PATRICIA HOWELL — APPELLANT

VERSUS — NO. 2007-CA-00726

GARDEN PARK COMMUNITY HOSPITAL AND
UNNAMED EMPLOYEES OF GARDEN PARK
COMMUNITY HOSPITAL (JOHN AND JANE DOE) — APPELLEES

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

BRIEF OF APPELLEE, GARDEN PARK COMMUNITY HOSPITAL

ORAL ARGUMENT REQUESTED

Respectfully submitted by:

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following people have an interest in the determination of this case. These representations are made in order that the Justices of the Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Patricia Howell, Appellant
2. Garden Park Community Hospital, Appellee
3. Rick Olando Amos, Attorney for Appellant
4. William E. Whitfield, III, Attorney for Appellee
5. Kaara L. Lind, Attorney for Appellee
6. Honorable Stephen B. Simpson, Circuit Court Judge

Respectfully submitted, this the 5th day of December, 2007.

WILLIAM E. WHITFIELD, III
KAARA L. LIND

Mississippi

Other

Statutes

Rules

Misc.

Summary Judgment by finding that the two-year state of limitations set out in Miss. Code Ann. § 15-1-36 applies to a claim where the patient alleges injuries as a result of falling from an x-ray table while the x-ray technician was manipulating the table into the desired position during a procedure.

II. Whether the trial court properly considered and ruled on the present issue as a Rule 12(b) Motion to Dismiss.

STATEMENT OF THE CASE

A. Statement of Facts.

On October 6, 2006, the Appellant, Patricia Howell [hereinafter "Howell"], filed a Complaint and named Garden Park Community Hospital [hereinafter "Garden Park"] as a defendant. (Complaint, RA, p. 5). In her Complaint, Howell alleges that on October 7, 2003, her physician, Dr. Stanford Owens, ordered several diagnostic studies and tests, including an upper GI, gallbladder ultrasound, and cervical x-rays. (Complaint, ¶ VII, RA, p. 7). Dr. Owens referred Ms. Howell to Garden Park for these studies. (Id.).

On October 10, 2003, Howell presented to Garden Park Medical Center for the outpatient studies ordered by Dr. Owens. In her Complaint, Howell alleges that on this date, she "employed and engaged" Garden Park "to attend her and properly, carefully, and skillfully, X-ray, among other diagnostic tests, plaintiff's neck and/or the cervical area of her body." (Id., ¶ VIII). Howell alleges that while she was lying on the x-ray table, the x-ray technician mechanically attempted to maneuver the x-ray table into position. (Id., ¶ XII, RA, p. 8). Howell alleges that while the x-ray technician was in the process of maneuvering the x-ray table, the table suddenly sloped down, causing Howell to fall head first to the floor. (Id.). Howell alleges she sustained injuries as a result of this fall, including head, neck, right leg, back and left shoulder injuries. (Id., ¶ XVI,

Howell claims that Garden Park's employees negligently operated the x-ray table. Howell also claims that Garden Park negligently maintained the x-ray table. Specifically, as to Howell's allegation that Garden Park's employees negligently operated the x-ray table, Howell alleges as follows:

> On October 10, 2003, Defendant through its agents and employees, did not use due, reasonable, or proper care or skill in X-raying plaintiff's neck and/or cervical area, and ignorantly, carelessly, improperly, and unskillfully X-rayed plaintiff's neck, resulting in serious personal injuries to plaintiff . . . .

(Complaint, ¶ XIII, RA, pp. 8-9). And, as to allegations that Garden Park negligently maintained the x-ray table, Plaintiff alleges:

> At all times mentioned, defendant negligently, carelessly, and recklessly omitted to exercise any care to maintain the X-ray machinery, appurtenances, appliances, and wiring in a safe condition. Instead, defendant negligently and carelessly permitted the X-ray machinery, appurtenances, appliances, and wiring to be and remain in a dangerous, defective, and improper condition and unsuited for use . . . .

(Id. ¶ XIV, RA, p. 9). The same two allegations are repeated again by Plaintiff as follows:

> On October 10,2 003, Defendant so carelessly and negligently maintained the X-ray machinery appurtenances, appliances, and wiring and so carelessly, negligently and unskillfully operated the X-ray table as to cause plaintiff to fall . . . .

(Id., ¶ XV, RA, p. 9).

B. Course of Proceedings.

Plaintiff filed the Complaint on October 6, 2006 in the First Judicial District of Harrison

defenses. (Answer, RA, p. 12-19). As its First Defense, Garden Park asserted that the Complaint fails to state a claim upon which relief may be granted pursuant to Rule 12 of the Mississippi Rules of Civil Procedure because the named defendant, "Garden Park Community Hospital", does not own, manage, or operate the hospital. Rather, Howell was advised that GPCH-GP, Inc. is the proper defendant as the owner, manager, and operator of the facility known as "Garden Park Medical Center." (Id., p. 12). As its Second Defense, Garden Park asserted that Howell failed to file this claim within the appropriate period of limitations under Miss. Code Ann. § 15-1-36 and further failed to comply with the attorney certificate provisions of Miss. Code Ann. § 11-1-58. (Id., pp. 12-13).

