# 2008-CA-00686

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**ANGELIA H. CHITTY** — **APPELLANT**

**VS.** — **CASE NO. 2008-CA-00686**

**JOSEPH R. TERRACINA, M.D., REGIONAL SURGICAL CENTER, INC., ABOUT FACE, INC., SKIN CONSULTANTS, LLC, and THE SKIN INSTITUTE** — **APPELLEES**

**ON APPEAL FROM THE CIRCUIT COURT OF WASHINGTON COUNTY, MISSISSIPPI**

**HONORABLE ASHLEY HINES, CIRCUIT JUDGE**

## BRIEF OF APPELLEES

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## ORAL ARGUMENT NOT REQUESTED

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ANGELIA H. CHITTY — APPELLANT

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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.

a. Don Barrett, Esq., Katherine B. Riley, Esq., Sally B. Williamson, Esq., Barrett Law Office, P.A., counsel for Appellant;

b. Lonnie D. Bailey, Esq., Upshaw, Williams, Biggers, Beckham & Riddick, LLP, counsel for Appellees;

c. R. Brittain Virden, Esq., Campbell, DeLong, LLP, counsel for Appellees;

d. Ms. Angelia H. Chitty, Appellant; and

e. Joseph R. Terracina, M.D., Regional Surgical Center, Inc., About Face, Inc., Skin Consultants, LLC, and The Skin Institute, Appellees.

Dated this the 11th day of November, 2008.

Lonnie D. Bailey

## STATEMENT REGARDING ORAL ARGUMENT

Appellees submit that the facts and legal arguments are adequately presented in the briefs and records such that the decisional process would not be significantly aided by oral argument. If, however, the Court determines that oral argument will be helpful, Appellee welcomes the opportunity to attend and participate.

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# BRIEF OF APPELLEES

## I. INTRODUCTION

This action purports to be an action brought by Angelia Chitty ("Chitty") against the Appellees, alleging that Chitty was injured as the result of fraudulent conduct arising out of medical treatment she received from Joseph R. Terracina, M.D. in January, 2004.

On November 22, 2006, nearly three (3) years after the alleged tortious conduct, Chitty attempted to institute an action in the Circuit Court of Washington County by filing a pleading denominated as a "Complaint" against Appellees. R. 1-10.[1] The statute of limitations for any cause of action which might have accrued to Chitty began to run no later than January 26, 2004, and expired on January 26, 2006. Miss. Code Ann. § 15-1-36(2) (Rev. 2003). As no action was begun prior to January 26, 2006, Chitty's claims are time-barred and the trial court correctly dismissed her claims with prejudice.[2]

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1 In this brief, references to the record are as follows: "R.____" refers to the Clerk's papers; "Tr. ____" refers to the Court Reporter's Transcript of the Summary Judgment Hearing before the trial court on February 20, 2008; and "R.E. ____" refers to Appellant's record excerpts.

2 Moreover, Chitty did not provide prior written notice to Appellees at least sixty (60) days prior to filing suit, as required by Miss. Code Ann. § 15-1-36(15) (Rev. 2003). In addition, (continued...)

Chitty now appeals to this Court on the basis that her claims did not arise out of the course of medical, surgical or other professional services pursuant to Miss. Code Ann. § 15-1-36(2) and were, therefore, not barred by the two-year statute of limitations contained therein. Chitty's position demonstrates a fundamental misunderstanding of § 15-1-36(2) and of the trial court's ruling below. Chitty attempts to ascribe a much narrower scope to the meaning of Miss. Code Ann. § 15-1-36(2) than did the Legislature. The plain, clear and unambiguous words of the statute at issue show that it applies to time bar the claims in Chitty's Amended Complaint.

## II. STATEMENT OF THE ISSUE

Whether the trial court correctly held that all of Plaintiff's claims arose out of the course of medical, surgical, or professional services rendered and were, therefore, time-barred by the statute of limitations contained in the Miss. Code Ann. § 15-1-36.

