

IN THE SUPREME COURT OF MISSISSIPPI
NO. 2006-IA-00859-SCT

MISSISSIPPI STATE VETERANS AFFAIRS BOARD APPELLANT/DEFENDANT

VS.

BEVERLY PETTIGREW KRAFT, PERSONAL
REPRESENTATIVE OF THE WRONGFUL DEATH
BENEFICIARIES AND HEIRS AT LAW OF BILLY L.
PETTIGREW, DECEASED; AND INDIVIDUALLY AS
THE DAUGHTER AND AN HEIR AT LAW OF
BILLY L. PETTIGREW, DECEASED; AND THE
ESTATE OF BILLY L. PETTIGREW, BY AND
THROUGH BEVERLY PETITGREW KRAFT,
ADMINISTRATRIX OF THE ESTATE

APPELLEE/PLAINTIFF

BRIEF OF APPELLANT

Senith C. Tipton (MSB No. [REDACTED])
Faye Murphree James (MSB # [REDACTED])
Melanie H. Morano (MSB No. [REDACTED])
Wilkins, Stephens & Tipton, P.A.
One LeFleur's Square, Suite 108
4735 Old Canton Road [39211]
P. O. Box 13429
Jackson, MS 39236-3429
Telephone: (601) 366-4343
Facsimile: (601) 981-7608

STATEMENT OF THE ISSUES

- A. Whether the Hinds County Circuit Court erred in denying MSVAB's motion for summary judgment, as a matter of law, because the statute of limitations had expired when the notice of claim and complaint were filed.
- B. Whether the Hinds County Circuit Court erred in denying MSVAB's motion for summary judgment, as a matter of law, because the plaintiff failed to attach the required expert certificate of consultation to the complaint when it was filed.
- C. Whether the Hinds County Circuit Court erred in denying MSVAB's motion for summary judgment, as a matter of law, because the plaintiff failed to establish even a *prima facie* case of vicarious liability on the part of the defendant MSVAB for alleged negligence of the nursing home caregivers who were not employed by MSVAB, but rather by an independent contractor management company which is not a defendant in this lawsuit.

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STATEMENT OF THE CASE

Mr. Billy L. Pettigrew, deceased, was a resident at the veteran's nursing home in who owns Jackson, Mississippi ("MSVAB") from April 1998 until his transfer to the hospital for medical treatment on August 8, 2001. Mr. Pettigrew suffered from several debilitating health diseases and conditions at the time of his admission, including but not limited to complications from one or more cerebrovascular strokes leaving him with left-sided paralysis and only partial use of his right arm. Mr. Pettigrew was also unable to ambulate and required a feeding tube to assist with his nutrition. Mr. Pettigrew remained at the hospital until his death on October 4, 2001, approximately two months after his transfer from the MSVAB facility. conduct date for survivors claim

Plaintiff filed her notice of claim pursuant to the Mississippi Tort Claims Act ("MTCA") on October 2, 2002, on behalf of the wrongful death beneficiaries of Mr. Pettigrew. (R.E. 1; C.P. 0038-0041.) She then filed her lengthy complaint on April 2, 2003, alleging wrongful death and "personal injuries and multiple acts of negligence during the life of Billy L. Pettigrew". (R.E. 2; C.P. 0005-0037.) Plaintiff's complaint identified no specific dates of allegedly negligent conduct to support her multiple vague allegations. Defendant timely answered plaintiff's complaint, putting plaintiff on notice of defendant's affirmative defenses of MTCA protections, bar of limitations, absence of liability, and plaintiff's failure to state a claim for which relief can be granted. (See R.E. 3; C.P. 0042-0054.) wait plead extends SLD ✓ statute

Defendant's motion for summary judgment for a breach of the statute of limitations and lack of certificate of expert consultation was served on March 10, 2005. (R.E. 4; C.P. 0055-0124; R.E. 5; C.P. Defendant's Reply Brief dated June 10, 2005, attached as an exhibit to Defendant's Corrected Motion to Supplement the Record.) Defendant's motion for summary judgment asserting a lack of vicarious liability for the employees of the independent contractor company who managed and operated the facility was served on April 7, 2006. (R.E. 6; C.P. 0170-0189.) A hearing was had on the matters and the trial court denied defendant's motions in orders entered on May 2, 2006. (R.E. 6; C.P. 0384-0387.) Defendant then timely filed its petition for interlocutory appeal requesting the Supreme Court's review of the trial court's denial of defendant's motions for summary judgment. (C. P. 0388-0389.)

SUMMARY OF THE ARGUMENT

Defendant offered three grounds for summary judgment: (1) breach of the applicable one-year statute of limitations under *Miss. Code Ann.* § 11-46-11; (2) lack of compliance with the mandatory certificate of expert consultation under *Miss. Code Ann.* § 11-1-58; and (3) defendant's lack of vicarious liability for the actions of employees of the independent contractor management company. The trial court erred as a matter of law in its denial of summary judgment on each of these grounds. A trial court's denial of summary judgment is reviewed de novo. *Jenkins v. Pensacola Health Trust*, 933 So. 2d 923, 925 (Miss. 2006).

