IN THE SUPREME COURT OF MISSISSIPPI

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| IRENE STARK AND KENNETH STARK | APPELLANTS |
| VS. | NO. 2008-CA-00072 |
| GREENWOOD LEFLORE HOSPITAL,<br>R. BRUCE NEWELL, M..D. AND<br>GREENWOOD ORTHOPEDIC CLINIC | APPELLEES |

# BRIEF OF APPELLEES


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**CERTIFICATE OF INTERESTED PERSONS**

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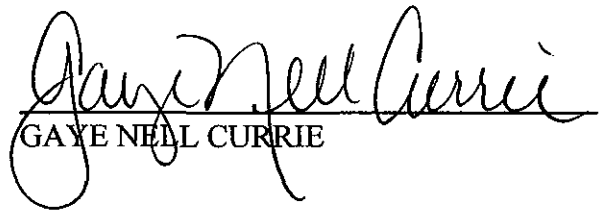
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Ms. Irene Stark - Plaintiff/Appellant;
2. Mr. Kenneth Stark - Plaintiff/Appellant;
3. John H. Cocke, Merkel & Cocke - Attorneys for Plaintiffs/Appellants;
4. Greenwood Leflore Hospital - Defendant/Appellee;
5. R. Bruce Newell, M.D. - Defendant/Appellee;
6. Greenwood Orthopedic Clinic - Defendant/Appellee;
7. Gaye Nell Currie, Wise Carter Child & Caraway - Attorney for Defendants/Appellees; and
8. Judge Margaret Carey-McCray - Leflore County Circuit Court Judge.

SO CERTIFIED this the 13th day of October, 2008.

Respectfully submitted,

Greenwood Leflore Hospital, R. Bruce Newell, M.D. and Greenwood Orthopedic Clinic

BY: 

GAYE NELL CURRIE

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## STATEMENT OF THE CASE

### I. Nature of Case and Course of Proceedings

Sixteen months after her alleged injury, Plaintiff Irene Stark, and her husband Kenneth Stark (hereinafter "Plaintiffs"), served a notice of claim pursuant to §15-1-36, Miss. Code Ann. (1972), on Dr. Bruce Newell, an employed physician of Greenwood Leflore Hospital. R. 26. Greenwood Leflore Hospital is a public hospital owned and operated by the County of Leflore and City of Greenwood, Mississippi. R. 20. Plaintiffs' notice of claim alleged that Dr. Newell was negligent in his care and treatment of Irene Stark on January 22, 2004. Id. By letter dated June 1, 2005, counsel for Plaintiffs was informed that Dr. Newell was an employed physician of Greenwood Leflore Hospital. R. 27. In addition, a redacted copy of Dr. Newell's physician employment contract was provided as evidence of his employment status. Id. Two weeks later, on June 13, 2005, a purported notice of claim letter was served on the Administrator of Greenwood Leflore Hospital with regard to Plaintiffs' claims.[1] R. 28. By letter dated June 28, 2005, counsel for Plaintiffs was again informed of Dr. Newell's employment status, advised that the notice failed to meet the provisions of the Mississippi Torts Claim Act, § 11-46-1, et seq., Miss. Code Ann. (1972) (hereinafter referred to as the "MTCA"), and the claim was denied. R. 29. Four months later, on October 25, 2005, Plaintiffs filed their Complaint alleging a claim for medical malpractice against Greenwood Leflore Hospital, R. Bruce Newell, M.D., and Greenwood Orthopedic Clinic. R. 4-5. Defendants, as they were entitled to do so by law, moved to dismiss or, in the alternative, for

[1]The June 13, 2005, notice of claim fails to meet the requirements for a notice of claim under § 11-46-11(2), Miss. Code Ann (1972). It fails to provide the seven categories of information required under the statute, specifically: (1) the circumstances that brought about the injury, (2) the extent of the injury, (3) the time and place the injury occurred, (4) the names of the persons involved, (5) the amount of money damages sought, (6) the residence of the person making the claim at the time of the injury, and (7) the claimant's residence at the time of filing the notice. *See,* South Central Regional Medical Center v. Guffy, 930 So. 2d 1252, 1257 (¶18) (Miss. 2006).

summary judgment on all Plaintiffs' claims raising as defenses the protections and provisions of the MTCA, including but not limited to the one-year statute of repose. § 11-46-1, et seq. Miss. Code Ann. (1972). R. 20-32. In addition, Defendants asserted that Plaintiffs' contention that the Defendants had some duty to inform Plaintiffs' prior to the notice of claim of Dr. Newell's employment status was not supported by law. R. 22.

Defendants' Motion was set for hearing on January 31, 2006. R. 36. Plaintiffs responded to Defendants' Motion on or about December 14, 2005. R. 39. Six days before the Defendants' Motion was set to be heard, however, Plaintiffs filed a Motion for Continuance of Hearing pursuant to Rule 56(f), asserting that limited discovery was needed to rebut the allegations contained in Dr. Newell's affidavit which was attached to Defendants' Motion. R. 61-62. A Motion to Strike the Affidavit of John H. Cocke was timely filed on behalf of Defendants on January 30, 2006, asserting that the affidavit failed to meet the requirements of Rule 56(f) but instead contained impermissible argument, rhetoric and unsubstantiated facts.[2] R. 67. Likewise, an opposition to the Motion for Continuance was filed. R. 69-70. The trial court, however, without hearing thereon, granted the Motion for Continuance and permitted limited discovery on the issues raised in Dr. Newell's Affidavit. R. 72. The hearing on Defendant's Motion to Dismiss was rescheduled for July 14, 2006, at which time the lower Court heard oral argument from the parties. R. 77; T. 1-25. After considering the evidence and argument of counsel, the Circuit Court for Leflore County, Mississippi rendered its Final Order and Opinion in this matter on June 15, 2007, finding that a dismissal of the claim with prejudice was warranted as Plaintiffs' claims were barred by the applicable statute of repose. In addition, the trial court found that Plaintiffs' could not avail themselves of the doctrines

[2]No ruling was entered on the motion to strike.

of equitable estoppel and fraudulent concealment to toll the statute of repose, as there was:

> no evidence that Dr. Newell engaged in any affirmative acts to withhold information regarding his employment status nor did he provide Plaintiff with any misleading and/or inaccurate information. **Plaintiff made no inquiry as to Dr. Newell's employment status until after the statutory period had run. Plaintiff's failure to exercise due diligence does not excuse her duty to comply with the procedural requirements of the Mississippi Torts Claim Act.**

R. 159-160. (emphasis added). Therefore, it was ordered and adjudged that Defendants' Motion to Dismiss or, in the alternative, Motion for Summary Judgment was granted and all of Plaintiffs' claims were dismissed with prejudice. R. 160. Feeling aggrieved of this Order, Plaintiffs instituted this appeal. R. 162.

