IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

NO. 2007-CA-00232

PATRICIA JONES SPANN
APPELLANT

Versus

GERALD J. DIAZ, JR., P.A.
APPELLEE

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

BRIEF OF APPELLEE GERALD J. DIAZ, JR., P.A.

ORAL ARGUMENT REQUESTED

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PATRICIA JONES SPANN **APPELLANT**

VS.

GERALD J. DIAZ, JR., P.A. **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualifications or recusal.

1. Gerald J. Diaz, Jr., P.A., Appellee herein;
2. Patricia Jones Spann, Appellant herein;
3. Gerald J. Diaz, Jr., Esq., member of Gerald J. Diaz, Jr., P.A.
4. J. Robert Ramsay, Esq., and the law firm of Ramsay & Hammond, PLLC, Attorney for Appellee, Gerald J. Diaz, Jr., P.A.;
4. Philip W. Thomas, Esq.; Attorney for Appellant, Patricia Jones Spann;
5. Honorable Bobby DeLaughter, Circuit Court Judge, Hinds County, Mississippi.

J. ROBERT RAMSAY
Attorney for Appellee,
Gerald J. Diaz, Jr., P.A.

TABLE OF CONTENTS

STATEMENT REGARDING ORAL ARGUMENT

Appellee, Gerald J. Diaz, Jr., P.A., requests oral argument from the Court as it will significantly assist the Court in rendering its decision.

TABLE OF AUTHORITIES

STATUTES

RULES

I. STATEMENT OF THE ISSUES

1. Whether the trial court erred in granting Defendant's Motion for Summary Judgment on the basis that the statute of limitations had expired as to Plaintiff's claims and in finding that there was no evidence of fraudulent concealment that would otherwise toll the limitations period.

2. Whether the trial court erred in finding that Defendant did not waive its right to raise the statute of limitations as an affirmative defense and/or seek dismissal of the amended complaint on that basis.

II. STATEMENT OF THE CASE

A. Course of Proceedings and the Disposition of the Court Below:

Plaintiff, Patricia Jones Spann[1] (hereinafter "Spann"), filed her Complaint against Defendant, Gerald J. Diaz, Jr., P.A.[2] (hereinafter "the Defendant Firm") on May 26, 2005 in the Circuit Court of Hinds County, Mississippi, First Judicial District. (R. 4-9). The crux of Spann's claim is that the Defendant Firm committed legal malpractice by failing to name certain defendants (Dr. John Rawson and the Newborn Group) in a wrongful death suit (hereinafter, "the underlying action") prior to the running of the statute of limitations. Id. Spann's Complaint demanded damages for legal malpractice, fraudulent concealment, breach of contract, breach of fiduciary duty, and breach of the duty of good faith and fair dealing and demanded judgment in the sum of $600,000.00, the amount of the Judgment awarded in the trial court of the Hinds County Circuit Court in the underlying action. Id.

The Defendant Firm filed its Answer on August 15, 2005. Incorporated within its Answer was a Motion to Dismiss pursuant to Miss. Rules of Civ. Proc. 9, and 12 (b)(6), and on the basis of the expiration of the Statute of Limitations, laches, estoppel and waiver. (R. 10-15). Spann never responded to this Motion nor denied the allegations contained therein. A Scheduling Order and Peremptory Setting was entered by the Trial Court upon the Motion *ore*

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[1] Spann attempted to file her Complaint both individually and on behalf of all wrongful death beneficiaries of Timothy Spann, deceased (two minor children and Timothy's father) despite the fact that her Complaint is not a wrongful death action and she cannot bring claims of legal malpractice in a representative capacity. This issue was briefed before the Trial Court. (R. 165-168). However, in finding the Plaintiff's claims were barred by the statute of limitations, the Trial Court implicitly found that the claims of the minor children (who are under guardianships of the Chancery Court of Hinds County) and any claims of Timothy Spann, Sr. were also barred without deciding whether Spann had legitimately asserted the claims on their behalf. (R. 455-461). In its Opinion and Order Denying Plaintiff's Rule 60 Motion, the Trial Court explicitly held that the claims of the minor children as well as those of Patricia and Timothy Spann are time-barred. (R. 480-483).

[2] It is undisputed that Spann was never represented by Gerald J. Diaz, Jr., P.A. Rather, her contract for services was with Cherry, Given, Peters, Lockett & Diaz, P.A. However, for the purposes of this Appeal, and the sake of brevity, the Appellee will be referenced as "the Defendant Firm".

tenus of the parties on November 14, 2005. (R. 25-26). This Order provided case specific deadlines including a motion deadline of October 2, 2006. (Id.) This Order was agreed to and approved by Spann. (R. 26).

On February 8, 2006 (within the timeframe provided in the Scheduling Order) Spann filed her Motion for Leave to File an Amended Complaint on February 8, 2006. (R. 59-60). The Defendant Firm filed its objection to the Motion on February 22, 2006 on the basis that the thirty-eight (38) new paragraphs of factual allegations together with the twenty-eight (28) new paragraphs of legal allegations essentially gave rise to new causes of action and legal theories. (R. 91-93). Spann's Motion was heard on March 31, 2006 and an Order was entered by Judge Bobby DeLaughter on April 7, 2006 granting Spann's Motion to File an Amended Complaint. (R. 103).

Contrary to Spann's assertion in her Brief, Judge DeLaughter specifically found the Amended Complaint contained "new allegations" on which Defendant would be allowed, if it so desired, to conduct discovery. (R. 103). Thereafter, Spann filed her Amended Complaint on April 12, 2006 (R. 104-121) and the Defendant Firm filed its Answer[3] on May 8, 2006 again incorporating a Motion to Dismiss based on several grounds including the expiration of the statute of limitations. (R. 123-142). For the first time, Spann filed her response to the Defendant Firm's Motion to Dismiss on May 16, 2006 denying the allegations. (R. 143).

On July 17, 2006, a mere seventy (70) days following the filing of its Answer to the Amended Complaint and two and one half months prior to the dispositive Motion deadline in the Scheduling Order, the Defendant Firm filed its Motion for Judgment on the Pleadings and/or Motion for Summary Judgment on the basis that: (1) Spann lacked standing to assert a legal

[3] Throughout her Brief Spann references the Defendant's "Amended Answer". The Defendant Firm did not file an "Amended Answer" as alleged by Spann. Rather, the Defendant Firm filed its Answer to Spann's **Amended Complaint**. This distinction is important in light of Spann's arguments of waiver.

malpractice claim on behalf of wrongful death beneficiaries, (2) Spann's claims were barred by the three (3) year statute of limitations, and (3) no attorney/client relationship existed between Spann and the Defendant Firm at the time the alleged wrongful act occurred. (R. 165-180). Spann subsequently filed her own Cross-Motion for Summary Judgment and Response to the Defendant Firm's Motion on July 31, 2006. (R. 320-323). The Defendant Firm filed its Reply in Support of its Motion on August 10, 2006 (R. 412- 433) and its Response to Spann's Cross Motion on August 14, 2006. (R. 436 – 447). The Motions were heard by the Trial Court on September 29, 2006 (Tr. 1-38), and the Court entered its Memorandum Opinion and Order Granting the Defendant Firm's Motion for Summary Judgment on November 15, 2006 finding that Spann's claims were barred by the statute of limitations. (R. 455-461).

In its Opinion and Order, the Trial Court specifically found that it was undisputed that Spann was aware, at least as of May 25, 2002[4], that the Defendant Firm failed to timely include Dr. Rawson in her medical malpractice claim and that the result of that omission was that her lawsuit was dismissed. (R. 458). The Trial Court further found Spann had a known, non-latent injury, and she had access to the materials, at least as of May 25, 2002, which identified the Defendant firm as the party at fault. (R. 459). The Trial Court also found there was no evidence of fraudulent concealment, but even assuming there was, Spann did not exercise the required diligence in order to discover any alleged fraud. (R. 459). Finally, the Trial Court held that the proclamation of MS Credit Ctr. Inc. v. Horton, 926 So. 2d 167, 181 (Miss. 2006) did not apply as the procedural history of the instant case is markedly different from MS Credit including the existence of an agreed scheduling order setting forth case specific (including motions) deadlines and the fact that Spann amended her complaint which the Defendant firm answered and

[4] Appellee asserts the Court intended the date as May 24, 2002, the date on which Spann was advised the Motion for Rehearing was denied. See R. 458. Nevertheless, using May 25, 2002 still renders Spann's claims barred by the Statute of Limitations in that her Complaint was not filed until May 26, 2005.

subsequently field its Motion seventy (70) days later. (R. 460-461). Spann subsequently filed her Notice of Appeal. (R. 462).

B. Statement of Facts Relevant to Issues for Review:

On April 7, 1994, at approximately 8:30 a.m., Timothy Spann was born to Patricia Jones (Spann) and Timothy Wayne Spann at Methodist Medical Center and was taken to the well baby nursery. At approximately 7:30 p.m., Ms. Spann was informed that Timothy had stopped breathing and had been taken to the Neonatal Intensive Care Unit where he died on April 8, 1994, as a result of meconium aspiration.[5]

On November 30, 1994, Patricia Spann's attorney, Arnold Dyre, sent a letter to Joey Diaz requesting Diaz review the Spann case "with the possibility of our working together on an associated basis" and included select medical records of Patricia Jones Spann and baby, Timothy Spann, in addition to providing the basic facts of the case, and an outline of the potential defendants. (R. 293-294).

On April 8, 1996, in an effort to preserve the statute of limitations on her claim, an associate with the firm of Cherry, Givens, Peters, Lockett & Diaz, P.A. filed a one (1) page wrongful death action on behalf of Patricia Jones Spann and all wrongful death beneficiaries of Timothy Spann, deceased against Methodist Medical Center, Jackson-Hinds Birth Center, Dr. Carl Reddix, and John Does 1-10 as defendants. (R. 341, 251-252). At that time, the Defendant Firm had had absolutely no contact with Patricia Spann prior to filing the original Complaint and the First Amended Complaint three (3) days later, nor did they have an attorney-client relationship with Spann at that time. (R. 251-252, 290, 342-346).

It was not until sometime in the latter part of May/early June that the Defendant Firm was able to get in touch with Ms. Spann who, along with her husband, Timothy Spann, Sr., came into

the office on June 13, 1996, and signed Attorney Fee Contracts with the Cherry, Givens, Peters, Lockett and Diaz firm. (R. 248-252, 297-298, and 350). At that time, the Defendant Firm advised the Spanns that it had filed suit on their behalf to protect their claims and that the attorneys would do what they could in order to pursue the Spanns' cause of action, if the Spanns so desired. The Spanns were grateful. (R. 244, 250-252, 341) Ms. Spann was relieved as she had been peddling the case to several attorneys including Rhonda Cooper, Esq. and Isaac Byrd, Esq. during the several weeks prior to the expiration of the statue of limitations on April 8, 1996, without success. (R. 264-265, 268) These attorneys had advised the Spanns that they did not have a case. (R. 295-296).

The treating neonatologist, Dr. John Rawson, was not included in the original Complaint or the First Amended Complaint. However, in January of 1997, the Defendant Firm was first informed by its medical expert that Dr. Rawson had potential liability for the death of Timothy. Rawson v. Jones, 816 So. 2d 367 (¶5) (Miss. 2002). Three (3) days later, the Defendant Firm filed a Motion to Amend the Complaint to add Dr. Rawson as a defendant which was later granted by the trial court. (R. 286). Methodist Medical Center settled the claims against it prior to trial for $400,000.00 and was eventually dismissed with prejudice on Nov. 2, 1998.[6] Rawson, 816 So. 2d at (¶3). Dr. Rawson filed a Motion for Summary Judgment on the basis that the statute of limitations against him had expired when he was added as a Defendant which was denied by the trial court. Id. Trial proceeded against Dr. Rawson and the Newborn Group on

[5] These facts from the underlying action are undisputed and can be found in the Record of Rawson v. Jones, 816 So. 2d 367 (Miss. 2002).

