IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-CA-00232

PATRICIA JONES SPANN **APPELLANT**

V.

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

APPEAL FROM THE CIRUCIT COURT
OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT
THE HONORABLE BOBBY DELAUGHTER

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

Philip W. Thomas (MB No. [redacted]
Philip W. Thomas, P.A.
Post Office Box 24464
Jackson, Mississippi 39225
747 North Congress Street
Jackson, Mississippi 39202

ATTORNEY FOR APPELLANT PATRICIA JONES SPANN

I. CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal:

1. Patricia Jones Spann, individually and as the representative of the heirs of Timothy Spann, Jr., Appellant/ Plaintiff;

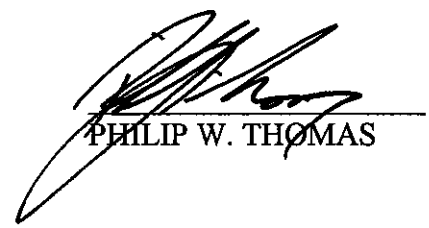
2. Gerald J. Diaz, Jr. P.A., Appellee/ Defendant;

3. Gerald ("Joey") Diaz, principal of Gerald J. Diaz, Jr.,

4. Philip W. Thomas, attorney for Plaintiff;

5. J. Robert Ramsay, attorney for Defendant; and

6. Amanda Clearman Waddell, attorney for Defendant.



PHILIP W. THOMAS

II. TABLES

A. Table of Contents

I. CERTIFICATE OF INTERESTED PERSONS.....ii

II. TABLES.....iii

A. Table of Contents.....iii

B. Table of Authorities.....iv, v

III. INTRODUCTION.....1

IV. STATEMENT OF THE ISSUES.....3

V. STATEMENT OF THE CASE.....4

A. Proceedings Below.....4

B. Statement of the Facts.....9

VII. SUMMARY OF THE ARGUMENT.....16

VIII. ARGUMENT.....18

A. Defendant waived its Motion for Summary Judgment under *MS Credit Center, Inc. v. Horton*.....18

B. The Statute of Limitations did not expire on Plaintiff's Claim....23

1. Diaz P.A. had a fiduciary relationship with the Spann family.....23

2. Diaz P.A. Fraudulently Concealed the Claim.....25

a. Diaz P.A. Concealed the Unaltered Telephone Transcript.....25

b. Diaz P.A. Failed to Disclose Material Facts.....26

(i.) Failure to Disclose Dilatory Conduct.....26

(ii.) Failure to Disclose Negligence.....27

c. Patricia Spann Exercised Due Diligence.....28

d. Summary of Fraudulent Concealment Argument.....31

3. The Discovery Rule Tolled the Statute of Limitations.....31

a. Diaz P.A.'s Malpractice was Secretive.....31

b. It is Not Reasonable to Expect Laymen to Perceive Concealed Legal Malpractice.....32

4. At a Minimum, there were Fact Questions that Precluded Summary Judgment.....34

IX. CONCLUSION.....36

X. CERTIFICATE OF SERVICE.....37

B. Table of Authorities

1. Cases

Century 21 Maselle and Associates, Inc. v. Smith, 2007 WL 2325271 (Miss. 2007).....22

Channel v. Loyaconno, 954 So. 2d 415 (Miss. 2007).....25, 31, 32

Circle Chevrolet Co. v. Giordano, Halleran & Ciesla, 142 N.J. 280, 662 A.2d 509 (N.J. 1995).....28

East Mississippi State Mental Hospital v. Brown 947 So. 2d 887 (Miss. 2007).... 20

Flores v. Elmer, 938 So. 2d 824 (Miss. 2006).....15

McCain v. Memphis Hardwood Flooring Co., 725 So. 2d 788 (Miss. 1998).....31

Mississippi Bar v. Land, 620 So. 2d 1213 (Miss. 1993).....6

Mississippi Bar v. Mathis, 620 So. 2d 1213 (Miss. 1993).....6

MS Credit Center, Inc. v. Horton, 926 So. 2d 167 (Miss. 2006).....2, 3, 16, 18

Neglin v. Breazeale, 945 So. 2d 988 (Miss. 2006).....15

Nofsinger v. Irby, 961 So. 2d 778 (Miss. 2007).....15

Olds v. Donnelly, 150 N.J. 424, 696 A.2d 633 (N.J. 1997).....25, 28

Rawson v. Jones, 816 So. 2d 367 (Miss. 2001).....6, 13, 28, 30, 33

Reich v. Jesco, Inc., 526 So. 2d 550 (Miss. 1998).....25

Robinson v. Cobb, 763 So. 2d 883 (Miss. 2000).....25

Simpson v. Lovelace, 892 So. 2d 284 (Miss. App. 2004).....15

Smith v. Orman, 822 So. 2d 975 (Miss. 2002).....24

Smith v. Sneed, 638 So. 2d 1252 (Miss. 1994).....23, 31, 34, 35

SRC Holding Corp., 364 B.R. 1 (D. Minn. 2007).....27

Staheli v. Smith, 548 So. 2d 1299 (Miss. 1989).....31

Stephens v. Equitable Life Assurance Society of U.S., 850 So.2d 78 (Miss. 2003)....25, 29

Van Zandt v. Van Zandt, 86 So. 2d 466 (Miss. 1956).....24

Warren v. Horace Mann Life Ins. Co., 949 So. 2d 770 (Miss. App. 2006).....29

Watts v. Horace Mann Life Ins. Co., 949 So. 2d 833 (Miss. App. 2006).....29

Whitten v. Whitten, 956 So. 2d 1093 (Miss. 2007).....21

2. Other Authorities

2 Mallen, Ronald E. & Jeffrey M. Smith, *LegalMalpractice* §14.22 (2007 ed.))).....27

III. INTRODUCTION

Gerald J. Diaz P.A. ("Diaz P.A.") obtained the Spann family's medical malpractice case in 1994 as a referral from another lawyer. For the next year and a half Diaz P.A. did not investigate the case or even contact the Spann family. Instead, the firm did nothing and then filed suit on the eve of the expiration of the statute of limitations. Diaz P.A. waited another eight months to have the case reviewed by an expert because the firm would not pay the expert's $400.00 fee. Once Diaz P.A. paid the expert's fee and talked to her, it learned that it sued the wrong doctor.

Diaz P.A. joined the new doctor as a defendant and obtained a $600,000 judgment against him. But the Mississippi Supreme Court reversed and rendered based on the statute of limitations. In the meantime, Diaz P.A. never notified the Spann family of the facts underlying the firm's dilatory conduct or the fact that the firm was negligent in handling the family's case. For instance, Diaz P.A. never told the family that it obtained the case in 1994—a year and a half before filing suit. A former Diaz P.A. attorney notified Patricia Spann of the firm's malpractice in May 2005—three years after the Supreme Court denied rehearing on the family's case. Mrs. Spann immediately sought legal counsel and filed suit for legal malpractice and breach of fiduciary duty. Plaintiff filed this action immediately upon being notified of her claim, which was three years and three days after the Supreme Court denied the motion for rehearing in the underlying case.