Also on November 9, 2006, Garden Park filed a Motion to Dismiss and/or for Summary Judgment, asserting three separate grounds for dismissal. (RA, p. 20-23).[1] Garden Park asserted that Howell failed to properly file her claim within the time constraints proscribed by the provisions of Miss. Code Ann. § 15-1-36, which requires that a plaintiff pursue his or her claim for negligence against a "hospital" arising out of "professional services" within two (2) years from the date of the event, act or omission. As discussed above, the occurrence happened on October 10, 2003, but suit was not filed until October 6, 2006. As such, Garden Park argued that Howell's claim is barred by the applicable two (2) year statute of limitations.

Garden Park also asserted that dismissal is proper pursuant to Rule 12 of the Mississippi

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Garden Park asserted in its Answer that Howell failed to properly identify the defendant. This was also a part of the Garden Park's Motion to Dismiss. It is apparent that the trial court felt in its April 4, 2007 Order of Dismissal that the issue before this Court now was dispositive and the trial court withheld ruling on the issue of the appropriate identity of the defendant, including the issuance of process.

service of process. Finally, Garden Park asserted that because Howell failed to properly comply with the provisions of Miss. Code Ann. § 11-1-58, which required her to file with the Complaint an affidavit of counsel that the matter has been reviewed by an expert and found to be meritorious, dismissal was proper for this reason as well.

On February 23, 2007, the trial court heard oral arguments. (T, p. 1-27). Thereafter, on April 4, 2007, the trial court entered an Order of Dismissal, granting the Motion to Dismiss and ordering dismissal of the Complaint on the grounds that the two-year statute of limitations found in Miss. Code Ann. § 15-1-36 had expired. (Order of Dismissal, RA, p. 51). In so ordering, the trial court found that the Complaint clearly states that the allegations in question arise out of the provision of medical and/or professional services; i.e., the procedure of performing diagnostic x-rays, and the provision of equipment to accomplish them. (Id., p. 52-53). Howell has appealed the decision of the Circuit Court.

Judgment filed by Garden Park Community Hospital. After thoughtful consideration of the two-year statute of limitation found in Miss. Code Ann. § 15-1-36 and case law defining "professional services", the Circuit Court appropriately found that this statute of limitation applied to Howell's claim. Howell's alleged injuries occurred on October 10, 2003 while she was undergoing an x-ray procedure at Garden Park. Therefore, the two year statute of limitations expired on October 10, 2005. Howell, however, did not file her Complaint until October 6, 2006. Given this set of circumstances, the claim brought by Howell is barred by the two-year statute of limitations.

The central issue in this appeal is whether the two-year statute of limitations found in Miss. Code Ann. § 15-1-36 is applicable to a negligence action where a patient claims injuries as a result of falling from an x-ray table while the x-ray technician was manipulating the table into the desired position for the purpose of performing a medical procedure. Howell argues that Garden Park's liability is predicated on simple negligence such that the three-year "general" limitations provisions under Miss. Code Ann. § 15-1-49 is applicable.

In the Complaint, Howell asserts Garden Park was negligent in performing the x-ray and negligent in the maintenance of the x-ray equipment. Miss. Code Ann. § 15-1-36 requires a plaintiff to pursue her claim against a "hospital" for "injuries" arising out of the rendering of "professional services" within two (2) years from the date of the event, act or omission. Garden Park asserts that the meaning of "professional services" includes performance of an x-ray and maintenance of the equipment as an adjunct to that professional service. Moreover, Howell was in the midst of treatment when her injuries occurred. Based on this reasoning, the Circuit Court

claim was proper.

limitations raises an issue of law, and as such, review of an Order granting same is *de novo*. Children's Medical Group, P.A. v. Phillips, 940 So. 2d 931, 933 ¶ 5 (Miss. 2006); Hood v. Mordecai, 900 So. 2d 370, 376-77 ¶ 18 (Miss. Ct. App. 2005); Newell v. Southern Jitney Jungle Co., 830 So. 2d 621, 622 ¶ 5 (Miss. 2002). "When considering a motion to dismiss, the allegations in the complaint must be taken as true and the motion should not be granted unless it appears beyond doubt that the plaintiff will be unable to prove any set of facts in support of [her] claim." Lang v. Bay St. Louis/Waveland Sch. Dist., 764 So. 2d 1234 (Miss. 1999) (citing T.M. v. Noblitt, 650 So. 2d 1340, 1342 (Miss. 1995)); see also, Miss. R. Civ. P. 12(b(6) cmt. (to grant a Rule 12(b)(6) motion to dismiss, "there must appear to a certainty that the plaintiff is entitled to no relief under any set of facts that could be proved in support of the claim"). On appeal, the ruling of the trial court will not be disturbed unless it is manifestly wrong, clearly erroneous or an erroneous legal standard was applied. Bell v. City of Bay St. Louis, 467 So. 2d 657, 661 (Miss. 1985).

LIMITATION FOUND IN MISS. CODE ANN. § 15-1-36 IS APPLICABLE.