[6] Dr. Reddix was dismissed by agreed order following his filing a Motion for Summary Judgment.

October 5, 1998, and the jury returned a verdict in favor of Spann in the amount of $1 million. Id.[7] However, the trial judge granted Dr. Rawson and the Newborn Group's Motion for a Setoff of $400,000.00 for the amount of settlement paid by Methodist Medical Center, thereby reducing the Judgment to $600,000.00. (Id.).

Dr. Rawson and the Newborn Group filed a Notice of Appeal to the Mississippi Supreme Court. (Id.) During the pendency of the appeal, the Spanns authorized the Defendant Firm to communicate an offer to Dr. Rawson's counsel to settle the judgment for a discounted sum of $500,000.00. (R. 299-304). Subsequent to oral argument, this Court rendered its opinion on June 28, 2001, finding that the statute of limitations had expired as to Dr. Rawson and the Newborn Group. This Court reversed and rendered Judgment for the Defendants. Rawson, 816 So. 2d at ¶1. Subsequent to the Court's decision, Joey Diaz met with the Spanns and reviewed the Court's opinion with them, specifically advising them of the Court's basis for its decision held and that six of the nine justices had supported the decision, (R. 243). He advised the Spanns that although the chances of success on rehearing "weren't very good", the Defendant Firm would file, and in fact, did file, a Motion for Rehearing on July 12, 2001. (R. 242; 271).

The Motion for Rehearing was denied by this Court on May 23, 2002. (R. 312). On May 24, 2002, the Defendant Firm received the Court's denial of the Motion for Rehearing. On the same day, Joey Diaz contacted Patricia Spann via telephone and advised her that the Motion for Rehearing had been denied, that the case was over, and requested she come into the office to discuss the conclusion of the case. (R. 242,312). It is undisputed that Spann had full knowledge

[7] Spann attempts to create an issue of a post-verdict celebratory dinner bill that was expensed to Spann. This is completely a non-issue before this Court, and in fact that expense was approved by the Chancery Court of Hinds County in the Guardianship proceedings for the minor children. *In the Matter of the Guardianship of Tyeshia Spann, Cause No. P-98-519, and Shaneka Jones, Cause No. 98-520.* Thus, Spann can hardly be heard to complain on this issue.

throughout the course of the underlying litigation that a primary defense by Dr. Rawson was that he had been named as a Defendant after the statute of limitations had expired. (R. 268-271)

In its 2001 decision, the Supreme Court stated that Spann had all of the facts she needed to institute legal proceedings against Dr. Rawson shortly after the death of the baby and that Dr. Rawson was not a "fictitious party" for which she would be saved by having named John Doe defendants. Rawson, 816 So. 2d at ¶12. The Court held that Spann knew, or with reasonable diligence, should have known the identity of the parties who rendered medical services to her son, that the statute of limitations against Dr. Rawson had expired, and that she was too late in naming Dr. Rawson as a Defendant. Rawson, 816 So. 2d 367.

In early May, 2005, Spann contacted Patrick Williams, an associate of the Defendant Firm, concerning the guardianship of her daughters, Tyeshia and Shaneka, as she desired to withdraw funds from the guardianship accounts and needed assistance in obtaining court approval. (R. 251, 272). Mr. Williams advised her that at the time they were quite busy and would not be able to immediately assist her. (R. 272). Spann inquired as to the location of a former legal assistant at the Defendant Firm, Betsy Cotton (who received her Bar license in 2001 and with whom Spann had also dealt, with regard to the guardianship proceedings). (R. 272). Mr. Williams advised that Ms. Cotten was now employed with the John D. Giddens, P.A. firm in Jackson. (Id.). Spann subsequently contacted Ms. Cotten for assistance regarding the guardianship. (Id.).

When Spann contacted the Defendant Firm's office in May 2005, it was the first communication she had with the firm in more than a year. (R. 271). Notwithstanding multiple communications between the Defendant Firm and Spann subsequent to both the decision of the Supreme Court reversing the $600,000.00 Judgment and rendering Judgment for the Defendants

on June 28, 2001, and the subsequent denial of Spann's Motion for Rehearing on May 23, 2002, at no time did Spann ever indicate any dissatisfaction with the representation she received by the Defendant Firm prior to the filing of this lawsuit against the Defendant Firm, even though she had been informed at every step that there were significant problems with the case against Dr. Rawson due to his addition as a Defendant after the expiration of the statute of limitations. (R. 271).

On May 26, 2005, over three (3) years following the decision of the Mississippi Supreme Court on June 28, 2001, and the denial of her Motion for Rehearing on May 23, 2002, Spann filed her lawsuit against Gerald J. Diaz, Jr., P.A. alleging legal malpractice arising from the underlying action.

III. SUMMARY OF THE ARGUMENT

The Circuit Court of Hinds County Mississippi did not err in finding Spann's claims against the Defendant Firm were barred by the statute of limitations and entering summary judgment in favor of the Defendant Firm. The **only** facts and/or issues not in dispute and relevant to this appeal are as follows: (1) that Spann's cause of action accrued at the latest on May 23, 2002; (2) that Spann filed her Complaint three years and three days after her cause of action accrued and after the expiration of the statute of limitations; (3) that the discovery rule does not save her claims as her injury was not latent; (4) that there is no evidence of fraudulent concealment that would save Spann's claim; and (5) that the Defendant Firm did not waive its right to bring forth its Motion for Summary Judgment and is entitled to have the Judgment in its' favor affirmed.

MISS. CODE ANN. § 15-1-49 governs legal malpractice claims and requires that a legal malpractice claim be filed "within three (3) years next after the cause of such action accrued, and not after." MISS. CODE ANN. § 15-1-49. Spann admits her cause of action accrued no later than

May 23, 2002. (Spann Brief at p. 25). She filed her action against the Defendant Firm on May 26, 2005 - nine (9) years and one (1) month after the alleged wrongful act/omission occurred; almost four (4) years after the this Court published its decision in Rawson v. Jones setting out the course of the underlying action herein; three (3) years and three (3) days after this Court denied rehearing; and three (3) years and two (2) days after Mr. Diaz informed her that rehearing was denied, and that they had lost. Spann's claim is barred by the statute of limitations.

Spann erroneously argues that the discovery rule saves her claims. However, the Mississippi legislature has made clear, that the discovery rule only applies to actions that involve latent injury. MISS. CODE ANN. § 15-1-49 (2). See also, PPG Architecture Finishes, Inc. v. Lowery, 909 So. 2d 47, 50 (¶11) (Miss. 2005). Thus, if a latent injury is *not* present, the discovery rule does not apply. Id. There was nothing latent about Spann's alleged injury—the Mississippi Supreme Court published its decision in Rawson v. Jones, setting forth that Spann, through her attorneys, failed to properly file a lawsuit against Dr. Rawson within the time period allowed for such action and reversed the $600,000 judgment.

Spann contends that she was not aware that she had a legal malpractice claim until Mr. Diaz's former law partner Giddens labeled the Defendant Firm's action "negligent," and she became aware that the Defendant Firm had had a portion of the medical records since late 1994, and that this lack of knowledge precluded her from discovering her cause of action. It is not necessary under the discovery rule that a would-be plaintiff know every detail or fact connected to her potential claim; nor does a would-be plaintiff need to be absolutely certain that she has a cause of action. First Trust Nat'l Assn. v. First Nat'l Bank of Commerce, 220 F.3d 331, 337 (5th Cir. 2000). Rather, the statute of limitations began to run once Plaintiff was "'on inquiry that a *potential* claim exists.'" Id. To claim the benefit of the discovery rule, "a plaintiff must be reasonably diligent in investigating the circumstances surrounding the injury." Wayne General

Hospital v. Hayes, 868 So. 2d 997, 1001 (Miss. 2004) ¶15, *overruled on other grounds*. Spann came forward with no evidence (nor could she) reflecting any type of investigation into the alleged negligence of the Defendant Firm before or after the Supreme Court's published decision in Rawson v. Jones in June 2001 and/or the denial of the Motion for Rehearing. Spann was armed with sufficient information by virtue of the Supreme Court's published decision to be on notice or inquiry that a potential claim existed, even if she did not know with certainty that the conduct was "legally negligent". See Hayes, 868 So.2d at ¶15.

Spann's fraudulent concealment theory fails as a matter of law for three (3) independent reasons: (1) the doctrine of fraudulent concealment does not apply to claims, such as the instant claim, that are based on matters of public record; (2) Spann could not satisfy her burden of proving that the Defendant Firm engaged in an affirmative act of concealment and that Spann acted with due diligence in attempting to discover the alleged negligence but was unable to do so; and (3) Spann had all of the information that she needed to be on notice or inquiry that a potential malpractice claim existed long before her conversation with Mr. Giddens.

Spann's action stems from this Court's *published* decision on June 28, 2001 in Rawson v. Jones and *published denial* of the Petition for Rehearing on May 24, 2002, both matters of public record as to which the fraudulent concealment doctrine does not apply. O'Neal Steele, Inc. v. Millette, 797 So.2d 869 (Miss. 2001). Under Mississippi law, in order to invoke fraudulent concealment as an exception to the statute of limitations, Spann must first have demonstrated that the Defendant Firm engaged in affirmative acts of concealment and that Spann acted with due diligence in attempting to discover the alleged negligence of the Defendant but was unable to do so. Sanderson Farms, Inc. v. Ballard, 917 So.2d 783 (Miss. 2005) (citations omitted). Spann failed to identify any affirmative act on the part of the Defendant Firm to conceal the fact that Dr. Rawson and the Neonatal Group were named after the applicable statute of limitations

expired. To the contrary, the irrefutable evidence is that, **throughout the litigation**, Spann was advised that there were problems with the case against Dr. Rawson in that Dr. Rawson had been added late and outside the statute of limitations.

Spann failed to identify any action she took to obtain any of the allegedly concealed information. To the contrary upon receiving a copy of the Rawson decision and learning that Rehearing had been denied, Spann did not take a single action toward discovering any claims she may have against the Defendant Firm for four (4) years before filing this suit. Spann's attempt to cite a redacted transcript of a telephone conversation that occurred in 1997 as evidence of the Defendant Firm's "fraudulent concealment" is a red herring and fails for the simple reason that it is not some obscure piece of irrelevant evidence that is purportedly "concealed" which satisfies the fraudulent concealment exception. Rather, it is the **cause of action** itself. Channel v. Loyacono, 954 So. 2d 415 (Miss. 2007) (¶ 29)

The Defendant Firm did not waive its right to move for summary judgment on the basis of the expiration of the Statute of Limitations. Spann's waiver argument is contrary to the Mississippi Rule of Civil Procedure Rule 56 and to the Scheduling Order that this Court entered in this case. Rule 56 governs motions for summary judgment and specifically provides that "[a] party against whom a claim ... is asserted ... may, **at any time"** move for summary judgment. MISS. R. CIV. P. 56(b) (emphasis added). Moreover, at the outset of the instant case, this Court issued a Scheduling Order, to which **Spann specifically agreed** and which specifically mandated that "all motions with the exception of motions *in limine* shall be filed with this Court on or before October 2, 2006". The Defendant Firm filed its motion two and one half months **in advance** of this deadline. Accepting Spann's waiver argument would lead to the grossly unfair result of having a Trial Court impose a specific deadline for filing dispositive motions then rule that such a motion filed in compliance with its deadline was untimely.