This case involves an admission of legal malpractice by a former employee of Diaz P.A. and affirmative acts of concealment by the firm. The affirmative acts of concealment consisted of both material misrepresentations and the failure to disclose

material facts as required in a fiduciary relationship. The trial court granted Diaz P.A.'s motion for summary judgment finding that the statute of limitations had expired. In doing so, the trial court refused to apply the waiver doctrine in *MS Credit Center, Inc. v. Horton* and found that Mrs. Spann should have discovered the claim sooner.

The trial court was incorrect in both respects. *MS Credit* applies in this case because Diaz P.A.'s motion for summary judgment was based on its statute of limitations affirmative defense, but not filed until after both a lengthy delay and voluntary participation in discovery. In addition, the fraudulent concealment doctrine and discovery rules tolled the statute of limitations because Diaz P.A. failed to disclose its negligence and other material facts and Mrs. Spann acted diligently to discover the claim.

IV. STATEMENT OF THE ISSUES

1. Does the existence of a scheduling order negate the waiver of affirmative defenses doctrine set forth in *MS Credit Center, Inc. v. Horton*?

2. Was the statute of limitations tolled for three days where the defendant law firm did not disclose that it was negligent or the facts underlying the law firm's negligence?

V. STATEMENT OF THE CASE

A. Proceedings Below.

In May 2005—after representing the Spann family for years—Diaz P.A. fired the family as clients and stated that the firm would no longer perform their chancery court work.[1] Patricia Spann contacted John Giddens (a former Diaz P.A. attorney) to perform the family's chancery court work.[2] When Mrs. Spann contacted John Giddens, he told her that Diaz P.A. made mistakes in handling her family's medical malpractice action that concluded three years earlier.[3] John Giddens met with Mrs. Spann and suggested that she contact the family's current attorney, who met with her and filed suit against Diaz P.A. the same day as their initial meeting: May 26, 2005.[4]

Plaintiff's Complaint alleged claims for negligence/ legal malpractice; fraudulent concealment; breach of contract; breach of fiduciary duty and breach of the duty of good faith and fair dealing.[5] On August 15, 2005, Diaz P.A. filed its Answer to the Complaint.[6] Diaz P.A.'s second affirmative defense was that "[t]his action is barred by the Mississippi Statutes of Limitations."[7]

---

[1] Record ("R.") at 272 (Patricia Spann depo. at p. 71).

[2] Id.

[3] R. at 273 (Spann depo. at pp. 75-76).

[4] R. 4 (Complaint); R. 257 (Spann depo. at p. 10); R. 273 (Spann depo. at pp. 75-76).

[5] R. 6-8 (Complaint).

[6] R. 10. (Diaz P.A.'s Answer).

[7] Id.

On September 16, 2005, Diaz P.A. noticed the deposition of Patricia Spann and propounded written discovery.[8] On September 30, 2005, Diaz P.A. produced for inspection its entire file for the underlying medical malpractice action at the office of Diaz P.A.[9] Defense counsel did not attend the inspection.[10] A subsequent detailed review of documents flagged for copying at the inspection revealed evidence of affirmative acts of concealment perpetrated by Diaz P.A. in the underlying action.

Plaintiff counsel's investigation revealed that Diaz P.A. removed language from a telephone call transcript that showed that Diaz P.A. was dilatory in having the underlying case reviewed by expert witnesses.[11] Diaz P.A. deleted from the transcript language that showed that there was an extended delay in the expert's review because Diaz P.A. did not pay the expert's retainer and that she thought that they had given up.[12] Specifically, the altered transcript deleted the following language:

> KW: I'm sorry I didn't get back to you sooner and I'm sorry it took me so long to get around to getting you paid so you could, you know, undertake the case.
>
> CW: Well, I was about to forget it. I thought you had given up.
>
> KW: Well, no, I have not given up. I hope you will give me reason to continue not to give up, if you follow that.

---

[8] R. 1 (contained in Plaintiffs Record Excerpts ("R.E.") at tab 1).

[9] R. 17.

[10] R. 18.

[11] Compare R. 362-369 (unaltered transcript) to R. 370-376 (altered transcript).

[12] Id.; R. 236 (Joey Diaz depo. at pp. 66-67).

CW: Yeah, I do.[13]

This language was important because Diaz P.A. argued to the trial court that it timely named the neonatologist (Dr. Rawson) as a defendant.[14] Diaz P.A. tendered the altered transcript as a complete copy to support its argument that it timely named Dr. Rawson as a defendant.[15]

Diaz P.A. contends that the work product doctrine allowed it to selectively redact language from the transcript without notifying opposing counsel.[16] This contention contradicts this Court's decisions in *Mississippi Bar v. Land*[17] and *Mississippi Bar v. Mathis,*[18] where lawyers were suspended for cherry-picking evidence disclosed in discovery. Regardless, it is undisputed that Diaz P.A. concealed the full transcript from the Plaintiff.[19]

With its fraudulent concealment exposed, Diaz P.A. refused to permit the re-inspection of its file.[20] Plaintiff filed a motion to compel, which the court granted.[21]

---

[13] R. 362. A small amount of additional language that is not relevant in this case was also redacted.

[14] *See Rawson v. Jones*, 816 So. 2d 367, 369 (Miss. 2001)(arguing that Dr. Rawson was a fictitious party under Miss. R. Civ. P. 9(h)).

[15] R. 236 (Diaz depo. at p. 67).

[16] R. 236 (Diaz depo. at pp. 66-67).

[17] 653 So. 2d 899 (Miss. 1994).

[18] 620 So. 2d 1213 (Miss. 1993).

[19] R. 379 (R.E. tab 3) (Affidavit of Patricia Spann at ¶ 11).

[20] R. 23.

[21] R. 58.

Unlike at the first inspection, Diaz P.A.'s counsel watched Plaintiff's counsel look at documents during the second inspection and later forced Plaintiff (who is a Jackson teacher's assistant) to reimburse Diaz P.A. over $800.00 in attorney's fees incurred by having counsel watch the document review.[22]

On October 14, 2005, Diaz P.A. took the deposition of Patricia Spann.[23] Diaz P.A. did not take any other depositions in the entire case. On November 10, 2005, the Court entered a Scheduling Order and Peremptory Trial Setting that Diaz P.A. agreed to.[24] The Order set the trial for November 27, 2006, the discovery deadline for September 15, 2006 and the motion deadline for October 2, 2006.[25]

On February 8, 2006 Plaintiff filed a Motion to Allow Filing of her First Amended Complaint.[26] The proposed Amended Complaint did not plead any new theories or add any new parties.[27] It simply pleaded Plaintiff's allegations in greater detail.[28] Diaz P.A. opposed the motion arguing that the amendment would prejudice it by necessitating new discovery.[29]

---

[22] R. 101.