## II. Statement of the Facts

Greenwood Leflore Hospital is a public hospital which owns and operates clinics throughout the Delta to serve the citizenry of the State of Mississippi, Leflore County, and the surrounding area. Grenada Speciality Clinic, formerly located in Grenada, Mississippi, was one of the satellite clinics owned and operated by Greenwood Leflore Hospital. R. 30; R. 54, T. 21. It is uncontested in this appeal that the protections and provisions of the MTCA apply to these Defendants. R. 20. Likewise, it is uncontested that at all pertinent times herein, Dr. Newell was an employee of Greenwood Leflore Hospital. R. 24; T3, 21.

On September 30, 2003, Mrs. Stark was first seen by Dr. Newell as a patient at Grenada Speciality Clinic. R. 117. At that time, Dr. Newell had been employed by Greenwood Leflore Hospital for more than three years. Id. Grenada Specialty Clinic was the only location where Dr. Newell ever saw or treated Mrs. Stark other than when he performed surgery on Mrs. Stark at Greenwood Leflore Hospital on January 22, 2004. R. 41. As part of his employment, however, Dr. Newell also saw patients at the Greenwood Orthopaedic Clinic, in Greenwood, Mississippi, another

satellite clinic owned and operated as a part of Greenwood Leflore Hospital. R. 21.

Dr. Newell performed surgery on Mrs. Stark at Greenwood Leflore Hospital on January 22, 2004. According to the Affidavit of Irene Stark dated December 8, 2005, following her surgery she immediately experienced a condition known as "foot drop." R. 41. Thus, according to Plaintiff, she was aware as early as January 22, 2004, that as a result of the surgical procedure, she had incurred some injury.[3] R. 41. Nonetheless, although Plaintiffs were aware that Mrs. Stark had suffered some injury and that injury may be proximately related to her surgery, Plaintiffs failed to engage in any due diligence investigation into their claim. R. 41; T. 9. Instead, Plaintiffs and their counsel, sat back, did nothing, waiting until four months after the expiration of the applicable statute of repose to send a defective notice of claim. T. 9.

Many of the facts in this matter are undisputed. Specifically, Plaintiffs', prior to the expiration of the statutory period, made no inquiry whatsoever into the identity or status of the proper party defendants in this cause. R. 41, 57; T. 9. Not a single phone call was made. T. 16-17. Not a single letter was written. Not a single question was asked. Although Mrs. Stark received bills from a clinic where she had never been seen, and was asked to send her payments to that facility, Plaintiffs made no inquiry as to why that would be. R. 41, 57. No inquiry was made with regard to what association existed between Dr. Newell, Grenada Speciality Clinic and Greenwood Orthopedics, even though Mrs. Stark was receiving letters and bills, not from the clinic where she was a patient, but a clinic where she had never been and which was located in another city. Plaintiffs never questioned why the superbills Mrs. Stark received on each of her visits to Grenada Speciality Clinic clearly read **"A Member of the Greenwood Leflore Hospital Clinic Network.** ***The***

[3]Defendants dispute, however, that the injury was the result of any medical negligence.

***Convenience of a Clinic. The Resources of a Hospital.***" R. 59; T. 15-16. No investigation was ever undertaken to discover Dr. Newell's relationship with either of these facilities. Quite telling is the fact that no where - - not in the affidavits of Plaintiffs or their counsel; not in Plaintiffs' pleadings; and especially, not in Plaintiffs' Brief on Appeal - - is there any evidence of any investigation into the relationship between Dr. Newell, Grenada Speciality Clinic, Greenwood Orthopedic Clinic and Greenwood Leflore Hospital. Sixteen months after her injury, and four months after the statutory period had passed, Plaintiffs' finally choose to take some action, not on the basis of any due diligence investigation, but on their own assumptions and perceptions.[4]

On May 18, 2005, a notice of claim letter was sent to Dr. R. Bruce Newell pursuant to §15-1-36, Miss. Code Ann. (1972). R. 26. Promptly after the notice of claim was received by Dr. Newell, his counsel timely and appropriately notified counsel for Plaintiffs of Dr. Newell's employment status, voluntarily provided a redacted copy of his employment agreement, and properly denied the claim.[5] R 27. Two weeks later, Plaintiffs submitted a second purported notice of claim to the Administrator of Greenwood Leflore Hospital, although they were fully aware at that time that their claim was time barred. R. 28. By letter dated June 28, 2005, Plaintiffs were again informed of Dr. Newell's employment status, that they failed to meet the provisions of the MCTA and that their claim was denied. R. 29. The dilatory actions of Plaintiffs continued, however, as though the claim was denied, Plaintiffs did not file their time-barred Complaint until four months later.[6] R. 3.

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[4]Plaintiffs' averred in their self-serving affidavits that Dr. Newell "appeared for all purposes" to be in private practice.

[5]Prior to sending the denial of the claim, a courtesy phone call was made to counsel for Plaintiffs' to advise of Dr. Newell's employment status and that the claim was barred by the applicable statute of repose.

[6]Plaintiffs continual disregard for the provisions of the MTCA is demonstrated by the fact that they did not even file their lawsuit until five months after they first received a denial of the claim. According to

Plaintiffs now ask this Court to excuse their own lack of diligence by applying the doctrine of equitable estoppel to prevent Defendants from asserting the statute of repose defense. Yet, Plaintiffs have not provided this Court with one example of how they exercised any due diligence in investigating their claim prior to the running of the statute of limitations. Instead, they try to divert this Court's attention from their lack of diligence, by asserting Defendants concealed, misrepresented, or prevented Plaintiffs from knowing or learning of Dr. Newell's employment status. Interestingly, however, they submitted no evidence to the trial court of such affirmative conduct on the part of these Defendants. Likewise, they ignore the facts that Dr. Newell's employment status was on file at the Circuit Clerk's office of Leflore County, the venue where this action was filed, and that advertisements regarding the ownership of the Grenada Specialty Clinic had run in Plaintiffs' own hometown newspaper two years prior to Mrs. Stark's surgery. R. 31, 58-59. Dr. Newell did not withhold any information from Plaintiffs; he was never asked for any. R. 58, 109. Had Plaintiffs made one single inquiry during the statutory time period at issue, they could have, and would have, learned of Dr. Newell's employment. The simple, uncontroverted fact is Plaintiffs merely relied on their own mispreceptions regarding Dr. Newell's practice while ignoring the obvious associations between the doctor, the two clinics and the hospital and conducted no due diligence investigation into their claims.