Spann's reliance on MS Credit Center, Inc. v. Horton, 926 So.2d 167 (Miss. 2006), is misplaced. In stark contrast to the defendant in MS Credit who moved to compel arbitration after substantially engaging in the litigation process, the Defendant Firm's participation in this litigation was not inconsistent with its right to move for summary judgment, but rather was in furtherance of this right. The Supreme Court in MS Credit did not intend to require immediate motions on affirmative defenses *that require factual development* such as the defenses raised in the Defendant Firm's motion. Further, the holding in MS Credit upon which Spann relies is that "a defendant's failure to timely and reasonably raise and pursue the enforcement of any affirmative defense or other affirmative matter or right which would serve to terminate or stay the litigation coupled with active participation in the litigation process will **ordinarily** serve as a waiver." MS Credit, 926 So.2d at ¶44. The circumstances of the instant case are hardly "ordinary" given that the Trial Court entered a scheduling order **upon Spann's joint motion,** Spann filed an amended complaint with multiple new allegations which essentially started the litigation anew, and the very affirmative defense in question required factual development.

In light of its determination as to the statute of limitations, the Trial Court did not feel it necessary to address the other issues in the Defendant Firm's dispositive Motion, *i.e.*, Ms. Spann's standing to bring suit on behalf of Mr. Spann and the guardianships as "wrongful death heirs" on a contract claim, nor the issue of an attorney/client relationship *vel non* prior to April 8, 1996. The very basis of Plaintiff's argument to this Court is predicated upon the existence of an attorney-client relationship between Spann and the Defendant Firm on April 8, 1996, the date the statute of limitations expired against Dr. Rawson in the underlying suit. There was no attorney/client relationship between Spann and the Defendant Firm on or before April 8, 1996. Mississippi adheres to the general rule that the formation of the attorney/client relationship requires mutual assent, evidenced by the manifestation of a client's intent that legal services be

provided to them. Hopper v. Frank, 16 F.3d 92 (5th Cir. 1994). As of April 8, 1996, Spann had absolutely no idea that the Cherry Givens firm existed, nor that they had a copy of some of the medical records. It was not until the first meeting held between Spann and an associate of the Defendant Firm on June 13, 1996, (two months after the limitations statute expired) when the Spanns were advised that a lawsuit had been filed on their behalf in order to protect their claim; that the attorneys would do what they could to try and help them; and the Spanns agreed to go forward with the claim and signed the Attorney's Fee Agreements, that the Spanns manifest intent that legal services be provided them by the Defendant Firm. In that it was impossible for Spann to have an attorney/client relationship without manifestation of intent to enter into that relationship on or about April 8, 1996, when the statute of limitations as to her underlying claim expired, no basis exists for a legal malpractice claim against the Defendant Firm. See, Wilbourn v. Stennett, Wilkinson & Ward, 687 So.2d 1205 (Miss. 1997).

For these reasons, the Trial Court's Opinion Order should be affirmed.

IV. ARGUMENT

A. Standard of Review.

In reviewing a Trial Court's ruling on Summary Judgment, including the application of a statute of limitations, this Court conducts a *de novo* review. Moss v. Batesville Casket Co., 935 So. 2d 393 (Miss. 2006); *Sarris v. Smith* 782 So. 2d 721 (Miss. 2001). In the Trial Court's Memorandum Opinion and Order dated November 15, 2006, from which the Spanns have filed this appeal, Judge Bobby D. DeLaughter reflected the number of cases provided by our Appellate Court with regard to the standard of review of a Trial Court's determination on Summary Judgment are legion. Judge DeLaughter thereafter reflected at length the comprehensive guidelines this Court set out in Grisham v. John Q. Long VFW Post, 519 So. 2d

413, 415 (Miss. 1988). This Appellee cannot state the standard of review more cogently or succinctly than the Trial Court reflected in its Memorandum Opinion and Order. (R. 455-457).

In determining what constitutes a genuine question of fact this Court has held that a genuine question of fact must be a material fact: "the existence of 100 contested issues of fact will not thwart summary judgment where none of them is material." Grisham, 519 So. 2d at 415.

B. The Trial Court Did Not Err in Finding Spann's Claims Were Barred by the Statute of Limitations

The Circuit Court of Hinds County, Mississippi, did not err in finding Spann's claims were barred by the Statute of Limitations. MISS. CODE ANN. § 15-1-49 governs legal malpractice claims and requires that a legal malpractice claim be filed "within three (3) years next after the cause of such action accrued, and not after." MISS. CODE ANN. § 15-1-49. This Court has found that in a legal malpractice action, "[t]he period of limitation . . . begins to run as of the date the client learns, or through reasonable diligence should have learned of his counsel's negligence". Hymes v. McIlwain, 856 So. 2d 416 (Miss. 2003) citing Smith v. Sneed, 638 So. 2d 1252, 1253 (Miss. 1994):

> This was the ground upon which the trial court found the suit untimely. Hymes was not required by the operative cause of action for professional malpractice to prove that the effect of his counsel's alleged negligence had been finally set aside. The limitation period was therefore not waiting final resolution of the criminal matter before it would begin. (¶ 13) **Hymes had reason to know his attorneys acted negligently for quite some time before filing suit against them.** Ineffective assistance of counsel was the basis for vacating the sentence. The Petition for Post Conviction Relief was filed in 1995 although it was not ultimately successful until 2000. **At the very latest, the statute of limitations began to run in 1995 when it became apparent Hymes knew of his attorneys' deficient performance.** The filing of this civil suit comes too late. (¶ 14).

Hymes, 856 So. 2d 416 (¶¶ 13, 14) (emphasis added).

Here, the alleged wrongful act/omission that gives rise to this malpractice suit is the alleged failure to name Dr. John Rawson and the Neonatal Group as defendants in the underlying wrongful death action before the applicable statute of limitations expired on April 8, 1996. The

Mississippi Supreme Court rendered its decision in Rawson v. Jones, 816 So. 2d 367 (Miss. 2001) on June 28, 2001, reversing the Trial Court's judgment and rendering a judgment that Spann take nothing on her claims against Dr. Rawson and the Neonatal Group on the grounds that these claims were time barred. Subsequent to the Supreme Court decision their ruling on June 28, 2001, the Defendant Firm contacted Spann and her husband, invited them into the office for a discussion, specifically reviewed the Court's Opinion with the Spanns, and advised that while the firm would be filing a Motion for Rehearing with the Mississippi Supreme Court, that six (6) of the nine (9) Justices had ruled against them and success on the Motion for Rehearing did not look good. (Deposition of J. Diaz, pp 95-98; R. 243-244; Deposition of P. Spann, pp 65-69; R. 271-272).

Subsequently, a Motion for Rehearing was filed on behalf of Spann in the underlying action and the Supreme Court denied that Motion for Rehearing on May 23, 2002. The following day, May 24, 2002, upon receipt of the Notice from the Supreme Court that the Motion for Rehearing had been denied, Joey Diaz phoned Spann, and advised her that the case was over, that in fact the Supreme Court had denied the Motion for Rehearing and there was nothing else that could be done.

Q: Am I correct that this is the Notice from the Mississippi Supreme Court denying the Motion for Rehearing that had been filed in the Appeal of the medical malpractice case?
A: Yes.
Q: This reflects that it was received by your firm on May 24, 2002, is that correct?
A: Yes.
Q: Handwritten on it is Patricia Spann and a phone number.
A: Yes.
Q: Do you know whose handwriting that is?
A: It's mine.
Q: Did you call Ms. Spann in relation to this?
A: Yes.
Q: **When did you call her?**
A: **I called her on May 24, 2002.**
Q: **How do you know that?**

A: **Because I remember distinctly getting this in the mail and I remember distinctly getting her telephone number and I distinctly remember calling her and talking to her about it.**

(Deposition of Gerald J. Diaz, Jr., p. 89, lines 12-25; p. 90, lines 1-15, R. 242) (emphasis added)

Q: Tell me what you remember about that?
A: **I called her up and told her that the Supreme Court had made a decision and that we had lost the case.**
Q: What else did you tell her?
A: **Well we had had conversations before in my office where I told her that the Supreme Court had ruled against us and that we were filing a Petition for Rehearing, that the chances weren't very good and that we were going to do everything we could to try to ask the Court to overturn it but that the odds weren't good. And when the Notice came in, I called Ms. Spann and told her that - I reiterated the conversation and told her that we had lost the case and asked her and her husband to come in and meet with me.**

(Deposition of Gerald J. Diaz, Jr., p. 91, lines 1-16, R. 242) (emphasis added)

Q: How clear is your recollection of that meeting?
A: I remember having the conversation, I remember the meeting.
Q: What do you remember talking to them as far as the case against Dr. Rawson?
A: Well we had had a number of conversations about Dr. Rawson up until then. That was the center of an appeal. And you know we talked about the Supreme Court and their decision **and that they had concluded that the statute of limitation had run against Dr. Rawson.**

(Deposition of Gerald J. Diaz, Jr., p.96, lines 3-14, R. 243) (emphasis added)

Q: Do you remember anything the Spanns said to you in that meeting?
A: Yes, I remember talking to Patricia but it's hard for me to discern between the two. But I remember the conversation that we had. And we talked specifically about it and I gave her my regrets for the case being lost and I told her that we had tried our best and that - **we went over the different reasons on what the Supreme Court concluded.**
Q: What do you remember her saying?
A: I remember her telling us that she thought we had worked hard and we tried hard, that Kenny had done a good job, she liked Kenny. She wanted - we talked about the fact that Ms. Spann had actually been talking to other lawyers and had moved and we weren't - didn't have good communication with her and that she had moved and that her number was unlisted and that she'd talked to other lawyers and she was thankful that we had filed the case and that we had actually spoke for her, that we actually got the case filed and we were able to settle the case against the hospital. She seemed to be very appreciative that she seemed to be very

> appreciative that we had tried very hard. She knew that we worked very hard. We put a lot of effort into it and that we got results against the hospital and went to Court and fought very hard for her.

(Deposition of Gerald J. Diaz, Jr., p. 97, lines 5-25; p. 98, lines 1-8, R. 244) (emphasis added)

Spann admits her cause of action accrued on May 23, 2002. (Spann Brief p. 25). Yet, Spann filed her action against the Defendant Firm on May 26, 2005 - over nine (9) years and one (1) month after the alleged wrongful act/omission occurred; three (3) years and eleven (11) months after the Mississippi Supreme Court issued its decision reviewing the Trial Court Judgment and rendering Judgment for the Defendants Rawson, et al.; three (3) years and three (3) days after the Mississippi Supreme Court denied rehearing; and three (3) years and two (2) days after Mr. Diaz phoned Spann to inform her that rehearing was denied, that the case was over and that the Spanns had lost. In that Spann filed her claim against the Defendant Firm over three (3) years from the date the alleged claim accrued, her claim is barred by the statute of limitations.[8] See Hymes v. McIlwain, 856 So.2d 416 (Miss. 2003).