[23] R. 255.

[24] R. 25-26.

[25] Id.

[26] R. 59.

[27] R. 61-78.

[28] Id.

[29] R. 93.

Plaintiff deposed Gerald (Joey) Diaz on March 22, 2006.[30] On April 7, 2006, the Court granted the motion for leave to amend and held that Diaz P.A. was permitted to conduct discovery as to the new allegations contained in the Amended Complaint.[31] Diaz P.A. conducted no additional discovery after the amendment despite its prior argument that it would be severely prejudiced if it did not conduct additional discovery.

On May 18, 2006, Plaintiff deposed Kenny Womack, the former Diaz P.A. associate who was involved in the altered phone transcript.[32] On June 25, 2006, Plaintiff designated her expert witnesses with the substance of their opinions.[33] On July 17, 2006, Diaz P.A. designated its expert witness and opinions.[34] On July 19, 2006, Diaz P.A. filed its "motion for judgment on the pleadings and/or motion for summary judgment."[35] The motion was based on both Rules 12 and 56.[36] The trial court granted the motion for summary judgment on November 15, 2006.[37] Plaintiff timely appealed the action to this Court.[38]

---

[30] R. 220.

[31] R. 103.

[32] R. 278 (Womack depo.).

[33] R. 145.

[34] R. 159.

[35] R. 165.

[36] Id.

[37] R. 455.

[38] R. 462.

B. Statement of the Facts.

On April 8, 1994, Timothy Spann, Jr. died as a result of meconium aspiration in the nursery at Methodist Medical Center.[39] On November 30, 1994, Patricia Spann's attorney (Arnold Dyre)—acting on her behalf—sent a letter to Joey Diaz with the medical records requesting that they work together on an associated basis.[40] When Joey Diaz received the letter he opened a file, assigned the case a file number, placed the statute of limitations on the firm's "tickler" system and assigned the case to attorney Kenny Womack.[41]

A year and a half later on April 8, 1996, Diaz P.A.'s tickler system notified Kenny Womack that the statute of limitations was about to expire on the Spanns' claim.[42] Mr. Womack was distressed that the statute of limitations was about to expire.[43] Mr. Womack hurriedly drafted a one page complaint and filed it that same day.[44] Afterwards, Mr. Womack asked John Giddens for sample complaints used by Giddens in other medical malpractice cases to use as a guide.[45] Womack then filed an amended complaint on April 9, 1996 that was longer than the original complaint, but that named the same

---

[39] R. 5.

[40] R. 326-27 (Arnold Dyre's letter).

[41] R. 229 (Diaz depo. at pp. 39-45).

[42] R. 230-31 (Diaz depo. at pp. 42-45).

[43] R. 395 (R.E. tab 4) (Affidavit of John Giddens at ¶ 3).

[44] Id. at ¶ 4; R. 341 (one page Complaint).

[45] R. 395 (R.E. tab 4) (Giddens' affidavit at ¶ 5).

defendants.[46] Neither complaint named as a defendant Dr. Rawson, who was Timothy Spann, Jr.'s treating neonatologist.[47]

There is no evidence in Diaz P.A.'s file indicating that the firm worked on Plaintiff's case between November 1994 and April 8, 1996. On April 11, 1996 Kenny Womack for the first time sent the medical records to someone in an attempt to identify expert witnesses for the case.[48] The cover letter does not indicate that a copy was provided to Patricia Spann.[49] Womack's letter included the statement that "we have already filed suit so I am under a great deal of pressure to come up with a colorable argument that there was negligence on the part of someone so as to avoid any 'Rule 11' problems."[50]

On May 2, 1996 Mr. Womack sent defense attorney Walter Johnson a copy of the medical records that Arnold Dyre sent to Joey Diaz in 1994.[51] There is no evidence in the file indicating that the firm made any effort to contact the Spann family until May 14, 1996—over a month after filing suit. On that date a legal assistant sent Mrs. Spann a letter stating that she tried to call her that day and that the firm filed a lawsuit "on your

---

[46] R. 342 (Amended Complaint).

[47] See id.

[48] R. 347 (April 11, 1996 letter from Womack to Garry Smith).

[49] Id.

[50] Id.

[51] R. 349 (May 2, 1996 letter from Womack to Walter Johnson). Patricia Spann was not copied on the letter. Id.

behalf regarding the Estate of Timothy Spann."[52] On June 13, 1996 Mr. Womack met with Mr. and Mrs. Spann and they signed contingency fee contracts.[53]

On June 27, 1996 Kenny Womack wrote a letter to Anthony Brancazio asking for the names of expert witnesses in OB and neonatology.[54] On June 28, 1996, Mr. Brancazio gave Mr. Womack the name of Dr. Corine Walentik as a neonatologist.[55] The same day, Womack submitted a check request for Dr. Walentik's $400.00 retainer fee and stated that he needed the check "ASAP."[56] On July 16, 1996 Womack submitted a second check request again requesting the check "ASAP."[57] The same day Womack requested that Joey Diaz approve the issuance of the $400.00 check for Dr. Walentik from the "Colortile fee payment."[58] Diaz P.A.'s file contains two original yet never-mailed letters from Womack to Dr. Walentik enclosing the $400.00 that were dated July 16, 1996 and September 5, 1996.[59] Apparently, Womack was eager to mail the records, but could not get the check disbursed.

---

[52] R. 350.

[53] R. 351.

[54] R. 353.

[55] R. 354.

[56] R. 355.

[57] R. 356.

[58] Id.

[59] R. 358-59.

In the meantime, on August 2, 1996 the firm's OB expert informed Womack that the treating OB defendant complied with the standard of care.[60] Between August 2, 1996 and January 10, 1997 Diaz P.A. continued to litigate the case without expert opinions against any defendant. This is a significant point with respect to the fraudulent concealment issue in this case because the firm later argued that they could not file suit against Dr. Rawson without expert opinions.[61] Diaz P.A. knew that its argument was untrue, since the firm filed suit against the two original defendants with no experts. Diaz P.A. never notified Plaintiff that the actual facts were inconsistent with the legal arguments made in the underlying case.

