

**IN THE SUPREME COURT OF MISSISSIPPI
NO.2006-M-364-SCT
CONSOLIDATED WITH
NO. 2006-M-00420-SCT**

TIMOTHY ESTES, M.D., et al

DEFENDANTS - APPELLANTS

VS.

**FREDERICA BRISTER, CONSERVATOR OF
WILLIE MCKEE, AS PERSONAL REPRESENTATIVE
OF PEARL HENRY, DECEASED AND ON BEHALF
OF THE WRONGFUL DEATH BENEFICIARIES OF
PEARL HENRY, DECEASED**

PLAINTIFF - APPELLEE

APPELLEE'S COMBINED RESPONSE TO APPELLANTS' BRIEFS

ORAL ARGUMENT REQUESTED

SUBMITTED BY:

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case.

1. Frederica Brister, Conservator of Willie McKee, As Personal Representative of Pearl Henry, Deceased, and on Behalf of the Wrongful Death Beneficiaries of Pearl Henry, Deceased.
2. Charles E. Gibson, Esq. and Gigi Gibson, Esq. from The Gibson Law Firm, PLLC
3. Timothy Estes, M.D.; Judson Williams; Forrest Hill Nursing Center; A.D. Buffington; Hugh Franklin; Long Term Care Management LLC; and Rhonda Bounds.
4. L Carl. Hagwood, Esq. and Sandra Doty, Esq. with the law firm of Wilkins, Stephens and Tipton, P.A..
5. Jim Bullock, Esq. and Jonathan Bullock, Esq. with the law firm of Shell Buford, PLLC
6. Andy McCullough, Esq. with the law firm of Markow Walker, P.A.

7. John L. Maxey II, Esq., S. Mark Wann, Esq., Marjorie S. Busching, Esq., Heather M. Aby, Esq., Paul H. Kimble, Esq., William H. Hussey, Esq with the firm of Maxey Wann, PLLC
8. Honorable Winston L. Kidd, Hinds County Circuit Court Judge.

SO CERTIFIED, this the 14th day of March, 2007.

BY: 

Charles E. Gibson, III (MSB #4821)
Gigi Gibson, (MSB #100540)

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I.

STATEMENT REGARDING ORAL ARGUMENT

The Appellee requests oral argument.

II.

STATEMENT OF THE ISSUES

AS TO APPELLANT ESTES:

Appellant Timothy Estes, M.D.'s Appeal was dismissed pursuant to a Joint Motion to Dismiss and Stipulation of Dismissal filed in this Court on March 5, 2007 and therefore all issues are moot and no response is necessary. See Clerk's Notice dated March 6, 2007, a copy of which is included as R.E. 2.

AS TO APPELLANT WILLIAMS:

Appellant Judson Williams, CNP's Appeal was dismissed pursuant to a Joint Motion to Dismiss and Stipulation of Dismissal filed in this Court on March 7, 2007 and therefore all issues are moot and no response is necessary. See Clerk's Notice dated March 8, 2007, a copy of which is included as R.E. 3.

AS TO APPELLANTS HUGH FRANKLIN, A.D. BUFFINGTON, AND RHONDA BOUNDS:

Appellants Hugh Franklin, A.D. Buffington and Rhonda Bounds Appeals were dismissed pursuant to a Joint Motion to Dismiss and Stipulation of Dismissal filed in this Court on March 12, 2007 and therefore all issues are moot and no response is necessary. See Joint Motion to Dismiss and Stipulation of Dismissal filed in this Court on March 12, 2007, copies of which are included as R.E. 4 and R.E. 5.

AS TO APPELLANTS FORREST HILL NURSING CENTER and LONG TERM CARE MANAGEMENT:

There are no justifiable issues before the Court; therefore, the appeal is moot. The underlying order(s) from which timely appeal was taken have been dismissed.¹ Therefore, the Court has no jurisdiction and their appeal should be docketed and dismissed.

¹ Forrest Hill Nursing Center and Long Term Care Management, LLC no longer have an appeal in which to join. As stated in their own brief, these defendants merely joined the interlocutory appeal filed by Defendant Timothy Estes, M.D.'s Appeal which has been dismissed pursuant to a Joint Motion to Dismiss and Stipulation of Dismissal filed in this Court on March 5, 2007. (Appellants' Forrest Hill Nursing Center, Hugh Franklin, A.D. Buffington, Long Term Care Management and Rhonda Bounds Brief, pg. 3, ¶ 2).