[8] Spann attempts unsuccessfully to make an issue before this Court that the Defendant Firm "fired" her as a client in May 2005 shortly before the expiration of the statue of limitations and that the continued representation of Spann in the guardianship proceedings somehow saves her cause of action against the Defendant Firm. This argument fails as a matter of law as Mississippi does not recognize the "continuous representation" rule. Channel v. Loyacono, 954 So. 2d 415, 421 (¶17) (Miss. 2007). Further, the Defendant Firm did not "fire" Spann as a client, rather she was advised at the time she requested immediate assistance that the Defendant Firm was not able to help her and referred her to Betsy Cotton, with whom Spann was familiar. (R. 271-272). Spann's mischaracterization of this issue before the Court is yet another diversion from the real issue before this Court; that her claims are barred by the statute of limitations and neither the discovery rule, allegations of fraudulent concealment or the MS Credit decision can save her claim.

C. The Discovery Rule Cannot Save Spann's Claim.

Spann mistakenly relies on *dicta* in Smith v. Sneed, 638 So.2d 1252 (Miss. 1994) to support her argument that she did not know of her cause of action until she was told she had a case by another attorney. Smith v. Sneed stands merely for the proposition that the discovery rule applies in cases of legal malpractice. This is not disputed by the Defendant as the same is now codified in MISS. CODE ANN. § 15-1-49. The discovery rule, however, does not save Spann's claims. First, as the Mississippi legislature made clear, the discovery rule only applies to actions that involve latent injury:

> (2) In actions for which no other period of limitation is prescribed and which involve latent injury or disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury.

MISS. CODE ANN. § 15-1-49 (2). This Court has repeatedly "cautioned that the discovery rule should only be applied in 'limited circumstances in negligence . . . involving latent injury'" PPG Architecture Finishes, Inc. v. Lowery, 909 So. 2d 47, 50 (¶11) (Miss. 2005), *citations omitted.* As the Lowery Court stated, "[i]mplicitly then, this Court has held that if a latent injury is *not* present the discovery rule would *not* apply." Id. citing, Chamberlin v. City of Hernando, 716 So. 2d 596, 602 (Miss. 1998) (emphasis in original).

"Latent injury" is defined as one where the plaintiff is precluded from discovery of the harm or injury "because of the secretive or inherently undiscoverable nature of the wrongdoing in question, or when it is unrealistic to expect a layman to perceive the injury at the time of the wrongful act." Id. at (¶12), *citations omitted*; Smith, 638 So. 2d at 1257.

Spann's legal malpractice claim does not involve a "latent injury." The undisputed evidence is that Spann was advised throughout the underlying litigation that Dr. Rawson was claiming that he had been sued after the statute of limitations expired. The injury that forms the basis of Spann's legal malpractice claim is that the verdict she obtained against Dr. Rawson was

overturned on appeal on statute of limitations grounds. There was nothing latent about this injury—the Mississippi Supreme Court published its opinion in Rawson v. Jones, in June 2001 setting forth that Spann, through her attorneys, failed to properly file a lawsuit against Dr. Rawson within the time period allowed for such action. Spann acknowledges that Mr. Diaz thoroughly reviewed this opinion with her. (See Deposition of Patricia Spann at pp. 66-67, R. 271). Under these circumstances, Spann cannot seriously suggest that she was unaware of either the injury or the cause of that injury.

Spann argues, however, that she was not aware that she had a legal malpractice claim until Mr. Diaz's former law partner, Giddens, labeled the Defendant Firm's action "negligent". She further argues that she was not aware of the fact that the Defendant Firm had received some of the medical records from Arnold Dyre, Esq. in late 1994, and that this lack of knowledge precluded her from discovering her cause of action. However, under the discovery rule, for the statute of limitations to begin to run it is not necessary that a would-be plaintiff know every detail or fact connected to her potential claim, nor does a would-be plaintiff need to be absolutely certain that she has a cause of action:

> When applying the discovery rule, '[t]he focus is upon the time that [the would-be plaintiff] discovers, *or should have discovered by the exercise of reasonable diligence,* that [it] *probably* has an actionable injury." **The would-be plaintiff need not have become absolutely certain that he had a cause of action; he need merely be on notice-or *should* be-that he should carefully investigate the materials** that suggest that a cause probably or potentially exists. **Neither need the plaintiff know *with precision* each detail of breach, causation, and damages, but merely enough to make a plain statement of the case** backed by evidence sufficient to survive a summary judgment motion.
>
> ...
>
> **The plaintiffs need not have actual knowledge of the facts before the duty of due diligence arises; rather, knowledge of certain facts which are "calculated to excite inquiry" give rise to the duty to inquire.** The statute of limitations begins to run once plaintiffs are on inquiry that a ***potential* claim** exists.

First Trust Nat'l Assn. v. First Nat'l Bank of Commerce, 220 F.3d 331, 337 (5th Cir. 2000) (applying Mississippi law) (internal citations omitted) (emphasis added). See also, Rawson v.

Jones, 816 So.2d 367 (Miss. 2002) (holding, Jones had all of the facts she needed to institute legal proceedings against Dr. Rawson shortly after the death of her baby); Wayne General Hospital v. Hayes, 868 So.2d 997, 1000 (Miss. 2004), *overruled on other grounds,* (holding, that the discovery rule tolled the statute of limitations "until a plaintiff should have reasonably known of some negligent conduct, **even if the plaintiff does not know with absolute certainty that the conduct was legally negligent.**" (emphasis added).

Rather, the statute of limitations began to run once Plaintiff was "'on inquiry that a *potential* claim exists.'" First Trust Nat'l Assn., supra; Lowery, 909 So. 2d at 51. (the level of knowledge required to vest a cause of action has been eroded); Sarris, 782 So. 2d at 725 (holding absolute certainty of legally negligent conduct is not required for Plaintiff to know a claim exists). Furthermore, for the discovery rule to apply, Spann would have to demonstrate she was precluded from discovery of the harm or injury because of the secretive or undiscoverable nature of the wrongdoing. Smith, 638 So. 2d at 1253. There is certainly nothing secret about this Court's Opinion in Rawson v. Jones, nor the cause of Spann's malpractice action. Further, Spann admits she absolutely knew her potential injury on or about June 28, 2001 when this Court reversed the Trial Court Judgment and rendered, and the factual basis for this reversal. Spann knew the irreversibility of her injury on May 24, 2002 when informed that rehearing was denied. See also, Channel v. Loyacono, 954 So. 2d 415 (Miss. 2007).[9]

In this case, Plaintiff was on inquiry that a potential legal malpractice claim existed at the very latest on May 23, or 24, 2002, the date the Supreme Court denied rehearing. Moreover, to claim the benefit of the discovery rule, "a plaintiff must be reasonably diligent in investigating

[9] In Channel, the Court found certain plaintiffs had sufficient information to know of the alleged wrongdoing of their attorneys. Channel, 954 So. 2d at ¶ 23. As applied herein, Spann not only knew of the alleged omission because she had a copy of the Jones Opinion, but Mr. Diaz went so far as to explain the Opinion to her. See Deposition Testimony *infra.*

the circumstances surrounding the injury." Hayes, 868 So.2d at 1001. In this case, Spann was not reasonably diligent in investigating her purported cause of action against the Defendant Firm and filed suit only after a "chance meeting" with attorney John Giddens. See Hayes, 868 So.2d 997[10] (holding, that the plaintiffs' claim was barred by the statute of limitations since they did not file their action against the defendants until after the expiration of the statute of limitations when the plaintiff filed suit after a "chance meeting" and conversation with a treating nurse and former employee of the defendant hospital which revealed the nurse's belief that the defendant hospital negligently caused the decedent's death).

Even assuming *arguendo* that the discovery rule applied, Spann came forward with no evidence demonstrating any diligence in discovering her injury, or cause thereof as she is required to do to obtain the benefit of the discovery rule. Spann provided no evidence reflecting any type of investigation as to her potential claim after once she was fully informed of the Supreme Court's decision in Rawson v. Jones on June 28,2001, and the denial of the Motion for Rehearing a year thereafter, on May 23, 2002.. As reflected in Hayes, the "intent of the discovery rule is to protect potential plaintiffs who cannot, through **reasonable diligence**, discover injuries done to them". Hayes, 868 So.2d at 1001 (emphasis added). Simply stated, it matters not what Spann "thought", but rather what she knew, or through the exercise of reasonable diligence could have discovered. Spann Brief at 33; See, Hayes, 868 So. 2d 997.

Clearly, Spann had more than enough information by virtue of the Supreme Court's June 28, 2001, decision to know that (1) her monetary judgment against Rawson had been reversed; (2) as a result of the fact that Rawson was not joined as a Defendant timely by the lawyers, even

[10] Hayes was recently overruled by this Court in Caves v. Yarbrough, 2006-CA-01857-SCT (Nov. 1, 2007) only for the proposition that there is no discovery rule contained within the Mississippi Tort Claims Act.

if she did not know with certainty that the failure to join Rawson at the time the Complaint was filed was "negligent as matter of law". See Hayes, 868 So.2d at 1001.

Furthermore, Spann's reliance on *dicta* in Smith v Sneed, 638 So. 2d a 1258, citing a California and a Texas case to suggest that an attorney's failure to expressly label his conduct as negligence is an affirmative act of concealment that tolls the statute of limitations is misplaced. In fact, neither the California nor the Texas cases cited in Smith v. Sneed, require an attorney to tell his client specifically that he was "negligent" - especially where as here, the Defendant Law Firm was not negligent as to the Spanns for the reasons stated *infra,* pp 36-41. See, Smith, 638 So. 2d at 1257. Rather, the Texas Court stated that as a fiduciary, an attorney is "obligated to render a full and fair disclosure of facts material to the client's representation". Smith, 638 So.2d at 1257, citing McClung v. Johnson, 620 S.W.2d at 647. This the Defendant Firm accomplished.

The Defendant Firm fully satisfied its obligations which arose subsequent to the formation of the attorney/client relationship with Spann by

(1) At the initial meeting with the Spanns in June 1996, disclosing to the Spanns that the Defendant Firm had received selected Spann medical records from Arnold Dyre, Esq. (*Ms. Spann testified that Mr. Dyre had told her that he could not help her; that she left Mr. Dyre before the end of the year 1994; and that she subsequently took her medical records, etc. to Rhonda Cooper,* Esq., *and subsequently to Issac Byrd, Esq., before the expiration of the statute of limitations on April 8, 1996*). (Deposition P. Spann pp 24-26, 31-32, 46-47; R. 260-262; 266-267; Letter of R. Cooper, Esq. dated March 13, 1996. R. 295) (*Infra* at page 39);

(2) That the Defendant Firm had attempted without success to contact her (*Ms. Spann testified that she had moved her residency approximately six months after the delivery date of her infant on April 8, 1994 and her telephone number was unpublished)* (Deposition P. Spann pp 24, 4; R. 262, 266);

(3) That the Defendant Firm had filed a Complaint on or about April 8, 1996 in an attempt to preserve her claim until they could contact her to determine her desires. (*Spann was relieved. She knew the statute of limitations had expired on April 8, 1996.*) (Deposition P. Spann pp 38-41; R. 264-265);

(4) Subsequently advised Spann that the Defendant Firm felt it necessary to join Dr. Rawson as a Defendant in late 1996;

(5) That Dr. Rawson had raised the statute of limitations as a defense to his joinder as a Defendant;

(6) At the time of settlement with Methodist Hospital for the sum of $400,000, advising Spann that this might be all the monetary consideration she would ever receive because of the defense of the statute of limitations imposed by Dr. Rawson; (Deposition P. Spann pp 58-59; R. 269);

(7) After the conclusion of the trial, advising Spann that the verdict obtained against Dr. Rawson was being appealed to the Supreme Court based upon the statute of limitations defense;

(8) Timely advising Spann that on June 28, 2001, the Supreme Court had reversed and rendered as to the monetary judgment against Dr. Rawson and further provided Spann a copy of the Court's June 2001 decision and explained the contents to her. (Deposition of G. Diaz, pp. 89, 91, 95-97; R. 242-244; Deposition P. Spann pp 65-67; R. 271).

