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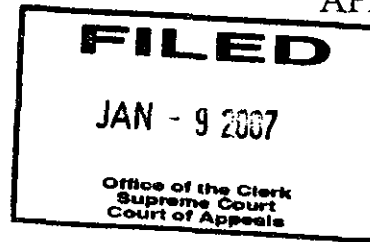
IN THE SUPREME COURT OF MISSISSIPPI
CASE NO. 2006-IA-00364-SCT
CONSOLIDATED WITH
2006-TS-00420-SCT

TIMOTHY ESTES, M.D., ET AL.

APPELLANTS

V.

FREDERICA BRISTER, As Conservator of
WILLIE MCKEE as Personal Representative
Of PEARL HENRY, Deceased and on Behalf
Of the Wrongful Death Beneficiaries
Of PEARL HENRY, deceased



APPELLEE

**APPELLANTS' FORREST HILL NURSING CENTER,
HUGH FRANKLIN, A.D. BUFFINGTON,
LONG TERM CARE MANAGEMENT AND RHONDA BOUNDS BRIEF**

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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:

Willie McKee, Sr., Appellee

Willie McKee, Jr., Appellee

Frederica Brister, Appellee

Carl L. Hagwood, Esquire, Sandra Doty, Esquire, Attorneys for Dr. Timothy
Estes

Jim Bullock, Esquire, Jonathan Bullock, Esquire, Attorneys for Judson
Williams

Andy McCullough, Esquire, Attorney for Robert Crawford

Charles Gibson, Gigi Gibson, Attorneys for Appellees

S. Mark Wann, Marjorie S. Busching, Heather M. Aby, Attorneys for Forrest Hill Nursing Center, A.D. Buffington, Hugh Franklin, Long Term Care Management, LLC and Rhonda Bounds

Honorable Winston L. Kidd, Hinds County Circuit Court Judge

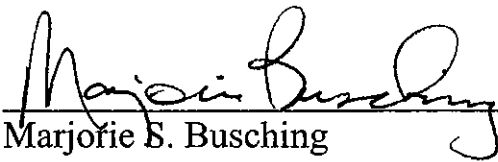

Marjorie S. Busching

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STATEMENT REGARDING ORAL ARGUMENT

The Appellants Forrest Hill Nursing Center, A.D. Buffington, Hugh Franklin, Long Term Care Management, LLC and Rhonda Bounds believe oral argument is not necessary regarding the procedural requirements of Mississippi's Medical Malpractice Tort Reform Act as such have been interpreted by this Court since the filing and acceptance of this interlocutory appeal. Should this Court deem necessary, oral argument would clarify the improper substitution of the parties.

STATEMENT OF THE ISSUES

Whether the lower court erred in: 1) failing to enforce the notice requirement of Mississippi Code Annotated §15-1-36(15) for any action filed on or after January 1, 2003, to provide sixty (60) days notice prior to filing suit; 2) failing to enforce the requirement of attachment of a Certificate of Expert Consultation to the complaint when suit was filed, pursuant to Miss. Code Ann. §11-1-58; and 3) allowing the 9(h) substitution of Rhonda Bounds as a party defendant.

STATEMENT OF THE CASE

On July 25, 2003, suit was filed in Hinds County Circuit Court alleging Pearl Henry (hereinafter referred to as “Ms. Henry” and/or “the Resident”) suffered personal injuries while residing at Forest Hill Nursing Center. (R. 20-59).¹ Scott Lindsey, an Administrator at one time, was also named as a defendant.² *Id.* In response, the original Defendants sought dismissal due to Plaintiff’s failure to comply with certain provisions of Mississippi’s Medical Malpractice Tort Reform Act, §§15-1-36(15) and 11-1-58. (R. 60-64). The Hinds County Circuit Court denied the motion, finding as follows:

1. Defendants filed this Motion to Dismiss alleging that the Plaintiff failed to comply with the sixty (60) day notice requirement and the Certificate of Consultation with an expert of the Mississippi Model Malpractice Tort Reform Act. Miss. Code Ann. §15-1-36(15) and §11-1-58.
2. Mississippi Code Annotated §15-1-36 (14) clearly states that “The limitation established by the 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.” Herein, Plaintiff’s decedent died on July 31, 2001. Accordingly any such limitations imposed by §15-1-36 cannot be applied

¹Appellants citation form is as follows: Citation to the record is (R.____).