III.

STATEMENT OF THE CASE

Pearl Henry was a resident of Forrest Hill Nursing Center from January 28, 2000 until her death on July 31, 2001. After Pearl Henry's death, Forrest Hill Nursing Center refused to provide Pearl Henry's medical records to Plaintiff despite repeated requests to do so. Plaintiff filed suit against Forrest Hill Nursing Center and a number of unknown John Doe defendants on July 25, 2003, one year, three hundred and fifty nine days after Pearl Henry's death; well within the Statute of Limitations. The complaint alleged negligence, wrongful death and wrongful withholding of medical records. (R.E. 6, Estes Petition Exhibit 4 at ¶ 7). On August 21, 2003, the named Defendant Forrest Hill Nursing Center filed a motion to dismiss. On October 2, 2003, just a little over two months after the filing of the initial complaint, Plaintiffs were granted permission by the Court to file an amended complaint.

On November 7, 2003, Plaintiffs filed the First Amended Complaint in this action. The style of the First Amended Complaint, like the style in the original complaint, described the defendants as "Forrest Hill Nursing Center, Scott Lindsey, and John Does 1-26." The body of the complaint itself contained a large section entitled "Parties" and numerous paragraphs describing in detail the John Does 1-26 by occupation, duties and negligent acts. The complaint assigned specific numbers to each category of fictitious party. John Doe 1 was specified to be owners of Forrest Hill Nursing Center whose identity was unknown to Plaintiffs; John Doe 2 was specified to be contractors providing skilled personnel to Forrest Hill Nursing Center; John Doe 4 was

specified to be the Medical Director of Forrest Hill Nursing Center whose identity was unknown to Plaintiffs; and John Does 5 through 17 were specified to be nurses whose identity was unknown to Plaintiffs. Scott Lindsey was identified as an administrator defendant, but Plaintiff specifically reserved the right to substitute a different administrator or add additional unidentified administrators upon learning the true identity of the other administrators that held the position during Pearl Henry's residency at the nursing home. (R.E. 7, First Amended Complaint at ¶¶ 3-14)

On November 20, 2003, approximately four months after filing the initial complaint and only two weeks after filing the first amended complaint, Plaintiffs again requested the medical records from Defendant Forrest Hill Nursing Center. Forrest Hill Nursing Center again failed to turn over these essential records which would contain vital information for determining the identity of the John Does actually responsible for the injuries to Pearl Henry. Plaintiff's counsel secretary then contacted the office of Defendant Forrest Hill Nursing Center's counsel to request the records again and was told that the firm of Maxey Wann did not represent Forrest Hill Nursing Center, a blatant falsehood. When Plaintiff's counsel was able to verify that Forrest Hill Nursing Center's counsel actually was the law firm of Maxey Wann, Plaintiff propounded discovery. (R.E. 6, Estes Petition, Exhibit 4 at ¶ 7)

The delay in identifying John Doe defendants and propounding discovery was clearly caused by the failure of Forrest Hill Nursing Center to turn over Pearl Henry's medical records and the deception on the part of Defendant's counsel in denying representation. The delay was not caused by a lack of diligence on the part of Plaintiff or Plaintiff's counsel. Given the abysmal failure of informal efforts to obtain the medical

records, it is clear that other informal methods would not have produced sufficient information to identify the medical director.

On June 5, 2005 after finally receiving the medical records and other discovery responses, Plaintiffs' counsel filed a notice of substitution and amendment to the complaint under M.R.C.P. 9(h). While the caption of the notice continued to use the short form "Forrest Hill Nursing Center, Scott Lindsey and John Does 1-26", the notice itself clearly demonstrated that it was amending the Parties section of the First Amended Complaint and was substituting specific names for specific John Does described in the First Amended Complaint. It specified that Robert Crawford, Hugh Franklin, and A. D. Buffington had been identified as owners of Forrest Hill Nursing Center and were being substituted under Rule 9(h) for the owner John Doe who was described in paragraph 5 of the First Amended Complaint. It specified that Rhonda Bounds and Verna Cook had each been identified as administrators of Forrest Hill Nursing Center and were being substituted under Rule 9(h) for John Doe Administrator, who was described in paragraphs ¶¶ 3-14 of the First Amended Complaint. It specified that Timothy Estes had been identified as the medical director and was being substituted under Rule 9(h) for John Doe 4 who was described in paragraph 9 of the First Amended Complaint. (R.E. 6, Estes Petition Exhibit 2)

On June 7, 2005, the Circuit Court entered an order authorizing the substitutions under Rule 9(h) and specifically finding that the substitutions were proper Rule 9(h) substitutions. The court also ruled that the identified defendants were effectively substituted in the complaint for the John Doe defendants specifically described in the complaint as John Doe Owners, John Doe Medical Director, John Doe Nurse, John Doe

Administrators, and John Doe Personnel Contractor. The court also specifically ruled that the substitutions related back to the original filing of the complaint. While the caption of the case was not changed on this Order, the Order is clear that it is effective in actually amending the Parties section of the original and First Amended Complaints.