The first of the three grounds for summary judgment was plaintiff's breach of the applicable one-year statute of limitations. Under the MTCA, the timely filing of a notice of claim tolls the one-year statute of limitations for a period of 95 days, after which plaintiff has an additional 90 days in which to file her complaint. Mr. Pettigrew, deceased, was a long-term resident of the facility from April 1998 until his transfer to the hospital on August 8, 2001. He died on October 4, 2001, while still in the hospital. Plaintiff maintains that the statute of limitations on her medical negligence and wrongful death action began to run on October 4, 2001, the date of Mr. Pettigrew's death; thus she claims her notice of claim filed on October 2, 2001, was timely filed. Defendant maintains that under current Mississippi case law and the language of the MTCA, the applicable one-year statute of limitations began to run, at the latest, on August 8, 2001, the date of Mr. Pettigrew's discharge from the facility. Under defendant's calculations, plaintiff's notice of claim filed October 2, 2002, was filed greater than one year next after the last possible date of allegedly negligent conduct

for WAB

(August 8, 2002), and therefore plaintiff's lawsuit filed on April 2, 2003, was time barred. Recent Mississippi case law and the language of *Miss. Code Ann.* § 11-46-11 support defendant's calculations.

Defendant's second ground for summary judgment was plaintiff's non-compliance with the certificate of expert consultation requirement under *Miss. Code Ann.* § 11-1-58, for which a strict compliance standard is applied. It is undisputed that plaintiff did not accompany her original complaint with the required certificate of expert consultation, and that dismissal was proper for this statutory breach. Plaintiff's assertion that she be excepted from compliance with the statutory mandate months after the date it was made effective by the Legislature is without support in Mississippi law. Therefore, under the plain language of *Miss. Code Ann.* § 11-1-58 and case law, dismissal is proper.

The third ground for summary judgment presented to the trial court was defendant's immunity from liability under Mississippi law and the MTCA because the allegedly negligent care was provided to Mr. Pettigrew by employees of an independent contractor management company, and not by employees of MSVAB; thus, MSVAB is an improper party to this action. The Legislature specified by statute that MSVAB is allowed to contract with independent companies to manage and operate MSVAB nursing home facilities, as was done in this case. Businesses are generally not liable for the negligence of independent contractors. Governmental entities are specifically excepted from liability for the allegedly negligent conduct of independent contractors under the MTCA. Accordingly, defendant has no vicarious liability for the care providers in this case. Plaintiff's assertion that MSVAB

is nonetheless liable despite the immunity under Mississippi law and the MTCA is incorrect and without authority. Defendant's assertion that it is immune from liability for the negligent conduct of employees of the independent contractor management companies is sound under Mississippi case law and the MTCA, and thus dismissal is proper.

There is no genuine issue of material fact that plaintiff has breached the applicable statute of limitations, failed to comply with the mandatory certificate of expert consultation, and sued the wrong party where the independent contractor management company employed and controlled the allegedly negligent care providers. Therefore, defendant requests this Honorable Court to reverse the trial court's denial of summary judgment and dismiss MSVAB from plaintiff's action, with prejudice, for any or all of the above-stated grounds.

ARGUMENT

- A. **Whether the Hinds County Circuit Court erred in denying MSVAB's motion for summary judgment, as a matter of law, because the statute of limitations had expired when the notice of claim and complaint were filed.**

In this case, the last possible date of conduct for which a claim could be made against this defendant was August 8, 2001, the date of Mr. Pettigrew's discharge from the facility. negates
discovery
aspect
Plaintiff was obviously aware, or thought she was aware, of the alleged negligence at that time, because she and her attorney, Jim Kitchens, went to the facility within days of the transfer (but weeks before Mr. Pettigrew's death) to take pictures. (C.P. pp. 116-118, Plaintiff's Deposition, attached as exhibit to Defendant's Corrected Motion to Supplement Record.) *

Mississippi case law interpreting the wrongful death statute applies the statute of limitations of the underlying tort to a wrongful death claim, with said statute of limitations to begin running on the date of the tort when the decedent obtained a right of action, rather (<->)
than the date of death. Claims for wrongful death filed under the MTCA even more stringently require this method of calculation. The language of the MTCA clearly sets the beginning of the one-year statute of limitations for all actions brought under the MTCA on the "date of the tortious, wrongful or otherwise actionable conduct," and specifies that these limitations control in all actions brought under the provision of that chapter, notwithstanding the nature of the claim. *Miss. Code Ann.* § 11-46-11(3).

The one-year statute of limitations under the MTCA applied to this case, which would be tolled for a period of time by the timely filing of plaintiff's notice of claim. Plaintiff was required to file her notice of claim no later than August 8, 2002, for this tolling

to take place; however, plaintiff did not file her notice of claim until October 2, 2002, several months after the expiration of the statute of limitations. Thus, plaintiff's complaint filed on April 2, 2003, was time barred.