²For clarity, Forest Hill Nursing Center and Scott Lindsey will be referred to collectively as “the original Defendants.” Scott Lindsey was subsequently dismissed and Rhonda Bounds, a former Administrator improperly substituted.

in this matter.

3. Miss. Code Ann. § 15-1-36(15), which sets forth the sixty (60) day notice requirement, was enacted during the 2002 legislative session and is likewise not applicable herein.
4. §11-1-58 of the Mississippi Code Annotated sets forth the Certificate of Consultation requirements. Additionally, this section was enacted during the 2002 session and cannot be applied herein.
5. The Court notes that MRCP 12(b)(6) governs Motion(s) to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted. The comment to the rule states that, "...to grant the [12(b)(6)] motion, there must appear to a certainty that the plaintiff is entitled to no relief under any set of facts that could be proved in support of the claim."
6. After reviewing the pleadings and other submissions, having heard the argument of the parties, and being otherwise advised in premises, the Court finds that because factual matters exist that must be resolved by the jury, the plaintiff is entitled to proceed with his case. As a result, the Defendant's Motion to Dismiss First Amended Complaint is not well taken and should be denied.

(R. 584-85). A subsequent petition for interlocutory appeal was denied by this Court as being untimely. (R. 391).

Thereafter, on June 3, 2005, Plaintiff filed a Notice of Substitution of True Names of alleged John Doe Defendants and Amendment to Complaint. (R. 194-202). Objections to the substitutions, as well as motions to dismiss were filed, again based

upon both the failure to provide sixty-days notice prior to filing suit and failure to attach a Certificate of Expert Consultation. The lower court heard arguments of the parties and ordered the substitutions.³ (R. 836-37). No actual signed order was ever entered by the Court denying the Motion(s) to Dismiss. The court, however, verbally denied the Motions in the May 23, 2005 hearing.

Aggrieved by Judge Kidd's rulings, the original Defendants, Forest Hill Nursing Center, along with newly named Defendants Hugh Franklin, A.D. Buffington, Long Term Care Management and Rhonda Bounds, joined the interlocutory appeal filed by Timothy Estes, M.D. An appeal of a trial court's denial of a motion to dismiss is reviewed under the *de novo* standard. *Arceo v. Tolliver*, __ So. 2d __, 2006 WL 3317036 (Miss. Nov. 16, 2006) (rehearing denied) (citing *Monsanto v. Hall*, 912 So. 2d 134, 136 (Miss. 2005)).

STATEMENT OF FACTS

This Appeal primarily centers around the application and enforcement of the procedural requirements of Mississippi's Medical Malpractice Tort Reform Act. Defendant Rhonda Bounds has a second argument related to the Lower Court's

³ A separate Order was entered regarding the substitution of Defendant Rhonda Bounds. (R. 840). Ms. Bounds argued her substitution was improper, based upon the fact that she had been named in a lawsuit filed by the same Plaintiff in June 2002. That Complaint was never served on any party. (R. 281-289). Her identity was clearly known at the time the 2003 suit was filed; therefore, her substitution was improper and made after the statute of limitations had expired.

allowing her to be substituted as a party defendant after the statute of limitations had expired.

Pearl Henry died on July 31, 2001. The instant suit was filed against the original Defendants on or about July 25, 2003, almost seven months after the Mississippi Medical Malpractice Tort Reform Act went into effect. Notice was not provided either to Forest Hill Nursing Center or Scott Lindsey prior to Plaintiff filing suit. In lieu of filing an answer, the original Defendants filed a Motion to Dismiss citing noncompliance with certain provisions of the Act.

