

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

BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible 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 & Carraway - Attorneys for Defendants
/Appellees;
8. Judge Margaret Carey-McCray, Leflore County Circuit Court Judge.

THIS, the 11th day of July, 2008.



JOHN H. COCKE, [REDACTED]
Attorney for Plaintiffs/Appellants

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STATEMENT OF ISSUES

1. Whether Defendants, who fraudulently concealed the fact that Newell was employed by the Greenwood Leflore Hospital, were equitably estopped from raising as a defense the one year statute of repose under the Mississippi Tort Claims Act.

STATEMENT OF THE CASE

I. Nature of Case and Course of Proceedings in Lower Court

The Appellants/Plaintiffs, Irene Stark and her husband Kenneth Stark, (hereinafter "Plaintiffs" or "Starks") filed suit against Greenwood Leflore Hospital, R. Bruce Newell, M.D. and Greenwood Orthopedic Clinic as a result of injuries suffered by Plaintiff Irene Stark during a hip replacement performed by Defendant Newell. The Defendants, having concealed that Newell was actually employed by Defendant Greenwood Leflore Hospital and was thus subject to a shorter statute of limitations, moved for summary judgment on all of the Plaintiffs' claims, raising as a defense the one year statute of repose provided by the Mississippi Tort Claims Act. Despite the Defendants' active misrepresentation of the employment status of Newell, the Circuit Court of Leflore County granted the Defendants' motion and dismissed the Plaintiffs' claims against the Defendants with prejudice. The Plaintiffs have appealed the decision of the lower court.

II. Statement of Facts Relevant to Issues for Review

The Plaintiff Irene Stark had sufficient arthritic deterioration of her hip to the extent that she required a hip replacement. R. 4. Stark sought treatment from Defendant Newell. R. 4. On January 22, 2004, Defendant Newell performed the hip replacement on Stark at the Defendant Greenwood Leflore Hospital. R. 4.

During the surgical procedure, Defendant Newell, who was an agent and/or employee of Defendant Greenwood Orthopedic Clinic, injured Stark's nerve, which caused her to have a permanent foot drop. R. 4. This condition requires her to wear a brace and very much inhibits her ability to ambulate. R. 4. Defendant Newell's conduct in injuring Plaintiff Irene Stark's nerve was below the standard of care for a reasonably prudent, minimally competent physician practicing in Greenwood, Mississippi, or a similar community, and constitutes negligence for which the Plaintiffs

are entitled to recover. R. 4.

On May 18, 2005, well within the two year statute of limitations generally applicable to medical malpractice claims against private physicians but outside the one year statute of repose applicable to medical malpractice claims against governmental entities under the Mississippi Tort Claims Act, the Plaintiffs gave notice of their claim to Defendant Newell at the Defendant Greenwood Orthopedic Clinic. R. 8. In response to the Plaintiff's May 18, 2005 notice of claim, the Plaintiff was informed for the very first time that Newell was actually an employee of the Greenwood Leflore Hospital and not employed by Greenwood Orthopedic Clinic. R. 27.

Unbeknownst to the Plaintiff and apparently any of Newell's other patients, Newell became employed by Greenwood Leflore Hospital in January 2000. R. 93. Prior to that, Greenwood Orthopedic Clinic had employed Newell. In fact, Dr. Newell testified that it was "fair to say that one day [he was] in private practice and the next day [he was] employed by the hospital" and that "if the patient had walked into [his] clinic both days," there would have been no way for the patient to tell that Newell's employment status had changed. R. 117.

When Newell secretly switched his employment to Greenwood Leflore Hospital, he did not make any changes to his practice. R. 94. Newell did not make any attempt to inform his patients that he was an employee of the hospital and no longer in private practice. R. 108-109. Newell did indicate that, at that point, the hospital took over all billing and collections but, as discussed below, such was not the case. R. 95. However, even if the hospital did take over all billing and collections, there was no indication of that on any of the bills or correspondence sent to Stark. R. 119, 120, 121. To the contrary, the bills and correspondence indicate that the bills are owed to Greenwood Orthopedic Clinic, not the hospital. R. 119, 120, 121.

