

IN THE SUPREME COURT OF MISSISSIPPI

IRENE STARK and
KENNETH STARK

APPELLANTS

VERSUS

NO. 2008-CA-00072

GREENWOOD LEFLORE HOSPITAL,
R. BRUCE NEWELL, M.D. and
GREENWOOD ORTHOPEDIC CLINIC

APPELLEES

REPLY BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

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SUMMARY OF THE ARGUMENT

The Supreme Court should reverse the dismissal of this case for two reasons. First, equitable estoppel requires that the MTCA's statute of limitations be tolled due to the Defendants' fraudulent concealment of Newell's employment status. The Defendants misled the public, including the Plaintiffs, into believing that Newell was still in private practice. Newell and Greenwood Orthopedic Clinic provided the Plaintiffs with documentation that further led the Plaintiffs to believe that Newell was still employed by Greenwood Orthopedic Clinic as a private physician. Newell provided the Plaintiffs with an appointment card that listed Newell as one of the physicians of Greenwood Orthopedic Clinic. Further, all of the documentation provided to the Plaintiffs indicated that they should pay Greenwood Orthopedic Clinic for Newell's services. No mention was ever made that Newell was actually employed by Greenwood Leflore Hospital, which would have alerted the Plaintiffs to the application of the shorter statute of limitations of the MTCA. The Defendants consciously kept the Plaintiffs in the dark as to Newell's true employment status, until after the MTCA's one year statute of limitations had run. The Defendants offer no explanation in their brief as to why they failed to take the effortless step of including a statement on Greenwood Orthopedic Clinic's bills that Greenwood Orthopedic was owned and operated by Greenwood Leflore Hospital. The Defendants provide no explanation because the only explanation is the truth, i.e. that such a statement was not included because to do so would alert potential plaintiffs to the application of the shorter limitations period. The Defendants' misrepresentations constitute fraudulent concealment and require the application of equitable estoppel to toll the MTCA's statute of limitations. The Supreme Court should not allow the Defendants to benefit by their own misrepresentations, which is the only result that would happen if the Plaintiffs lose their day in court.

Second, the Supreme Court made it clear that the discovery rule still applies to claims brought pursuant to the Mississippi Tort Claims Act (“MTCA”) when it withdrew its original opinion in *Caves v. Yarbrough*, 2007 WL 3197504 (Miss. 2007) and replaced it with *Caves v. Yarbrough*, 991 So.2d 142 (Miss. 2008). The new and final *Caves* decision held that the MTCA’s statute of limitations begins to run when the claim is discovered, not on the date the tortious conduct occurs. The Plaintiffs did not discover that they had a claim pursuant to the MTCA (and thus subject to the MTCA’s shorter statute of limitations) until the Plaintiffs learned of Newell’s secret employment status with Greenwood Leflore Hospital. Therefore, the MTCA’s one year statute of limitations did not begin to run until June 1, 2005, the date the Plaintiffs first learned of Newell’s employment with Greenwood Leflore Hospital. When the discovery rule is applied to the MTCA’s limitation period, the Plaintiffs’ claims become timely, thereby making dismissal improper.

ARGUMENT

I. The Defendants’ fraudulent concealment of Newell’s employment status requires the application of equitable estoppel to toll the MTCA’s statute of limitations.

Fraudulent concealment can trigger the application of equitable estoppel to toll a statute of limitations. *Windham v. Latco*, 972 So.2d 608, ¶ 9 (Miss. 2008). “If fraudulent concealment is proven, equity mandates that the tortfeasor be barred from benefitting from the statute of limitations.” *Windham, supra* at ¶ 9. Equitable estoppel can even toll the MTCA’s statute of limitations. *Trosclair v. Mississippi Dep’t of Transportation*, 757 So.2d 178, 181 (Miss. 2000) (“the facts of a case may permit the application of equitable estoppel to the notice of claim provision *as well as the statute of limitations* of the Tort Claims Act.” (Emphasis added)). The Court in *Trosclair* went on to state that “logic and case law suggests that where there is inequitable conduct, in order to avoid a serious injustice, equitable estoppel should be applied” to the statute of limitations under

the Tort Claims Act. *Trosclair, supra* at 181. “The logic supporting the availability of common-law equitable estoppel as a remedy to bar application of a statute of limitations is compelling. Equity mandates that wrongdoers should be estopped from enjoying the fruits of their fraud.” *Id.* at ¶ 7.