In response, Plaintiff asserted that neither the sixty-day notice requirement of §15-1-36(15) nor the requirement of attaching a Certificate of Expert Consultation applied. It was further argued that amendments to the Act in 2002 would not apply since Pearl Henry died prior to the effective date. Plaintiff additionally argued that Miss. Code Ann. §15-1-36(14) limited the necessity of the sixty-day notice requirement “only to actions the cause of which occurred on or after January 1, 2003.” (R. 66). In making this argument, Plaintiff misinterpreted the term “limitation” found in Miss. Code Ann. §15-1-36(14). Section 14 addresses the application of the new two - year statute of limitations, but has no effect on the notice requirement found in the following section.

With regard to Miss. Code Ann. §15-1-36(15), Plaintiff did admit his failure to provide notice under the Act, but then asserted such notice was inapplicable. (R. 65-69). Plaintiff further proposed the Complaint, in and of itself, served as notice since an Amended complaint was filed after the original Defendants sought dismissal of the case.⁴

Plaintiff further argued he was unable to attach a Certificate of Expert Consultation because of the close proximity of the running of the statute of limitations. (R. 72-73). Plaintiff argued the reason for not attaching the Certificate was the result of his failure to receive the medical records from Forest Hill Nursing Center. (R. 76). This argument is nonsensical as Plaintiff's Counsel did not request the medical records until November 20, 2003, *four (4) months after this lawsuit was filed*. The medical records however, had been previously produced on July 14, 2002.⁵

Plaintiff's second argument makes the first completely irrelevant. He argued the Act did not apply, but, regardless was in compliance by subsequently filing a

⁴On October 12, 2003, Plaintiff filed his First Amended Complaint. He argued the filing of the Complaint provided notice, stating, "[n]otice was given the Defendant when the Complaint was first filed on July 25, 2003." (R. 78). He further asserted that "[t]his complies with Miss. Code Ann. § 15-1-36(15)." *Id.* Clearly, it would reduce this Statute to minutia if such an interpretation was allowed to stand.

⁵Plaintiff had filed the same lawsuit in 2002; however, it was not served on any party. (R. 281-87). The Gibson Law Firm was Counsel of Record and included on the authorization for release of medical records requested on November 26, 2001. (R. 255). These records were produced on July 24, 2002. (R. 426-28; 429-31). Plaintiff's argument of not having access to the records is disingenuous and should be disregarded by the Court.

purported Certificate of Consultation with the First Amended Complaint.⁶ (R. 176). Plaintiff's alternative arguments evidence his acquiescence to the requirements of the Act. The lower court did not have the benefit of *Pitalo* and its prodigy during argument on these issues.⁷ The lower court misapplied the requirements of the Act in denying the motions. (R. 569-70).

The original Defendants' Motion, as stated herein, was filed due to Plaintiff's failure to comply with Mississippi Code Ann. §§ 15-1-36(15) and 11-1-58. The Court construed both provisions as inapplicable since enacted during the 2002 legislative session. (R. 569-570). The lower court also opined that since Ms. Henry died on July 31, 2001, the limitations of §15-1-36(15) would not apply.⁸ (R. 569). The court further likened or converted the Motion to Dismiss to a summary judgment motion. (R. 570). The ruling of the lower court was unsupported in fact and is unfounded as a matter of law.

⁶Defendants contend the "certificate of consultation" despite being labeled as such, did not meet the requirements as outlined in the statute. Further, the savings clause within § 11-1-58(1)(b) or (4) affords the Plaintiff no relief under the circumstances as no certificate was attached when filed asserting a statute of limitations issue. Additionally, records must be requested before filing suit and not received to obtain a reprieve under section (4) of the statute. See Miss. Code Ann. § 11-1-58.)

⁷See *Lavon Kay Pitalo v. GPCH-GP, Inc., d/b/a Garden Park Medical Center and Dr. Ronald Graham*, 933 So. 2d. 927 (Miss. 2006); see also *Salvador Arceo v. Tolliver*, ___ So. 2d. ___ 2006 WL 3317036 (Miss. Nov. 16, 2006).

⁸In *Arceo*, referenced in footnote 7, the Plaintiff Tommie Tolliver passed away July 13, 2002, well before the October 2002 legislative session. *Arceo*, at ¶ 3.