Newell testified that he does not know if anything was posted in his office indicating his new

employment with the hospital or the fact that he was no longer in private practice. R. 102-103. Newell admitted that he never instructed any of his staff to post anything so the patients would know that he was no longer in private practice. R. 103.

Newell also admitted that his patients do not customarily inquire into the status of his clinic or the business structure of his clinic. R. 110. He also admitted that Ms. Stark never inquired into the nature of his employment or the status or business structure of his clinic. R. 110. Further, Newell does not recall ever telling Ms. Stark that he was an employee of the hospital and does not know of anyone who ever told Ms. Stark that he was not in private practice. R. 102, 113.

Not only did Newell and Greenwood Orthopedic Clinic not publicize the fact that Greenwood Leflore Hospital had hired Newell, Newell and Greenwood Orthopedic Clinic took affirmative steps to conceal his employment status from Stark and their other patients. For instance, the appointment card provided to Stark does not mention Greenwood Leflore Hospital but instead lists Greenwood Orthopedic Clinic at the top with Newell's name listed as among the clinic's physicians. R. 85. Thus, the appointment card contained nothing to indicate that Newell's employment status was nothing other than what it appeared to be, namely that of a private physician with Greenwood Orthopedic Clinic.

The bills sent to Mrs. Stark for Dr. Newell's treatment of her also perpetuate the belief that Dr. Newell was a private physician. The bills do not mention Greenwood Leflore Hospital, much less list Greenwood Leflore Hospital as Newell's employer. R. 120, 121. Instead, the bills identified themselves as being from Greenwood Orthopedic Clinic. R. 120, 121. The bills further indicate that the "Provider/Practice Name" as Greenwood Orthopedic Clinic and that Stark was to make her check payable to Greenwood Orthopedic Clinic and mail her payment to Greenwood Orthopedic Clinic at its address in Greenwood. R. 120, 121. The bills even instruct Stark that, should she have a billing

inquiry, she should call “662-453-0504”, which is Greenwood Orthopedic Clinic’s phone number, as listed on the appointment card provided to Stark. R. 85 and 120, 121.

Greenwood Orthopedic Clinic also wrote Stark a letter about her bills. R. 119. The letterhead at the top of the letter lists “**Greenwood Orthopedics**” in large lettering and lists “**Greenwood Orthopedics**” with a Greenwood, Mississippi address as the sender of the letter. R. 119 (emphasis added). The body of the letter indicates that “We at **Greenwood Orthopedics** have hired Account Receivable Management Service to assist you and us in maintaining your account(s)” and references “payment arrangements made with **Greenwood Orthopedics**”. R. 119 (emphasis added). The letter indicates that “Payments may be paid directly to **Greenwood Orthopedics** or mailed to ... **Greenwood Orthopedics.**” R. 119 (emphasis added). The letter also states that “**Greenwood Orthopedics** can charge the balance of your account to” a credit card. R. 119 (emphasis added). The letter is even signed “**Greenwood Orthopedics**”. R. 119 (emphasis added).

Even if something had tipped off the Plaintiff that Newell’s employment status was not what it appeared to the world to be, she would have had a hard time learning the truth. The American Medical Association’s website indicates that Newell has an “office based practice” and that his office is “Greenwood Orthopedic Clinic”. R. 86-87. Neither the BellSouth Real Yellow Pages nor the Three Rivers Telephone Directory mentions Newell as being associated with, much less employed by, the Greenwood Leflore Hospital. R. 106 - 108.