Finally, on January 2, 1997, Womack sent the $400.00 retainer check to Dr. Walentik for her review.[62] Dr. Walentik reviewed the case and concluded that Dr. Rawson was negligent. Dr. Walentik gave her opinions in a January 10, 1997 telephone conversation with Mr. Womack that he recorded and had transcribed.[63] During the conversation Womack apologized for the firm's delay in issuing the check so Dr. Walentik could review the case.[64]

On January 10, 1997, the Diaz firm filed a Motion for Leave to File Second Amended Complaint so that the neonatologist (Dr. Rawson) could be added as a defendant. The Motion was granted on July 8, 1997 and Dr. Rawson was added to the

---

[60] R. 360. Diaz P.A. had the case reviewed by the OB because he did not require a retainer fee in advance.

[61] In 1997 Mississippi law did not require expert consultation before filing suit.

[62] R. 361.

[63] R. 362-69.

[64] R. 362.

case. Dr. Rawson argued that the statute of limitations expired before he was named as a defendant. To support Plaintiff's arguments, Diaz P.A. submitted to the trial court an altered version of the January 10, 1997 telephone transcript.[65] The altered transcript deleted the fact that Diaz P.A. delayed sending the retainer check to Dr. Walentik.[66] Such delays were common in the firm due to the lack of funds or credit.[67]

On October 9, 1998 a Hinds County jury awarded the Spanns $1,000,000.00, which was offset to $600,000.00 due to a $400,000.00 settlement with Methodist Hospital. That night, lawyers from Diaz P.A. had a celebratory dinner at Tico's Steakhouse and charged the $608.00 bill to the Spann family as a case expense.[68] In an opinion dated June 28, 2001—but which did not become final until rehearing was denied on May 23, 2002—the Mississippi Supreme Court reversed the jury verdict and rendered the case on the grounds that the statute of limitations had expired.[69] On June 10, 2002, Patricia and Timothy Spann met with Joey Diaz regarding the Supreme Court's denial of rehearing and Mr. Diaz told them that the case was over.[70]

During the course of the litigation Patricia Spann knew that the statute of limitations was an issue in the case. But Patricia Spann did not know the following: (1)

---

[65] R. 370-376; R. 236 (Diaz depo. at p. 66).

[66] Compare R. 370 (altered) to R. 362 (unaltered).

[67] R. 395 (R.E. tab 4) (Giddens affidavit at ¶ 9).

[68] R. 377. The Spann family reimbursed Diaz P.A. for the Tico's bill from proceeds from their settlement with Methodist Hospital.

[69] See *Rawson v. Jones*, 816 So. 2d 367 (Miss. 2001).

[70] R. 243-44 (Diaz depo. at pp. 96-97).

that Diaz P.A. was negligent; (2) that the firm obtained her case (including the medical records) in 1994 and did no work before filing suit; (3) that the firm did not have potential experts review the case until suit was filed; or (4) that the firm redacted portions of the 1997 transcript in order to conceal its negligence.[71]

The Diaz firm never did anything to dissuade the impression that they obtained the case shortly before filing suit.[72] Patricia Spann learned that Diaz P.A. attorneys were negligent in handling the case in May 2005 when John Giddens notified her of this fact.[73] She filed this lawsuit the same day that she hired counsel.[74]

---

[71] R. 378 (R.E. tab 3) (Spann affidavit at ¶¶ 11-12).

[72] Id.

[73] Id. at ¶ 13.

[74] R. 4; 257.

VI. STANDARD OF REVIEW

Mississippi appellate courts review the grant or denial of a motion for summary judgment *de novo*.[75] The Court must examine all evidence in the light most favorably to the non-moving party.[76] The non-movant is given the benefit of any doubt.[77] Summary judgment should be granted only when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law.[78] Moreover, statute of limitations issues should not be decided on summary judgment when there are fact questions as to when the plaintiff should have discovered the claim.[79] The question should only be taken from the jury when reasonable minds could not differ.[80]

---

[75] *Nofsinger v. Irby*, 961 So. 2d 778, 779-80 (Miss. 2007).

[76] Id. at 780.

[77] Id.

[78] Id.

[79] *See Neglin v. Breazeale*, 945 So. 2d 988, 989 (Miss. 2006)(questions of fact existed as to application of discovery rule); *Flores v. Elmer*, 938 So. 2d 824, 828 (Miss. 2006)(issue of when plaintiff discovered her injury was question of fact that should have been submitted to trier of fact).

[80] *Simpson v. Lovelace*, 892 So. 2d 284, 289 (Miss. App. 2004).

VII. SUMMARY OF THE ARGUMENT

Under *MS Credit Center, Inc. v. Horton* a defendant waives affirmative defenses by engaging in the litigation process and delaying the filing of a motion to dismiss. Diaz P.A. filed its motion to dismiss based on the statute of limitations affirmative defense over eleven months after filing its answer and following its substantial engagement in the litigation process. Under *MS Credit* this constitutes waiver of the affirmative defense as a matter of law. The trial court misinterpreted *MS Credit* and held that scheduling orders and amended answers negate the waiver doctrine. The trial court committed reversible error on this issue and the grant of summary judgment should be reversed.

Notwithstanding the waiver doctrine Plaintiff timely filed this action due to the fraudulent concealment doctrine and discovery rule. The fraudulent concealment doctrine applies to toll the statute of limitations for at least the required three days. Diaz P.A. committed two categories of affirmative acts of concealment. First, Diaz P.A. fraudulently altered a telephone transcript by removing language that showed its dilatory conduct in the underlying litigation. Second, Diaz P.A. breached its fiduciary duty by not disclosing its negligence and the material facts underlying its negligence.

Plaintiff exercised due diligence to discover her claim. Plaintiff reasonably believed that Diaz P.A. did not obtain the case in time to file suit against the correct doctor. Plaintiff did not know that Diaz P.A. obtained the case a year and a half before filing suit and Diaz P.A. never told her. Plaintiff also possessed no document or information that showed Diaz P.A.'s dilatory conduct. Plaintiff immediately filed suit upon learning that Diaz P.A. was negligent.

The discovery rule also applies to toll the statute of limitations. Diaz P.A.'s malpractice was secretive and Plaintiff is a layperson with no training or experience in the legal field. It is uncontested that Plaintiff actually discovered Diaz P.A.'s negligence in May 2005 shortly before filing suit. For the discovery rule to not apply the Court must find that a layperson should have been able to figure out that her attorney was withholding material facts and filed suit based on the withheld facts. Under the facts of this case the fraudulent concealment doctrine and discovery rule apply as a matter of law. In the alternative, the case involves fact questions that preclude the grant of summary judgment.