Following this first ruling, Forest Hill Nursing Center and Scott Lindsey mistakenly filed a petition for interlocutory appeal directly with the lower court, rather than this Court.⁹ As a result of this procedural error, the petition was denied. (R. 887).

On or about June 3, 2005, Plaintiff substituted party defendants. (R.194-202). Objections to the substitutions were filed by all Defendants including Rhonda Bounds. All newly named Defendants filed Motions to Dismiss on the same grounds as Forest Hill Nursing Center's and Scott Lindsey's previously filed Motion. Defendants also asserted arguments regarding improper substitution of the parties. (R. 205-291, 302-362). Defendant Rhonda Bounds, having been named in the June 2002 suit that was never served on any party, objected to the substitutions. (R. 266-69). Ms. Bounds was previously identified in the 2002 suit. (R. 281-87). Plaintiff's claim that her identity was uncovered as part of discovery is not accurate. Ms. Bounds was known to the Plaintiff when he named her as a Defendant in 2002. Her substitution after the running of the statute of limitations was impermissible and does not meet the requirements of Mississippi Rule of Civil Procedure 9(h). The lower court erred in denying the motions to dismiss, and allowing the substitutions. (R.203-204).

⁹Defendants failed to realize the amendment to the Mississippi Rules of Appellate Procedure took effect one month prior and mistakenly filed the appeal with the wrong court. After transferring the matter to this Court, the request for interlocutory appeal was denied, not on the merits, but solely as a result of untimeliness. (R. 887).

As a result, on March 6, 2006, this Interlocutory Appeal was properly filed on behalf of Timothy Estes, M.D. and joined by all other Defendants.¹⁰ The issues before this Court are simple - - no Defendant was given sixty-day notice of Plaintiff's intent to file suit, nor did Plaintiff attach a Certificate of Expert Consultation with the Complaint. Accordingly, pursuant to now - settled Mississippi jurisprudence, the matter should be dismissed. Further, the improper substitution of Rhonda Bounds was made after the statute of limitations expired; therefore, all claims against her are barred and she should be dismissed.

ARGUMENT

DUE TO BOTH STATUTORY LAW AND MISSISSIPPI SUPREME COURT PRECEDENCE, THIS MATTER IS RIPE FOR DISMISSAL

A. Plaintiff failed to comply with the notice requirements of Mississippi Code Annotated §15-1-36(15); therefore dismissal is warranted.

Notice was not provided to any Defendant prior to Plaintiff filing suit even though this action was filed almost seven months after the notice requirements went into effect; therefore dismissal is warranted. This Court has previously ruled upon the notice provision of Mississippi's Medical Malpractice Tort Reform Act. *See Pitalo v. GPCH-GP, Inc.*, 933 So. 2d 927 (Miss. 2006), Miss. Code Ann. §15-1-36(15) (Rev.

¹⁰The notice issues and the objections to the substitutions were contained in separate petitions to this Court which were consolidated once accepted.

2003); *see also* *Salvador Arceo v. Tolliver* __ So. 2d. __, 2006 WL 3317036 (Miss. Nov. 16, 2006); *Doolittle v. Wyse*, No. 2005-IA-01443-SCT (Miss. October 5, 2006); and *Bologna v. Wyse*, No. 2005-IA-01235-SCT (Miss. October 5, 2006). The Act provides that actions based upon the professional negligence of a healthcare provider cannot be filed until the defendant has been given at least sixty (60) days prior written notice of the *intention* to begin an action. *See Pitalo*, 933 So. 2d. at 929. The language of the Statute specifically provides:

No action based upon the health care provider's professional negligence may be begun unless the defendant has been given at least sixty (60) days prior written notice of the intention to begin the action. No particular form of notice is required, but it shall notify the defendant of the legal basis of the claim and the type of loss sustained, including with specificity the nature of the injuries suffered. If the notice is served within sixty (60) days prior to the expiration of the applicable statute of limitations, the time for the commencement of the action shall be extended sixty (60) days from the service of the notice for said health care providers and others. This subsection shall not be applicable with respect to any defendant whose name is unknown to the plaintiff at the time of filing the complaint and who is identified therein by a fictitious name.