## SUMMARY OF THE ARGUMENT

Mississippi law requires that Plaintiffs, such as Mr. and Mrs. Stark, exercise due diligence to investigate their claims, including ascertaining the identity of the proper party defendants. This due diligence inquiry must take place prior to, not after, the running of the limitations period

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the provisions of the MTCA, if a claim is denied, there is no 90-day tolling period. Presumably, Plaintiffs', being aware that their claim was already time-barred, thought that further delay would be of no moment.

applicable to their claim. Plaintiffs herein failed to conduct any inquiry whatsoever into the association between Dr. Newell, Grenada Speciality Clinic, Greenwood Orthopedics Clinic and Greenwood Leflore Hospital prior to the expiration of the limitations period. It is undisputed that Mr. and Mrs. Stark never once made any inquiry as to Dr. Newell's employment status. Had Plaintiffs taken any step whatsoever to investigate their claim, they could have, and would have, learned of Dr. Newell's status as a public employee. Because the Starks failed to exercise any due diligence investigation in this matter, Mississippi law will not allow them to avail themselves of the doctrines of fraudulent concealment and equitable estoppel. Because Plaintiffs' failed to follow the law, their claim is time barred. Furthermore, as the trial court, who is the trier of fact and law in this matter astutely, held there is no evidence that Dr. Newell or Greenwood Leflore Hospital engaged in affirmative acts to withhold information regarding Dr. Newell's employment status, nor did they provide any misleading and/or inaccurate information to the Plaintiffs. Rather, Plaintiffs simply failed to exercise any due diligence to investigate their claim. This failure must enure to the detriment of Plaintiffs, not these Defendants. As Plaintiffs' claims are barred by the limitations period contained in the MTCA, the trial court's dismissal of all Plaintiffs' claims with prejudice was appropriate under the law.

## ARGUMENT

### I. Standard of Review

This Court uses a *de novo* standard of review when passing on questions of law including statute of limitations issues. Ellis v. Anderson Tully Co., 727 So. 2d 716, 718 (¶14)(Miss. 1998). Where the moving party establishes the Plaintiff's inability to meet any one of the essential elements of his claim, "all other contested issues of fact are rendered immaterial." Williams v. Bennett, 921 So. 2d 1269, 1272 (Miss. 2006) (*citing* Celotex Corp. v. Caterett, 477 U.S. 317, 323 (1986)).

Likewise, where a non-moving party who bears the burden of proof at trial fails to present credible evidence to support any single essential element of their claim, other issues become immaterial and the movant is then entitled to judgment as a matter of law. Crain v. Cleveland Moose Lodge 1532, 641 So. 2d 1186,1188 (Miss. 1994). Furthermore, this Court will not overturn on appeal the trial court's decision "unless [it is] manifestly wrong, clearly erroneous or an erroneous legal standard was applied. Stanton v. Delta Regional Medical Center, 802 So. 2d 142, 145 (Miss. 2001). In this case, the trial court correctly applied the appropriate legal standard and summary judgment was appropriate as a matter of law.

**II. Plaintiffs' Claims Are Barred By the Statute of Repose.**

Plaintiffs' claim Mrs. Stark's injury allegedly resulted as a consequence of the surgical procedure performed on her by Dr. Newell on January 22, 2004. In Mrs. Stark's affidavit, submitted in opposition to Defendant's Motion to Dismiss or in the alternative, Motion for Summary Judgment, Mrs. Stark averred that she "had drop foot ever since [Dr. Newell] operated." R. 41. Thus, Plaintiffs were fully aware, as early as January 22, 2004, of the facts necessary to institute a claim for medical malpractice. R. 41.

Plaintiffs neither contest the applicability of the limitations period contained in the MTCA nor the fact that they failed to timely serve notice thereunder. It is uncontested that Plaintiffs' failed to serve a notice of claim in this matter until May 18, 2005, over 16 months after Mrs. Stark's alleged injury. Likewise, Plaintiffs' admit that the original notice of claim was incorrectly sent to Dr. Newell pursuant to §15-1-36, Miss. Code Ann. (1972), rather than to the chief executive officer of Greenwood Leflore Hospital as required by § 11-46-11, Miss. Code Ann. (1972). R. 26. Furthermore, it is uncontested, that the purported notice of claim was not sent to the Administrator

of Greenwood Leflore Hospital until seventeen months after Mrs. Stark's alleged injury.[7] R. 6. Therefore, as Plaintiffs' readily admit, at the time both notices of claim were sent, Plaintiffs' claims were clearly barred by the applicable limitations period. Id.

Yet, Plaintiffs now ask this Court to allow them to circumvent the statutory limitations period, despite the fact they were aware of their claim in sufficient time to have timely filed it within the limitations period. R. 41, T.9. Plaintiffs' assert their lack of diligence should be excused simply because they "never dreamed" that Dr. Newell could be a public employee. Their dreams aside, such argument is contrary to the law and the longstanding principles governing limitations periods. "The primary purpose of statutory time limitations is to compel the exercise of a right of action within a reasonable time." Mississippi Dept. of Public Safety v. Stringer, 748 So. 2d 662, 665 (Miss. 1999). The limitations period is not intended to allow Plaintiffs to sit back and wait until the last possible moment to pursue their claim. Waiting until the last minute to act, does not constitute diligence on the part of a litigant. *See*, generally, Powe v. Byrd, 892 So. 2d 223, 22 (¶ 9) (Miss. 2004) (holding waiting until the last day to serve process does not constitute diligence on the part of the litigant). Statutes of limitations are founded on the principle that claims will be "promptly pursued and not allowed to remain neglected." Id. There was no need for Plaintiffs to wait sixteen months to serve notice of their claim, they were aware of Mrs. Stark's injury immediately.[8] The

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[7]Defendants assert that the purported notices of claim sent to both Dr. Newell and to the chief executive officer of Greenwood Leflore Hospital were also defective as they failed to provide the information required under §11-46-11(2), namely: (1) the circumstances that brought about the injury, (2) the extent of the injury, (3) the time and place the injury occurred, (4) the names of the persons involved, (5) the amount of money damages sought, (6) the residence of the person making the claim at the time of the injury, and (7) the claimant's residence at the time of filing the notice. *See,* South Central Regional Medical Center v. Guffy, 930 So. 2d 1252, 1257 (¶18) (Miss. 2006).