(9) Explaining to the Spanns that Defendant Firm would file a Petition for rehearing but that the likelihood of success "wasn't good". (Deposition of P. Spann pp 67; R. 271);

(10) Advising Spann on May 24, 2002, that the Petition for rehearing had been denied by the Supreme Court on May 23, 2002 and that the Spanns had lost. (Deposition G. Diaz pp 90-92; R. 242; Deposition P. Spann pp 69-71; R. 272)

Armed with all of this information, Spann had all of the material facts necessary to pursue a purported cause of action against the Defendant Firm. See Hayes, 868 So.2d 997 (Miss. 2004). Spann has admitted that she was fully informed throughout the litigation and appeal process of the fact that Dr. Rawson was added as a defendant outside the statute of limitations. (Deposition of Patricia Spann, pp. 55- 69, R. 268-272).

Spann merely attempts to make the same failed argument to this Court previously made to the Trial Court - that she did not "know" of her cause of action against the Defendant Firm until an attorney/expert told her. If Spann is able to prevail on such a theory here, then certainly the underlying case would not have been lost on appeal. The key is not when a Plaintiff is "told" she has a cause of action by her attorney/expert, but rather when she had sufficient material facts

"to excite inquiry" that a potential claim existed, which facts Spann had at least five (5) years before the denial of the Motion for Rehearing in May 2002 and at the very latest, on the date of the denial of the Motion for Rehearing. See Hayes, 868 So.2d at 997.

D. The Trial Court Did Not Err in Finding There Was No Evidence of Fraudulent Concealment by the Defendant Firm.

Further, Spann attempts to escape the statute of limitations problem, by alleging that the redaction of a recorded conversation with an expert equates to fraudulent concealment on the part of the Defendant Firm and tolled the statute of limitations, at least until **May 26, 2005**, the date that Mr. Diaz's former law partner, John Giddens in the former firm of Diaz, Lewis & Giddens, PLLC, allegedly told Ms. Spann (without apparent elaboration) that the Defendant Firm had been negligent in failing to timely name Dr. Rawson and the Neonatal Group as defendants in the underlying suit. This is an interesting theory in that Giddens did not inform Spann of the redacted statement on that date, rather the redacted statement was discovered by Spann's counsel during the discovery process conducted during the litigation of which Spann now complains. Notwithstanding Spann's flawed theory, this redacted statement is yet another smoke screen by Spann in attempt to divert this Court's attention which will be more fully addressed *infra*.

Spann's fraudulent concealment theory fails as a matter of law for three (3) independent reasons: (1) the doctrine of fraudulent concealment does not apply to claims, such as the instant claim, that are based on matters of public record; (2) Spann cannot satisfy her burden of proving that the Defendant Firm engaged in an affirmative act of concealment or that Spann acted with due diligence in attempting to discover the alleged negligence but was unable to do so; and (3) Spann had all of the information needed to pursue a legal malpractice claim, albeit a spurious one, even before her conversation with Mr. Giddens.

Mississippi law is well-settled that the fraudulent concealment exception to the statute of

limitations does not apply to claims arising from matters of public record:

> [t]he Rule of Concealed Fraud is an exception to the applicable statute of limitation. **However, the Rule of Concealed Fraud cannot apply to matters of public record.**

O'Neal Steele, Inc. v. Millette, 797 So.2d 869 (Miss. 2001) (emphasis added). See also, Carder v. BASF Corporation, 919 So. 2d 258 (Miss. Ct. App. 2005) (where the Court held that when the information is placed in the public domain, the doctrine of fraudulent concealment ceases to be applicable); Hobgood v. Koch Pipeline Southeast, Inc., 769 So. 2d 838 (Miss. Ct. App. 2000) (holding, the Rule of Concealed Fraud cannot apply to things that are matters of public record). See also, Deposit Guaranty National Bank v. Biglane, 427 So. 2d 945 (Miss. 1983) (holding, that where the dates and facts necessary to determine the merits of the statute of limitations defense were matters of public record no prejudice, by surprise or otherwise, could have been suffered by plaintiff); McWilliams v. McWilliams, 2007 WL 4111409, No. 2007-CA-00170-COA (Ct. App. Miss. Nov. 20, 2007) (holding, matters of public record obviates the defense of concealed fraud which would toll the statute of limitations).

This legal malpractice claim stems from the Mississippi Supreme Court's published Opinion on June 28, 2001 (ruling that the underlying claim against Dr. Rawson and the Neonatal Group was time-barred) and published denial of the Petition for Rehearing on May 23, 2002, both matters of public record to which the fraudulent concealment doctrine does not apply. Furthermore, Spann admitted that she sustained her injury on May 23, 2002, when the Mississippi Supreme Court denied rehearing.

Even assuming *arguendo* that the June 28, 2001, Supreme Court decision was not public record, Spann's claim of fraudulent concealment would still fail. Under Mississippi law, in order to invoke fraudulent concealment as an exception to the statute of limitations, Spann must first demonstrate that the Defendant Firm (1) engaged in affirmative acts of concealment and (2) that

Spann acted with due diligence in attempting to discover the alleged negligence of the Defendant. Sanderson Farms, Inc. v. Ballard, 917 So.2d 783 (Miss. 2005) (citations omitted). As to the first prong to establish fraudulent concealment, Spann failed to identify any affirmative act on the part of the Defendant Firm to conceal the fact that Dr. Rawson and the Neonatal Group were joined as Defendants in the underlying action after the applicable statute of limitations ran. The undisputed evidence is that, **throughout the litigation**, Spann was advised that there were problems with the case against Dr. Rawson in that Dr. Rawson had been added late and outside the statute of limitations.

Q: Do you recall the conversation with Mr. Womack in which he was telling you they thought it would be best to try to join Dr. Rawson and his group in the lawsuit? **Do you recall him talking to you about the fact that there may be a problem with waiting too long because more than two (2) years had gone by since the death of your son?**
A: **Yes.**
Q: Did they tell you they were willing to go on and take that fight and see if they could win that?
A: Yes.

(Deposition of Patricia Spann, p. 55, lines 17-25; p. 56, lines 1-2, R. 268). (emphasis added)

Q: **You knew after Dr. Rawson was joined after he got sued that his lawyer was taking the position that you as the plaintiff had waited too late to try to join him in the lawsuit? Do you recall that?**
A: **Yes.**
Q: **You discussed that at length with Mr. Womack as well, didn't you?**
A: **Yes.**

(Deposition of Patricia Spann, p. 56, lines 21-25; p. 57, lines 1-7. R. 268). (emphasis added)

Q: Shortly before the lawsuit was going to trial, we talked about the fact that Methodist was going to pay $400,000.00 to get out and they talked to you about that settlement, didn't they?
A: Yes.
Q: In the course of that of telling you what they were offering, Mr. Womack **and Mr. Diaz told you as well that while they were going to continue to go to trial against Dr. Rawson and his group, there was a chance that even if they got a verdict they might not be able to hold it because Dr. Rawson was contending that the plaintiff had waiting too long to file suit against him?**

A: **Yes.**

(Deposition of Patricia Spann, p. 58, lines 8-22, R. 269). (emphasis added)

Q: ...Mr. Womack told you **that even though they had a verdict - they got a verdict against Dr. Rawson they might not be able to keep that verdict because Rawson was contending that you waited too long and that consequently this might be the only money that would be forthcoming associated with all their efforts. You were told that weren't you?**
A: **Yes.**

(Deposition of Patricia Spann, p. 59, lines 21-25; p. 60, lines 1-3, R. 269). (emphasis added)

Q: **Well do you deny that he [Diaz] told you that what the [Supreme] Court ended upholding was that you had waited too late to join Dr. Rawson or to sue Dr. Rawson in a lawsuit?**
A: **I remember that, yes.**
Q: Do you recall in that conversation being told that on your behalf they were going to try to petition the Court to reconsider?
A: Yes.
Q: ...Well **did you understand that you had lost at that point?**
A: **Yes.**
Q: What did you understand they were going to do to see if they could help any further?
A: **Try to get the Court to overturn the decision.**
Q: **What did you understand was the prospect for them being successful in light of the Court's decision that had just been published? It wasn't good, was it?**
A: **No, sir.**

(Deposition of Patricia Spann, p. 66, lines 17-21; p. 67, lines 13-24, R. 271). (emphasis added)

Q: Now do you recall what happened with the Motion to Reconsider that they filed on your behalf to try to get the Supreme Court to change its mind?
A: No.
Q: Do you deny that you received a call on May 24, 2002, from Mr. Diaz in which he told you that the Supreme Court had denied the reconsideration?
A: I'm not sure about the date, but I sort of remember that call.
Q: And he told you, we lost.
A: Yes.

(Deposition of Patricia Spann, p. 69, lines 3-13, R. 272).

Furthermore, the second prong to establish fraudulent concealment requires the exercise of due diligence to obtain the information. In the instant matter, Spann did not identify any

action she took to obtain any of the allegedly concealed information. The basis of Spann's current lawsuit that the Defendant Firm failed to timely name Dr. Rawson and the Neonatal Group as Defendants, was clearly discernable from the Mississippi Supreme Court's Opinion in Rawson v. Jones, an Opinion that Spann acknowledges was provided to her and explained to her in detail by Mr. Diaz in the summer of 2001. Upon learning of this decision, Spann failed to take a single step toward discovering any alleged claims she may have had against the Defendant Firm in over five (5) years thereafter. Having sat idly by for this period of time, Spann cannot now claim fraudulent concealment.

Finally, Spann's fraudulent concealment theory fails because the undisputed evidence established that Spann had all of the information necessary to assert a malpractice claim even before her conversation with Mr. Giddens. Spann's claim is that the Defendant Firm should have, but failed to name Dr. Rawson and the Neonatal Group when the underlying wrongful death suit was filed on April 8, 1996 - the day the statute of limitations expired. Spann admittedly knew all of this well before her conversation with Mr. Giddens. (See deposition of Patricia Spann, pp 55-69, R. 268-272). The only new piece of information that Mr. Giddens imparted to Spann in their May 26, 2005 conversation was that the above actions/actions constituted "negligence". (See Deposition of Patricia Spann, p. 75, lines 24-25; and p. 76, lines 1-12, R. 273). Ironically, in its published Opinion in the underlying action, the Mississippi Supreme Court rejected the notion that the statute of limitation is tolled until an expert labels the known acts as negligence. Rawson, 816 So.2d at 369. Because Spann had all of the information necessary to assert this malpractice claim within the three (3) year period provided by Mississippi law, Spann should not now be heard to cry fraud.

Spann's attempt to cite a redacted transcript of a telephone conversation that occurred in

1997[11] as evidence of the Defendant Firm's "fraudulent concealment" is equally specious when in reality the section redacted has absolutely no relevance to Spann's alleged potential claim against the Defendant Firm. Spann admitted she knew the problems associated with the statute of limitations against Dr. John Rawson from the beginning. Furthermore, it is not some obscure piece of irrelevant evidence that is purportedly "concealed" which satisfies the fraudulent concealment exception. Rather, it is the **cause of action** itself:

> If a person liable to any personal actions shall fraudulently conceal **the cause of action** from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered.