Calculation of the statute of limitations from the dates of injury/discovery rather than the date of death in wrongful death actions is supported by Mississippi case law. "A wrongful death action, since it is predicated on an underlying tort, is limited by the statute of limitations applicable to the tort resulting in the wrongful death." *Wells v. Radiator Specialty Company*, 413 F. Supp. 2d 778, 782 (S.D. Miss. 2006) citing *Thiroux ex rel Cruise v. Austin ex rel Arceneaux*, 749 So. 2d 1040, 1042 (Miss. 1999). "A wrongful death beneficiary is only allowed to bring claims that the decedent could have brought if the decedent had survived . . ." and "the decedents may NOT bring claims the decedent could not have brought, had the decedent survived." *Cleveland v. Mann*, 942 So. 2d 108, 118-119 (Miss. 2006) (*in dicta*). A "wrongful death action is a derivative action brought by the beneficiaries who are subject to all of the defenses that would have been available against the decedent." *Wells* at 782, citing *Lee v. Thompson*, 859 So. 2d 981 (Miss. 2003).

Simply put, the wrongful death action accrues to the beneficiaries of the decedent upon his death and the time-bar for the filing of a wrongful death action begins, for the beneficiaries, at that point. However, the accrual of the wrongful death action does not toll the limitations period for the tort which caused the death. Therefore, under the facts of this action, the time bar commences on the date the plaintiff, or her decedent, discovered, or by reasonable diligence should have discovered, the injury.

Wells at 782.

In *Jenkins v. Pensacola Health Trust, Inc.*, 933 So. 2d 923 (Miss. 2006), the deceased lived at the Greenbough Nursing Center from December 27, 1997, until her death on October 4, 2001. Administratrix of her estate filed an action against the nursing home company alleging that she sustained severe personal injuries during her residency which led to her death. *Jenkins* at 924. In *Jenkins*, the Court held “that the beneficiaries could not bring a claim for wrongful death where the statute of limitations had expired and would have prevented the decedent from bringing the claim herself.” *Cleveland* at 119. Noting that the applicable statute of limitations was three years, the Court found that *Jenkins* may not rely on any act of negligence which allegedly occurred more than three years before the complaint was filed. “Claims - whether for negligence or wrongful death - that were not brought within the statute of limitations are barred by that statute.” *Jenkins* at 926.

In *Wells v. Radiator Specialty Company*, 413 F. Supp. 2d 778, 782 (S. D. Miss. 2006), the decedent was diagnosed with acute myelogenous leukemia (“AML”) on November 3, 2000, leading to his death on November 9, 2001. Plaintiff’s wrongful death action was filed on October 22, 2004. The Court counted the statute of limitations from the date the AML was diagnosed rather than the date of death and found that plaintiff’s claim was barred by the applicable three-year statute of limitations. *Wells* at 780-783.

Similarly, in *May v. Pulmosan Safety Equipment Corporation*, 948 So. 2d 483 (Miss. Ct. App. 2007), Mr. May was diagnosed in 1971 with silicosis, a condition which was discovered to be the result of allegedly tortious conduct by the defendant, at the latest, on March 11, 1997. On March 18, 2002, Mr. May filed a claim for personal injuries but died

shortly thereafter on May 6, 2002. His wife was substituted as plaintiff, and since this was a mass tort action, it already alleged wrongful death. Under the facts of this case, the Supreme Court determined the three-year statute of limitations began to run on March 11, 1997, and expired on March 11, 2000; thus plaintiff's complaint for negligence and wrongful death was belatedly filed and was time barred. *May* at 485.

Case law interpreting the MTCA has specifically found that the one-year statute of limitations begins to run on the date of the allegedly negligent conduct, not the date of death. It is undisputed that this action against MSVAB falls under the MTCA, *Miss. Code Ann.* § 11-46-1 et al. The MTCA provides for a one-year statute of limitations stating "all actions brought under the provisions of this chapter shall be commenced within one year next after the date of the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based, and not after." *Miss. Code Ann.* § 11-46-11(3). By the clear language of Mississippi law, the statute of limitations applicable to all actions brought under the MTCA is the one-year statute of limitations and no other statute of limitations applies. See *Stockstill v. State*, 854 So. 2d 1017 (Miss. 2001). If the plaintiff files his notice of claim within the specified one year of the date of the allegedly negligent conduct, the statute of limitations is tolled for a period of time, but no tolling takes place without the timely filing of a notice of claim. *Miss. Code Ann.* § 11-46-11. "The limitations period provided herein shall control and shall be exclusive in all actions subject to and brought under the provisions of this chapter, notwithstanding the nature of the claim, the label or other characterization the claimant may use to describe it, or the provisions of any other statute of limitations which

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would otherwise govern the type of claim or legal theory if it were not subject to or brought under the provisions of this chapter.” *Miss. Code Ann.* § 11-46-11(3).