Miss. Code Ann. § 15-1-36(15) (Rev. 2003).

Notice was not provided to any Defendant prior to suit being filed. This failure is in total disregard of and completely extinguishes the purpose of the Act. Plaintiff admitted this failure to the lower court. (R. 183-87). Plaintiff's attempt to cure his

shortcomings by arguing an amended complaint could allow the original complaint to serve as notice should be disregarded as illogical. While creative, such an argument does not comport with the intent of the Act. To allow application of the statute in this manner in no way reflects legislative intent. To contend that the filing of an action in court can serve as notice of intent to file an action flaunts the purposes of the notice requirement.

Plaintiff incorrectly maintains that Miss. Code Ann. §15-1-36(14), which states, “[t]he limitation established by this section as to institutions for the aged and infirm shall apply only to actions the cause of which occurred on or after January 1, 2003,” can be read to suggest that the notice requirements do not apply even though the suit was filed seven months after the effective date of the Act. Clearly, §15-1-36(14) addresses application of the new two-year statute of limitation, since it would have been manifestly unjust to bar claims overnight upon passage of the Act when those claims would not have been barred before the Act went into effect. Therefore, §15-1-36(14) states that the limitation (the statute of limitation) only becomes two years for actions the cause of which occurred on or after January 1, 2003. However, as this court has held, the notice provisions apply to all actions filed after January 1, 2003. In *Arceo*, this Court applied the prerequisites to filing suit even though the cause in that case occurred before January 1, 2003. (See footnote 8). This case should be dismissed.

B. A Certificate of Expert Consultation was not attached to the Complaint; therefore, dismissal is warranted.

Dismissal is also proper as a result of Plaintiff's failure to attach the required Certificate of Expert Consultation pursuant to Miss. Code Ann. §11-1-58. Miss. Code Ann. §11-1-58 specifically provides:

(1) In any action against a licensed physician, health care provider or health care practitioner for injuries or wrongful death arising out of the course of medical, surgical or other professional services where expert testimony is otherwise required by law, the complaint shall be accompanied by a certificate executed by the attorney for the plaintiff declaring that:

(a) The attorney has reviewed the facts of the case and has consulted with at least one (1) expert qualified pursuant to the Mississippi Rules of Civil Procedure and the Mississippi Rules of Evidence who is qualified to give expert testimony as to standard of care or negligence and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis of such review and consultation that there is a reasonable basis for the commencement of such action; or

(b) The attorney was unable to obtain the consultation required by paragraph (a) of this subsection because a limitation of time established by Section 15-1-36 would bar the action and that the consultation could not reasonably be obtained before such time expired. A certificate executed pursuant to this paragraph (b) shall be supplemented by a

certificate of consultation pursuant to paragraph (a) or (c) within sixty (60) days after service of the complaint or the suit shall be dismissed; or

(c) The attorney was unable to obtain the consultation required by paragraph (a) of this subsection because the attorney had made at least three (3) separate good faith attempts with three (3) different experts to obtain a consultation and that none of those contacted would agree to a consultation.

(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.

(3) A certificate under subsection (1) of this section is not required where the attorney intends to rely solely on either the doctrine of “res ipsa loquitur” or “informed consent.” In such cases, the complaint shall be accompanied by a certificate executed by the attorney declaring that the attorney is solely relying on such doctrine and, for that reason, is not filing a certificate under subsection (1) of this section.

(4) If a request by the plaintiff for the records of the plaintiff’s medical treatment by the defendants has been made and the records have not been produced, the plaintiff shall not be required to file the certificate required by this section until ninety (90) days after the records have been produced.

(5) For purposes of this section, an attorney who submits a certificate of consultation shall not be required to disclose the identity of the consulted or the contents of the consultation; provided, however, that when the attorney makes a claim under paragraph (c) of subsection (1) of this

section that he was unable to obtain the required consultation with an expert, the court, upon the request of a defendant made prior to compliance by the plaintiff with the provisions of this section, may require the attorney to divulge to the court, in camera and without any disclosure by the court to any other party, the names of physicians refusing such consultation.