Howell filed her Complaint on October 6, 2006, seeking damages against "Garden Park Community Hospital"arising out of the performance of an x-ray procedure that occurred on or about October 10, 2003, at Garden Park Medical Center at which time an x-ray table allegedly malfunctioned resulting in the abrupt and emergent removal of Howell from the table.[2] Garden Park filed a Motion to Dismiss and/or for Summary Judgment, asserting that Howell failed to properly file her claim within the time constraints proscribed by the provisions of Miss. Code Ann. § 15-1-36, which requires that a plaintiff pursue a claim for negligence against a "hospital" arising out of "professional services" within two (2) years from the date of the event, act or omission. Howell, on the other hand, asserts that her claim is one of "simple negligence" such that the three-year "general" limitations provisions of Miss. Code Ann. § 15-1-49 apply. The trial court agreed with Garden Park and correctly ordered the dismissal of the Complaint.

A. Miss. Code Ann. § 15-1-36 Is Applicable to the Complaint Filed by Howell.

The guiding and applicable statute of limitations referable to a health care provider such as a hospital is found in Miss. Code Ann. § 15-1-36 and in relevant part, it states as follows:

> (2) For any claim accruing on or after July 1, 1998, and except as otherwise provided in this section, no claim ***in tort*** may be brought against a licensed physician, osteopath, dentist, ***hospital***, institution for the aged or infirm, nurse, pharmacist, podiatrist, optometrist or chiropractor ***for injuries*** or wrongful death ***arising out of the course of medical***, surgical or ***other professional services*** unless it is filed within two (2) years from the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or

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Given the *mensa* of Howell in filing this claim, it is curious that she failed to pursue, or even give any lip service to the pursuit of, a claim against the manufacturer of the x-ray table.

Miss. Code Ann. § 15-1-36 (emphasis added).

The Mississippi Supreme Court has repeatedly stated "that words used in a statute should be given their ordinary and popular meaning in an attempt to glean legislative intent from the statute." Bell v. West Harrison County District, 523 So. 2d 1031, 1033 (Miss. 1988). It is abundantly clear from the provisions of this statute, that any claim "in tort" which arises out of the rendering of "professional services" by a "hospital" must be pursued within two years. Indeed, the Mississippi Supreme Court, in construing the meaning of this statute, has held that hospitals "enjoy the benefit of the two-year statute of limitations when medical or professional services are involved in an alleged negligent act." Id. By examining the terms "tort", "arising out of", and "professional services", the Court should easily conclude, as did the trial court, that the negligence at issue in the present lawsuit falls squarely within the legislative intent of Miss. Code Ann. § 15-1-36.

1. Howell's Claims Are "In Tort".

Most notably, the phrase "medical malpractice" appears nowhere in Miss. Code Ann. § 15-1-36. Instead, the legislature used the word "tort" in framing this limitations provision against licensed health care providers, including hospitals. By not using the phrase "medical malpractice" within this limitations statute, the legislature clearly did not limit the two-year limitations period to only medical negligence actions against health care providers. Rather, the two-year limitations period applies to all "torts" against a licensed health care provider, so long as the tort arises out of medical or other professional services.

What is a claim "in tort"? Prosser and Keeton on Torts suggest that a satisfactory

the court will provide a remedy in the form of an action for damages." Id.; see also, Black's Law Dictionary 1489 (6th ed. 1990). A tort consists of the breach of duties fixed and imposed upon the parties by the law itself, without regard to their consent to assume them, or their efforts to evade them. Id.

Applying this definition to the present case, Howell's claims of negligence against Garden Park are torts because Howell is claiming that Garden Park breached various duties owed to her. In particular, Howell claims Garden Park was negligent in taking x-rays and negligent in maintaining its x-ray machine. Specifically, in Paragraph VIII of the Complaint, Howell alleges that Garden Park had a duty to "properly, carefully, and skillfully, X-ray . . . plaintiff's neck and/or the cervical area of her body." (Complaint, ¶ VIII, RA, p. 7). And, in Paragraph XIV of the Complaint, Howell alleges that Garden Park had a duty to "maintain the X-ray machinery, appurtenances, appliances, and wiring in a safe condition." (Complaint, ¶ XIV, RA, p. 9). In both instances, Howell claims Garden Park breached its duties owed to her. (Complaint, ¶¶ XIII-XV, RA, p. 8-9). Based on the face of her Complaint, Howell's claims against Garden Park are "in tort", and should be covered by the two-year limitation period of Miss. Code Ann. § 15-1-36, if her injuries are found to "arise out of the course of" Garden Park's "medical or other professional services."

2. Howell's Claims "Arise out of the Course Of" Medical or Other Professional Services She Received at Garden Park.

Miss. Code Ann. § 15-1-36 next requires that for the two-year limitations period to apply, the claim in tort must "arise out of the course of" medical, surgical, or professional services of

causal connection between the employment and the injury. Singley v. Smith, 844 So. 2d 448, 453 (¶20) (Miss. 2003); see also, Mathis v. Jackson County Bd. of Supervisors, 916 So. 2d 564 (Miss. Ct. App. 2005) (same). Using this definition, for the two-year limitation provision found in Miss. Code Ann. § 15-1-36 to apply, there must be a causal connection between medical, surgical, or other professional services received by a plaintiff and her injuries.