Having no reason to suspect that Newell was a government employee rather than having a private practice, Stark and her attorney believed the two year statute of limitations applied to Stark’s claims. Based on this belief, the Plaintiff did not provide notice of her claim before the one year statute of repose provided by the Mississippi Tort Claims Act had run. R. 64. Shortly after

providing notice of her claim, the Plaintiff filed this lawsuit on October 25, 2005. R. 5. The filing of the Complaint would be timely if the two year statute of limitations applicable to private physicians did indeed apply. However, if the Court applies the one year statute of repose afforded governmental entities by the Mississippi Tort Claims Act, the Plaintiff's claim would be barred, thus allowing the Defendants the spoils of their fraudulent concealment.

As noted *supra*, the Circuit Court of Leflore County granted the Defendants' motion for summary judgment and dismissed the Plaintiffs' claims against the Defendants with prejudice. R. 159. The trial court based its decision on the incorrect statement that 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 misleading and/or inaccurate information." R. 160. However, Newell and Greenwood Orthopedic Clinic did misrepresent Newell's employment status on the correspondence and bills sent to Stark as well as the appointment card they provided to Ms. Stark. R. 85, 119-121. Further, the dubious silence of Newell and his cohorts as to his change in employment status is a sufficiently affirmative act to justify not allowing the Defendants the benefit of their misrepresentations and omissions. The Plaintiffs have timely appealed the decision of the lower court. R. 162.

SUMMARY OF THE ARGUMENT

The Defendants conspired to mislead the Plaintiffs and others similarly situated by both affirmatively and passively concealing from the Plaintiffs and presumably others that Newell was a private physician employed by the Greenwood Orthopedic Clinic. Not a single page of the documents produced in this case indicate that Newell was employed by the Greenwood Leflore Hospital or was anything other than in private practice. The medical bills bear the name of Greenwood Orthopedic Clinic and instruct Stark to pay the clinic, not the hospital. Correspondence sent to Stark by Greenwood Orthopedic Clinic also fail to mention the hospital and indicate that the bills are owed to the clinic, not the hospital. The appointment card provided to Stark by Newell's clinic, the internet and the yellow pages all fail to indicate that Newell is anything but in private practice. No reasonable person, viewing the situation as a whole, would ever suspect that Newell was employed by the hospital and thus protected by the Mississippi Tort Claims Act.

The Defendants, apparently knowing this, committed their carefully orchestrated misrepresentations for the purpose of concealing from potential plaintiffs such as the Starks that believing Newell was in private practice and thereby trick them into believing they had two years to bring any medical negligence claims, rather than the one year afforded to governmental entities by the Mississippi Torts Claims Act. This Court should not allow the Defendants to profit from their deception by hiding behind a shorter statute of limitations that their misleading conduct kept the Plaintiff from knowing was applicable to her claims.

ARGUMENT

I. Standard of Review

Summary judgment is affirmed only if the evidence, viewed in the light most favorable to the party against whom the motion is made, shows there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *City of Starkville v. 4-County Elec. Power Ass'n*, 819 So.2d 1216, 1220 (Miss. 2002). When looking at the grant or denial of summary judgment, the appellate Court, as well as the trial court, must consider all evidentiary matters before it, including admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. *Cook v. Children's Med. Group, P.A.*, 756 So.2d 734, 739 (Miss. 1999); *Bennett v. Madakasira*, 821 So.2d 794, 797 (Miss. 2002); *Cole ex rel. Cole v. Buckner*, 819 So.2d 527, 530 (Miss. 2002). Issues of fact are present when one party swears to one version of the matter and another says the opposite. *Cook*, 756 So.2d at 739. Where there is the *slightest* doubt over whether a factual issue exists, the Court should resolve in favor of the non-moving party. *Cothorn v. Vickers, Inc.*, 759 So.2d 1241, 1245 (Miss. 2000).