[8]Plaintiffs made no arguments to the lower court that any extenuating circumstances existed which necessitated a delay in serving notice in this cause. Again, Plaintiffs readily admitted that they were aware of their cause of action prior to the expiration of the limitations period under the MTCA. T. 9.

only thing which prevented Plaintiffs from timely filing their action was indeed their own failure to act, their conscious decision to wait sixteen months before serving notice of their claim. The principle of equitable estoppel cannot be used to toll the limitations period when Plaintiffs failed to conduct any due diligence investigation into the identity of the proper party defendants.

**III. Equitable Estoppel Cannot Apply To Excuse Plaintiffs' Failure to Follow the Law.**

Plaintiffs assert that the doctrine of equitable estoppel should be applied to prevent these Defendants from asserting their lawful defense of the statute of repose. Equitable estoppel has been defined as "a doctrine 'by which a person may be precluded by his act or conduct, or silence **when it is his duty to speak**, from asserting a right he otherwise would have.'" In re Municipal Boundaries of City of Southaven v. City of Southaven, 864 So.2d 912, 916 (¶10) (Miss. 2003) (quoting BLACK'S LAW DICTIONARY 373 (6TH ED. ABR. 1991) (emphasis added).[9] The principle of equitable estoppel may be used to toll a statute of repose if fraudulent concealment on the part of the defendant can be proven. Windlam v. Latco, 972 So.2d 608 (¶ 9) (Miss. 2008). However, plaintiffs who seek to avail themselves of the fraudulent concealment doctrine, must not only plead fraudulent concealment, but must also prove some affirmative act or conduct was done by defendants which prevented the discovery of a claim and that due diligence was performed on their part to discover it. Stephens v. Equitable Life Assur. Soc'y, 850 So.2d 78, 83-84 (Miss. 2003). Significantly, the only thing which prevented Plaintiffs' herein from timely filing their claim was their own lack of diligence. Plaintiffs who fail to exercise due diligence cannot avail themselves of the doctrine of fraudulent concealment to equitably toll the limitations period. Russell v. Williford, 907 So. 2d 362 (Miss.App. 2005).

[9]As will be shown below, Dr. Newell and Greenwood Leflore Hospital had no affirmative duty to inform the Starks prior to receipt of the purported notices of claim of Dr. Newell's status an employed physician of Greenwood Leflore Hospital. Likewise, Greenwood Leflore Hospital and Dr. Newell engaged in no acts or conduct which prevented Plaintiffs' from timely filing their claim.

(holding patient who was immediately aware of condition after surgery had duty to act diligently to investigate his claim.)

**A. Plaintiffs' Failed to Conducted Any Due Diligence Inquiry Into Dr. Newell's Employment Status or to Ascertain the Identity of the Proper Party Defendants.**

To toll a statute of limitations based upon fraudulent concealment of a claim, a plaintiff must prove that **despite investigating with due diligence**, plaintiff was unable to discover the claim." Nygaard v. Getty Oil Co., 918 So.2d 1237, ¶22 (Miss. 2005) (emphasis added). Thus, not only must Plaintiffs herein show that they (1) engaged in due diligence to discover the information they claim was withheld from them, but they must also show that (2) **despite their due diligence**, they were unable to timely discover the information they needed to pursue their claim. Stephens v. Equitable Life Assurance Soc'y of U.S., 850 So. 2d 78, 84 (Miss. 2003) (emphasis added). *See also,* In Re Catfish Antitrust Litigation, 826 F. Supp. 1019, 1031 (N.D. Miss. 1993) (holding Plaintiffs must show they failed, despite the exercise of due diligence on their part, to discover the facts that form the basis of their claim.) This the Plaintiffs cannot do. While asserting that Defendants engaged in affirmative acts to conceal Dr. Newell's employment status, which is vehemently denied, Plaintiffs' do not and cannot dispute the fact that they conduct no due diligence inquiry into the matters which they allege were concealed from them. Likewise, they do not plead, much less can they prove, they were unable to discovery these facts despite investigating with due diligence. In fact, Plaintiffs' brief gives short shrift to this essential element of their claim. Why? Because, as will be shown below, Plaintiffs' herein presented no evidence of any due diligence investigation to discover that which they claim was concealed from them.

Plaintiffs' Brief is glaringly lacking of any evidence of a due diligence investigation on their part. Astoundingly, the name of **Grenada Speciality Clinic**, the only location other than

Greenwood Leflore Hospital where Mrs. Stark was ever treated by Dr. Newell, never appears in Plaintiffs' Complaint, in Plaintiffs' notice of claim letters, or even in Plaintiffs' Brief on Appeal. Rather, Plaintiffs employ a written "sleight of hand" designed to deflect this Court's attention from the simple truth: Plaintiffs were on notice, if not fully aware, prior to and during the statutory period, that an association existed between Dr. Newell, Grenada Speciality Clinic, Greenwood Orthopedic Clinic and Greenwood Leflore Hospital. "[P]laintiffs need not have actual knowledge of the [specific] facts before a duty of due diligence arises; rather, knowledge of certain facts which are 'calculated to excite inquiry' give rise to the duty to inquire." In re Catfish Antiturst Litigation, 826 F. Supp, 1019, 1031 (Miss. 2000).