(R.E. 6, Estes Petition, Exhibit 2) Almost two months later, on July 25, 2005, Robert Crawford, one of the defendants and a newly identified John Doe Owner, filed a motion to dismiss asserting that the statute of limitations had expired as to the defendants joined by the Rule 9(h) substitution order alleging that the substitutions cannot relate back to the original complaint because the Plaintiffs failed to exercise due diligence in identifying the substituted parties prior to the running of the statute of limitations. Estes subsequently joined in this Motion. (R.E. 6, Estes Petition Exhibits A and B) When this Motion was brought to the Circuit Court's attention at a hearing on October 20, 2005, the Circuit Court orally denied the Motion.

Subsequently this matter was settled with the defendant(s) Robert Crawford d/b/a Crawford Nursing Home and later dismissed against the defendants Timothy Estes, Judson Williams, Hugh Franklin, A.D. Buffington and Rhonda Bounds, leaving only the Defendants Forrest Hill Nursing Home and Long Term Care Management.

Forrest Hill Nursing Center and Long Term Care Management, LLC are the only two defendants remaining in this appeal.

IV.
FACTS

The plain language of MISS. CODE ANN. § 15-1-36(14) states:

(14) The limitation established by this section as to institutions for the aged or infirm shall apply only to actions the cause of which occurred on or after January 1, 2003.

Pearl Henry's date of death is July 31, 2001, thus her cause of action occurred on that date, July 31, 2001. Suit was filed July 25, 2003. The Defendant Forrest Hill Nursing Home made an untimely attempt to file an interlocutory appeal in this matter which was denied by order of this Court on June 15, 2005. There is no timely appeal by either party before this Court.

Defendants' Forrest Hill Nursing Center and Long Term Care Management, LLC Appeal should be denied and the matter remanded to the Hinds County Circuit Court.

By Order dated April 5, 2005, the Hinds County Circuit Court denied Forrest Hill Nursing Center's motion to dismiss, finding that Miss. Code Ann. §15-1-36 "cannot be applied in this matter" and that Miss. Code Ann. §11-1-58 "cannot be applied herein." (R.E. 8, Circuit Court's Order dated April 5, 2005).

On June 15, 2005, the Mississippi Supreme Court dismissed Forrest Hill Nursing Center's Motion for Interlocutory Appeal of the Hinds County Circuit Court's April 5, 2005 Order. (R.E. 9, Mississippi Supreme Court Order dated June 15, 2005).

Therefore, Defendants' Appeal pending before this Court today on petitions related to the notice requirements of Miss. Code Ann. §15-1-36 is nothing more than an attempt to take another bite at the apple.

Even if Miss. Code Ann. §15-1-36 applied, which the Hinds County Circuit Court has correctly ruled it does not, Plaintiff would show that the Complaint was filed on July 25, 2003, and the First Amended Complaint was filed on October 13, 2003 naming fictitious parties. Plaintiff learned through discovery and other sources, the true identity of John Doe Personnel Contractor, Long Term Care Management, LLC, who was added as a party defendant in this cause pursuant to Rule 9(h) of the Mississippi Rules of Civil Procedure and by Order of the Circuit Court dated June 7, 2005. (R.E. 10, Circuit Court's Order dated June 7, 2005) As such, Plaintiff was not required to give sixty days prior written notice pursuant to Miss. Code Ann. §15-1-36(15) which specifically provides:

This subsection shall not be applicable with respect to any defendant whose name is unknown to the plaintiff at the time of the filing of the complaint and who is identified therein by a fictitious name.

Even if Miss. Code Ann. §11-1-58 applied, which the Circuit Court has correctly ruled it does not, Plaintiff denies that he has failed to comply. Plaintiff filed Certificates of Consultation on September 15, 2003 and on October 3, 2003. Miss. Code Ann. §11-1-58(2) states:

(2) Where a certificate is required pursuant to this section only, a single certificate is required for an action, even if more than one (1) defendant has been named in the complaint or is subsequently named.