“The statute of limitations contained in § 11-46-11 of the MTCA sets its accrual on the date of the occurrence.” *Ellisville State School v. Merrill*, 732 So. 2d 198, 202 (Miss. 1999). The clear and unambiguous language in the MTCA states that the statute of limitations begins to run on the date that the allegedly negligent conduct took place, and not after. *Miss. Code Ann.* § 11-46-11(3). The standard applied to the statute of limitations under the MTCA is strict compliance. *Burge v. Richton Municipal Separate School District*, 797 So. 2d 1062, 1065, ¶ 11 (Miss. Ct. App. 2001). “In considering a statute passed by the legislature, . . . the first question a Court should decide is whether the statute is ambiguous. If it is not ambiguous, the Court should simply apply the statute according to its plain meaning and should not use principles of statutory construction.” *Allred v. Yarbrough*, 843 So. 2d 729 (Miss. 2003). The Supreme Court has a “constitutional mandate to faithfully apply the provisions of constitutionally enacted legislation.” *University of Mississippi Medical Center v. Easterling*, 928 So. 2d 815, 820 (Miss. 2006).

In wrongful death actions, the Mississippi Supreme Court has consistently construed the MTCA statute of limitations to begin on the dates of the allegedly wrongful conduct, rather than from the date of death. In *Marshall v. Warren County Board of Supervisors*, 831 So. 2d 1211, 1212 (Miss. 2002), the plaintiff’s husband began to exhibit violent behavior in July and was taken into custody on July 31, 1999. On that same day, he was released without provision for his medical or psychological needs, whereupon he took an overdose

of prescription medication the following day and died from the overdose several days later. The Court found that the action arose on the date of the allegedly negligent conduct which was July 31, 1999, and not the date of death several days later. Following the plain meaning of the statute, the Court found plaintiff's claim filed greater than one year after the date of allegedly negligent conduct to be time barred. Similar cases in which the Supreme Court counted the statute of limitations from the date of the accident or allegedly negligent conduct rather than the date of death are *City of Tupelo v. Martin*, 747 So. 2d 822, 827 (Miss. 1999), *Williams v. Delta Regional Medical Center*, 740 So. 2d 284, 285 (Miss. 1999), and *City of Jackson v. Sutton*, 790 So. 2d 977, 978 (Miss. 2001).

Similar to this case, the Supreme Court addressed the counting of the statute of limitations in a wrongful death action under the MTCA in *Pounds v. Mississippi Department of Health*, 946 So. 2d 413 (Miss. Ct. App. 2006). In *Pounds*, the mother of a deceased prematurely born infant brought a medical malpractice and wrongful death lawsuit against a Mississippi State Department of Health clinic. The last date of treatment at the defendant facility was August 6, 1999, where the infant was born several days later and died on October 22, 1999. The Court found that the statute of limitations expired no later than August 6, 2000, one year next after the last date of care, and that plaintiff's complaint filed on January 24, 2001, was time barred. *Pounds* at 416-417.

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“In medical malpractice and wrongful death actions filed under the Mississippi Tort Claims Act, the statute of limitations begins to run from the date of the tortious, wrongful

or otherwise actionable conduct on which the liability phase of the action is based.” 80 ALR 2d 368 ¶ 4; citing *Pounds*.

Statute of limitations set forth by Mississippi Tort Claims Act began to run as to mother’s malpractice and wrongful death claims, rising from alleged improper prenatal care and death of her prematurely-born infant on date that last alleged tortious act occurred, namely date that mother received prenatal care at defendant facility, rather than on date of infant’s death.

70 ALR 4th 535, ¶¶ 7 and 22, citing *Pounds*.

It is clear that under Mississippi law and the MTCA, the counting of the statute of limitations in a wrongful death claim begins on the date of allegedly negligent conduct. The statute of limitations in this case was one-year under the MTCA, expiring on August 8, 2002. As plaintiff’s notice of claim had not been filed prior to the expiration of the one-year statute of limitations, no tolling of the statute of limitations took place. Therefore, plaintiff’s notice of claim filed on October 2, 2002, and plaintiff’s lawsuit filed April 2, 2003, were filed after the applicable statute of limitations had expired. Thus under Mississippi law, plaintiff’s claim is time-barred and dismissal is proper.

B. Whether the Hinds County Circuit Court erred in denying MSVAB’s motion for summary judgment, as a matter of law, because the plaintiff failed to attach the required expert certificate of consultation to the complaint when it was filed.

Plaintiff’s complaint was not accompanied by a certificate of expert consultation, as was required by law. For non-compliance with this pre-requisite to filing suit, dismissal is proper. *Miss. Code Ann.* § 11-1-58(1)(a) states:

In any action against a licensed physician, healthcare provider or healthcare 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 must 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.

If the attorney is unable to obtain said consultation due to the statute of limitations, the legislature provided an alternative in *Miss. Code Ann. § 11-1-58(1)(b)*, where plaintiff's complaint is to be accompanied by a certificate so stating and then the certificate of expert consultation pursuant to § 11-1-58(1)(a) or (c) must be supplemented within 60 days after service of the complaint "or the suit shall be dismissed." Section 11-1-58 took effect and was in force from and after January 1, 2003, and applied to all causes of action filed on or after that date. The Mississippi Supreme Court "has clearly indicated that when reviewing statutory requirements, this Court will examine the record to determine compliance or non-compliance." *Walker v. Whitfield Nursing Center*, 931 So. 2d 583, 589 ¶19 (Miss. 2006); citing *University of Mississippi Medical Center v. Easterling*, 928 So. 2d 815, 820 (Miss. 2006).