Certainly, Plaintiffs had sufficient information to "excite inquiry" into the association between the physician, the clinics and the hospital, especially in light of the fact Mrs. Stark was never seen as a patient at Greenwood Orthopedic Clinic. The obvious association between Dr. Newell, Grenada Speciality Clinic, Greenwood Orthopedic Clinic and Greenwood Leflore Hospital is apparent (1) from the fact that Mrs. Stark received an appointment card with Greenwood Orthopedic Clinic printed thereon but crossed out in pen with "Grenada" written to the side; (2) from the fact the bills Plaintiffs received were not from Grenada Speciality Clinic, where Mrs. Stark was treated, but from Greenwood Orthopedic Clinic, a clinic where she had never been seen as a patient, and (3) from the superbills she received upon each visit to Grenada Speciality Clinic which read:

A Member Of The
Greenwood Leflore Hospital Clinic Network
*The Convenience of a Clinic. The Resources of a Hospital.*

R. 59. (emphasis in original). Amazingly, according to Plaintiffs, receiving an appointment card with another clinic's name on it, receiving bills from a clinic where you have never been treated, and receiving documentation stating "***The Convenience of a Clinic. The Resources of Hospital***" is not

enough to "tip off" – to "provide a clue," – or to "trigger" the Starks or their counsel to inquire into the association between Dr. Newell, Grenada Speciality Clinic, Greenwood Orthopedic Clinic and Greenwood Leflore Hospital.[10] Had Plaintiffs had exercised any due diligence inquiry into the obvious connections between Grenada Specialty Clinic and Greenwood Orthopedic Clinic, they could have, and would have, discovered that Greenwood Leflore Hospital owned and operated both clinics, and that Dr. Newell, as its employee, treated patients at both facilities.

In Ray v. Keith, 859 So. 2d 995 (Miss. 2003), an argument similar to that being made by Plaintiffs' was considered and rejected. Therein, Ray was involved in an vehicular accident with Keith, an employee of the Lee County Fire Department. Id. at 995. Ray filed suit against Keith but failed to comply with the notice requirements of the MTCA prior to filing her suit. As with Plaintiffs herein, Ray claimed she was unaware that Keith was a public employee and entitled to the protections and provisions of the MTCA, including but not limited to the one year statute of limitations period. Id. at 996. Ray sought to have the Keith and Lee County equitably estopped form asserting their limitations defense. Rejecting that notion, this Court held "Ray did not exercise due diligence in determining the true parties to the lawsuit or in determining Keith's employment." Id. at (¶ 15). Likewise, just as the Starks failed to do in this case, "Ray made no attempt to determine the employment status of Keith" within the applicable limitations period. Id. at 999, (¶ 16). Therefore, Ray could not invoke the doctrine of equitable estoppel. Id. at 999 (¶ 16). Likewise, as the trial court herein found, the Ray Court also found that the defendants did nothing to mislead Ray or to give Ray any inaccurate information. Id. At 997 (¶ 17).

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[10]Curiously, such documentation was sufficient to allow Plaintiffs to forward a notice of claim to Dr. Newell, not at Grenada Speciality Clinic where he treated Ms. Stark, but to Greenwood Orthopedic Clinic, a location where Mrs. Stark was never treated as a patient.

Plaintiffs' attempt to distinguish the holding in Ray by arguing that the accident report in Ray, which indicated Keith was an employee of Lee County, triggered Ray's duty to investigate. Because, according to Plaintiffs, no document was provided to them which indicated Dr. Newell was an employee of Greenwood Leflore Hospital, Plaintiff assert they had no duty to investigate. However, such is not the law. This Court specifically held that Ray's duty to investigate her claim arose at the time of her injury. Id. In addition, the Mississippi Court of Appeals has also held that the duty to investigate arises at the time of injury. Davis v. Forrest Royale Apts., 938 So. 2d 293 (Miss. App. 2006).

In Davis, the Mississippi Court of Appeals held that where a Plaintiff fails to conduct a due diligence inquiry into the identity of the proper party defendants, the limitations period will not be tolled. 938 So. 2d 293 (Miss. App. 2006). Davis leased an apartment in Hattiesburg pursuant to a lease with Forest Royale Apts., a subsidiary of South Mississippi Health Services, Inc. ("SMHS"). Subsequently, Davis was injured when her apartment patio fell. Thirteen months later, she filed a personal injury suit against Forest Royale, as a subsidiary of SMHS. Forrest General Hospital intervened into the lawsuit as the owner of Forest Royale and moved for summary judgment, asserting Davis' claim was barred by her failure to comply with the requirements of the MTCA. Davis had filed no notice of claim. Likewise her suit was filed more than one year after the date of her cause of action accrued. Id. at 294.

In affirming the trial court's award of summary judgment in favor of Forrest General, the Mississippi Court of Appeals held that the MTCA "provides the exclusive civil remedy against a governmental entity or its employees for acts or omissions which give rise to a suit." Id. at 295. Furthermore, the Court held the statute of limitations should not be tolled until such time as Davis learned Forrest General owned the property. Id. Rather, the Court held "from the time of Davis's

(sic) injury on May 7, 2001, she was under a duty to exercise due diligence in ascertaining the proper defendant. Like the plaintiff in Davis, Plaintiffs herein had a duty to exercise due diligence to investigate their claim from the time of Mrs. Stark's alleged injury.

Furthermore, Plaintiffs' argument is factually incorrect. As shown above, the documentation which Plaintiffs received was more than sufficient to "'excite inquiry' giving rise to a duty to inquire." In re Catfish, 826 F. Supp, 1019, 1031 (Miss. 2000). The superbills Mrs. Stark received on each visit to Grenada Speciality Clinic clearly read "A Member of the **Greenwood Leflore Hospital Clinic Network**. *The Convenience of a Clinic. The Resources of a Hospital.*" R. 59. (emphasis added). Certainly, the language "The Resources of a Hospital" raises "a red flag" to alert Plaintiffs that there exists some connection between the clinic and the hospital. The appointment cards and bills clearly demonstrated an association between Dr. Newell, Grenada Speciality Clinic, and Greenwood Orthopedics. Plaintiffs simply choose not to conduct any investigation into what that relationship was.

The Fourth Circuit Court of Appeals considered a case with strikingly similar facts as the case at bar, Gould v. United States Dep't of Health & Human Servs., 905 F.2d 738, (4th Cir. 1990). *cert. denied*, 498 U.S. 1025, 111 S.Ct. 673, 112 L.Ed. 2d 666 (1991). Therein, Gould and her children filed a medical malpractice action for the wrongful death of her husband in connection with treatment rendered to him by physicians employed by the U. S. Public Health Service. These physicians, however, did not see the patient at a federal facility but saw the patient at a local clinic and a local hospital. Gould failed to file her suit within the statutory time period under the Federal Torts Claim Act. Id. at 740. Gould argued that she had no knowledge of the physicians' status as federal employees and thus, the limitations period should be tolled. Id. at 741. The Fourth Circuit, finding Plaintiffs did not exercise any due diligence to determine the true parties of the lawsuit or

to determine the employment status of the physicians, could not, therefore, avail themselves of equitable tolling of the limitations periods. Significantly, the Fourth Circuit held:

> While it is true that the employment status of the attending physicians was not made known to Plaintiffs at the time treatment was given, **it is also true that Plaintiffs made no inquiry as to the physicians employment status [until after the statutory period had run.]** When asked, the government responded promptly to Plaintiffs' request for this information. Unfortunately, such requests were not made until the statute of limitations period had expired.