As applied to the present case, for the two-year limitation period to apply, Howell's injuries must be causally connected to medical or other professional services she received at Garden Park on October 10, 2003. Again, looking to the face of her Complaint, Howell alleges that on October 10, 2003, while lying on the x-ray table, the x-ray technician was in the process of maneuvering the x-ray table into place when the x-ray table suddenly sloped down, causing her to fall. (Complaint, ¶ XII, RA, p. 8). Howell alleges she fell because Garden Park "carelessly and negligently maintained the X-ray machinery" and "carelessly, negligently and unskillfully operated the X-ray table". (Complaint, ¶ XV, RA, p. 9). Howell alleges that as a result of these two acts of negligence, she fell from the x-ray table and suffered "severe personal injuries." (Id.). Howell goes on to allege in her Complaint that she "suffered great bodily injury and accompanying pain" as a "sole, direct, and proximate result" of Garden Park's "carelessness and negligence . . . ." (Complaint, ¶ XVI, RA, p. 9-10).

Based on these allegations, Howell fell from the x-ray table while in the process of being x-rayed. Howell's alleged injuries clearly are causally connected to the medical services/x-ray procedure she received at Garden Park on October 10, 2003. Accordingly, Howell's injuries "arise out of the course of" medical or other professional services she received on this date such

and "Other Professional Services".

The last condition for the two-year limitation period of Miss. Code Ann. § 15-1-36 to apply is that a plaintiff's injuries must arise out of the course of "medical, surgical, or other professional services." At issue is the meaning of "medical" or "other professional services" and whether Garden Park's alleged failure to use reasonable or proper care or skill in x-raying Howell's neck and alleged failure to properly maintain its x-ray equipment fits within this meaning. If Garden Park's alleged negligence was inherently connected with the providing of a professional medical service, then this action falls within the purview of Miss. Code Ann. § 15-1-36.

In the context of whether a liability insurance policy provided coverage to an insurance agent, the Mississippi Supreme Court has stated that "a 'professional service' involves the application of special skills, knowledge and education arising out of a vocation, calling, occupation or employment." Shelton v. American Insurance Co., 507 So. 2d 894, 896 (Miss. 1987) (citations omitted). The Mississippi Court of Appeals has applied this same definition in determining that disciplining and supervising students by teachers are "professional services" within the meaning of an exclusion of the school district's liability insurance policy. Titan Indemnity Co. v. Williams, 743 So. 2d 1020 (Miss. Ct. App. 1999).

Using this definition of "professional services", this Court should find that what constitutes "medical, surgical, or other professional services" for purposes of Miss. Code Ann. § 15-1-36 involves the application of special skill, knowledge and education arising out of a vocation, calling, occupation or employment. This means that for the two-year statute of

Looking at the face of the Complaint, Howell claims she fell while undergoing a diagnostic x-ray. (Complaint, ¶ XII, RA, p. 8). Howell claims she fell due to Garden Park's employee negligently maneuvered the x-ray table and Garden Park negligently maintaining the x-ray table. (Complaint, ¶¶ XIII-XV, RA, p. 8-9). Medical and professional services were obviously involved in these alleged negligent acts. A licensed x-ray technologist performs diagnostic x-rays, and part of performing diagnostic x-rays includes maneuvering the x-ray table into position. What position to put the x-ray table in is based on the particular radiological studies ordered by the patient's physician. This, of course, requires a degree of knowledge concerning the diagnostic equipment involved. In addition, maintaining a piece of medical diagnostic equipment also involves special skill, knowledge, and education. Clearly, both acts involve a professional service as special skill and knowledge is required for both. As a result, Garden Park was rendering "professional services" to Howell when her injuries occurred.

Fitting all the pieces of the puzzle together, the allegations made by Howell in her Complaint fall within the purview of Miss. Code Ann. § 15-1-36. Howell claims the negligent acts of Garden Park and her injuries occurred on October 10, 2003. Applying this two-year statute of limitation, Howell was required to bring her claims on or before October 10, 2005. Because Howell did not file her Complaint until October 6, 2006, her claims are time barred and the trial court was correct in ordering dismissal the Complaint on this basis.

B. Mississippi Case Law Discussing Issue.

The Mississippi Supreme Court has discussed the issue of whether the two-year limitations period set forth in Miss. Code Ann. § 15-1-36 applied to a situation where a nurse

In examining Miss. Code Ann. § 15-1-36, the Bell Court held that based on the wording of the statute, the Legislature intended that hospitals and nurses enjoy the benefit of the two-year statute of limitations where a tortious injury arises out of the rendering of "medical, surgical or other professional services." Id. at 1032. The plaintiff contended that the nurse's failure to raise the bed rails of a sedated patient did not amount to medical or professional services, but rather, said conduct amounted to ordinary negligence, such that the general six-year statute of limitation found in Miss. Code Ann. § 15-1-49 applied. Id. at 1033. The Court rejected the plaintiff's argument, stating that a "[a] nurse's decision as to whether or not bed rails should be utilized entails a degree of knowledge concerning the subject patient's condition, medication, history, etc." Id. The Court further stated that this decision "plainly calls for the rendition of a medical or professional service, even under the most basic of rationale." Id. Based on this reasoning, the Court held that a nurse's failure to raise the rails of a bed, in deference to the law as well as common sense, involves a professional medical service." Id. Therefore, the Court held the trial court correct dismissed the plaintiff's suit on the basis it was time barred by Miss. Code Ann. § 15-1-36. Id.