Channel, 954 So. 2d at ¶ 29, citing, Stephens v. Equitable Life Assurance Soc., 850 So. 2d 78, 83 (Miss. 2003). It is undisputed that Spann knew or had sufficient information to require inquiry of a potential claim against the Defendant Firm at the latest on May 24, 2002 when Joey Diaz advised her that the Motion for Rehearing had been denied and the case was over. This issue of the redacted transcript is nothing more than a fallacious argument that fails as a matter of law.

Furthermore, whether the conversation between Kenny Womack and Dr. Walentik occurred in January of 1997 or June 28, 1996, when Dr. Walentik's name was first provided to Womack as a potential expert, **the result is the same - it is undisputed that the conversation occurred well after the expiration of the statute of limitations against Dr. John Rawson.** Consequently, the "discovery" of the redacted statement by Spann would not have made any difference whatsoever with regard to a potential claim against the Defendant Firm. Any "delay" in contacting an outside neonatology expert is simply irrelevant as the statute of limitations against Dr. John Rawson expired on April 8, 1996, at which time no attorney/client relationship

[11] The transcript was submitted to the trial court in support of a Response to Motion for Summary Judgment filed by Dr. John Rawson. The redacted portion merely concerned the delay in payment to Dr. Walentik for her review of the records and contained nothing of substance relevant to either this action or the underlying action. It is simply not the "smoking gun" Spann would have this Court believe.

existed between the Defendant Firm and Spann.[12] Additionally, any "discovery" of the redacted statement (which interestingly was **after** her Complaint was filed against the Defendant Firm) is completely irrelevant for the same reason and does not give rise to an "affirmative act of concealment" since it is totally irrelevant to Spann's claim and did not in fact prevent her from the discovery of her "potential" claim. Channel, 954 So. 2d at ¶ 29 (holding, "[t]he affirmative act must in fact be designed to **prevent the discovery of the claim**.") (emphasis added).

Thus, even assuming that the fraudulent concealment doctrine applied, Spann simply has no evidence of any affirmative act of concealment by the Defendant Firm that would serve to toll the statute of limitations as to her claims of legal malpractice based on the expiration of the statute of limitations against Dr. Rawson. Consequently, the Trial Court's ruling on this issue should be affirmed.

E. Underlying All of Spann's Arguments to This Court is the Assumption of an Attorney/Client Relationship When in Fact None Existed Between Spann and the Defendant Firm on April 8, 1996, When the Complaint Was Filed and When the Statute of Limitations Against Dr. Rawson Expired.

While the Trial Court, in light of its determination as to the statute of limitation, did not feel the necessity to address the Defendant Firm's contention that no attorney-client relationship existed between Spann and the Defendant Firm on April 8, 1996, this issue is the underlying basis of Appellant's arguments here. Consequently the Appellee feels it is necessary to address this issue. Simply stated, there was no attorney/client relationship between Spann and the Defendant Firm at the time of the alleged negligent omission, i.e. the expiration of the stature of limitations on April 8, 1996, at a time with Dr. Rawson was not a named Defendant.

An essential element of a legal malpractice claim is that an attorney/client relationship

[12] Furthermore, Dr. Walentik was not hired to be a "neonatology expert" against the neonatologist, Dr. Rawson; rather, she was hired to offer opinions as to the nursing negligence of the hospital both in the well-baby nursery and in the neonatal intensive care unit nursery. It was only after the telephone conversation in January of 1997 that it was discovered by the Defendant firm that Dr. John Rawson had potential liability and Dr. Walentik's opinions were extended.

must exist between plaintiff and the defendant at the time the alleged act or omission occurred. See Wilbourn v. Stennett, Wilkinson & Ward, 687 So.2d 1205 (Miss. 1997). Here, the alleged wrongful act/omission occurred on April 8, 1996, the date the statute of limitations expired on the wrongful death claim against Dr. Rawson and the Neonatal Group. To pursue this legal malpractice claim Spann must prove by a preponderance of the evidence that an attorney/client relationship existed between her and the Defendant Firm on April 8, 1996. This she cannot do.

Mississippi adheres to the general rule that the formation of the attorney/client relationship requires mutual assent. Specifically, under Mississippi law, the attorney/client relationship arises when:

> (1) **a person manifest to a lawyer the person's intent that the lawyer provide legal services for the person**; and (2)(a) the lawyer manifest to the person consent to do so, or (b) fails to manifest lack of consent to do so, knowing that the person reasonably relies on the lawyer to provide the services, or (c) a tribunal with power to do so appoints the lawyer to provide the services.

Hopper v. Frank, 16 F.3d 92 (5th Cir. 1994) citing Singleton v. Stegall, 580 So.2d 1242, 1244 (Miss. 1991) quoting Restatement of the Law: The Law Governing Lawyers, § 26 (emphasis added).

Here, the undisputed evidence demonstrates that as of April 8, 1996, no member of the firm of Cherry, Givens, Peters, Lockett & Diaz, P.A. had ever had any contact with Spann whatsoever - making it impossible for Spann to have manifested the requisite intent to form an attorney/client relationship with that firm.

It is undisputed that on April 8, 1996, Kenny Womack, an associate with the firm of Cherry, Givens, Peters, Lockett & Diaz, P.A., filed a one page Complaint against Dr. Carl Reddix, Jackson-Hinds Birth Center, and Methodist Medical Center in an effort to preserve Spann's claims even though she was not his client or a client of the firm. Spann's cause of action concerning the death of her son, Timothy Spann, expired on April 8, 1996. On April 8,

1996, neither Kenny Womack nor any other member of the Cherry Givens firm had ever had any contact with Ms. Spann whatsoever:

Q: At the time you received your documents back from Ms. Rhonda Cooper with a letter that was addressed to you saying we can't help you, **had you ever talked to Ken Womack at that point in time? Ever heard of him?**
A: **No.**
Q: Now can you tell me then if we assume for a second that this is the letter that was hand delivered to you and it's **dated March 13, 1996**, can you give me some idea how long after you got your documents delivered back to you by Ms. Cooper with a letter from the McTier firm, **how long after that that you first heard from Mr. Womack or heard his name?**
A: **I'm not sure.**
Q: **Can you give me a judgment? Was is several weeks, several months?**
A: **Months.**

(Deposition of Patricia Spann, p. 43, lines 12-25; p. 44, lines 1-4, R. 265). (emphasis added)

Q: Are you telling me that you recall an initial conversation with Mr. Womack?
A: Yes.
Q: At the time that he called and talked to you, did he tell you that in fact Mr. Dyre had sent them some records to see if they could help you?
A: Yes.
Q: Do you recall him telling you that because the statute had already run, they had filed a lawsuit but they needed to talk to you quickly to get more facts and get some additional records?
A: Yes.
Q: **But at least based upon this letter would it be fair to say that as of May 1996 you had never heard from Mr. Womack, never heard of him?**
A: **That's true. . .**
Q: But they told you in the initial phone call to try to protect your rights they had filed a lawsuit for you?
A: That's correct.

(Deposition of Patricia Spann, p. 46, lines 5-25; p. 47, lines 1-8, R. 266). (emphasis added)

Q: **Had you talked to Mrs. Spann or anyone from her family when this Complaint was filed?**
A: **I do not believe so, no.**

(Deposition of Kenny Womack, p. 13, lines 12-14, R. 281). (emphasis added)

Q: So when you reviewed this file and the statute of limitations was

beginning to loom large **prior to April [8], 1996, when you filed this Complaint, had you ever had any type of communications, directly or indirectly, with Mr. or Mrs. Spann?**

A: **I don't believe so, no.**

Q: ...Using that date as a pivot for a moment, June 13, 1996. For that date at any time to your knowledge had there been - to your knowledge had there been any communications, directly or indirectly, by anyone associated with the Joey Diaz law firm?

A: Not that I know of.

(Deposition of Kenny Womack, p. 46, lines 5-11 and lines 19-24, R. 290). (emphasis added)

Q: Were you ever successful in communicating with Mr. and Mrs. Spann prior to the necessity for filing this initial Complaint on April 6, 1996?

A: I don't believe so.

Q: What was the purpose then for your filing the initial Complaint on April 6, 1996, and Amended Complaint I think it's April 11, 1996?

A: To protect their right to pursue the lawsuit or the claim.

(Deposition of Kenny Womack, p. 48, lines 8-18, R. 290).

Rather, the Cherry Givens firm, unbeknownst to Plaintiff, received a letter from Arnold Dyre, Esq. with selected portions of the Spann medical records in November of 1994 and requesting the firm to review the potential of the case for litigation with "the possibility" of working with Mr. Dyre "on an associated basis (R. 293-294).

Q: Well how did your firm come to represent Ms. Spann?

A: Well, we received an initial letter from Mr. [Arnold] Dyre and it included some of the medical records. It came into our office and we opened a file when it came into the record - when it came into our office. At that time, it was tickled to - for a statute of limitation, and then I don't think there was any contact with Ms. Spann.

Q: **When did an attorney/client relationship form with the Spanns?**

A: **After the Complaint was filed, there was efforts to try to reach Ms. Spann. And at some point our firm was able to locate her and she was invited to come in. And we talked to her and told her that we had filed a Complaint in an effort to save her cause of action and that if she wanted us to continue to pursue it, we would look towards trying to pursue it for her if there was in fact a claim to be pursued. When. I guess it would have been when we sat down with her and discussed that.**

Q: Which was some time after the Complaint was filed?

A: As best I remember.

Q: **When do you consider the firm to have started representing Ms.**

Spann?

A: **When we sat down and talked to Ms. Spann about pursuing her claim.**

Q: So sometime after the case was filed?

A: As best I know.

Q: So you don't consider the firm to have been representing the Spanns when you filed the case?

A: When the case came up for expiration of the statute of limitation, we had the records in our office and we made a decision, or someone in our office made a decision, to file a claim to protect Ms. Spann's interests.

(Deposition of Gerald J. Diaz, Jr., p. 44, lines 16-25; p. 45, lines 1-24, R. 230-231). (emphasis added)

Q: And that Complaint was filed on Ms. Spann's behalf, correct?

A: Yes.

Q: So was the firm representing her at that time?

A: I don't know that we had ever talked to Ms. Spann up to that point, but the case had come to us through Arnold Dyre with an eye toward association. When it came up on the statute of limitations deadline, we made the decision to do everything we could to try to preserve Ms. Spann's cause of action and a Complaint was filed.

Q: **So in your mind the firm did not start representing Ms. Spann until you actually sat down and spoke with Ms. Spann after the case was filed, is that correct?**

A: **Yes.**

(Deposition of Gerald J. Diaz, Jr., p. 46, lines 1-18, R. 231). (emphasis added)

Having been unable to contact Mr. Dyre or Ms. Spann, or obtain a current address and telephone number for Ms. Spann, Mr. Womack decided to file a one page Complaint in an attempt to save Ms. Spann's cause of action (and probably to protect Mr. Dyre). (Deposition of Kenny Womack, pp 46-49; R. 290; Deposition of Patricia Spann pp 26-29, 44-45; R. 261-262; 265-266) He did this at a time when he had no authority from Ms. Spann or any other wrongful death beneficiary of Timothy Spann, and at a time when he had no attorney/client relationship with anyone concerning this claim:

Q: **And as of the time you filed the lawsuit, had you had any authorization, direct or indirect, from Mr. or Mrs. Spann to file a lawsuit?**

A: **All I had was this letter.**

Q: **From Mr. Dyre?**

A: **Right.**

(Deposition of Kenny Womack, p. 48, lines 19-25, R. 290) (emphasis added)

Q: ...And on the occasion of that meeting on June 13, 1996, you requested that they sign the Contract?
A: Yeah.
Q: And had they refused?
A: That's their prerogative.
Q: ...To your knowledge, based on the conversations that you had with Mr. and Mrs. Spann, did either Mr. or Mrs. Spann have any knowledge or awareness of the existence of Joey Diaz or the firm with which both of you worked at that time before that contact was made that precipitated the meeting on June 13, 1996?
A: Not that I know of.
Q: ...Did you rely upon both the letter [from Arnold Dyre] and the documents attached thereto in determining what persons or entities to identify as defendants when you initially filed the Complaint and Amended Complaint denoted Exhibits 27 and 28.
A: Yes.