“Equitable estoppel requires a representation by a party, reliance by the other party, and a change in position by the relying party.” *Carr v. Town of Shubuta*, 733 So.2d 261, 265 (Miss. 1999). Here, the Defendants made multiple misrepresentations that were relied on by the Plaintiffs to their detriment.

All of the documentation that Newell and Greenwood Orthopedic Clinic provided to the Plaintiffs would lead any reasonable person unaware of Newell’s true employment status to believe that he was employed in a private practice at Greenwood Orthopedic Clinic. The appointment card provided to Stark identified Greenwood Orthopedic Clinic at the top of the card and, most importantly, listed Dr. Newell’s name among the clinic’s physicians. R. 85. Further, all of the bills provided by Newell and/or Greenwood Orthopedic bore the name of Greenwood Orthopedic Clinic, not the name of the hospital. R. 120, 121. The bills indicated that Greenwood Orthopedic Clinic was the “Provider/Practice Name”, not the hospital. R. 120, 121. One of the bills listed Dr. Newell as the provider in the bill’s itemization, not the hospital. R. 121. Further, the bills directed that Stark make her check payable to “Greenwood Orthopedic Clinic”, not the hospital, and that she should mail her check to Greenwood Orthopedic Clinic’s address, not the hospital or its address. R. 120, 121. Even a letter written specifically to the Plaintiff by Greenwood Orthopedic Clinic regarding her account for treatment by Dr. Newell referenced “Greenwood Orthopedic” on eight occasions but failed to reference the hospital even once. R. 119. None of the documentation provided to Stark by the Defendants indicated that Newell was employed by Greenwood Leflore Hospital or any other entity covered by the Mississippi Tort Claims Act. R. 85, 119-121.

It is uncontested that the Plaintiffs and their counsel relied upon the Defendants' misrepresentations in concluding that Newell was in private practice. See the Affidavits of Plaintiff Irene Stark, Plaintiff Kenneth Stark and Plaintiff's counsel John Cocke. R. 41-42, 46 and 64-65. Further, their reliance on the Defendants' misrepresentations caused the Plaintiffs to allow the statute of limitations to pass and thus changed their position for the worse, including having their claims dismissed via summary judgment. Thus, the Plaintiffs have satisfied the elements of equitable estoppel.

However, since the Plaintiffs are attempting to toll the statute of limitations, they must also establish the elements of fraudulent concealment. "Inequitable or fraudulent conduct must be established to apply the doctrine of equitable estoppel to a statute of limitations." *Trosclair, supra* at 181 (citing *Stringer*, 748 So.2d at 665 and *Carr*, 733 So.2d at 265). To establish fraudulent concealment, "the party purporting that there has been fraudulent concealment must show that '(1) some affirmative act or conduct was done and prevented discovery of a claim, and (2) ... due diligence was performed on their part to discover it.'" *Windham, supra* at FN8. As discussed above, the Plaintiffs have shown that the Defendants engaged in affirmative conduct designed to hide Newell's true employment status from his patients, including Ms. Stark.

The affirmative acts of (1) listing Newell as a physician of Greenwood Orthopedic Clinic on the appointment card, (2) instructing the Starks to pay Greenwood Orthopedic Clinic for Newell's services, and (3) consistently indicating to the Starks that Greenwood Orthopedic Clinic was the service provider, are sufficient affirmative acts that prevented the Plaintiffs from discovering their claims pursuant to the MTCA. The question thus becomes whether the Plaintiffs were fooled despite their own due diligence.

“Due diligence” is defined as “the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation – Also termed *reasonable diligence*.” Black’s Law Dictionary (emphasis in original). In other words, the exercise of due diligence means to exercise the level of diligence that a reasonable person would exercise under the same or similar circumstances.