VIII. ARGUMENT

A. Defendant Waived its Motion for Summary Judgment under *MS Credit Center, Inc. v. Horton.*

The trial court granted summary judgment based on Diaz P.A.'s affirmative defense that the statute of limitations expired on Plaintiff's action.[81] The Mississippi Supreme Court held in *MS Credit Center, Inc. v. Horton*[82] that parties must timely and reasonably raise affirmative defenses or they are waived. The trial court found *MS Credit* inapplicable because Diaz P.A. filed its motion before the dispositive motion deadline set by the scheduling order.[83]

In *MS Credit* the defendants plead arbitration in their answers, but waited eight months before moving to compel arbitration.[84] In the meantime, the defendants substantially engaged in the litigation process by: (1) consenting to a scheduling order; (2) engaging in written discovery; and (3) deposing the plaintiff.[85] The Court noted that neither engaging in the litigation process nor delaying filing the motion standing alone constitutes waiver.[86] But where there is both, waiver exists as a matter of law.[87]

---

[81] R. 459 (R.E. tab 2) (Memorandum Opinion).

[82] 926 So. 2d 167, 180-81 (Miss. 2006).

[83] R. 461 (R.E. tab 2).

[84] *MS Credit*, 926 So. 2d at 180.

[85] Id.

[86] Id.

[87] Id.

"...[A]bsent extreme and unusual circumstances-an eight month unjustified delay in assertion and pursuit of any affirmative defense or other right which, if timely pursued, could serve to terminate the litigation, coupled with active participation in the litigation process, constitutes waiver as a matter of law."[88] The Court defined pursuit of an affirmative defense as: (1) asserting the defense in a pleading; (2) filing a motion with the court; and (3) requesting a hearing.[89] The Court stated that its holding applies to all affirmative defenses:

> [o]ur holding today is not limited to assertion of the right to compel arbitration. 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.[90]

This case is indistinguishable from *MS Credit*. Diaz P.A. moved for summary judgment based on its statute of limitations defense eleven months after asserting the defense in its Answer.[91] Instead of timely moving for dismissal, Diaz P.A. actively participated in the litigation process as follows:

8/12/05—filed Answer

9/12/05—submitted responses to Plaintiff's written discovery

9/14/05—noticed Plaintiff's deposition

9/14/05—propounded written discovery to Plaintiff

10/15/05—took Plaintiff's deposition

---

[88] Id. at 181.

[89] Id. at 181 n. 9.

[90] Id at 180.

[91] R. 10; 165.

11/10/05—Agreed to Scheduling Order and Peremptory Trial Setting

1/13/06—appeared at hearing opposing Plaintiff's Motion to Compel

3/22/06—participated in deposition of Joey Diaz noticed by Plaintiff

3/31/06—participated in hearing on Plaintiff's Motion to Amend and Defendant's Motion for Costs

4/12/06—filed Answer to First Amended Complaint

5/18/06—participated in deposition of Kenny Womack noticed by Plaintiff

7/14/06—designated expert witnesses

7/19/06—filed Motion to Dismiss.

This was virtually identical to the defendant's participation in the litigation process in *MS Credit,* except here the delay was even longer—almost a full year after answering the Complaint. *MS Credit* applies and Defendant waived its statute of limitations defense as a matter of law.

In 2007 this Court followed *MS Credit* and denied an untimely motion in *East Mississippi State Mental Hospital v. Brown.*[92] In *Brown*, the plaintiff filed a wrongful death action against a state hospital and the Mississippi Department of Mental Health.[93] The plaintiff filed suit on July 2, 2003.[94] the defendants' answers asserted affirmative defenses of insufficient and inadequate service of process pursuant to Rules 12(b)(4) and 12(b)(5), based on plaintiff's failure to serve the attorney general as required by Miss. R.

---

[92] 947 So. 2d 887 (Miss. 2007).

[93] Id. at 889.

[94] Id.

Civ. P. 4(d)(5).[95] The defendants filed their motion for summary judgment on June 9, 2005, based on insufficiency of service of process.[96] The trial court ruled that the defendants waived the defenses by not asserting them earlier.[97] This Court affirmed, quoting *Ms Credit*.[98] The Court found that the defendants waived their affirmative defenses by participating in discovery and filing and opposing various motions for over two years without actively contesting jurisdiction.[99]

In 2007 the Mississippi Court of Appeals followed *MS Credit* in *Whitten v. Whitten*.[100] The Court of Appeals reiterated that an eight month delay coupled with active participation in discovery constitutes waiver of the affirmative defense as a matter of law.[101]

In this case, the trial court declined to apply *MS Credit* because Diaz P.A. filed its motion seventy days after answering the amended complaint and within the time specified in the court's scheduling order.[102] With all due respect to the trial court, it misapplied *MS Credit* in several respects. First, the trial court viewed the entry of the

---

[95] Id.

[96] Id.

[97] Id.

[98] Id. at 891.

[99] Id.

[100] 956 So. 2d 1093 (Miss. 2007).

[101] Id. at ¶ 19.

[102] R. 460-61 (R.E. tab 2).

scheduling order as a linchpin factor that precluded a finding of waiver.[103] In fact, Diaz P.A.'s agreeing to a scheduling order is one of the factors that require a finding of waiver.[104]

Second, the trial court ignored the seven month delay between the filing of Diaz P.A.'s original answer and its amended answer and concluded that the amended answer started a new waiver period.[105] But Diaz P.A.'s engaging in the litigation process for seven months already constituted a waiver. The fact that the amended complaint did not add new legal claims or parties and that Diaz P.A. further delayed filing its motion for several additional months only bolsters the waiver argument.

Third, the rationale for *MS Credit's* waiver principal was that the court system and opposing party were prejudiced by the defendant's failure to assert the affirmative defense until late into the litigation process.[106] Here, Plaintiff was prejudiced by Diaz P.A.'s delay in asserting its statute of limitations defense. Plaintiff incurred the substantial expense of participating in discovery, taking depositions, paying for deposition transcripts and hiring an expert witness to provide opinions in the case. All of these substantial expenses would have been avoided if Diaz P.A. had filed its motion within a reasonable time after answering the complaint. The trial court would have granted the motion and all these expenses would have been avoided.

---

[103] R. 461 (R.E. tab 2).

[104] See *MS Credit*, 926 So. 2d at 180 (defendants substantially engaged in litigation by consenting to scheduling order).

[105] R. 461 (R.E. tab 2).

[106] *See also Century 21 Maselle and Associates, Inc. v. Smith*, 2007 WL 2325271 (Miss. 2007)(active participation and prejudice to opposing party constitutes waiver).