## III. STATEMENT OF THE CASE

### A. Nature of the Case

The case below, filed by Angelia Chitty against Dr. Joseph Terracina and his clinic interests ("Dr. Terracina"), involved allegations of fraudulent conduct arising out of medical treatment she sought and received from Dr. Terracina in January 2004. Amended Complaint, R. 133-144. After discovery and motion practice, the Circuit Court of Washington County granted Defendants' Motion

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[2](...continued)
Chitty did not accompany the Complaint with a certificate of expert consultation as required by Miss. Code Ann. § 11-1-58 (Rev. 2003). As a result of these omissions, Chitty's complaint was also due to be dismissed. The trial court, however, did not find it necessary to reach these issues. R. 113-15, R.E. 7-9 (The Record Excerpts of Appellant served on counsel for Appellees were unnumbered. The page numbers have been determined by counting pages, excluding the cover sheet.)

to Dismiss and/or for Summary Judgment on the basis that all of Chitty's claims were subject to Miss. Code Ann. § 15-1-36(2) and were time-barred because Chitty's initial complaint was filed more than two (2) years after her claims accrued. R. 113-15, 116, R.E. 7-10.

Chitty concedes that her claims are "torts". R. 102. She also acknowledges that her initial complaint was filed more than two (2) years after the alleged tortious conduct. Consequently, the only issue before this Court on appeal is whether the trial court erred when it necessarily found that Chitty's claims arose out of the course of medical, surgical or other professional services.

**B. <u>The Course of the Proceedings and Disposition in the Court Below</u>**

*Angelia H. Chitty v. Joseph R. Terracina, M.D., et al.*, Civil Action No. CI 2006-277, was initially filed in the Circuit Court of Washington County, Mississippi, on November 22, 2006. R. 1-10. An Amended Complaint was filed on November 15, 2007. Ms. Chitty charged that Dr. Terracina was guilty of fraud, fraudulent inducement, civil conspiracy, medical battery, intentional infliction of emotional distress and unjust enrichment, all in connection with the rendition by Dr. Terracina of dermatological/pathological services to Ms. Chitty, at her request. R. 133-144.

On November 8, 2007, Dr. Terracina answered the Amended Complaint. R. 51-58. Dr. Terracina denied the essential allegations of the Amended Complaint[3] and raised, among others, the defense that Chitty's claims were time-barred. *Id.* After discovery and motion practice, on December 27, 2007, Dr. Terracina filed Defendants' Motion to Dismiss and/or for Summary Judgment. R. 59-100. The motion set out three (3) reasons for dismissal: (a) that the action was time-barred; (b) that plaintiff failed to provide prior written notice of her intention to sue as required

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[3] Dr. Terracina admitted, among other things, that he is a medical doctor offering medical services to the public and that he biopsied a lesion on Ms. Chitty's cheek below her left lower eyelid.

by § 15-1-36(15); and (c) that plaintiff did not accompany the complaint with a certificate of expert consultation as required by Miss. Code Ann. § 11-1-58. *Id.*

On February 20, 2008, the trial court held a hearing on Defendants' Motion to Dismiss and/or for Summary Judgment. After hearing argument of counsel, the trial court took the motion under advisement. Tr. 17. On March 4, 2008, the trial court issued its Opinion and Judgment of Dismissal. R. 113-116; R.E. 7-10. Noting plaintiff's concession that her claims are torts and that the initial complaint was filed more than two (2) years after Dr. Terracina's alleged wrongful conduct, the trial court found that Miss. Code Ann. § 15-1-36(2) is unambiguous and that Chitty's claims were time-barred. R. 113-115; R.E. 7-9. Concurrent with its written opinion, the trial court issued its Judgment of Dismissal, dismissing all of Chitty's claims with prejudice. R. 116; R.E. 10.