Suit filed
Apr 2, 2003

Plaintiff's allegations against this defendant require qualified expert support to prove the healthcare provided was below the standard of care and that said alleged breach of the

standard of care was the proximate cause of the injury and death of Billy Pettigrew. It is undisputed that plaintiff's complaint was filed on April 2, 2003, which is after the effective date of § 11-1-58. It is further undisputed that plaintiff's original complaint lacked the required certificate of expert consultation pursuant to (a) or (b) and that no certificate of expert consultation was supplemented within the 60 days as required by law. (Although plaintiff filed a belated certificate of expert consultation on April 25, 2006, upon direction of the trial court, this untimely effort was insufficient to satisfy the statutory requirement as a matter of law.) (C.P. 0360-0362) Thus, plaintiff's claim of medical negligence and/or wrongful death should properly be dismissed under Mississippi law.

The Supreme Court first interpreted § 11-1-58 in *Walker v. Whitfield Nursing Center*, 931 So. 2d 583 (Miss. 2006), where the plaintiff asserted negligence and wrongful death in the care provided to a nursing home resident. Plaintiff failed to attach the required certificate of expert consultation, but later in response to defendant's motion for summary judgment asserted that he had consulted with a nursing expert prior to the filing of the lawsuit. The Court found that "clearly, nothing was filed or supplied at the time the complaint was filed or served in April 2004." *Walker* at 589, ¶ 21. The Court concluded that "the 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." Thus, the Supreme Court affirmed the trial court's granting of summary judgment and dismissal with prejudice. *Walker* at 591-592, ¶¶ 31-34.

The Court again interpreted § 11-1-58 in *Caldwell v. North Mississippi Medical Center, Inc.*, 956 So. 2d 888 (Miss. 2007), where the plaintiff and her husband brought a medical malpractice action against a medical center and physician. The Court found no certificate accompanied the original complaint nor was one filed within 60 days of service of the original complaint and that an expert disclosure filed several months after the complaint was insufficient to satisfy the statute, *Caldwell* at 893, ¶¶ 19-21. The Supreme Court again applied a strict compliance standard to the filing of the required certificate of expert consultation and affirmed the trial court's dismissal. *Caldwell* at 895, ¶¶ 23-26.

There is no genuine issue of material fact that no certificate of expert consultation pursuant to § 11-1-58(1)(a) accompanied plaintiff's original complaint. There is likewise no genuine issue of material fact that no certificate pursuant to § 11-1-58(b) accompanied service of plaintiff's original complaint, nor was a certificate of expert consultation provided in supplement within 60 days thereafter. Thus, plaintiff failed to strictly comply with the clear statutory mandate and dismissal is proper.

- C. Whether the Hinds County Circuit Court erred in denying MSVAB's motion for summary judgment, as a matter of law, because the plaintiff failed to establish even a *prima facie* case of vicarious liability on the part of the defendant MSVAB for alleged negligence of the nursing home caregivers who were not employed by MSVAB, but rather by an independent contractor management company which is not a defendant in this lawsuit.**

Mr. Pettigrew resided at the veteran's facility which was managed and operated by independent contractor companies and not by employees of the state. As the state has no

liability for the alleged negligence of non-governmental employees, it is clear that MSVAB is an improper party to this action and dismissal is proper.

The Legislature unambiguously provided that “[t]he State Veterans Affairs Board may contract with non-governmental entities or the United States Department of Veterans Affairs to operate state veterans homes.” *Miss. Code Ann.* § 35-1-21 (2). During the years that Mr. Pettigrew was a resident of the facility, MSVAB contracted with two non-governmental entities to operate and manage the subject Jackson home- Affiliated Nursing Homes, Inc. (“Affiliated”) (a Louisiana-based company) and Diversified Health Services (DHS) of Mississippi, L.L.C. (“Diversified”) (a Tennessee-based company). (R.E. 7- 1, 2, & 3.) These contracts specifically provided that the healthcare workers caring for Mr. Pettigrew at MSVAB were the employees of the management companies, with Diversified the independent contractor company providing care during the majority of his residency.¹

“An employee is a person employed by an employer to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right of control by the employer. An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor is subject to the other’s right to control with respect to his physical conduct in the performance of the undertaking.” *Heirs and Wrongful Death Beneficiaries of Branning v. Hinds Community*

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The contract for the first two and a half months of Mr. Pettigrew’s residency (April 1998 - June 30, 1998) was with Affiliated, a period for which the statute of limitations has long run. The contracts with Diversified covered from July 1, 1998, through the remainder of his residency.

College District, 743 So. 2d 311, 316, ¶ 28 (Miss. 1999). "An employer of an independent contractor is not responsible for the torts of the contractor." *Branning* at 218, ¶ 36. "Generally, an employer is liable for the negligent acts of its employee done in the course and scope of his employment under the doctrine of *respondeat superior*, but an employer is not liable for the negligence of an independent contractor." *McKee v. Brimmer*, 39 F. 3d 94 5th Cir. 1994. In determining whether an individual is an employee or an independent contractor, the Mississippi Supreme Court has suggested a number of factors for a court to consider. *Branning v. Hinds Community College District*, 743 So. 2d 311, 316-317 (Miss. 1999). However, the right to control the details of the employee's work is still the primary factor. See *McKee v. Brimmer*, 39 F.3d 94, 96 (5th Cir. 1994).