"This Court reviews orders granting summary judgment *de novo*. As such, all evidence is viewed in the light most favorable to the non-moving party and they are given the benefit of the doubt. The burden is placed on the moving party to show that no genuine issue of material fact exists. ... All questions of law are reviewed *de novo*." *McFarland v. Leake*, 864 So.2d 959, 960-61 (Miss.Ct.App. 2003) (citing *Sample v. Haga*, 826 So.2d 1293 (Miss.Ct.App. 2002)).

II. Due to their misleading conduct regarding Newell's governmental employment status, Defendants should be equitably estopped from benefitting from the Mississippi Tort Claims Act's shorter statute of repose.

Typically, the statute of limitations in a medical malpractice action runs two years from the date "the alleged act, omission or neglect shall or with reasonable diligence might have been first

known or discovered.” Miss. Code Ann. § 15-1-36. However, claims against any governmental entities are subject to a shorter, one year statute of repose. Miss. Code Ann. § 11-46-11(e). See also *Caves v. Yarbrough*, 2007 WL 3197504 (Miss. 2007).

Based upon the conspiratorial efforts of Newell and Greenwood Orthopedic Clinic to conceal Newell’s status as an employee of Greenwood Leflore Hospital, the Plaintiffs and their counsel were duped into thinking the two year statute of limitations applied to the Plaintiffs’ claims. Relying on the misrepresentations and misleading conduct of the Defendants, the Plaintiffs waited until May 18, 2005 to provide notice to Newell and Greenwood Orthopedic Clinic of the Plaintiffs’ claims. R. 8. Thus, the Plaintiffs gave notice and filed this lawsuit within the two year statute of limitations that they were tricked into thinking applied but outside the one year statute of repose that, unbeknownst to the Plaintiffs, was actually in effect due to Newell’s status as an employee of a governmental entity.

In *Caves v. Yarbrough*, 2007 WL 3197504 (Miss. 2007), the Mississippi Supreme Court held that the MTCA’s one year limitation period is a statute of repose beginning to run on the date of the tortious conduct, not on the date that the cause of action accrues.¹ Thus, according to *Caves*, the discovery rule does not apply to the MTCA’s one year limitation period. While at first glance, the *Caves*’ holding would appear to be dispositive of the Plaintiff’s claims, the ruling in *Caves* does not apply to the present case for two reasons.

First, the *Caves* opinion is not a final opinion because no mandate has issued due to a pending motion for rehearing. See *Gray v. University of Mississippi School of Medicine*, 2008 WL

¹ The Mississippi Supreme Court had previously held that the discovery rule did apply to tort claim actions as well. *Barnes v. Singing River*, 733 So.2d 199 (Miss. 1999) and its progeny.

570430, *3 (Miss. App. 2008) (citing *Miss. Transp. Comm'n v. Allday*, 726 So.2d 563, 566 (Miss. 1998) (stating that “as a general matter, an opinion of this [c]ourt should not be considered final until the parties and this State’s bar have had an opportunity to respond to the opinion” and finding that a prior decision did not become final until after the petition for rehearing was denied). Thus, it currently has no precedential effect on this case and the Court need not rely upon the *Caves*’ holding in ruling on Plaintiff’s appeal. See *Gray, supra* at *3.

Second, after the Supreme Court’s holding in *Caves*, the Supreme Court held in *Windham v. Latco*, 972 So.2d 608, ¶ 9 (Miss. 2008), that fraudulent concealment can toll a statute of repose. In *Windham*, the Mississippi Supreme Court applied the principles of equitable estoppel to toll a statute of repose, stating that “[i]f fraudulent concealment is proven, equity mandates that the tortfeasor be barred from benefitting from the statute of repose.” *Windham, supra* at ¶ 9. “The logic supporting the availability of common-law equitable estoppel as a remedy to bar application of a statute of repose is compelling. Equity mandates that wrongdoers should be estopped from enjoying the fruits of their fraud.” *Id.* at ¶ 7. “Wrongdoing ought not be shielded if fraudulent concealment can be proven.” *Id.* at ¶ 10.