The Defendants argue that the Plaintiffs did not exercise due diligence, without actually defining that term. Instead of correctly defining due diligence, the Defendants morph due diligence into requiring much more than what is actually required. The Defendants’ idea of due diligence requires the Plaintiffs to expect the unexpected, i.e. that Newell, despite all indications to the contrary, was actually employed by Greenwood Leflore Hospital. However, due diligence does not require a person to expect the unexpected. Instead, due diligence requires people to act like reasonable people would act in the same or similar situation. In other words, the Plaintiffs exercised due diligence if they reacted to the circumstances and information before them as a reasonable person would react.

Thus, for the Defendants’ argument to prevail, the Court must find that it was not reasonable for the Plaintiffs to believe that Newell worked for the Greenwood Orthopedic Clinic. To reach this conclusion, the Court must make at least two findings. First, it must find that it was unreasonable for the Plaintiffs to believe the documentation that Defendants Newell and Greenwood Orthopedic Clinic provided them, namely the bills that instructed the Plaintiffs to pay Greenwood Orthopedic Clinic for Newell’s services, the appointment card that listed Newell as one of the doctors of Greenwood Orthopedic Clinic and the letter Greenwood Orthopedic Clinic sent them that repeatedly refers to the Plaintiffs’ account with Greenwood Orthopedic Clinic but never mentions Greenwood Leflore Hospital. Second, and most significantly, the Court must also conclude that the Plaintiffs

unreasonably relied on their own eyes, when they saw Newell working as what appeared to be a private physician.

At the same time that the Court must find that a reasonable person would ignore all of the above indications that Newell was employed by Greenwood Orthopedic Clinic, the Court must also find that a reasonable person would forget everything he had seen or read upon reading the lone ambiguous statement found on the bottom of the Plaintiff's bill that read "A Member of the Greenwood Leflore Hospital Clinic Network. The Convenience of a Clinic. The Resources of a Hospital." According to the Defendants, this one statement, which mentions neither Newell's employment status nor that Greenwood Leflore Hospital owned Greenwood Orthopedic Clinic, should, in the eyes of a reasonable person, trump all of the other indications that Newell was employed in a private practice. The Defendants contend that this one vague statement should have told the Plaintiffs that Greenwood Orthopedic Clinic was not just a member of some network of clinics loosely associated with the hospital. Instead, the Defendants contend that this statement should have clearly indicated to the Plaintiffs that, contrary to everything else they had seen or read, Greenwood Orthopedic Clinic was actually owned by Greenwood Leflore Hospital.

When the totality of the circumstances with which the Defendants presented the Plaintiffs are viewed, it was clearly reasonable for the Plaintiffs to believe that Newell was in private practice. In fact, any other conclusion would contradict the information possessed by the Plaintiffs. As a result, there was no reason for the Plaintiffs, or any other reasonable person, to inquire as to whether Newell was actually employed by Greenwood Leflore Hospital. In other words, the Plaintiffs did exercise due diligence because they reacted to the misinformation the Defendants placed before them just as any other reasonable person would - they believed it.

The Defendants also argue that they had no duty to inform their patients of Dr. Newell's employment status and, as a result, did nothing wrong when they did not inform the Plaintiffs of Newell's employment by Greenwood Leflore Hospital. While it may be true that the Defendants had no duty to speak, they did owe a duty not to mislead their patients into believing that Newell was employed in a private practice and therefore not protected by the MTCA.

The Defendants carefully orchestrated an illusion that Newell was still in private practice. In addition to the documentation provided to Newell's patients that indicated he was a physician of Greenwood Orthopedic Clinic, Newell made no change in the way he did business or in the way that his business appeared to the public. R. 64. He did not change the name of his clinic to reflect his new employment status. He did not relocate to the hospital, despite his new employment there. Newell still practiced in the exact same clinic where he practiced before his employment change. He still had the exact same sign out front of his office. R. 64. As far as the record reflects, Newell did not post anything in the Greenwood Orthopedic Clinic indicating that he was no longer in private practice or was now employed by the hospital. R. 102-103.