Under the MTCA, sovereign immunity is waived only for the torts of employees of governmental entities while acting in the course and scope of their employment. *Miss. Code Ann.* § 11-46-5(1), and § 11-46-7(2). The MTCA specifically defines a covered employee as follows:

"Employee" means any officer, employee or servant of the state of Mississippi or a political subdivision of the state, including elected or appointed officials and persons acting on behalf of the state or a political subdivision in any official capacity, temporarily or permanently, in the service of the state or a political subdivision either with or without compensation. The term "employee" shall not mean a person or other legal entity while acting in the capacity of an independent contractor under contract to the state or a political subdivision

Miss. Code Ann. § 11-46-1(f). (Emphasis added.) The waiver of immunity under the MTCA does not apply to independent contractors, and state entities have no liability for the conduct of independent contractors. See *Watts v. Sang*, 828 So. 2d. 785 (Miss. 2002). “With few exceptions, independent contractors are excluded from the definition of ‘state employee’ and therefore do not benefit from the provisions of the sovereign immunity statute.” *Estate of Johnson v. Chatelain*, 943 So. 2d 684 ¶ 10 (Miss. 2006).

In *Branning v. Hinds Community College District*, 743 So. 2d 311 (Miss. 1999), passenger April Branning was killed in a plane crash where pilot Michael Tomlinson was found to have had an excessive blood alcohol level. Hinds Community College District (“HCCD”) was the airport authority for the John Bell Williams Airport, where the plane departed. HCCD had contracted with Tomlinson Avionics, Inc. to be its airport manager and fixed based operator, with pilot Michael Tomlinson serving as physical manager and operator of the subject airport under this contract. After examining the language of the contractual agreement and under the facts of the case, the Supreme Court found that Tomlinson Avionics was an independent contractor of HCCD and that Michael Tomlinson was an employee of Tomlinson Avionics, Inc., not HCCD. Based on this finding, the Supreme Court found that the lower court was correct in granting summary judgment for HCCD. See *Branning* at 318.

Similarly, in *Chisolm v. Mississippi Department of Transportation*, 942 So. 2d 136 (Miss. 2006), the plaintiff was involved in a motor vehicle accident precipitated by an 18 inch bolt which had been left on the road by construction workers. At the time of the accident, Great River Stone Company (“Great River”) was under contract with the

Mississippi Department of Transportation ("MDOT") to replace a bridge with an underground box culvert near the accident area. The Supreme Court found that although MDOT had developed the traffic plan and that the construction work had to comply with MDOT specifications, Great River was an independent contractor of MDOT, implementing MDOT's plan and maintaining control over the performance of the work. *Chisolm* at ¶¶ 7-17. The Court determined that "plaintiffs may not hold MDOT liable for the negligence of its contractor, Great River" and summary judgment was proper. *Chisolm* at ¶ 17, 22.

Plaintiff has improperly named MSVAB as defendant in this action. In plaintiff's complaint, she alleges that MSVAB has vicarious liability for the acts and omissions of employees of the nursing home. (R.E. 2, ¶¶ 9, 10 and 34.) These allegations of vicarious liability were denied by MSVAB in its answer and defenses. (R.E. 3, defenses 1 through 3, 13, 16, ¶¶ 9, 10 and 34.) MSVAB is a governmental entity that can only be sued under the MTCA. The plaintiff may recover from MSVAB only if employees of MSVAB were negligent in the care of Mr. Pettigrew. However, under the facts of this case, the persons providing care to Mr. Pettigrew were not employees of MSVAB, but were rather employed by Diversified.

Diversified was at all times expressly an independent contractor in its relationship to MSVAB. The contractual agreement beginning on July 1, 1999, and continuing after Mr. Pettigrew's transfer to the hospital on August 8, 2001, stated clearly:

The Contractor shall, at all times, be regarded as an independent Contractor and shall, at no time, act as an agent for the State. Nothing contained therein shall be deemed or

construed by the State, the Contractor, or any third party as creating the relationship of principal and agent, partners, joint venturers, or any similar such relationship between the State and the Contractor. Neither the method of computation of fees or other charges, nor any other provision contained herein, nor any acts of the State or the Contractor hereunder, creates or shall be deemed to create a relationship other than the independent relationship of the State and the Contractor. Contractor's personnel shall not be deemed in any way, directly or indirectly, expressly or by implication, to be employees of the State.

The Contractor shall be legally considered an independent Contractor and neither the Contractor nor its employees shall, under any circumstances, be considered servants or agents of the SVAB; and the SVAB shall be at no time legally responsible for any negligence or other wrongdoing by the Contractor, its servants, or agents.

(R.E. 7-3, p. 2.)