(Deposition of Kenny Womack, p. 50, lines 1-3 and lines 19-25; p. 51, lines 1-7 and lines 22-25; p. 52, lines 1-3, R. 291)

Q: Do you agree with the statement that the decision [to wait to sue Dr. Rawson] was made by her attorneys?
A: When Arnold Dyre sent me the material, he asked me to review it with an eye toward association. Ms. Spann, I don't think ever talked to our firm. She didn't talk to our firm. She went out and was talking to other attorneys and our firm did not know she was talking to other attorneys. When the thing came up on our tickler, we made the decision to file suit to preserve her claim. At that time, Mr. Womack made a decision to name the prenatal care, the Ob/Gyn and the hospital. To preserver her claim, he decided to name several John Doe defendants. He made that decision and filed suit to preserve her claim. After he did that, he contacted - our firm reached out and found Ms. Spann, brought her into our office, and sat **down with her and told her what we had done, that we had filed suit and that we would pursue her claim if she wanted us to. She decided to let us pursue it.** Now we pursued that claim and over the course of that representation, we decided that Dr. Rawson needed to be added as a defendant. Ms. Spann knew that he had not been named and that there was - that he had not been named and that we had later decided to amend the Complaint and name him as a defendant.

(Deposition of Gerald J. Diaz, Jr., p. 113, lines 21-25; p. 114, lines 1-24, R. 248) (emphasis added)

Q: Now inside the firm before suit was filed, had physicians been consulted?

A: I did not talk to any physicians. Now whether or not Mr. Womack did or not, I do not know. But as best I know we didn't do anything on the file until we filed suit other than reviewing the records and talking to Mr. Dyre. **We did not actually represent Ms. Spann.**
MR. RAMSAY: Up until what time?
THE WITNESS: **Up until the time that she came in and sat down with us and we told her that we had preserved the statute of limitations, preserved the claim, and asked her if she wanted us to pursue the claim for her. She thanked us for doing that and told us she wanted us to pursue the claim for her. That was some time in June of 1996.**

(Deposition of Gerald J. Diaz, Jr., p. 129, lines 21-25; p. 130, lines 1-15, R. 252) (emphasis added)

In addition, Ms. Spann has admitted that she had no idea as to the existence of Cherry Givens firm or Kenny Womack, that she had peddled her case to at least three (3) other attorneys, including Isaac Byrd, Esq. and Rhonda Cooper, Esq. all of whom advised her she "had no case", but that the statute of limitations was close to expiration. It was not until she received a phone call from Kenny Womack several weeks on April 8, 1996, that she became aware that a Complaint had in fact been filed on her behalf in an attempt to save her cause of action:

Q: Did you have an understanding that you were hiring Mr. Dyre to investigate and if necessary file a lawsuit on your behalf as a result of the death of your child?
A: Yes.
Q: **Now how long did Mr. Dyre represent you in attempting to determine whether you had a lawsuit and if so, against whom?**
A: **I'm not sure how long.**

(Deposition of Patricia Spann, p. 26, lines 6-14, R. 261)

Q: When you left Mr. Dyre, where did you go?
A: Nowhere....Okay, that's what I wanted to go back to. I did talk with Ms. Rhonda Cooper.
Q: Now who is Rhonda Cooper?
A: She's an attorney.

(Deposition of Patricia Spann, p. 30, lines 16-17; p. 32, lines 3-9, R. 262)

Q: What other lawyers did you go visit associated with the death of your infant?
A: Mr. Isaac Byrd.
Q: When did you go see Mr. Isaac Byrd?

A: I'm not sure exactly when.
Q: Was that before or after you went to see Ms. Rhonda Cooper?
A: Afterward.
Q: Was that after Ms. Cooper had returned all your documents to you?
A: Yes.

(Deposition of Patricia Spann, p. 34, lines 10-20, R. 263)

Q: Well what happened with regard to Isaac Byrd and his representation of you?
A: Pretty much the same thing.
Q: And that is what?
A: That they couldn't find anyone to agree with me.
Q: Did they tell you that they had had a doctor review the records and that doctor could not find where there was a basis for you to sue somebody?
A: True.

(Deposition of Patricia Spann, p. 35, lines 15-24, R. 263)

Q: How long after you received the documents back from Mr. Byrd's office before you went to see any other lawyer?
A: That was it, I didn't see anyone else.
Q: Well how did you first come to know of the Gerald Diaz firm?
A: That was when Mr. Womack called me.
Q: He called you?
A: Yes.
Q: Did he tell you how he got your name?
A: Yes.
Q: What did he tell you?
A: **That the firm had received my file from Mr. Dyre and it's been a long - has been a long process of them looking to find me because I had moved and all my information had changed.**

(Deposition of Patricia Spann, p. 36, lines 12-25; p. 37, lines 1-2, R. 263)

Q: Now you're telling me you recall receiving a call from Mr. Womack?
A: Uh-huh.
Q: Do you remember what year you received that call?
A: In '96.
Q: When you went to see Mr. Dyre did he not tell you there was a time limit within which you had to figure out whether you had a lawsuit and if so, against whom, and actually file the lawsuit or the law would not let you continue with your claim?
A: Yes.

(Deposition of Patricia Spann, p. 38, lines 6-19, R. 264)

Q: She [Rhonda Cooper] told you as well that time was running out in filing a

lawsuit against anybody when she returned your documents.

A: Yes.

Q: ...When this lady, Felicia [at Isaac Byrd's office], returned the documents to you, did she tell you as well that time was running out, that you only had two years from April 8, 1994, in which to file a lawsuit against somebody if you were going to pursue your claim

A: Yes.

(Deposition of Patricia Spann, p. 39, lines 6-19, R. 264)

Q: Did you tell Mr. Womack at the time he initially called you that you had already had the case reviewed by Rhonda Cooper's office and they had said they couldn't help you?

A: Yes.

Q: Did you also tell him that you had also had the records reviewed by Isaac Byrd's office and they had told you that they had had it reviewed by a medical consultant and they said they couldn't help you?

A: Yes.

(Deposition of Patricia Spann, p. 47, lines 22-25; p. 48, lines 1-7, R. 266)

Given that on the date of the expiration of the statute of limitations which forms the basis of this Complaint, Spann had absolutely no idea that the Cherry Givens firm existed nor that they had a copy of a portion of Spann medical records, she was not in a position to manifest her intent to enter into an attorney/client relationship. Rather, it was not until the first meeting held between Spann and Mr. Womack on June 13, 1996, when agreements were signed and Spann was advised that a lawsuit had been filed on her behalf in order to protect her claims and that the attorneys would do what they could to try and help her, that the Spanns agreed to go forward with the claim, and signed the Attorney's Services Agreement. It was at this point where she manifested her intent that the firm provide legal services to her and not before. In that it was impossible for Ms. Spann to have entered into an attorney/client relationship without manifestation of intent to enter into that relationship on April 8, 1996, when the statute of limitations as to her underlying claim expired she had no basis for a legal malpractice claim against the Defendant Firm.

Had no lawsuit been filed on or before April 8, 1996, by the Defendant Law Firm

indisputably, neither Spann nor the Defendant Law Firm would be before this Court. Spann would have had absolutely no colorable action against the Defendant law firm. It is truly a paradox that as a result of the Defendant Law Firm's affirmative actions in April 1996, whereby Spann's cause of action was preserved and she ultimately obtained a monetary settlement of $400,000, the present action was initiated!

F. The Trial Court Did Not Err in Declining to Apply *Ms. Credit Center, Inc., v. Horton* to the Instant Case.

The Defendant Firm did not waive its right to move for summary judgment on the basis of the expiration of the Statute of Limitations. Plaintiff contends that the Defendant Firm waived its right to move for summary judgment on the basis of the expiration of the Statute of Limitations, because prior to filing its motion, the Defendant Firm engaged in discovery—the very discovery upon which the Defendant Firm relied in support of its motion and that Plaintiff cited in her response! This argument is frivolous on its face.[13]

Had the Defendant Firm brought on for hearing its Motion based on the statute of limitations at the outset of the litigation, Spann would have undeniably come forward with an affidavit(s) as she did in response to the Summary Judgment Motion stating that the statute of limitations is saved because she did not know there was "negligence" until John Giddens told her on May 26, 2005. This would have resulted in a finding that the Motion was premature absent factual development through discovery. This would certainly have resulted in the Defendant Firm "participating in litigation" and thereby subjecting itself to waiver. The end result is the same – the Defendant Firm would be prejudiced by being held that it waived an affirmative

[13] Spann never responded to the initial Motion to Dismiss contained in the Defendant Firm's Answer to the original Complaint thereby confessing the allegations contained therein. Miss. R. Civ. Proc. 8 (d); Rhodes v. Roberts, 223 Miss. 580, 583, 78 So. 2d 614, 617 (Miss. 1955). Thus, Spann can hardly be heard to now complain that the Defendant Firm waived their right to bring forth the statute of limitations defense when she admitted the Defendant Firm was entitled to dismissal.

defense that it clearly set forth in its Motion to Dismiss and Answer pursuant to Miss. R. Civ Pro. 8 (c) by developing the factual basis therefor through discovery or the Defendant's Motion based on its affirmative defenses would be defeated for lack of factual support. The resulting prejudice is immeasurable.

In any event, Spann's waiver argument is contrary to Mississippi Rule of Civil Procedure Rule 56 and to the Scheduling Order that this Court entered in this case. Rule 56 governs motions for summary judgment and specifically provides that "[a] party against whom a claim ... is asserted ... may, **at any time**, move with or without supporting Affidavits for a summary judgment in his favor as to all or any part thereof." MISS. R. CIV. P. 56(b) (emphasis added). Moreover, at the outset of the instant case[14], this Court issued a Scheduling Order, to which **Spann specifically agreed** and which specifically mandated that "all motions with the exception of motions *in limine* shall be filed with this Court on or before October 2, 2006". The Defendant Firm filed its motion two and one half months **in advance** of this deadline.[15] Accepting Spann's waiver argument would lead to the grossly unfair result of having a Trial Court impose a specific deadline for filing dispositive motions then rule that such a motion filed in compliance with its deadline was untimely.

Spann's reliance on MS Credit Center, Inc. v. Horton, 926 So.2d 167 (Miss. 2006), is misplaced. In stark contrast to the defendant in MS Credit who moved to compel arbitration as required in a contract pursuant to the Federal Arbitration Act after substantially engaging in the litigation process, the Defendant Firm's participation in this litigation was not inconsistent with its right to move for summary judgment. To the contrary, the Defendant Firm's participation in this case was in furtherance of this right. The Defendant Firm participated in discovery and the

[14] The Court issued the Scheduling Order within ninety (90) days of the Defendant Firm answering Plaintiff's Complaint.