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.

Due to the Defendants’ fraudulent concealment of Newell’s true employment status, the Defendants are equitably estopped from asserting the one year statute of repose as a defense to the Plaintiff’s claims. With the replacement of strict compliance with that of substantial compliance, the Court opened the door for the application of equitable estoppel in cases arising under the Tort

Claims Act.” *Trosclair v. Mississippi Dep’t of Transportation*, 757 So.2d 178, 181 (Miss. 2000) (citing *Smith County Sch. Dist. V. McNeil*, 743 So.2d 376 (Miss. 1999); *Mississippi Dep’t of Pub. Safety v. Stringer*, 748 So.2d 662 (Miss. 1999); *Ferrer v. Jackson County Bd. of Supervisors*, 741 So.2d 216 (Miss. 1999); *Carr v. Town of Shubuta*, 733 So.2d 261 (Miss. 1999)). As the Court said in *Trosclair*, “[g]iven this line of precedent, 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.” *Trosclair*, *supra* at 181 (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 repose under the Tort Claims Act. *Trosclair*, *supra* at 181. Equitable estoppel arises when one party may be precluded by his act or conduct, or silence when it is his duty to speak, from asserting a right which he otherwise would have had.” *Morrow v. Vinson*, 666 So.2d 802, 803 (Miss. 1995) (citing *Black's Law Dictionary* 538 (6th ed. 1990)). “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). “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.

Again, in *In re Enlargement & Extension of the Municipal Boundaries v. City of Southaven*, 864 So. 2d 912 (Miss. 2003), the court reiterated:

Equitable estoppel is 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." BLACK'S LAW DICTIONARY 373 (6th ed. abr.1991). A party asserting equitable estoppel must prove a (1) belief and reliance on some representation; (2) change of position as a result of the representation; and (3) detriment or prejudice caused by the change of position. Mound Bayou School Dist. v. Cleveland School Dist., 817 So. 2d 578, 583 (Miss. 2002); Covington County v. Page, 456 So. 2d 739, 741 (Miss. 1984). *Id.* at 917.

McCrary v. City of Biloxi, 757 So. 2d 978 , lists the elements of equitable estoppel as follows:

Conduct and acts, language or silence, amounting to a representation or concealment of material facts, with knowledge or imputed knowledge of such facts, with the intent that representation or silence, or concealment be relied upon, with the other party's ignorance of the true facts, and reliance to his damage upon the representation or silence. The burden of establishing the elements of an estoppel is on the party asserting the estoppel. The existence of the elements of an estoppel must be established by the preponderance of the evidence. *Id.* at 980-81; *see also* *Chapman v. Chapman*, 473 So.2d 467, 470. (Miss. 1985) (citations omitted).

As discussed *infra*, the Plaintiffs have presented sufficient evidence to establish all three of the elements of equitable estoppel as well as the two elements of fraudulent concealment. The Court should thus find that the Circuit Court erred in allowing the Defendants to hide behind a defense that their own fraudulent concealment.

A. The Defendants Made Multiple Misrepresentations Regarding Newell's Employment Status.

The first element to justify the application of equitable estoppel is that the party that is sought to be estopped must have made a representation. *Carr, supra* at 265. Not only did Defendants make numerous representations regarding Newell's employment status, these representations rise to the level of misrepresentations given the true status of Newell's employment.

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. 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. This misrepresentation alone is enough to satisfy the first element of equitable estoppel, but the misrepresentations did not stop there.

All of the bills provided by Newell and/or Greenwood Orthopedic bore the name of Greenwood Orthopedic Clinic, not 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. A letter written to the Plaintiff by Greenwood Orthopedic Clinic regarding her account for treatment by Dr. Newell referenced "Greenwood Orthopedic" on eight occasions. R. 119. It failed to reference the hospital or any other governmental employee even once. R. 119.