(6) The provisions of this section shall not apply to a plaintiff who is not represented by an attorney.

(7) The plaintiff, in lieu of serving a certificate required by this section, may provide the defendant or defendants with expert information in the form required by the Mississippi Rules of Civil Procedure. Nothing in this section requires the disclosure of any “consulting” or nontrial expert, except as expressly stated herein.

Miss. Code Ann. §11-1-58. Plaintiff’s Counsel failed to comply as required under the statute. In *Walker v. Whitfield Nursing Center, Inc.*, this Court was faced with the issue of attachment of a Certificate when filing suit. 931 So. 2d 583 (Miss. 2006). The Court found “[t]he language of Miss. Code Ann. §11-1-58 is clear and unambiguous that based on the failure to comply with its mandatory, statutory requirements, the Complaint shall be dismissed. *Walker* at 591. Just as in *Walker*, the Court determined the “Complaint must be dismissed.” This matter must likewise be dismissed.

The lower court, in applying Plaintiff’s logic, found compliance not to be necessary since the Decedent passed away July 31, 2001, prior to the 2002 Legislative session. (R. 569). As stated, *supra*, Plaintiff alternatively asserted he was unable to

comply due to the close proximity of the running of the statute of limitation six (6) days after filing suit. Plaintiff further asserted he was unable to comply because the Defendants failed to provide the medical records. Plaintiff must decide which way he would like to argue. However, no matter which direction is chosen, the argument must fail. Compliance with Mississippi's Medical Malpractice Tort Reform Act is mandatory for any and all actions filed on or after January 1, 2003.¹¹ *Pitalo*, 933 So. 2d 927; *See also Arceo*, __ So. 2d __, 2006 WL 3317036, (Miss. Nov. 16, 2006) at ¶8.

Plaintiff's ~~statute of limitation~~ argument should be disregarded. A savings clause is contained within §11-1-58, whereby a plaintiff has the opportunity to attach the required Certificate at a later date if the records have been requested but not produced. Miss. Code Ann. §11-1-58(4). In the case-at-bar, records were requested on behalf of the same Plaintiff in 2001 and produced by Forest Hill Nursing Center. (R. 426-28, R. 429-31).¹² The Gibson Law Firm was counsel of record in the lawsuit filed by Plaintiff, Willie McKee on June 11, 2002, as part of an apparent mass filing of nursing home abuse cases and drug cases by the Gibson Law Firm, as well as the Garvin Firm, Frazier Davidson, and Butch Cothren. (R. 407-418).

¹¹The decedent in that case expired July 13, 2002, also before the October 2002 Legislative Session, but this Court correctly held the case to fall within the purview of the Statute.

¹²Counsel for the Plaintiff was part of an "agreement" known as NHAJ, entered into by four attorneys, Charles Gibson, Bill Garvin, James Cothren and T. Roe Frazier, II. (R. 407-418).

Unfortunately for the Plaintiff, while the Complaint in 2002 was filed, it was never served and the statute of limitations continued to run. During this same time, the Gibson Law Firm filed suit against its NHAH partner law firms referenced, *supra*, over an apparent fee dispute.¹³ The Gibson Firm sued the other attorneys resulting in inaction and inattention to the lawsuit that had been filed June 11, 2002 and for which records had been previously requested and provided to the Plaintiff's attorneys. It is clear from the documentation that as part of this mass litigation, the Gibson Law Firm was responsible for receipt of the medical records, further, negating Plaintiff's argument. (R. 408). Regardless, neither inaction nor internal issues of Plaintiff's Counsel can be used to penalize the Defendants.

Plaintiff again requested records from the Defendants on November 20, 2003, four months *after* the instant suit was filed. (R. 432). Miss. Code Ann. §11-1-58(4) only protects a Plaintiff who has made a request for the records prior to filing suit and those records have not been received. Plaintiff received the records in 2002 prior to filing the 2002 suit. Plaintiff requested the records a second time, 4 months after filing the instant suit, the first time as part of the 2003 suit, and said request was responded to by the Defendant facility. (R.433). As such, this Court should disregard Plaintiff's arguments and dismiss this action.