Like the negligent conduct in Bell, the alleged negligent conduct of Garden Park relates to the rendition of medical or professional service. In her Complaint, Howell alleges that on October 10, 2003, Garden Park, through its agent or employee, acted negligently in operating the x-ray table. (Complaint, ¶¶ XIII, XV, RA, pp. 8-9). How an x-ray technician maneuvers an x-ray table into the desirable position entails a degree of knowledge concerning how the diagnostic equipment works, what part of the patient's body is being filmed, and what particular views are

professional medical service was being furnished, such that any negligence on the part of the x-ray technician was connected with this professional medical service so as to fall within the purview of Miss. Code Ann. § 15-1-36.

Howell also claims that on October 10, 2003, Garden Park negligently maintained the x-ray machinery so as to cause her to fall. (Complaint, ¶¶ XIV, XV, RA, p. 9). A hospital has a duty to provide a safe environment for its patients, and this duty includes maintaining its diagnostic equipment in a safe and functioning condition. This is clearly part of the professional service that is a component of care. A hospital maintaining its diagnostic equipment is an integral part of providing medical services to its patients. Hospital diagnostic equipment is maintained by someone with specialized medical or technical knowledge as to how the particular diagnostic equipment functions, whether it be x-ray, ultrasound, or MRI equipment, or even the multitude of equipment that is available in the physical therapy department, pathology department, the pharmacy, the surgical department and even on the acute care floor. Therefore, how to maintain diagnostic equipment should be governed by accepted standards of care or safety within the health care industry, as opposed to standards of ordinary care. In addition, Howell's treating physician, Dr. Owens, was of the opinion that cervical x-rays were necessary for her continued medical treatment. This means that Howell's claim of alleged failure to maintain the x-ray equipment was an inseparable part of the rendition of medical treatment to her. In other words, Howell would not have been injured by falling off the x-ray but for receiving those services ordered by her physician. The x-ray table was clearly related to Howell's diagnosis, care and treatment such that the alleged negligent of this x-ray table arose in

connected with the providing of professional services to Howell so as to fall within the purview of Miss. Code Ann. § 15-1-36.

C. Out-of-State Cases Are Supportive.

If this Court were to apply the rationale of other states that have discussed this issue, a similar result would be reached. For instance, in Bellamy v. Central Valley General Hospital, 50 Cal. App. 4th 797, 800 (Cal. Ct. App. 1996), the plaintiff alleged she was injured after falling off a rolling x-ray table onto her head. The plaintiff alleged the hospital was negligent because the x-ray table was not secured and she was left unattended. Id. The issue before the California court was whether the claim was one for professional negligence as opposed to ordinary negligence. If ordinary negligence, the claim was time-barred, but if professional negligence, it would be considered timely.[3] Although the plaintiff's complaint did not expressly allege that she was on the x-ray table for the rendering of some professional services, the court noted that "[p]eople do not commonly mount x-ray tables in hospitals except for a radiological examination or therapy." Id. at 805. Therefore, the court acknowledged that the plaintiff was injured either in preparation for, during, or after an x-ray exam or treatment. Id. The court found that under the facts alleged in the complaint, the hospital was rendering professional services to plaintiff in taking x-rays and she would not have been injured by falling off the x-ray table but for receiving those professional services. Id. As a result, the court held that any negligence in allowing her to

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3 California statutes have a notice requirement for professional negligence actions against health care providers, such that the one-year statute of limitations for ordinary negligence is extended 90 days if notice is served within 90 days of the applicable statute of limitations. Bellamy, 50 Cal. App. 4th at 800 n.2.

the rendering of services for which the health care provider is licensed." Id. (quoting Murillo v. Good Samaritan Hospital, 99 Cal. App. 3d 50, 57 (1979)).

In Neilinger v. Baptist Hospital of Miami, Inc., 460 So. 2d 564, 566 (Fla. Dist. Ct. App. 1984), the plaintiff, a maternity patient, slipped and fell on a pool of amniotic fluid while descending from an examination table under the direction and care of employees of the hospital. The Florida court held that the complaint, on its face, alleged breach of a professional standard of care because the accident occurred while the hospital was performing a direct medical service, and the plaintiff was injured as a direct result of receiving medical care or service. Id.

In Olsen v. Richards, 440 N.W.2d 463 (Neb. 1989), the plaintiff alleged she went to her physician's office for an examination and treatment. She sat in the doctor's examination chair, and he moved the headrest down onto her neck, causing injuries. Id. at 463-64. The plaintiff's action against the doctor was filed nearly four years later and was timely if considered one for ordinary negligence, but barred if one for professional negligence or malpractice. Id. at 464. The Nebraska Supreme Court affirmed a judgment dismissing the action after the defendant physician's demurrer was sustained. The Nebraska court stated: "It can only be inferred from Olsen's averments that when the alleged act of negligence occurred, Richards was positioning Olsen for the purpose of rendering her a service in his role as her physician." Id. at 465.