Defendants' allegations regarding a previously filed Complaint of which Plaintiff and his counsel were unaware are irrelevant.

V.

ARGUMENT

A. ABSENT A TIMELY NOTICE OF APPEAL, THIS COURT HAS NO JURISDICTION

Timely notice of appeal has been held to be jurisdictional. Even if not raised by one of the parties, the Court is required to inquire and note lack of jurisdiction. *Michael v. Michael*, 650 So. 2d 469 (Miss. 1995).

Whether raised by the parties or not, this Court is required to note its own lack of jurisdiction. **Common Cause of Mississippi v. Smith**, 548 So. 2d 412, 414 (Miss. 1989); **Cotton v. Veterans Cab Co., Inc.**, 344 So. 2d 730, 731 (Miss. 1977); **Byrd v. Sinclair Oil & Refining Co.**, 240 So. 2d 623 (Miss. 1970)...when a party does not timely file a notice of appeal, this Court is without jurisdiction. **Duncan v. St. Romain**, 569 So. 2d 687, 688 (Miss. 1990). [**11] Naturally, when this Court is without jurisdiction, it has no power to decide issues.

See also *Duncan v. St. Romain*, 569 So. 2d 687 (Miss. 1990). Dismissal is mandatory. *Moore v. Wax*, 544 So. 2d 312 (Miss. 1989), *Tandy Electronics v. Fletcher*, 554 So. 2d 308 (Miss. 1989). The only appeal filed timely in this matter is the appeal of Timothy Estes, M.D. This appeal has been dismissed. This Court must dismiss appellants Forest Hill Nursing Center and Long Term Care Management for lack of jurisdiction.

B. ANY ISSUES BEFORE THIS COURT HAVE BECOME MOOT

With the dismissal of the appeals of Timothy Estes, M.D. and Judson Williams, CNP, along with the settlement of this matter as to Robert Crawford and the dismissal of Hugh Franklin, A.D. Buffington and Rhonda Bounds, this appeal has become moot. *Gartrell v. Gartrell*, 936 So. 2d 915 (Miss. 2006).

This Court's review should not be allowed for the purpose of settling abstract or academic questions, and this Court has no power to issue advisory opinions.

This Court should not issue advisory opinions. *A & F Properties, LLC v. Madison County Board of Supervisors*, 933 So. 2d 296 (Miss. 2006).

VI.

CONCLUSION

This interlocutory appeal will not resolve an issue of general importance in the administration of justice. Forrest Hill Nursing Center and Long Term Care Management, LLC are the only two defendants remaining in this appeal. As previously stated, these two defendants merely joined Defendant Timothy Estes, M.D.'s Appeal which was dismissed pursuant to a Joint Motion to Dismiss and Stipulation of Dismissal filed in this Court on March 5, 2007 and Defendant Judson Williams, CNP's Appeal which was dismissed pursuant to a Joint Motion to Dismiss and Stipulation of Dismissal filed in this Court on March 7, 2007. Technically, Forrest Hill Nursing Center and Long Term Care Management, LLC no longer have an appeal in which to join. Since no timely notice of appeal was filed by these parties as to an order relating to them, this Court has no jurisdiction and must dismiss.

For the foregoing reasons, the judgment of the Trial Court should be affirmed and this case should be remanded to the Circuit Court of Hinds County, Mississippi.

FREDERICA BRISTER, CONSERVATOR OF
WILLIE MCKEE, AS PERSONAL REPRESENTATIVE
OF PEARL HENRY, DECEASED AND ON BEHALF
OF THE WRONGFUL DEATH BENEFICIARIES OF
PEARL HENRY, DECEASED

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CERTIFICATE OF SERVICE

I, Charles E. Gibson, III, attorney for Appellee Frederica Brister, hereby certify that I have this day served a copy of the above and foregoing **Appellee's Combined Response to Appellants' Briefs** by United States mail, postage pre-paid, a true and correct copy of the above and foregoing to the following:

Honorable Winston Kidd
Hinds County Circuit Judge
Post Office Box 327
Jackson, MS 39205

CIRCUIT COURT JUDGE FOR THE JUDICIAL DISTRICT OF HINDS COUNTY,
MISSISSIPPI

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This the 14th day of March, 2007.



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