There was simply nothing to tip the Starks or her counsel off to the fact that Newell was employed by the hospital and was no longer in private practice. There was no change in the way Newell did business or in the way that his business appeared to the public. R. 64. The name of his clinic did not change. The clinic did not relocate into the hospital. 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, there was nothing posted in the Greenwood Orthopedic Clinic that Newell was not in private practice or was employed by the hospital. R. 102-103. In fact, 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.

Further, fraud or misrepresentation can occur by silence or failure to speak, as well as by affirmative false statements. Newell failed to tell his patients of his new employment and/or the effect of that new employment on his patients' rights. R. 102, 108-109. Specifically, he failed to tell Mrs. Stark of his employment by the hospital. R. 102. Instead of informing the public or his patients of his new employment status, the Defendants continued on with business as usual allowing Newell's patients to incorrectly believe what they saw was actually the truth. They never mentioned their secret deal with Greenwood Leflore Hospital because to do so would eliminate the benefit of that deal, namely the shorter statute of repose that no patient would ever suspect. The Court should not allow the Defendants to profit from underhanded actions.

B. The Plaintiffs Relied Upon the Defendants' Multiple Misrepresentations Regarding Newell's Employment Status.

The Plaintiffs also provided sufficient evidence to establish the second element of equitable estoppel, namely that they and their counsel relied on the Defendants' representations regarding Newell's employment status.

The Plaintiff Irene Stark provided an affidavit regarding her reliance on the Defendants' misrepresentations. R. 41. She testified that she "was led to believe by Dr. Newell that he had his own independent practice and there was no clue ever provided to [her] that Dr. Newell worked for the Greenwood Leflore Hospital or was in any other way associated with any governmental entity." She stated that Newell "appeared for all purposes to be a doctor in private practice as are all the other physicians of which [she was] aware that [she had] seen in Mississippi." R. 41.

The Plaintiff Kenneth Stark also provided an affidavit touching this issue, in which he swore under oath that “[a]t all times, [the Plaintiffs] were led to believe by Dr. Newell that he had his own independent practice and were never informed by Dr. Newell that he worked for the Greenwood Leflore Hospital or was in any other way associated with any governmental entity.” Mr. Stark went on to say that Newell “appeared for all purposes to be a doctor in private practice as were all the other physicians Irene Stark has seen in the past.” R. 46.

Plaintiff’s counsel John H. Cocke also provided an affidavit regarding the Defendants’ misdirection. The Plaintiff’s counsel was, “in fact, misled by the Defendant’s way of doing business and the thought that the Defendant Newell was an employee of the Defendant Hospital was never triggered because of the misleading way in which the Defendant Newell continued to do business after he became an employee of the Defendant Hospital.” R. 64. “There is no question in [the] mind [of Plaintiffs’ counsel] that the Defendant Newell misrepresented the way in which he was doing business and there is absolutely no question that [Plaintiffs’ counsel] relied upon that misrepresentation and did not file suit within one year.” R. 64.

Considering the fact that the Defendants claim to have had no way of knowing what their patients thought about Newell’s employment status, as testified to multiple times by Newell, it is clear that the only evidence as to whether the Plaintiffs relied on the Defendants’ misrepresentations is the testimony of the Plaintiffs and their counsel. Thus, the Plaintiffs have established the second element of equitable estoppel.

C. Due to the Plaintiffs’ Reliance on the Defendants’ Multiple Misrepresentations, the Plaintiffs Suffered a Change in Position.

The third and final element of equitable estoppel is that the relying party must show a change in position. As a result of their reliance on the Defendants’ misrepresentations, the Plaintiffs

position did change and for the worse.