Fourth, *MS Credit* cannot be avoided where there was an amended complaint or where the motion was filed within a scheduling order for filing dispositive motions. Amended complaints against the same parties do not take the case back to the starting line, particularly where the affirmative defense at issue was plead in the original answer. Likewise, dispositive motions filed on the eve of scheduling deadlines are for motions that test the sufficiency of the evidence supporting a plaintiff's claim. It makes sense for these motions to be filed after discovery is completed. A motion to dismiss based on an affirmative defense is another matter. These motions can and should be filed as soon as reasonably possible so that parties may avoid unnecessary litigation expenses. Moreover, under *MS Credit* these motions must be filed sooner than one year after service of the complaint. *Ms Credit* applies and compels a finding of waiver and reversal of the trial court's grant of summary judgment.

B. The Statute of Limitations did not Expire on Plaintiff's Claim.

1. Diaz P.A. had a Fiduciary Relationship with the Spann Family.

The attorney-client relationship is a special, fiduciary relationship.[107] An attorney must use the skill, prudence, and diligence commonly exercised by practitioners of the profession.[108] The client has a right to rely on her attorney's advice.[109] As a fiduciary the attorney must render a **full and fair disclosure** of facts material to the client's

---

[107] *Smith v. Sneed*, 638 So. 2d 1252, 1257 (Miss. 1994)(citation omitted).

[108] Id.

[109] Id.

representation.[110] A corollary to the attorney's expertise is the layman's inability to detect negligence by the attorney.[111] But the existence of the fiduciary relationship protects the client by requiring the attorney to disclose the attorney's negligence.[112] This prevents the attorney from obtaining immunity from an initial breach of the duty by committing a subsequent breach of the obligation to disclose.[113]

The attorney's failure to disclose the negligence to the client is an affirmative act of concealment.[114] The requirement for a fiduciary to disclose material facts has also been recognized by this Court in cases not involving attorneys.[115] Finally, although not intended to set the standard of care, Rule 1.4 of the Mississippi Rules of Professional Conduct also requires lawyers to disclose relevant information to clients and the Comment to the Rule states that "[a] lawyer may not withhold information to serve the lawyer's own interest or convenience."

---

[110] Id. (emphasis added) (citation omitted).

[111] Id. (citation omitted).

[112] See id.

[113] Id. (citation omitted).

[114] Id. (citation omitted).

[115] *See Smith v. Orman*, 822 So. 2d 975, 981 (Miss. 2002)(silence by fiduciary tolled statute of limitations); *Van Zandt v. Van Zandt*, 86 So. 2d 466, 470 (Miss. 1956)(failure to disclose material facts as much fraud as affirmative false representation).

2. Diaz P.A. Fraudulently Concealed the Claim.

a. Diaz P.A. Concealed the Unaltered Telephone Transcript.

Plaintiff's legal malpractice action against Diaz P.A. accrued on the date that the Supreme Court denied the motion for rehearing and dismissed the case.[116] Fraudulent concealment tolls a claim for legal malpractice.[117] In order to establish fraudulent concealment a plaintiff must show: (1) affirmative acts or conduct by the defendant that prevented discovery of a claim; and (2) due diligence was performed by the plaintiff to discover the claim.[118] In addition, the defendant's affirmative act must be designed to prevent discovery of the claim.[119]

In this case Diaz P.A. attorneys altered a telephone transcript that showed that the firm was dilatory in investigating Plaintiff's claim and submitted the altered version to both the Plaintiff and the court. Diaz P.A. did not disclose to Plaintiff that it altered the telephone transcript and did not provide Plaintiff with a copy of the unaltered transcript.[120] These were affirmative acts of concealment that were designed to prevent the discovery of the claim.

---

[116] *See Olds v. Donnelly*, 150 N.J. 424, 696 A.2d 633, 640 (N.J. 1997)(majority of courts follow rule that when legal malpractice occurs during course of litigation action accrues when damage actually sustained).

[117] *See Channel v. Loyaconno*, 954 So. 2d 415, 423 (Miss. 2007).

[118] Id. (*citing Stephens v. Equitable Life Assurance Society of U.S.*, 850 So. 2d 78, 84 (Miss. 2003)).

[119] *Channel*, 954 So. 2d at 423 (*citing Robinson v. Cobb*, 763 So. 2d 883, 887 (Miss. 2000); *Reich v. Jesco, Inc.*, 526 So. 2d 550, 552 (Miss. 1998)).

[120] R. 379 (R.E. tab 3) (Spann affidavit at ¶ 11).

b. Diaz P.A. Failed to Disclose Material Facts.

(i.) Failure to Disclose Dilatory Conduct.

The fiduciary relationship between Diaz P.A. and the Spanns required Diaz P.A. to make a full and fair disclosure of all material facts. This means that Diaz P.A. had to disclose the facts underlying its dilatory conduct in investigating the Spann's claim. It is undisputed that Diaz P.A. did not disclose the following:

1. Diaz P.A. obtained the case a year and a half before filing suit,
2. Diaz P.A. did nothing to investigate the case before filing suit;
3. Diaz P.A. did not consult any expert witnesses until months after filing suit;[121]
4. Diaz P.A. did not consult and provide the medical records to a nenatologist until eight months after filing suit and over two years after accepting the case;
5. Diaz P.A. committed affirmative acts of concealment in the trial court by removing the portion of the telephone transcript with the neonatologist that revealed a delay caused by Diaz P.A.'s failure to pay the expert her $400.00 fee;
6. Diaz P.A.'s delays constituted a breach in the standard of care;[122]

---

[121] Diaz P.A. represented to the trial court that it previously obtained expert reviews, but at most these "reviews" were discussions with lawyers associated with the firm who also had medical degrees. R. 280 (Womack depo. at p. 8). Diaz P.A. did not seek a neonatology review until after filing suit and that review was delayed for months waiting on approval from management to issue a $400.00 check. R. 395-397 (Giddens affidavit at ¶¶ 3-20).

[122] R. 384-94 (R.E. tab 5) (Plaintiff's expert designation of Mack Brabham).

7. Diaz crafted arguments in the trial court that were designed to conceal the firm's dilatory conduct; and

8. when the Supreme Court reversed the trial court Diaz P.A. knew that its negligence caused Plaintiff to suffer damages.

Diaz P.A. had to disclose all of these material facts for there to have been a full and fair disclosure as required by Mississippi law. Instead, Diaz P.A. did not disclose and continued to perform chancery court work for the Plaintiff for three years—perhaps only coincidentally the same length of time as the statute of limitations on legal malpractice claims. Diaz P.A. then fired the Spann family as its clients. The family would have never learned the truth if John Giddens had not told them in May 2005. Diaz P.A.'s failure to disclose material facts to the Spanns constituted multiple affirmative acts of concealment.[123]

(ii.) Failure to Disclose Negligence.

The fiduciary relationship also requires a lawyer to explain to the client the legal significance of the material facts.[124] An attorney must promptly notify his client of his failure to act and of the possible claim that the client may have against the attorney.[125]

---

[123] *See Smith,* 638 So. 2d at 1257.