In Stanley v. Lebetkin, 507 N.Y.S.2d 468 (N.Y. 1986), the plaintiff fractured her ankle while alighting from the defendant physician's examining table. The New York court held that the plaintiff's action against the physician to recover for personal injury was one for malpractice, not simple negligence, such that the malpractice statute of limitations applied. In so holding, the

[T]he failure of a doctor or his employee in helping a patient from the diagnostic table is clearly related to the treatment just given, and the duty to help the patient down safely also derives from the same treatment as the doctor-patient relationship." Id. at 469.

In Chaff v. Parkway Hospital, 613 N.Y.S.2d 237 (N.Y. App. Div. 1994), the plaintiff, while undergoing an x-ray procedure performed by the defendant doctor, fell off the x-ray table and fractured her hip. The New York court stated that the plaintiff fell off the table while under the supervision of the doctor during an x-ray examination. Id. at 238. As a result, the court found that the "incident arose out of the physician-patient relationship between the [plaintiff] and [the doctor] and occurred during the course of a procedure substantially related to medical treatment." Id. As a result, the court held that the action sounds in medical malpractice statute of limitations applied. Id.

In Espinosa v. Baptist Health System, 2006 WL 2871262 *1 (Tex. App. 2006), the plaintiff sued the hospital for injuries he allegedly sustained when the trapeze lift device over his hospital bed suddenly became detached as he was holding onto it, causing him to fall back on the bed. The plaintiff made several allegations of negligence, including a failure to properly inspect and maintain the overhead bed frame device. Id. at *2. In examining the underlying nature of the claim, the San Antonio Court of Appeals stated that the plaintiff has "alleged a failure to properly assemble and install, as well as a failure to inspect, supervise, and maintain, a device ordered by his physician for his continued medical care, and assembled and utilized by hospital staff in accordance with the physician's orders" Id. at *2. These allegations, the court held, "notwithstanding the use of the premises liability language, amount to a claimed departure from

was in the midst of performing medical services for the plaintiff at the time of the alleged injury, then the complaint alleges a breach of professional standard of care. As applied to the present case, Howell claims her injuries were a direct result of receiving medical care from Garden Park on October 10, 2003. Indeed, Howell claims she was in the process of being x-rayed when she fell from the x-ray table. (Complaint, ¶ XII, RA, p. 8). Howell explained in the Complaint that these x-rays were ordered by her treating physician for a specific medical purpose. Howell alleges that she would not have fallen from the table were it not for the negligence of Garden Park and its agents and employees. (Complaint ¶¶ XII-XV, RA, p. 8-9). Based on her allegations, Howell would need to establish the acceptable and appropriate standard of care by similarly situated hospitals and that the breach of that standard was the cause of her injuries. There is no way that the plaintiff will be able to divorce herself from having to explain the lack of "due care" but for reference to a "medical standard" of care. For these reasons, this Court should conclude, as the trial court correctly did, that Howell's claim is for medical negligence, such that the two-year limitations period of Miss. Code Ann. § 15-1-36 applies.

D. Louisiana's *Coleman* Factors Are Helpful.

In Louisiana, the Medical Malpractice Act governs actions against a qualified health care provider arising from medical malpractice, and all other tort liability on the part of the qualified health care provider is governed by general tort law. Coleman v. Deno, 813 So. 2d 303, 315 (La. 2002). Obviously, Louisiana's Medical Malpractice Act is different from Mississippi's two year statute of limitation found in Miss. Code Ann. § 15-1-36, which covers "claims in tort" as opposed to "medical malpractice". Nevertheless, the Louisiana Supreme Court has set forth

known as the "Coleman" factors. The Louisiana courts apply these "Coleman" factors to cases where a plaintiff's claims arise in tort to determine whether the alleged tortious conduct was within the ambit of the Medical Malpractice Act. This Court may find the "Coleman" factors helpful in determining whether the negligence alleged in the present lawsuit arises out of the course of medical or other professional services.

The "Coleman" factors are as follows:

(1) Whether the particular wrong is "treatment related" or caused by dereliction of professional skill;

(2) Whether the wrong requires expert medical evidence to determine whether the appropriate standard of care was breached;

(3) Whether the pertinent act or omission involved assessment of the patient's condition;

(4) Whether an incident occurred in the context of a physician-patient relationship, or was within the scope of activities which a hospital is licensed to perform; YES

(5) Whether the injury would have occurred if the patient had not sought treatment; and, NO

(6) Whether the tort alleged was intentional. NO

Coleman, 813 So. 2d at 315-16.

The Louisiana courts have applied the "Coleman" factors to various allegations. For instance, in Williamson v. Hospital Service District No. 1 of Jefferson, 888 So. 2d 782, 784 (La. 2004), after the plaintiff was discharged from West Jefferson Medial Center and was being pushed in a wheelchair by a hospital employee, a wheel on the wheelchair fell off, causing her to be thrown to the ground, resulting in injury. The plaintiff alleged that her injuries were caused by

service. The question before the court was whether the unintentional tort complained of fell within the definition of malpractice of the Act; i.e., whether it was one "based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient . . . ." Id. at 788-89.