Due to the misrepresentations of the Defendants, neither the Plaintiffs nor their counsel ever dreamed that Newell's employment status was anything other than what it appeared. R. 41, 46 and 64. Because of the Defendants' misrepresentations, the Plaintiffs did not know that the limitation period applicable to their claims was only one year, rather than two. R. 41, 64. As a result, they did not file their claim within the one year statute of repose because they had no idea they needed to do so. R. 41, 64. In other words, the Plaintiffs were duped into allowing their limitation period to run, which caused a change in their position. Thus, the Plaintiffs have established the third and final element of equitable estoppel. The Court should therefore reverse the trial court's order granting summary judgment as the Defendants should have been estopped from using their own misrepresentations to their advantage.

D. The Defendants' Fraudulent Concealment of Newell's Employment Status Requires the Tolling of the Statute of Repose

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.

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. In fact, 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.

Further, the Defendants failed to indicate on any of the documentation provided to Stark by Newell and/or Greenwood Orthopedic Clinic that Newell was employed by Greenwood Leflore Hospital or any other entity covered by the Mississippi Tort Claims Act. R. 85, 119-121. On the appointment card provided to Stark, the Defendants identified Greenwood Orthopedic Clinic at the top of the card and, most importantly, listed Dr. Newell's name among the clinic's physicians, not as being employed by the hospital. R. 85. The Defendants listed the name of Greenwood Orthopedic Clinic, not the hospital, on all of the bills they provided to Stark. 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 Defendants 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.

A letter written to the Plaintiff by Greenwood Orthopedic Clinic regarding her account for treatment by Dr. Newell referenced "Greenwood Orthopedic" on 8 occasions. R. 119. It failed to reference the hospital or any other governmental employee even once. R. 119.

Newell failed to tell his patients of his new employment and/or the effect of that new employment on his patients' rights. R. 102, 108-109. Specifically, he failed to tell Mrs. Stark of his employment by the hospital. R. 102. Instead of informing the public or his patients of his new employment status, Newell and Greenwood Orthopedic continued on with business as usual.

One of the elements of the Plaintiffs' claims against Greenwood Leflore Hospital is that Newell is an employee of the hospital. Due to the misleading representations of the Defendants, the Plaintiffs did not learn that Newell was an employee of Greenwood Leflore Hospital until on or about June 1, 2005. R. 27. There was no way the Plaintiffs should have reasonably known that Greenwood Leflore Hospital was Newell's true employer before that date. Thus, the Plaintiffs could not have reasonably known that they possessed claims against Greenwood Leflore Hospital before June 1, 2005.

By their conduct, the Defendants engaged in affirmative conduct the only purpose of which was to hide Newell's new employment status from his patients, thereby secretly cutting in half their time to file suit for any negligence committed by Newell. The Defendants' affirmative acts used to fraudulently conceal Newell's employment status kept the Plaintiff from knowing that she had a claim against the hospital until after the one year time period of the MTCA's statute of repose had run. The Defendants should not be allowed to shield themselves from liability by their own scheme to fraudulently conceal Newell's employment status. If the Court allows the Defendants the fruits of their fraud, the Court will be sanctioning the Defendants' fraudulent conduct and will be going against the "compelling logic" espoused by the Supreme Court in *Windham*.

E. Due Diligence Does Not Require Omniscience, But Merely That Which Is Reasonable.

The Plaintiff has also established the second element of fraudulent concealment, i.e. that the

Plaintiff exercised due diligence to discover the Defendants' fraudulent concealment. The Defendants' primary argument before the trial court was that they had no duty to tell the Plaintiffs about Newell's secret employment status. Instead, the Defendants argue that the burden of discovering Newell's employment status rested on the Starks, even though there was no indication that Newell's status was anything other than that of a private physician.

The Defendants base this argument on the notion that, before equitable estoppel could apply, the Plaintiffs must show that they failed, despite the exercise of due diligence on their part, to discover the facts that form the basis of their claim. While this may be true, the Defendants morph the concept of due diligence into something much more than it is. The Defendants apparently contend that the Plaintiffs and their counsel were required to exhibit all knowing omniscience to be able to satisfy their due diligence. However, such is not the case.