An examination of the contractual agreement in effect on or before August 8, 2001, reveals that Diversified was by contract and practice the employer for the nurses, assistants, and other persons providing care to Mr. Pettigrew. Diversified agreed to provide nursing care for the residents provided the written personnel policy for its employees. Diversified likewise hired and terminated its employees, and prior to hiring it investigated their backgrounds and health status and ensured they met all licensure/certification requirements.

(R. E. 6-3, pp. 3-4, 14, 6, 16.)

The day-to-day supervision and control of Diversified's employees was by agreement the sole responsibility of Diversified, who agreed to institute and maintain a properly documented quality control program. Diversified developed and managed the long-term care

program in effect at the facility on and before August 8, 2001. This program provided daily care including nursing services, record keeping and quality assurance as well as comprehensive health care including speciality therapy, social services, pharmaceutical services, activities services, rehabilitation services, and clerical support.. (R.E. 6-3; pp. 14-22.) Diversified likewise ensured the home and grounds were kept sanitary, neat and in good repair. (R.E. 6-3; p. 17.) Diversified agreed per the contract to operate the nursing home and bill MSVAB monthly for actual services rendered. MSVAB's rights and responsibility under its contractual agreement with Diversified was limited to such items as structural maintenance of the homes and provision of professional services such as physicians and pharmacies, but did not include the nursing and daily care alleged by plaintiff to have been negligently performed. (R.E. 6-3; pp. 22-24.)

In addition to providing the daily care for residents like Mr. Pettigrew, Diversified was also required to provide appropriate insurance coverage for property, professional liability, personal liability and general liability. (R.E. 7-3, pp. 8, 10, 15.) Diversified also agreed to assume responsibility for all claims of intentional or negligent conduct by its employees. (R.E. 7-3, p. 7.) The contractual agreement specifically stated "Nothing in this agreement shall be interpreted as excluding or limiting any tort liability of the Contractor for harm caused by the intentional or reckless conduct of the Contractor or for damages incurred through the negligent performance of duties by the Contractor." (R.E. 7-3, p. 7.)

The plaintiff's deposition clearly shows that she knew that a management company operated the MSVAB facility and she believed that the management company was the source

of the problem with her father's care. (R. E. 7; pp. 37, 45, and 47; C.P. plaintiff's deposition, an exhibit to corrected motion to supplement the record.) In fact, plaintiff testified that her father had previously resided in a Kosciusko MSVAB nursing home and had been moved to the Jackson nursing home because of care issues they experienced with the management company in Kosciusko. She testified "bear in mind, I found out later that the same management company managed both. If I had known that to begin with, I might have made - - or I might have suggested something different." (R.E. 8, p. 37.) When asked to clarify what management company she was referring to, the plaintiff stated:

A. Whatever the - - the same entity - - the same entity that managed the VA nursing home in Kosciusko managed the one in Jackson. I found that out later. Did not know that at the time, do not recall their name. But I believe it is accurately reflected in the style of the lawsuit.

Q. The Mississippi State Veterans Affairs Board?

A. No, there's a management company. And they not be - - they may not be named in that.

Q. Okay?

A. But there was a management company that actually ran the day-to-day operation.

(R.E. 8, p. 45.)

Ms. Kraft knew about the management company during the time that her father was a resident of the facility as indicated by her testimony that the management company's name was on the business card of certain key personnel such as the DON. She stated "but at some

point, I discovered that the state contracted with the management company. And I think it was reflected on - - on the business cards of like the director of nursing, the assistant director of nursing, it listed the name of that entity.” (R.E. 8; p. 47.)

There is no genuine issue of material fact that an independent contractor company operated and managed the MSVAB facility during the time period in question and employed the allegedly negligent employees and that Ms. Kraft knew that the management company operated the nursing home. Under the facts of this case, the trial court should have granted summary judgment as a matter of law in favor of the defendant MSVAB, finding that it could have no vicarious liability for the alleged errors or omissions of employees of the independent contractor company managing and providing Mr. Pettigrew’s care and was improperly made a party to this action. Thus, defendant MSVAB respectfully requests this Honorable Court to reverse the trial court’s denial of summary judgment on this issue and to grant defendant’s summary judgment motion for lack of vicarious liability under Mississippi law and the provisions of the MTCA, dismissing MSVAB from plaintiff’s complaint with prejudice.

CONCLUSION

There is no genuine issue of material fact that the allegedly negligent conduct occurred, at the latest, on August 8, 2001, and that plaintiff knew or thought she knew of the alleged negligence in August, 2001. There is no genuine issue of material fact that plaintiff's notice of claim served on October 4, 2002 and lawsuit filed on April 2, 2003, breached the one year statute of limitations under the MTCA, *Miss. Code Ann.*, § 11-46-11, and thus dismissal with prejudice is proper.

There is likewise no genuine issue of material fact that plaintiff wholly failed to accompany her complaint with the certificate of expert consultation required by *Miss. Code Ann.* § 11-1-58, and did not seek to remedy this statutory breach until long after the filing of defendant's motion for summary judgment. Thus, under the statutory language and Mississippi case law, summary judgment and dismissal with prejudice is proper.