After applying the "Coleman" factors, the court concluded that the negligent conduct at issue did not constitute medical malpractice. As to the first factor, the court found that failure to repair a wheelchair and failure to insure it was in proper working condition is neither "treatment related" nor caused by a dereliction of "professional skill". Id. at 789. This is because the acts were not directly related, nor did they involve, "treatment" of the plaintiff. Id. at 790. In addition, no "professional skill" was exercised in repairing a wheelchair or the decision to place it back into service. Id. As to the second factor, the court could not envision the need for expert medical evidence to determine whether the appropriate standard of are was breached. Id. Nor was there any showing that expert medical testimony would be necessary to establish the proper maintenance procedures regarding the wheelchair in question. Id. As to the third factor, the court found that the alleged acts or omissions of the hospital did not implicate or require an assessment of a patient's medical condition. Id. As to the fourth factor, the court found that repairing and using a wheelchair to transport a patient was not shown to be within the scope of activities a hospital must first be licensed to perform. Id. at 791. As to the fifth factor, the court noted that while the plaintiff likely would not have been transported in the wheelchair had she not sought treatment at the hospital, the court found that it is just as reasonable to say that any visitor to the hospital, even those not seeking treatment, who used this particular wheelchair

factors weighed in favor of the hospital, the court concluded that the claims did not fall within the provisions of the Medical Malpractice Act. Id.

If this Court were to apply similar factors to the present case, it should find that the negligence alleged by Howell arises out of medical or professional services, and therefore, falls within the purview of two-year limitations period found Miss. Code Ann. § 15-1-36.

1. The Alleged Wrongs Were Treatment Related or Caused by a Dereliction of Professional Skills.

The wrongs alleged by Howell are failure to properly operate the x-ray table and failure to maintain the x-ray table. The x-ray table, in this case, was intricately tied to the treatment provided to Howell in that the fall occurred while she was in the process of her neck being x-rayed. Clearly, the operation of the x-ray table as well as the furnishing of an x-ray table in working order has everything to do with the condition and associated treatment for which Howell was at Garden Park. In addition, "professional skill" was obviously exercised in maneuvering the x-ray table into position to x-ray Howell's neck. Likewise, maintenance of diagnostic equipment, such as an x-ray machine, definitely requires "professional skill". The diagnostic equipment is treatment-related for the patients of Garden Park. The maintenance of diagnostic equipment is not performed by a hospital's maintenance or housekeeping personnel. It is performed by someone who has skill and expertise in how this particular piece of equipment functions. For these reasons, this first factor weighs in favor of the position of Garden Park.

2. The Wrongs Require Expert Medical Evidence to Determine Whether the Appropriate Standard of Care Was Breached.

The act of maneuvering the x-ray table into the desired position based on the radiological

technologist and as such, expert testimony on radiology technology standards of care will be relevant and perhaps even necessary. Likewise, the maintenance of a hospital's diagnostic equipment, such as x-ray, ultrasound or MRI, will require expert testimony to determine the proper maintenance procedures for the relevant piece of equipment. Individuals that maintain this type of diagnostic equipment have technical or specialized knowledge that will not be generally known to lay persons. As such, this Court should find that this factor as well weighs in favor of Garden Park's position.

3. The Alleged Negligent Acts Involved Assessment of Howell's Condition.

How an x-ray table will be maneuvered into position based on the radiological films ordered by a patient's treating physician clearly involve an assessment of a patient's condition by the radiology technologist performing the procedure. In addition, ensuring that x-ray equipment is functioning properly is an act that may be attributable to either a radiologist, radiology technologist, or other hospital employee who regularly maintains this type of diagnostic equipment. If the x-ray equipment is not functioning properly, then a patient cannot be treated as ordered by a physician. As applied to this case, Howell was at Garden Park to undergo several diagnostic procedures, including an x-ray of her neck. Therefore, the reason Howell was at Garden Park and being assessed has everything to do with the omissions alleged; i.e., her neck condition for which she was being x-rayed is clearly related to the alleged the x-ray technician not properly maneuvering the x-ray table into position and Garden Park or its employees not properly maintaining the condition of the x-ray table. Therefore, the Court should find this factor also weighs in favor of finding that the allegations fall within the purview of Miss. Code Ann. §

4. Howell's Fall from the X-ray Table Occurred [illegible] Activities Which a Hospital Is Licensed to Perform.

This factor is clearly met in this case because Howell was admitted to Garden Park for diagnostic tests, including cervical x-rays. Garden Park holds a license to perform x-rays. Therefore, the incident of Howell falling from the x-ray table while in the process of being x-rayed occurred within the scope of activities Garden Park is licensed to perform.

5. Howell's Injuries Would Not Have Occurred If She Had Not Sought Treatment.

Only patients who are ordered by a physician to receive x-rays in the radiology department of Garden Park will mount one of its x-ray tables. X-ray equipment is not accessible to the visiting public or to any and all patients. The x-ray equipment is only for patients whose physicians have ordered x-rays be taken. As noted in Bellamy, 50 Cal. App. 4th at 805, "[p]eople do not commonly mount X-ray tables in hospitals except for a radiological examination or therapy." Thus, if Howell had not been admitted to Garden Park for outpatient treatment, including cervical x-rays, she would not have been subject to the alleged failure to appropriately maneuver the x-ray table or the alleged failure to properly maintain the diagnostic equipment. This factor, as well, weighs in favor of finding that Miss. Code Ann. § 15-1-36 is applicable to this case.