¹³An affidavit of one of the attorneys sued by the Gibson Firm outlined the claims asserted in the lawsuit. (R. 407-418).

C. Rhonda Bounds was improperly substituted as a party Defendant.

Rhonda Bounds, along with others, was substituted as a party Defendant on June 3, 2005. Ms. Bounds' substitution was unequivocally improper. Ms. Bounds was named in the 2002, unserved suit. (R. 281-87). The Gibson firm represented the Plaintiff in that suit as well. As such, her identity was known in 2002 *and in 2003* when this suit was filed. Plaintiff erroneously argued to the lower court that her name was identified as part of discovery. Ms. Bounds' substitution some three and a half years after the expiration of the statute of limitations was improper. The Plaintiff failed to meet the criteria of Mississippi Rule of Civil Procedure 9(h), therefore, Ms. Bounds substitution was impermissible. Rule 9(h) provides:

When a party is ignorant of the name of an opposing party and so alleges in his pleading, the opposing party may be designated by any name, and when his true name is discovered, the process and all pleadings and proceedings in the action may be amended by substituting the true name and giving proper notice to the opposing party.

Miss. R. Civ. P. 9(h).

In addition to the plain language of Rule 9(h), this Court has added a "reasonable diligence" test for a Plaintiff to attempt to ascertain the name of a fictitious party. *Womble v. Singing River Hosp.*, 618 So. 2d. 1252, 1266-68 (Miss. 1993). This Court later determined that this "reasonable diligence" must be exercised prior to the running of the statute of limitations. *Doe v. Mississippi Blood Services*,

Inc., 704 So. 2d 1016, 1018 (Miss. 1997). Plaintiff knew of Ms. Bounds' identity (both in name and job title), when the Gibson Law Firm filed suit on his behalf on June 11, 2002. (R. 281-87).

The statute of limitations began to run as to Rhonda Bounds no later than the death of Ms. Henry on July 31, 2001. Even if this Court were to hold there was a three year statute of limitations under Miss. Code Ann. §15-1-49 because the cause of action occurred before January 1, 2003, the statute would have run July 31, 2004, almost one year prior to substituting Ms. Bounds. Substitution of Rhonda Bounds on June 3, 2005 was improper. She should be dismissed with prejudice.

CONCLUSION

Plaintiff filed this lawsuit on July 25, 2003. Plaintiff failed to give notice to any Defendant prior to filing suit as required under Miss. Code Ann. §15-1-36(15). Plaintiff failed to attach a Certificate of Expert Consultation under §11-1-58 to the Complaint although records had previously been produced. This complete disregard of the procedural requirements of the Act warrants dismissal of the action.

Plaintiff substituted Defendant Rhonda Bounds in 2005. Mrs. Henry passed away July 31, 2001. Plaintiff knew her identity in 2002. As a result, her dismissal is proper. The lower court's allowance of her substitution pursuant to Miss. R. Civ. P. 9(h) was improper. Ms. Bounds should be dismissed, as should this action in its entirety.

This the 9th day of January, 2007.

Respectfully submitted,

Forest Hill Nursing Center, A.D. Buffington,
Hugh Franklin, Long Term Care Management
LLC and Rhonda Bounds

A handwritten signature in black ink, appearing to read 'S. Mark Wann', is written over a horizontal line.

S. Mark Wann, Esquire (MSB # [REDACTED])

Marjorie S. Busching (MSB # [REDACTED])

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date set forth hereinafter, a true and correct copy of the above and foregoing document was forwarded *via U.S. Mail* to the following:

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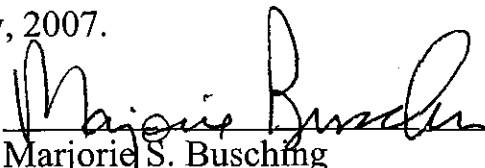
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Honorable Winston L. Kidd
Hinds County Circuit Court Judge
Post Office Box 327
Jackson, MS 39205-0327

Dated this the 9th day of January, 2007.


Marjorie S. Busching