905 F. 2d 738, 745(4th Cir. 1990). Had the Starks asked, Dr. Newell would have readily advised them of his employment status. R. 116. Unfortunately, they too never took the time to ask one single question. Because the Starks failed to exercise any due diligence inquiry in to the employment status of Dr. Newell prior to the running of the limitations period, equitable estoppel cannot be used to toll the limitations period in this case.

**B. Dr. Newell and Greenwood Leflore Hospital had no Duty to Inform Plaintiffs' of Dr. Newell's Employment Status.**

Instead of demonstrating due diligence, Plaintiffs' attempt to deflect the Court's attention from their own deficiencies by attempting to shift the burden to these Defendants to anticipate Plaintiffs' claim and to provide Plaintiffs with the information needed to assert their claims. However, the law does not place any such burden on these Defendants to "tip the Starks or their counsel off" that they should follow the law. To the contrary, "[t]hough statutes of limitations may sometimes have harsh effects, it is not the responsibility of the State, nor any other potential defendant, to inform adverse claimants that they must comply with the law." Mississippi Department of Public Safety v. Stringer, 748 So.2d 662, 667 (Miss. 1999). Plaintiffs' further argue that because Dr. Newell was a public employee, he had some greater duty to inform Plaintiffs' of his employment status, even before he was aware of a claim. However, as this Court has previously

held, the "government is under no obligation to notify every prospective plaintiff of its identity and involvement through its employees in all potential legal actions." Ray, 859 So.2d at 998 (¶12), *citing* Gould v. United States Dep't of Health & Human Servs., 905 F. 2d 738, 745 (4th Cir. 1990). Defendants had no duty, under the law or otherwise, to inform Mrs. Stark that Dr. Newell had become an employee of Greenwood Leflore Hospital nearly four years before Mrs. Stark ever became a patient under Dr. Newell's care. To the contrary, the duty rested with the Plaintiffs to investigate their claims and to identify the proper party defendants.

**C. Plaintiffs Improperly Relied Upon Their Own Assumptions and Presumptions Regarding the Identity of the Proper Party Defendants in this Cause.**

Rather than conducting a due diligence inquiry into the employment status of Dr. Newell or the identity of the proper party defendants herein, Plaintiffs instead relied upon their own misconceptions and assumptions with regard to Dr. Newell's employment status. As stated in Mrs. Starks' Affidavit, Dr. Newell "appeared for all purposes to be a doctor in private practice." R. 41. Based upon that appearance and nothing more, Plaintiffs' and their counsel assumed Dr. Newell was in private practice and made no effort to ascertain whether their assumption was correct.

Plaintiffs may not, however, rely upon mere assumptions and appearances but must investigate the identity of the proper party defendants. The Sixth Circuit Court of Appeals in Whittlesey v. Cole, 142 F.3d 340 (6th Cir. 1998), considered a case with the same issue but with a reversed factual situation: the plaintiff therein, Whittlesey, claimed that the statute of limitations should be tolled because he was unaware that the physician at issue, Dr. Cole, was a private physician, not a Naval physician. Id. at 343. Because plaintiff's wife was treated at a Naval facility in Tennessee, plaintiff, based solely upon appearances, assumed the physician was a federal

employee and limitations period applicable thereto would apply.[11] Whittlesey conducted no due diligence inquiry to determine the employment status of the physician but relied upon his own assumptions as to Dr. Cole's employment status. Importantly, in considering the case, the Court held "[h]ad Whittlesey exercised reasonable diligence, he may have likely learned through inquiry that Dr. Cole was a civilian doctor and therefore learned of his need to sue Dr. Cole personally before the statute had run." Id. at 343. Significantly, the Court stated, **"[Plaintiffs'] lack of knowledge could have been alleviated by simple, basic investigation."** Id., *quoting* Franklin v. State,1992 (WL 97079, *344 at *4 (Tenn.Ct.Ap. May 12, 1992)(emphasis added).[12] Like the plaintiffs in Cole, the Starks failed to conduct even **a simple, basic investigation**, but instead relied on their own misperceptions and assumptions as demonstrated in the Starks' affidavits averring, "[h]e appeared for all purposed to be a doctor in private practice." However, had the Starks asked one simple question, they would have learned the information they needed. But, as shown above, Plaintiffs conducted no inquiries whatsoever into Dr. Newell's employment status.

**D. Plaintiffs Have Presented No Evidence That They Were Unable to Discover Dr. Newell's Employment Status or the Identity of the Proper Party Defendants.**

Assuming for the sake of argument, Plaintiffs had conducted a due diligence inquiry into Dr. Newell's employment status or into the identity of the proper party defendants in this cause, Plaintiffs have produced no evidence to demonstrate that they were prevented from discovering information regarding Dr. Newell's employment status, despite their attempts to do so. Plaintiffs assert that because internet web sites and directories list Dr. Newell's practice as an "office based

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[11]The statute of limitations period was shorter than hat provided under the Federal Torts Claim Act.

[12]Wherein, the Tennessee Court of Appeals rejected Plaintiff's claim that his cause of action arising out of a vehicular accident did not accrue until he such time as he learned the alleged tortfeasor was a state employee.

practice," give his address as "Greenwood Orthopedic Clinic," and because the telephone listings do not indicate that Dr. Newell is an employee of Greenwood Leflore Hospital, that Plaintiffs "would have had a hard time learning the truth." Brief of Appellant, P. 5. Significantly, however, Plaintiffs never even looked at these web sites, directories, or telephone listings prior to the running of the limitations period.[13] Furthermore, as Dr. Newell testified, he had no input into the content of these various listings. R.113-116. It is undisputed that no inquiry was ever made of Dr. Newell, or anyone, regarding Dr. Newell's employment status prior to the running of the limitations period. Instead, Plaintiffs' assert, without any basis in fact, that Dr. Newell and Greenwood Leflore Hospital engaged in a "secret deal" (some five years before) to hide Dr. Newell's employment and that their "calculated silence" was designed to deprive Mr. and Mrs. Stark of any knowledge of his employment status. To the contrary, Dr. Newell's employment status was not a secret.