6. The Alleged Torts Were Not Intentional.

This particular factor is not an issue in this case as there are no allegations of Howell that the actions or inactions of Garden Park or its employees were intentional.

Based on the foregoing analysis, Garden Park asserts that Howell's allegations arise out of the course of medical or other professional services provided by Garden Park. The Court

equipment were integral to the rendering care and treatment to Howell. These are clearly medical or other professional services falling within the purview of the two-year limitations period found Miss. Code Ann. § 15-1-36.

II. THE TRIAL COURT PROPERLY CONSIDERED AND RULED ON THE PRESENT ISSUE AS A RULE 12(B) MOTION TO DISMISS.

Throughout her Brief, Howell misstates that Garden Park filed a Motion for Summary Judgment.[4] Howell also incorrectly characterizes the trial court's decision as one based on Rule 56 of the Mississippi Rules of Civil Procedure.

On November 9, 2006, Garden Park filed a pleading entitled "Motion to Dismiss and/or for Summary Judgment." Garden Park filed this Motion pursuant to the provisions of Rule 12 of the Mississippi Rules of Civil Procedure on three grounds: (1) Failure to properly serve process and insufficiency of process in that Howell failed to identify the correct defendant and serve process upon the correct registered agent for service of process; (2) Failure to state a claim upon which relief can be granted on the grounds that Howell's Complaint was barred by the two year statute of limitations found in Miss. Code Ann. § 15-1-36; and (3) Failure to state a claim upon which relief can be granted on the grounds that Howell failed to properly comply with the provisions of Miss. Code Ann. § 11-1-58. Garden Park did not intend for this Motion to be considered anything but a Rule 12(b) Motion to Dismiss.

The main thrust of Garden Park's argument was the Rule 12(b)(6) dismissal based on the statute of limitations grounds. The purpose of a motion made under Rule 12(b)(6) is to test the

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4 In some instances, Appellant calls it a Motion for Summary Judgment. At other times, Appellant calls it a Motion to Dismiss.

P.A. v. Phillips, 940 So. 2d 931, 934 (¶7) (Miss. 2006). When considering a motion to dismiss, the allegations in the complaint must be taken as true and the motion should not be granted unless it appears beyond doubt that the plaintiff will be unable to prove any set of facts in support of her claim. Miss. R. Civ. P. 12 cmt; see also, Newell v. Southern Jitney Jungle Co., 830 So. 2d 621, 623 (¶5) (Miss. 2002). In this situation, a trial court should not look outside the pleadings. HeartSouth, PLLC v. Boyd, 865 So. 2d 1095, 1102 (¶17) (Miss. 2003). This is what distinguishes a motion under Rule 12(b)(6) from a Rule 56 motion for summary judgment, which tests whether there are genuine issues of material fact to be tried. Miss. R. Civ. P. 56 cmt; Phillips, 940 So. 2d at 934 (¶7). Nevertheless, Rule 12(b) does allow a trial court to consider matters outside the pleadings. Miss. R. Civ. P. 12(b). If the trial court does so, the motion is often treated as one for summary judgment. Id.

In the present case, matters outside the Complaint were neither presented by the parties nor considered by the trial court. Therefore, the Motion presented by Garden Park and decided upon by the trial court was a Rule 12(b)(6) Motion to Dismiss. At the hearing on the Motion to Dismiss and/or Summary Judgment, counsel for Garden Park argued this as a Rule 12(b) Motion to Dismiss and asked the Court to base its decision solely on the Complaint. (TT, pp. 4-7, 23-24). Counsel for Garden Park did not request that matters outside the pleadings be considered. In fact, counsel for Garden Park specifically stated at the hearing that as to what actually happened on October 10, 2003 for another day. (TT, p. 2-3).

Likewise, in her Response to the Motion, Howell did not request that the trial court consider matters outside the Complaint. (RA, pp. 31-38). Nor did Howell ever make such request of the trial court at the hearing on the Motion to Dismiss and/or for Summary Judgment.

to determine whether professional services were involved in Howell's [illegible]

In its Order of Dismissal, the trial court based its decision on the face of the Complaint, as well as common sense. (RA, pp. 51-53). Also in its Order, the trial court specifically granted the "Motion to Dismiss of Garden Park Community Hospital." (RA, p. 53). The trial court based its decision solely on the statute of limitations issue. The trial court never characterized either Garden Park's Motion or the Order of Dismissal as one under Rule 56 of the Mississippi Rules of Civil Procedure. Based on the foregoing, Howell cannot now complain that the trial court should have "pierced the pleadings" to determine whether there are any genuine issues of material fact to be litigated on the issue of professional services. Regardless, additional discovery is not needed to make a decision, in that for purposes of a Rule 12 Motion, the facts alleged in the Complaint are taken as true.

CONCLUSION

For all the foregoing reasons, this Court should affirm the Trial Court's Order of Dismissal on the grounds that two-year limitations period of Miss. Code Ann. § 15-1-36 applies and time bars the allegations in the Complaint.

Respectfully submitted,

GARDEN PARK COMMUNITY HOSPITAL

BY: BRYANT, DUKES & BLAKESLEE, P.L.L.C.

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P.L.L.C., do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the within and foregoing Appellee's Brief to the following at their record mailing addresses:

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This, the 5th day of December, 2007.

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