Newell admitted that he did not make any changes to inform his patients that he was an employee of the hospital and no longer in private practice. R 108-109. As admitted by Newell, it was fair to say that one day Newell was in private practice and the next he was employed by the hospital, but that there was nothing apparent to the patients that his employment status had changed. R. 117. As far as Newell's practice, nothing changed as far as the general public was concerned. R. 64. In fact, since no change was made at all to Newell's practice by his change of employer, one might ask why Newell changed his employment status. Apparently, the change was made for the sole purpose of acquiring the protections of the MTCA which, if made known to Newell's patients such as the Plaintiffs, would reduce the advantage of acquiring the MTCA's protections.

The Defendants also argue that there was no reason the Plaintiffs could not discover Newell's employment status had they inquired about it. While this is true, it is immaterial. The correct question is not whether the Plaintiffs could have learned of Newell's true employment status but whether there was any reason for the Plaintiffs to suspect that Newell was not in private practice. Given the information and circumstances presented to the Plaintiffs, no reasonable person would have thought to inquire regarding Newell's employment status.

The Defendants rely on several cases, all of which are easily distinguished from the present case. First, the decision *Ray v. Keith*, 859 So.2d 995 (Miss. 2003) turned on a very important fact that is not present in this case. *Ray* involved a motor vehicle accident allegedly caused by the negligence of a Lee County, Mississippi employee. The Supreme Court refused to apply equitable estoppel to toll the Tort Claims Act's one year statute of limitations even though the defendant in *Ray* did not tell the plaintiff that he was acting in the course and scope of his employment with Lee County at the time of the wreck. Unlike the present case, the plaintiff in *Ray* was on notice of the defendant's governmental employment because the accident report indicated that the defendant was an employee of Lee County. *Ray, supra* at 996. Here, not only was no document ever provided to the Starks that indicated Newell's true employment status, the documents that were provided to the Starks either hinted or flat out indicated that Newell was employed in a private practice.

The Defendants also rely upon *Davis v. Forrest Royale Apts.*, 938 So.2d 293 (Miss. App. 2006), a case where the Court of Appeals refused to toll a limitation period when the plaintiff failed to name the property owner in a premises liability lawsuit. Unlike the present case, however, a reasonable person in a premises liability case would seek to ascertain the identity of the owner of the premises on which the person was injured. This is easily accomplished by a visit to the local Chancery Clerk's office, a step which the plaintiff in *Davis* apparently did not take.

The plaintiff in *Davis* apparently did not think about checking the land records to make sure she named the proper defendant. The Starks however did consider the question of the identity of the proper defendant, as evidenced by their naming Greenwood Orthopedic Clinic, Newell's apparent employer, as a defendant rather than Grenada Speciality Clinic, where Newell treated Ms. Stark. However, the Starks reasonably believed they had identified the proper defendants. They only got it wrong because they relied on the Defendants' misrepresentations of Newell's employment status. *Davis* involved no such misrepresentation and is therefore not applicable to the present case.

Finally, the Defendants rely on *Gould v. U.S. Dept. of Health & Human Services*, 905 F.2d 738 (4th Cir. 1990), a decision from the United States Court of Appeals from the Fourth Circuit which is obviously not binding on this Court. Further, like *Ray* and *Davis*, the facts of *Gould* differ significantly from the facts of the present case. Prior to his untimely death, Gould was treated by Dr. James Kevin O'Rourke, a commissioned officer of the United States Public Health Service, as well as Dr. Barry Nathanson, a civilian employee of the United States Public Health Service. *Gould, supra* at 740. However, Gould's treatment by Drs. O'Rourke and Nathanson occurred at the South County Family Health Care Corporation ("South County"), which is a private clinic. *Gould, supra* at 740. Drs. O'Rourke and Nathanson were assigned to South County because it was located in a health manpower shortage area. *Id.*

Gould died due to the alleged negligence of O'Rourke and Nathanson. Unaware that Gould's physicians were federal employees, Gould's survivors did not file a lawsuit until after the nonwaivable two year limitations period found in the Federal Tort Claims Act. See 28 U.S.C. § 2401(b). The Fourth Circuit affirmed the trial court's order dismissing Gould's wrongful death claim as time barred. The Defendants fail to mention in the Appellees' Brief that, unlike the present case, there was no evidence that "the treating physicians 'held themselves out as agents and

employees of the private health facility' so as to mislead or deceive the plaintiffs or otherwise hide their legal identity as federal employees." *Gould, supra* at 745. Newell, of course, did just that, by his name being listed on the appointment card as a physician of Greenwood Orthopedic Clinic. Thus, *Gould* is distinguishable from the present case. The Defendants' reliance on this non-binding, distinguishable case is misplaced.