Finally, there is no genuine issue of material fact that plaintiff filed suit against the wrong party. The allegedly negligent care was provided by employees of an independent contractor management company and MSVAB had no vicarious liability for said employees under the MTCA and other Mississippi law. As plaintiff has failed to assert a claim for which MSVAB is liable as a matter of law, summary judgment and dismissal with prejudice is proper.

THEREFORE, defendant MSVAB respectfully requests this Honorable Court to dismiss it from this action with prejudice for breach of the applicable statute of limitations, lack of the required certificate of expert consultation, and as an improper party lacking

vicarious liability for the allegedly negligent conduct of care provider who were not employees of the state.

THIS, the 10th day of August, 2007.

Respectfully submitted,

MISSISSIPPI STATE VETERANS AFFAIRS
BOARD

WILKINS, STEPHENS & TIPTON, P.A.

BY: Melanie H. Morano
Senith C. Tipton (MSB No [REDACTED])
Faye Murphree James (MSB [REDACTED])
Melanie H. Morano (MSB No [REDACTED])

WILKINS, STEPHENS & TIPTON, P.A.
One LeFleur's Square
4735 Old Canton Road
Post Office Box 13429
Jackson, Mississippi 39236-3429
Phone: 601-366-4343
Fax: 601-981-7608

CERTIFICATE OF SERVICE

I do hereby certify that I have caused to be hand delivered a true and correct copy of the above and foregoing *Brief of Appellant* to the following:

Hon. Tomie T. Green
Circuit Judge, Hinds County
Post Office Box 327
Jackson, Mississippi 39205-0357

James W. Kitchens, Esq.
Margaret P. Ellis, Esq.
Kitchens & Ellis
610 North Street
Jackson, Mississippi 39202-3116
Attorneys for Plaintiffs

THIS, the 10th day of August, 2007.

Melanie H. Morano
Senith C. Tipton (MSB No [REDACTED])
Faye Murphree James (MSB # [REDACTED])
Melanie H. Morano (MSB No [REDACTED])

IN THE SUPREME COURT OF MISSISSIPPI
NO. 2006-IA-00859-SCT

MISSISSIPPI STATE VETERANS AFFAIRS BOARD APPELLANT/DEFENDANT

VS.

BEVERLY PETTIGREW KRAFT, PERSONAL
REPRESENTATIVE OF THE WRONGFUL DEATH
BENEFICIARIES AND HEIRS AT LAW OF BILLY L.
PETTIGREW, DECEASED; AND INDIVIDUALLY AS
THE DAUGHTER AND AN HEIR AT LAW OF
BILLY L. PETTIGREW, DECEASED; AND THE
ESTATE OF BILLY L. PETTIGREW, BY AND
THROUGH BEVERLY PETITGREW KRAFT,
ADMINISTRATRIX OF THE ESTATE

APPELLEE/PLAINTIFF

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 Court may evaluate possible disqualification or recusal.

1. Beverly Pettigrew Kraft, personal representative of the wrongful death beneficiaries and heirs at law of Billy L. Pettigrew, deceased; and individually as the daughter and an heir at law of Billy L. Pettigrew, deceased; and the estate of Billy L. Pettigrew, by and through Beverly Pettigrew Kraft, administratrix of the estate, *appellee*.

2. James W. Kitchens, Esq., and Margaret P. Ellis, Esq., Kitchens & Ellis, 610 North Street, Jackson, Mississippi 39202-3116, *attorneys for appellee*.
3. Mississippi State Veterans Affairs Board, *appellant*.
4. Senith C. Tipton, Esq., Faye Murphree James, Esq., and Melanie H. Morano, Esq., Wilkins, Stephens and Tipton, P.A., P. O. Box 13429, Jackson, MS 39236-3429, *attorneys for appellant*.

SO CERTIFIED, this the 15th day of August, 2007.

BY: Melanie H. Morano
Senith C. Tipton (MSB No. 8227)
Melanie H. Morano (MSB No. 100339)

WILKINS, STEPHENS & TIPTON, P.A.
One LeFleur's Square, Suite 108
4735 Old Canton Road [39211]
P. O. Box 13429
Jackson, MS 39236-3429
Telephone: (601) 366-4343
Facsimile: (601) 981-7608 (fax)

CERTIFICATE OF SERVICE

I do hereby certify that I have caused to be forwarded a true and correct copy of the above and foregoing *Certificate of Interested Persons* to the following:

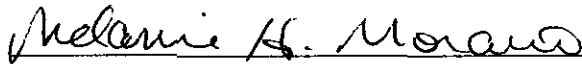
VIA HAND DELIVERY

Hon. Tomie T. Green
Circuit Judge, Hinds County
Hinds County Courthouse
Post Office Box 327
Jackson, Mississippi 39205-0357

VIA UNITED STATES MAIL, POSTAGE PREPAID

James W. Kitchens, Esq.
Margaret P. Ellis, Esq.
Kitchens & Ellis
610 North Street
Jackson, Mississippi 39202-3116
Attorneys for Plaintiffs

THIS, the 15th day of August, 2007.


Senith C. Tipton (MSB No. 8227)
Faye Murphree James (MSB # 2990)
Melanie H. Morano (MSB No. 100339)