[124] *In re SRC Holding Corp.*, 364 B.R. 1, 46 n.66 (D. Minn. 2007)(quoting 2 Mallen, Ronald E. & Jeffrey M. Smith, *Legal Malpractice* § 14.22 (2007 ed.)).

[125] *In re SRC Holding*, 364 B.R. at 46(*quoting In re Tallon*, 86 A.D. 2d 897, 447 N.Y.S.2d 50, 51 (N.Y. 1982)(suspending lawyer for six months for breaching duty to inform client of attorney's failure to act and possible malpractice claim client had against attorney)).

Once an attorney makes a mistake the attorney must notify the client of the mistake and the client's right to obtain new counsel and sue the attorney for negligence.[126]

Diaz P.A. failed to explain to the Spann family that Diaz P.A. was negligent.[127] Diaz P.A. does not contend otherwise.[128] Instead, Diaz P.A. argues that as a layperson Patricia Spann should have deciphered the known facts into the conclusion that Diaz P.A. was negligent. Diaz P.A.'s argument fails, however, since it is uncontested that Diaz P.A. never met its fiduciary obligation to disclose its negligence and explain the consequences of the material facts.

c. Patricia Spann Exercised Due Diligence.

There is record evidence in this case that Patricia Spann exercised due diligence in relation to discovering Diaz P.A.'s negligence. First, it is undisputed that Mrs. Spann did not know that the reason that the statute of limitations expired due to Diaz P.A.'s negligence.[129] Mrs. Spann concluded that Diaz P.A. did not obtain the case in time to timely sue Dr. Rawson.[130] Mrs. Spann's conclusion was reasonable, since the Mississippi Supreme Court made the same conclusion.[131]

---

[126] *In re SRC Holding*, 364 B.R. at 46 (*quoting Circle Chevrolet Co. v. Giordano, Halleran & Ciesla*, 142 N.J. 280, 662 A.2d 509, 514 (N.J. 1995), abrogated on other grounds by *Olds v. Donnelly, 696 A.2d at 633*).

[127] R. 379 (R.E. tab 4) (Spann affidavit at ¶ 12).

[128] R. 243-44 (Diaz deposition at pp. 95-99).

[129] R. 379-80 (R.E. tab 4) (Spann affidavit at ¶¶ 13-15).

[130] R. 380 (R.E. tab 4) (Spann affidavit at ¶ 15).

[131] See *Rawson v. Jones*, 816 So. 2d at 370.

Second, there is no evidence that Mrs. Spann did not read documents or ignored other evidence in her possession such as in the line of fraudulent concealment cases involving the sale of insurance policies.[132] In those cases the plaintiffs failed to exercise due diligence by not reading their insurance policies. In contrast, there is no evidence that Mrs. Spann ignored documents in her possession that disclosed the truth.

Third, when John Giddens gave Patricia Spann a full disclosure of all the material facts, including an explanation of Diaz P.A.'s negligence, she immediately retained counsel and filed suit the same day. This is evidence that Mrs. Spann acted diligently, not that she sat on her family's rights and ignored the claim. There is sufficient evidence before the Court for it to conclude that Patricia Spann exercised due diligence as a matter of law.

The trial court focused on the second prong of the fraudulent concealment test and granted summary judgment based on its conclusion that Diaz P.A.'s fraudulent concealment did not prevent discovery of the claim.[133] To support its conclusion, the trial court stated that the Mississippi Supreme Court's May 25, 2002 opinion "clearly identified Diaz as the party at fault."[134] But contrary to this statement, the Supreme

---

[132] *See, e.g., Watts v. Horace Mann Life Ins. Co.*, 949 So. 2d 833, 837-38 (Miss. App. 2006)(plaintiff failed to exercise due diligence by not reading insurance policy); *Warren v. Horace Mann Life Ins. Co.*, 949 So. 2d 770, 772-73 (Miss. App. 2006)(same); *Stephens v. Equitable Life Assurance Society of U.S.*, 850 So. 2d 78, 84 (Miss. 2003)(same).

[133] R. 458-59 (R.E. tab 2).

[134] R. 459 (R.E. tab 2).

Court's opinion suggested that Diaz P.A. was not at fault: "[w]e add that [Mrs. Spann's] trial counselor and counsel on appeal were not her original lawyer."[135]

The Supreme Court made this statement in response to Diaz P.A.'s argument that the lawsuit against the Dr. Rawson was timely because the expert opinion was not obtained until January 1997.[136] Like Patricia Spann, the Supreme Court apparently concluded that Diaz P.A. obtained the case too late to timely investigate the underlying facts and sue Dr. Rawson. In fact, Diaz P.A. obtained the case in plenty of time to fully investigate the facts and sue Dr. Rawson.[137]

Diaz P.A. did not tell Mrs. Spann anything different from what the firm argued to the courts, which was carefully crafted to conceal the firm's dilatory conduct and make the firm's delays a "moot issue."[138] Initially, the firm was successful and the trial court ruled that the amendment naming Dr. Rawson related back to the original filing.[139] But when the Supreme Court reversed and rendered the trial court's decision on this issue, John Giddens knew that the firm's negligence was to blame.[140]

---

[135] *See Rawson v. Jones*, 816 So. 2d 367, 370 (Miss. 2001).

[136] Id.

[137] R. 388-391 (R.E. tab 5) (Plaintiff's Expert Designation of Mack Brabham at ¶¶ 10; 14-26).

[138] R. 396 (R.E. tab 4) (Giddens affidavit at ¶ 12).

[139] Id. (Giddens affidavit at ¶ 13).

[140] Id. (Giddens affidavit at ¶ 16).

d. Summary of Fraudulent Concealment Argument.

Diaz P.A. committed two categories of affirmative acts of concealment. First, Diaz P.A. altered the telephone transcript that showed its dilatory conduct and gave a copy to the Spann family and the Court. Second, Diaz P.A. failed to disclose its negligence or the material facts underlying its negligence. Both categories satisfy the first prong of the fraudulent concealment test.

Patricia Spann acted with due diligence. There is no evidence that Mrs. Spann did not read documents in her possession that disclosed Diaz P.A.'s negligence or fraudulent concealment. Mrs. Spann had a reasonable explanation for the delay in naming Dr. Rawson as a defendant and Diaz P.A. provided her with no information that dispelled her understanding. When John Giddens disclosed the negligence to Mrs. Spann she immediately retained counsel and filed suit. As a result, Plaintiff satisfies both elements of the fraudulent concealment test and she timely filed this action.

3. The Discovery Rule Tolled the Statute of Limitations.

a. Diaz P.A.'s Malpractice was Secretive.