Allowing the Defendants to benefit from their scheme to hide Newell's employment status will render the longer two year statute of limitations for medical malpractice cases meaningless. If the Plaintiffs are punished for not knowing something that was hidden from them by the Defendants, then future plaintiffs will be forced to file all claims within the shorter time frame of the MTCA or risk losing their claim due to some similar hidden machinations of the wrongdoers in their cases. To allow defendants to skirt the rules and, by their own secretive maneuvers, avoid a trial on the merits is to cheat justice itself. The purpose of the Mississippi Tort Claims Act was to give injured persons a means to be made whole. Its purpose was not to allow private defendants to use secret deals to rob potential plaintiffs of their day in court. For these reasons, reversal is appropriate.

II. Discovery rule clearly applies to MTCA claims in light of withdrawal of original opinion in *Caves v. Yarbrough*.

The Mississippi Supreme Court initially held that the discovery rule did apply to claims pursuant to the MTCA. *Barnes v. Singing River*, 733 So.2d 199 (Miss. 1999) and its progeny. Despite this long standing rule, the Supreme Court in *Caves v. Yarbrough*, 2007 WL 3197504 (Miss. 2007), held that the MTCA's one year limitation period is a statute of limitations beginning to run on the date of the tortious conduct, not on the date that the cause of action accrues. Thus, according to the initial *Caves* decision, the discovery rule did not apply to the MTCA's one year limitation period. For this reason, at the time of the Appellants' principal brief, it appeared that the

Defendants' fraudulent concealment of Newell's employment status was the only way in which the Plaintiffs could be excused for not filing their litigation within the MTCA's one year statute of limitations.

However, after the filing of the Appellants' principal brief but before the filing of the Defendants' principal brief¹, the Supreme Court withdrew the original *Caves* opinion, reaffirming that the discovery rule does indeed apply to MTCA claims. *Caves v. Yarbrough*, 991 So.2d 142 (Miss. 2008). As a result, regardless of whether the Defendants fraudulently concealed Newell's employment status, the one year statute of limitations did not begin to run in the present case until the Plaintiffs learned that the MTCA applied to the Plaintiffs' claims, i.e. when the Plaintiffs learned of Newell's secret employment by Greenwood Leflore Hospital. Because the Plaintiffs' claims were filed within one year of learning of Newell's employment with Greenwood Leflore Hospital, the Court should reverse the trial court's order dismissing the Plaintiffs' claims as time barred.

CONCLUSION

The Defendants should simply not be allowed to profit from their own misrepresentations. Due to the Defendants' misleading documentation, no reasonable person would suspect that Newell was anything other than what he appeared, namely a private physician. Because the Plaintiffs acted with the same diligence as any other reasonable person would use, the Defendants are wrong to claim that the Plaintiffs failed to perform their due diligence. Because of the Defendants' concealment of Newell's true employment status, equitable estoppel requires that the MTCA's statute of limitations be tolled until the Plaintiffs learned of Newell's secret government employment. For this reason,

¹ Oddly, despite the withdrawal of the original *Caves* opinion occurring before the filing of the Appellees' principal brief, the Defendants make no mention of either the original *Caves* opinion or the final *Caves* opinion.

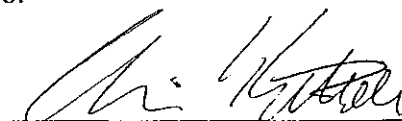
CERTIFICATE OF SERVICE

I, John H. Cocke, 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 document to the following:

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THIS, the 26th day of November, 2008.



JOHN H. COCKE