According to Black's Law Dictionary, "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*." (Emphasis in original). Thus due diligence only requires that one conduct whatever investigation is "reasonably expected" under the circumstances.

In the Starks' case, the Plaintiff's due diligence was satisfied by her and her counsel's review of the documents before them, which all supported the belief that everything was just as it appeared to be, namely that Newell was still employed in private practice and was not an employee of the hospital. It was reasonable not to inquire further into Newell's employment status given the evidence before the Plaintiff and her counsel, namely the bills, the appointment card and the fact that Newell appeared to them and the public to be in private practice. There was simply no red flag, no indication, nothing to trigger the Starks or their counsel to question Newell's employment as a

private physician. Without any indication that Newell was anything but a private physician, any duty to perform any further investigation into Newell's employment never arose.

Such is supported by the Supreme Court's ruling in *Ray v. Keith*, 859 So.2d 995 (Miss. 2003). In that case, which 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 repose even though Keith did not tell Ray that he was acting in the course and scope of his employment at the time of the wreck. Unlike the present case, there was something in the *Ray* case to tip the plaintiff off that the defendant might be subject to the protections of the Tort Claims Act. In *Ray*, the accident report indicated that Keith 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 Court in *Ray* based its holding on its finding that Ray "failed to establish that Lee County withheld any information regarding Keith's employment nor has [Ray] shown that Lee County has provided [Ray] with misleading or inaccurate information." *Ray, supra* at 997. However, in the present case, there is ample evidence that the Defendants provided the Starks with misleading or inaccurate information. They provided the Starks with bills that listed Greenwood Orthopedic Clinic and failed to mention Newell's true employer, Greenwood Leflore Hospital. R. 120-121. They told the Starks to pay the amount owed for Newell's treatment of Irene Stark to Greenwood Orthopedic Clinic, not Newell's true employer, Greenwood Leflore Hospital. R. 119-121. Newell even provided Irene Stark with an appointment card that listed him as one of the physicians of Greenwood Orthopedic Clinic and failed to mention his true employer, Greenwood Leflore Hospital. R. 85. Therefore, the fact that the Defendants took the affirmative act of providing the Starks with

inaccurate and/or misleading information distinguishes *Ray* from the present case and supports the application of equitable estoppel to the Plaintiffs' claims.

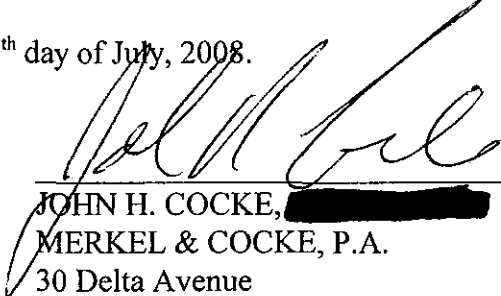
All of the elements supporting the application of fraudulent concealment and equitable estoppel exist. More importantly, fairness requires the application of equitable estoppel in this case. The Plaintiffs deserve their day in court. The Court should not allow the Defendants to manipulate the justice system and use their own scheme of fraudulent concealment to avoid responsibility for their negligent actions. This Court should therefore reverse the trial court and reinstate the Plaintiffs' claims against the Defendants.

CONCLUSION

The Defendants have engaged in a scheme to manipulate the system and avoid responsibility to patients injured by their negligence. Through their misrepresentations and calculated silence, the Defendants made it impossible for any reasonable person to suspect that Newell was not in private practice and was instead employed by Greenwood Leflore Hospital. The Court should not allow the Defendants to profit from their conspiracy to cheat the system.

For the reasons stated above, the Plaintiffs respectfully request that the Mississippi Court of Appeals reverse the Circuit Court's Order Granting the Defendants' Motion for Summary Judgment and reinstate the Plaintiffs' claims against the Defendants.

Respectfully submitted, this the 11th day of July, 2008.



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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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