[15] The Motion was filed on July 17, 2006, and Defendant obtained a hearing date and noticed the motion the following day on July 18, 2006 for an agreed hearing date of September 29, 2006.

collection of necessary evidence, including documents and deposition testimony, to support its Motion for Summary Judgment. Without the benefit of factual development through discovery, including deposition testimony, any motion for summary judgment on the bases raised by the Defendant Firm would have been premature and would have been summarily denied by the Trial Court. Certainly the Supreme Court in MS Credit did not intend to require immediate motions on affirmative defenses that require factual development such as the defenses raised in the Defendant Firm's motion. See Id. (requiring "unreasonable" or "unjustified" delay in asserting rights). Interpreting MS Credit as Spann would have this Court do would subject a defendant to either waiver of the affirmative defense or denial of its dispositive motion without factual development and or Rule 11 sanctions, an impossible position in which to place a defendant.

Furthermore, the holding of MS Credit upon which Spann relies is that "a defendant's failure to timely and reasonably raise and pursue the enforcement of any affirmative defense or other affirmative matter or right which would serve to terminate or stay the litigations coupled with active participation in the litigation process will **ordinarily** serve as a waiver." MS Credit, 926 So.2d at ¶44. The circumstances of the instant case are hardly "ordinary" given that the Trial Court entered a scheduling ordered **upon Spann's joint motion with the Defendant** in addition to Spann filing an amended complaint containing totally new allegations which essentially started the litigation anew. The MS Credit Court refrained from setting a "minimum number of days" that constitutes unreasonable delay but rather deferred such a finding to the trial court. Id. This Trial Court examined the circumstances of this case and found that the "unusual circumstances" required by MS Credit existed by virtue of the Motion to Amend.[16] Further, any delay was justified in the instant action since the testimony of the Plaintiff and others was

[16] While the Trial Court allowed the Defendant Firm leave to conduct additional discovery following the filing of the Amended Complaint, the decision was made at that time to bring forth its Motion rather than incur additional litigation expense by conducting discovery on Spann's new claims. Thus, the Defendant

necessary for the Defendant Firm's dispositive motion and the Trial Court's determination on summary judgment.

Spann also cites to Whitten v. Whitten, 956 So. 2d 1093 (Miss. Ct. App. 2007) and East Miss. State Hosp. v. Adams, 947 So. 2d 887 (Miss. 2007) in support of her claim of waiver. However, the affirmative defense in issue in both Whitten and Adams was insufficiency of process and insufficiency of service of process. Certainly there is no further development

through discovery required in order to bring forth a Motion based on the sufficiency of process or the sufficiency of service of process in that the sufficiency of process is evident on the face of the Summons and the sufficiency of service is evident on the face of the return of service affidavit. This is a totally different issue from a statute of limitations defense which may require factual development prior to bringing this issue before the Trial Court for determination. Furthermore, in Whitten, the Defendant was found to have provided "no justification" nor asserted any "extreme and unusual circumstances" as the Defendant Firm has done herein. Whitten, 956 So. 2d at ¶22.

Finally, Spann relies on this Court's ruling in Century 21 Maselle & Assoc. Inc. v. Smith, 956 So. 2d 1031 (Miss. 2007) which, like MS Credit, is an arbitration case. There is no doubt that there exists a long line of Mississippi cases that hold that the right to arbitrate is waived if not asserted early. See Century 21, 956 So. 2d at ¶8. However, the instant case is not a case of arbitration, rather it is a legal malpractice action which required factual development which could only be obtained through discovery in order to seek disposition of the case on the basis of the statute of limitations and the other dispositive issues including Spann's affirmative assertions in avoidance of the expiration of the limitations statute.

Firm was timely in bringing forth its Motion following the filing of its Answer to the Amended

Moreover, in Century 21 this Court required the Plaintiff asserting waiver to come forward with sufficient evidence at a hearing to overcome the presumption in favor of arbitration. Centruy 21, 956 So. 2d at ¶12. Thus, if Century 21 is to be followed, then by extension, Spann would have been required to come forward with sufficient evidence at the hearing on the Defendant Firm's Motion, or at the very least raised in her Response, that she was entitled to a waiver by demonstrating some sort of prejudice. It is undisputed that she failed to meet this burden. Neither in her Response to the Defendant Firm's Motion, nor at the hearing on September 29, 2006 did Spann ever claim any prejudice that she would suffer if the Defendant Firm's Motion was considered and determined at that time. (Tr. 1-38 and R. 320-323). Rather, Spann chose for the **first time** to raise the issue of prejudice **on Appeal** before this Court in claiming that expenses incurred in litigation (that were incurred due to her own course of action) was evidence of prejudice.[17] This Court has long held that matters not contained in the record may not be considered on appeal. Centruy 21, 956 So. 2d at ¶12 (holding, "[t]he court may not act upon or consider matters which do not appear in the record and must confine itself to what actually does appear in the record.").

Furthermore, raising the statute of limitations as a defense in a Motion for Summary Judgment prior to trial is permitted if "sufficient time to respond is given without prejudice". Bennett v. Madakasira, 821 So.2d 794 (Miss. 2002), (holding "as indicated in Rule 15, the test

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Complaint.

[17] Even assuming arguendo that Spann is allowed to raise prejudice for the first time on appeal, the only deposition Defendant took was that of the Plaintiff. Rather, it was Plaintiff that forced a lengthy discovery period by not only requesting a second review of the original file due to her failure to properly utilize her time during the first unfettered review, but she also took the depositions of both Joey Diaz and Kenny Womack. Spann can hardly be heard to cry foul and increased litigation expense when she brought these expenses upon herself by failing to utilize her time which resulted in a sanction of attorneys' fees against her and choosing to take not one, but two depositions. Further, Spann chose to proceed with hiring an outside legal expert rather than utilizing John Giddens who first advised her of the purported "negligence". It is absurd for Spann to complain about expenses incurred by her own voluntary actions in choosing the course by which she prosecuted her action.

for determining whether a party has waived an affirmative defense according to the Theunissen Court is whether the defendant's timing resulted in unfair surprise and undue prejudice."); see also, Theunissen v. GSI Group, 109 F.Supp.2d 505 (N.D. Miss. 2000) (holding "When a plaintiff can adequately confront and defend against an affirmative defense, there is no undue prejudice."); Bonti v. Ford Motor Co., 898 F.Supp. 391, 395 (S.D. Miss. 1995) (finding no waiver where defendant presented issue of statute of limitations well before trial and plaintiff fully responded to summary judgment motion grounded on that issue.) See also, Ingraham v. United States, 808 F.2d 1075, 1079 (5th Cir. 1987) (holding "Central to requiring the pleading of affirmative defenses is the prevention of unfair surprise.")

In that Spann certainly cannot claim unfair surprise or undue prejudice by the Defendant's filing of the Motion for Summary Judgment two and one half months prior to the deadline for dispositive motions, and Spann had both the opportunity to and did fully responded to the motion, her claim as to waiver of the motion fails as a matter of law. See also, Robertson v. Moody, 918 So.2d 787 (Ct. App. Miss. 2005) (holding the defense of statute of limitations is proper for summary judgment). To penalize under our State's Civil Rules and Mississippi law a party for exercising his right to factually develop the basis of his affirmative defense(s) before filing his dispositive motion is not what this Court intended in rendering its decision in MS Credit. Under the circumstances, any argument constituting waiver should fail as a matter of law and the Trial Court's determination on this issue should be affirmed.

V. CONCLUSION

The Appellee, Gerald J. Diaz, Jr., P.A. has clearly demonstrated that the Circuit Court of Hinds County did not err when it entered summary judgment against Spann's claims and in favor of Appellee. Simply stated, there is no issue of material fact in that it is undisputed that Spann admits her cause of action accrued at the latest on May 24, 2002 and she filed her Complaint against the Defendant Firm over three years later. The discovery rule does not save Spann's claims, nor does a claim for fraudulent concealment since there is no evidence of such and MS Credit does not apply. Thus, for the reasons set forth herein, the Judgment of the Circuit Court of Hinds County, First Judicial District, should be affirmed with all costs of this appeal taxed to the Appellant.

RESPECTFULLY SUBMITTED, this the 10th day of December, A.D., 2007.

GERALD J. DIAZ, JR., P.A.

BY: _____
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CERTIFICATE OF SERVICE

I, the undersigned, being the attorney of record for the Appellee, Gerald J. Diaz, Jr., P.A., in Docket No. 2007-CA-00232, in the Supreme Court of Mississippi, do hereby certify that I have, pursuant to Mississippi Rules of Appellate Procedure 25 and 31, this day delivered a copy of the foregoing brief for Appellee to: Philip W. Thomas, Post Office Box 24464, Jackson, MS 39225; and Honorable Bobby DeLaughter, Hinds County Circuit Court Judge, Post Office Box 27, Raymond, MS 39154; via Regular United States Mail, postage prepaid.

THIS, the 20th day of December, 2007.

J. ROBERT RAMSAY

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CERTIFICATE OF SERVICE AS TO FILING

I, the undersigned, being the attorney of record for the Appellee, Gerald J. Diaz, Jr., P.A., in Docket No. 2007-CA-00232, in the Supreme Court of Mississippi, do hereby certify that I have, pursuant to Mississippi Rules of Appellate Procedure 25 and 31, this day delivered for filing, the original and 3 copies of the foregoing Brief for Appellee to Betty Sephton, Supreme Court Clerk, Post Office Box 249, Jackson, Mississippi 39205, via Regular United States Mail, postage prepaid.

THIS, the 20th day of December, 2007.

J. ROBERT RAMSAY

J. ROBERT RAMSAY (MSB # 4617)
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IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

NO. 2007-CA-00232

PATRICIA JONES SPANN
APPELLANT

Versus

GERALD J. DIAZ, JR., P.A.
APPELLEE

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

APPENDIX

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

Miss. Code Ann. § 15-1-49

C
West's Annotated Mississippi Code Currentness
Title 15. Limitations of Actions and Prevention of Frauds
Chapter 1. Limitation of Actions (Refs & Annos)

→§ 15-1-49. Actions without prescribed period of limitation; actions involving latent injury or disease

(1) All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after.

(2) In actions for which no other period of limitation is prescribed and which involve latent injury or disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury.

(3) The provisions of subsection (2) of this section shall apply to all pending and subsequently filed actions.

CREDIT(S)

Laws 1989, Ch. 311, § 3; Laws 1990, Ch. 348, § 1, eff. from and after passage (approved March 12, 1990).

HISTORICAL AND STATUTORY NOTES

For applicability provision concerning Laws 1989, Ch. 311, see Historical and Statutory Notes under Section 15-1-36.

Laws 1990, Ch. 348, § 2 provides:

"If any section, paragraph, sentence, clause, phrase or any part of this act is declared to be unconstitutional or void, or if for any reason is declared to be invalid or of no effect, the remaining sections, paragraphs, sentences, clauses, phrases or parts of this act shall be in no manner affected thereby but shall remain in full force and effect."

Derivation:
Code 1930, § 2292; Code 1942, § 722.

LAW REVIEW AND JOURNAL COMMENTARIES

Class Actions & Joinder in Mississippi. Phillips, 71 Miss.L.J. 447 (Winter 2001)

Legislative reform of statutes of limitations in Mississippi: Proposed interpretations, possible problems. Jackson, 9 Miss.C.L.Rev. 231 (1989).

Mississippi's Civil Justice System: Problems, Opportunities and Some Suggested Repairs. Joyce, Hotra, 71 Miss.L.J. 395 (Winter 2001)

Mississippi's Statutes of Limitations and Choice of Law Analysis: A Borrowed Conflict. Comment, 57 Miss.L.J. 739 (1987).