Mississippi also recognizes the discovery rule in legal malpractice cases.[141] The discovery rule applies when the plaintiff is unable to discover the harm due to the secretive or inherently undiscoverable nature of the wrongdoing or when it is unrealistic to expect a layman to perceive the injury at the time of the wrongful act.[142] The "secretive

---

[141] *Channel*, 954 So. 2d at 421.

[142] Id. (*citing McCain v. Memphis Hardwood Flooring Co.*, 725 So. 2d 788, 794 (Miss. 1998); *Smith v. Sneed,* 638 So. 2d at 1257; *Staheli v. Smith*, 548 So. 2d 1299, 1303 (Miss. 1989)).

or inherently undiscoverable" standard applies where there is some piece of physical evidence that is subject to the test.[143]

In this case there was undisclosed physical evidence that prevented Mrs. Spann from discovering her claim. The altered telephone transcript, 1994 letter from Arnold Dyre to Joey Diaz, 1996 check requests and un-mailed letters to the expert were in Diaz P.A.'s possession and not provide to Mrs. Spann or anyone else. In addition, Diaz P.A. had subjective knowledge of facts that it did not disclose and that Plaintiff could not discover. Therefore, this is an appropriate case for application of the discovery rule.

b. It is Not Reasonable to Expect Laymen to Perceive Concealed Legal Malpractice.

In focusing on the layman standard, the Court should recognize that judges and lawyers are not lay-persons in a legal malpractice case. It should be easier for courts to apply the layman standard in non-legal malpractice cases, such as cases involving alleged medical malpractice or insurance sales. Like the trial court, this Court is composed of former practicing attorneys with specialized knowledge of the legal system. For example, current and former practicing attorneys know that a law firm maintains a legal file on each case that might contain information that, for whatever reason, was not provided to the client. This is obvious to a person with experience in the legal field. But it is not obvious to a true layman.

A person with training and experience in the legal field would know to request a copy of the lawyer's file in order to gain an understanding of everything that the lawyer knew. A true layman, however, trusts their attorney and does not know what goes into the finished work product or what is contained in their attorney's file. And the fact that Diaz

[143] *Channel*, 954 So. 2d at 421 (*citing Staheli*, 548 So. 2d at 1303).

P.A. possessed and controlled the file is shown by Diaz P.A.'s conduct of charging Plaintiff $800.00 to have her lawyer review the file for a second time in this case.

Patricia Spann was a true lay-person with no training or experience in the legal field.[144] Mrs. Spann thought—based on the information provided to her by Diaz P.A.—that the firm had not done anything wrong and that the problem was that Diaz P.A. did not obtain the case in time to identify the neonatologist as a proper defendant.[145] It is undisputed that until Mrs. Spann talked to John Giddens in May 2005, no one associated with the firm told her that Diaz P.A. was negligent.[146]

Diaz P.A.'s negligence was not obvious to a layman for at least three reasons. First, Diaz P.A. recovered $400,000.00 for the Spann family. Thus, the entire case was not lost due to Diaz P.A.'s negligence. Second, Mrs. Spann believed that Diaz P.A. did not obtain the case from her prior lawyer in time to name Dr. Rawson.[147] This was a reasonable conclusion for a lay-person with no training or experience in the legal field.

Third, the Court's opinion in *Rawson v. Jones* suggested that Diaz P.A. was not at fault because it did not obtain the case earlier. This Court should resist the tendency to view the facts through its non-layperson eyes and recognize that under the peculiar facts of this case it was not reasonable to expect Mrs. Spann to recognize Diaz P.A.'s negligence before she was notified of it by John Giddens. The Court should apply the

---

[144] R. 378 (R.E. tab 3) (Spann affidavit at ¶ 2).

[145] Id. at ¶¶ 13-15.

[146] Id. at ¶¶ 11-13.

[147] Id. at ¶ 15.

discovery rule and find that it tolled the statute of limitations for at least three days and that Plaintiff timely filed this action.

4. At a Minimum, there were Fact Questions that Precluded Summary Judgment.

In *Smith v. Sneed* the Court reversed the grant of a motion for summary judgment because there were fact questions as to when the plaintiffs should have discovered their legal malpractice claim.[148] In this case there is at a minimum a fact question as to whether the statute of limitation was tolled for the required three days due to Diaz P.A.'s fraudulent concealment. Plaintiff's expert witness opined that the statute did not expire because of Diaz P.A.'s failure to disclose material facts that were not known to the Plaintiff.[149]

It is undisputed that Plaintiff did not know all material facts related to Diaz P.A.'s negligence. It is also undisputed that Plaintiff did not know all the material facts because Diaz P.A. did not tell her. The trial court essentially held that Plaintiff should have investigated her potential claim and that, if she had, she would have discovered Diaz P.A.'s negligence as a matter of law. Under the facts of this case this issue is a fact question, at best.

The facts in this case are peculiar and are not susceptible to summary adjudication against the Plaintiff. This case involves a law firm obtaining a case and not contacting the client until after filing suit over a year and a half later. The law firm then compounded the delay by not having the medical records reviewed for another eight months, only to discover that the original complaint did not name one of the negligent defendants. The

---

[148] *Smith*, 638 So. 2d at 1253.

[149] R. 391 (R.E. tab 5) (Plaintiff's Expert Designation of Brabham at ¶ 23).

firm then implemented a campaign of concealment that concealed the firm's dilatory and negligent conduct from Plaintiff until 2005 when a former lawyer with the firm confessed to the Plaintiff. This fact pattern may be so bizarre that as in *Smith v. Sneed*, it should be left to a jury to decide if the statute of limitations expired on Plaintiff's claim.

IX. CONCLUSION

The trial court incorrectly granted summary judgment in this action. The Court should reverse the trial court and remand this action for a trial on the merits.

This the 10th day of October, 2007.

Respectfully Submitted,

PATRICIA JONES SPANN, Individually, and in her Representative Capacity on behalf of the wrongful death beneficiaries of Timothy Spann, Jr.

By Her Attorneys:

PHILIP W. THOMAS
MS Bar No [redacted]

Philip W. Thomas, Esq.
PHILIP W. THOMAS, P.A.
Post Office Box 24464
Jackson, Mississippi 39225
Tel: (601) 714-5660
Fax: (601) 714-5659

X. CERTIFICATE OF SERVICE

I certify that I have served via U. S. Postal Service a true and correct copy of the above and foregoing to the following:

J. Robert Ramsay, Esq.
Amanda Clearman Waddell, Esq.
Ramsay & Hammond, PLLC
Post Office Box 16567
Hattiesburg, Mississippi 39404-6567

Honorable Bobby B. DeLaughter
Hinds County Circuit Court Judge
Post Office Box 27
Raymond, MS 39154

This the 10th day of October, 2007.

PHILIP W. THOMAS