEL:

WISE CARTER CHILD & CARAWAY, P.A.
600 HERITAGE BUILDING
401 EAST CAPITOL STREET
POST OFFICE BOX 651
JACKSON, MISSISSIPPI 39205-0651
TEL: (601) 968-5500
FAX: (601) 944-7738
ATTORNEYS FOR APPELLANT MISSISSIPPI BAPTIST MEDICAL CENTER, INC.

CERTIFICATE OF SERVICE

I, D. Collier Graham, Jr., 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:

Trent Walker, Esq.
Schwartz & Associates
Post Office Box 3949
Jackson, Mississippi 39207-3949

Jesse V. Harris, Esq.
Harris Law Firm, P.C.
70 West Madison Street
Suite 1400
Chicago, Illinois 60602

Chaka Smith, Esq.
Law Office of Chaka Smith
Post Office Box 1820
Cleveland, Mississippi 38732-1820

Jane E. Tucker, Esq.
235 Melbourne Street
Jackson, Mississippi 39206-5302

ATTORNEYS FOR APPELLEE

Chris J. Walker, Esq.
Markow Walker
Post Office Box 13669
Jackson, Mississippi 39236-3669

John L. Hinkle, IV, Esq.
Markow Walker
Post Office Box 50
Oxford, Mississippi 38655-0050

ATTORNEYS FOR APPELLANTS JACKSON ANESTHESIA ASSOCIATES, P.A., GARLAND K. MILNER, M.D., AND DEREK MARSHALL, M.D.

Hon. William Gowan
Post Office Box 22711
Jackson, Mississippi 39225

TRIAL COURT JUDGE

THIS the 20th day of June, 2011.

D. COLLIER GRAHAM, JR.