Had Plaintiffs' taken advantage of any one of the avenues available to them, they could have easily learned of Dr. Newell's employment status. For example, had Mr. or Mrs. Stark or their counsel simply asked, Dr. Newell would have readily told them that he was, and at the time he first saw Mrs. Stark had been nearly four years, an employee of Greenwood Leflore Hospital. R. 116. He was not trying to keep his employment a secret. In fact, in May of 2002, an advertisement was placed in the local newspaper in Grenada, Mississippi, where Plaintiffs' reside, advertising that Grenada Speciality Clinic, the only clinic where Dr. Newell ever treated Mrs. Stark, was "**A Member of the Greenwood Leflore Hospital Clinic Network.**" R. 30. A query of the Secretary of State's Corporate Information Division would have revealed that in late 1999, just prior to Dr.

[13]It was only after Plaintiffs filed their Rule 56(f) motion for discovery did Plaintiffs review the various web pages and directories, copies of which were later attached to their Supplemental Response to Defendant's Motion for Summary Judgment. R. 80.

Newell's employment by Greenwood Leflore Hospital in early 2000, Greenwood Orthopedic Clinic, P.A., dissolved. R. 157. Moreover, Dr. Newell's employment contract was on file at the offices of Circuit Clerk of Leflore County.[14] Thus, Dr. Newell's employment status was a matter within the public domain. *See*, Carder v. BASF Corp., 919 So. 2d 258, 262 (Miss. App. 2005) (holding that when the information that a party claims to have been concealed from him is a matter which has been previously placed in the public domain, the doctrine of fraudulent concealment cannot apply.)[15] Therefore, Plaintiffs cannot avail themselves of the equitable tolling of the limitations period as they conducted no due diligence inquiry into the basis of their claim and were not prevented from discovering the information needed to prosecute their action.

**E. Defendants Engaged in No Fraudulent Conduct, Made No Misrepresentations of Fact, and Took No Affirmative Action to Withhold Information from Plaintiffs Regarding Dr. Newell's Employment Status.**

In order to estop these Defendants from asserting a statute of limitations defense, Plaintiffs must establish some inequitable or fraudulent conduct on the part of the Defendants. Such conduct must have also been designed to affirmatively prevent Plaintiffs from discovering Dr. Newell's employment status. In re Catfish Antitrust Litigation, 826 F. Supp. 1019, 1030 (N.D Miss. 1993). As the trial court, who is trier of fact and law in this matter, correctly found, "[t]here is no evidence

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[14]In April of 2005, trial was held in the matter in the matter of Peggy Orman v. Greenwood Leflore Hospital, Civil Action No. 2003-0127-CICI, Circuit Court of Leflore County, wherein a verdict was rendered in favor of Greenwood Leflore Hospital. Dr. Newell's employment contract was produced therein and is a part of that record on file at Leflore County Courthouse.

[15]The Carder opinion dealt the a latent injury, which of course, is not present in this case. The Court of Appeals in it's opinion in Carder cautioned that the opinion was not intended to suggest that information published in a newspaper located anywhere automatically is sufficient to commence the running of the statute of limitations in a latent injury case. However, the Carder opinion is persuasive as the information which Plaintiffs claim they could not discovery, and which they claim was concealed from them, had in fact been published in the Plaintiff's home town newspaper prior to her treatment by Dr. Newell.

that Dr. Newell engaged in any affirmative acts to withhold information regarding his employment status nor did he provide Plaintiffs with any misleading and/or inaccurate information." R. 160.

Plaintiffs argue that because the appointment cards and bills submitted to Plaintiff did not state Dr. Newell was employed by Greenwood Leflore Hospital, that such omissions constitute a fraudulent misrepresentation on the part of these Defendants.[16] It is true that the appointment cards and bills contained no statements regarding Dr. Newell being employed by Greenwood Leflore Hospital. Conversely, those documents likewise did not state that Dr. Newell was a physician in solo private practice or in a group practice. All of which begs the question, "Why should an appointment card or a bill contain any information with regard to a physician's employment status?" They should not.

The purpose of an appointment card is to remind the patient of when and where their next appointment with their physician will be. The purpose of a billing statement is to advise the patient of the charges incurred for the services rendered, document the treatment rendered, and to indicate where to remit payment. Neither of these documents are designed, nor are they expected, to contain information concerning a physician's employment, his type of practice – whether it be a partnership, a professional association, or owned by a public entity – his insurance carrier, or his medical credentials.[17] Physicians are no more required to advertise or publicize their employment status than

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[16]This Court has established the following elements of intentional or fraudulent misrepresentation: "(1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) his intent that it should be acted on by the hearer and in the manner reasonably contemplated, (6) the hearer's ignorance of its falsity, (7) his reliance on its truth, (8) his right to rely thereon, *and* (9) his consequent and proximate injury." Franklin v. Lovitt Equip. Co., Inc., 420 So.2d 1370, 1373 (Miss.1982) (citations omitted)(Emphasis added). These elements must be proved by clear and convincing evidence. Id. Significantly, however, Plaintiffs have produced no evidence to establish any of these essential elements.

[17]Plaintiffs' make some inference that had they known that Dr. Newell had been employed by Greenwood Leflore Hospital for years prior to the time Mrs. Stark first saw him, that perhaps they would have chosen another doctor. One would question why Plaintiffs' would believe that a physician who is

they are required to inform their patients upon presentation whether they own or rent the building in which they work. In fact, it is ridiculous to imagine that a physician, seeing a patient for the first time, would engage in a conversation regarding his employment status, his assets, and his insurance status — at least it is hoped that society has not yet reached the stage that physicians should regard all patients as potential litigants rather than individuals in need of medical services.

Dr. Newell made no representation regarding his employment, one way or another. It is undisputed he was never asked about his employment status. Plaintiffs do not alleged that Dr. Newell told Plaintiffs he was in private practice, but they admit they assumed such. Incredibly, Plaintiffs make the argument that because their was no sign at Greenwood Orthopedic Clinic which read "I work for the hospital," Dr. Newell was misrepresenting his employment status. T. 11. Such an argument defies logic and is not supported by the law. As previously established, Dr. Newell had no duty to inform the Starks that he was a public employee. Ray, 859 So.2d at 998 (¶12), (citation omitted.) Furthermore, whether Dr. Newell had a sign at Greenwood Orthopedic Clinic which read he was an employee of Greenwood Leflore Hospital would not have made any impact on the Starks: Mrs. Stark was never treated at Greenwood Orthopedic Clinic!

In addition, Plaintiffs assert that because there were no outward signs of a change in Dr. Newell's practice after he became employed by Greenwood Leflore Hospital, Dr. Newell was misrepresenting his employment status. Quite simply, there was no reason for his practice to change. Dr. Newell's treatment of his patients was not required to differ because he became an employee of the hospital, no more than it would have if his practice had changed from a partnership

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working for the public is any less qualified that one in private practice, but that is something only they can answer for themselves. Interestingly, however, Plaintiffs admit that asking their physician about his employment status is not something they would routinely do.

to professional corporation. The practice of medicine remains the same. Nonetheless, it is important to remember that Dr. Newell became an employee of Greenwood Leflore Hospital nearly four years before he ever treated Mrs. Stark. Thus, even if his method of practice had changed, Mrs. Stark would not have been aware of any difference as she was not his patient at the time he became employed by Greenwood Leflore Hospital.

Equitable estoppel should only be used in exceptional circumstances. Windham v. Latco of Mississippi, Inc., 972 So. 2d 608, 612 (Miss. 2008) In the limited cases where it has been applied to toll a statute of limitations, the Plaintiff has either (1) been induced by promise or representation that the statutory bar would not be interposed, (2) been lead to believe that an amicable adjustment of the claim would be made without suit, or (3) been induced by the Defendant in some other way not to sue." Southern Win-Dor, Inc. v. RLI Ins. Co., 2005 WL 2739902 (Miss. App. 2005). In fact, the cases cited by Plaintiffs in their Brief are illustrative of this point. In Trosclair, the Plaintiffs were told by MDOT that the construction work being performed was not done by MDOT, but by a private contractor, which was untrue. 757 So. 2d 178, 179 (¶ 2) (Miss. 2000). In McCrary v. Biloxi, the City told the Plaintiff it would file his claim for him, engaged in settlement negotiations with him, but then failed to the notice as promised. 757 So. 2d 978, 982 (¶ 18) (Miss. 2000).

In this case, there are no allegations, much less any proof, the Defendants acted in any manner to induce plaintiffs to fail to timely file their cause of action. No statements or promises were made by Dr. Newell or Greenwood Leflore Hospital which would have induced Plaintiffs' not to timely exercise their right to sue. Robertson v. Moody, 918 So. 2d 787 (Miss. App. 2005). No representations were made that if Plaintiffs would make some concession, the Defendants would not purse their limitations defense. In fact, it is undisputed that neither Dr. Newell nor Greenwood Leflore Hospital were even aware of Plaintiffs potential claim until after the limitations period had

expired. No affirmative actions were taken to conceal anything from Plaintiffs, much less to prevent them from discovering any aspect of their claim. As the trial court properly held, there is simply no evidence whatsoever that any fraudulent conduct occurred. R. 160. Therefore, the trial court's well-reasoned ruling granting Defendant's summary judgment based upon the expiration of the limitations period should be affirmed.

## CONCLUSION

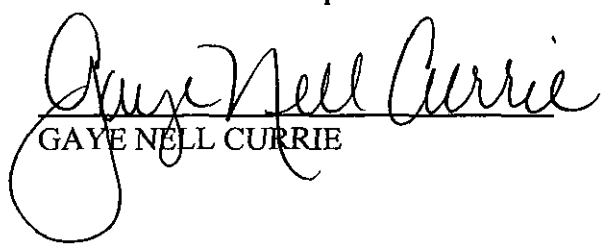
Equitable estoppel is not to be applied so liberally as to allow a Plaintiff to assert estoppel where no inequitable behavior is present. Stringer, 748 So. 2d at 665 (¶ 13). The record on appeal is devoid of any evidence that Dr. Newell or Greenwood Leflore Hospital misled Plaintiffs to believe that they need not comply with the notice provisions or the limitations period contained in the MTCA. The Starks have not established any fraudulent conduct on the part of these defendants. There is simply no evidence in the record that Dr. Newell or Greenwood Leflore Hospital prevented the Starks from filing their claim before the statute of repose expired. Moreover, the undisputed evidence shows that neither Dr. Newell or Greenwood Leflore Hospital were even aware of Plaintiffs' claim until after the expiration of the limitations period. Thus, they certainly engaged in no affirmative conduct designed to prevent, and which did prevent, Plaintiffs from discovering Dr. Newell's employment status and timely filing their action. The duty rests upon the Plaintiff to conduct a due diligence investigation in the facts needed to pursue their claim. The Plaintiffs herein failed so to do. The only thing that prevented the timely filing of the Starks' complaint was the misplaced assumption, based upon their own preconceived notions, that Dr. Newell was in private practice and therefore, Plaintiffs could wait two years before filing their complaint. Had the Plaintiffs engaged in any due diligence inquiry, they could have easily discovered Dr. Newell was a public employee and could have timely filed their action. The doctrine of fraudulent concealment

cannot be applied to equitably estop defendants from asserting their lawful limitations defense when plaintiffs conducted no due diligence whatsoever into the particulars of their claim. As the trial court correctly found, Plaintiffs had a duty to exercise due diligence in ascertaining the proper party defendants and their failure to so do cannot excuse their duty to comply with the procedural, and jurisdictional, requirements of the MTCA.

Dated this the 13th day of October, 2008.

Respectfully submitted,

Greenwood Leflore Hospital, R. Bruce Newell, M.D. and Greenwood Orthopedic Clinic

BY: 
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## CERTIFICATE OF SERVICE

I, GAYE NELL CURRIE, do hereby certify that I have this day mailed by United States Mail, postage prepaid, a true and correct copy of the above and foregoing pleading to:

John H. Cocke
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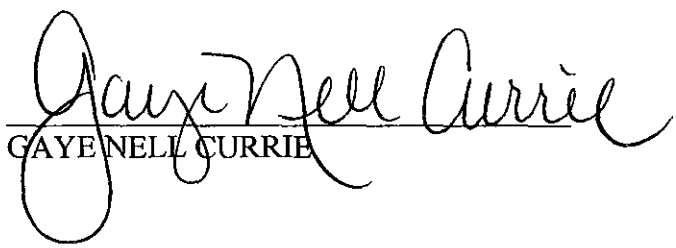
Honorable Margaret Carey-McCray
Leflore County Circuit Judge
900 Washington Avenue
Post Office Box 1775
Greenville, Mississippi 38702-1775

Dated this the 13th day of October, 2008.



GAYE NELL CURRIE

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