## C. Statement of the Relevant Facts

On January 26, 2004, Chitty presented herself at Dr. Terracina's medical offices concerned about a red, raised spot on her cheek below her left eyelid. R. 133-144. Dr. Terracina, a board-certified dermatologist and pathologist, obtained a biopsy of the lesion. R. 100. Pathological examination of the biopsy revealed a squamous cell carcinoma in situ. *Id.* By letter dated February 2, 2004, Dr. Terracina informed Chitty of the results of the biopsy and scheduled a return appointment for additional treatment. *Id.*

Prior to her scheduled return appointment, Chitty advised Dr. Terracina's office that she intended to seek follow-up treatment elsewhere. *Id.* Chitty has received no further treatment from Dr. Terracina or his clinic. *Id.*

Apparently Chitty decided to seek a second opinion and went to see another Greenville dermatologist, Dr. Bologna. R. 137. Dr. Bologna opined that the remainder of the bump on Ms.

Chitty's cheek was not cancerous. *Id.* Based on these facts, Chitty filed her initial Complaint accusing Dr. Terracina of fraud, fraudulent inducement, civil conspiracy, medical battery, intentional infliction of emotional distress and unjust enrichment. R. 1-10.

## IV. SUMMARY OF THE ARGUMENT

After considering Defendants' Motion to Dismiss and/or for Summary Judgment, Chitty's response and having heard argument of counsel, the trial court found that all of the claims set out in Chitty's Amended Complaint were subject to the limitations provisions of Miss. Code Ann. §15-1-36(2) and were, thus, time-barred because the initial complaint in this action was filed more than two (2) years after the claims accrued. This appeal presents a singular legal question: whether the claims arose out of the course of medical, surgical or other professional services. A *de novo* review of the record confirms that they do and that the claims are, thus, time-barred by the statute.

Chitty does not contest that the claims set out in her Amended Complaint are "torts". She does not argue that she filed her initial complaint within two (2) years after her claims purportedly accrued. She argues, instead, that affirmance would lead to "untenable results" in future cases and that, while her claims are torts, they did not arise out of medical, surgical or other professional services.

The trial court found, correctly, that § 15-1-36(2) is clear and unambiguous. Applying the clear meaning of the statute to the claims set out in Chitty's Amended Complaint, the trial court found that they were time-barred as a matter of law.

Without question, § 15-1-36(2) applies to the claims set out in Chitty's Amended Complaint. Her attempts to "plead around" the limitation provision by disclaiming medical negligence are unavailing. Ms. Chitty sought medical and surgical services from Dr. Terracina. Dr. Terracina

provided those services. Apparently unhappy with Dr. Terracina's medical services, diagnosis, clinic, staff or some other reason, Chitty then sought a second opinion and never returned to Dr. Terracina. Based on this one visit, Ms. Chitty accused him of fraud, fraudulent inducement, civil conspiracy, medical battery, intentional infliction of emotional distress and unjust enrichment. Any way that Chitty tries to "spin" her lawsuit, all of her claims spring from her request for medical and surgical services from Dr. Terracina. For these reasons the claims are time-barred by § 15-1-36(2) and the trial court's judgment of dismissal is due to be affirmed.

## V. ARGUMENT AND AUTHORITY

### A. Standard of Review

The trial court granted the Defendants' Motion to Dismiss and/or Motion for Summary Judgment. The standard of review of either a motion to dismiss or a motion for summary judgment is *de novo*. *See Ralph Walker, Inc. v. Gallagher*, 926 So.2d 890, 893 (Miss. 2006) (stating that an appellate court is to review *de novo* the grant, or denial, of a motion to dismiss for failure to state a claim); *Estate of Grimes ex. rel. Wrongful Death Beneficiaries v. Warrington*, 982 So.2d 365, 367 (Miss. 2008) (stating that when reviewing a trial court's grant or denial of summary judgment, this Court applies a *de novo* standard of review pursuant to Rule 56(c) of the Rules of Civil Procedure) (citing *Jones v. Fluor Daniel Servs. Corp.*, 959 So.2d 1044, 1046 (Miss. 2007); *Leffler v. Sharp*, 891 So.2d 152, 156 (Miss. 2004)).

Furthermore, the only issue on this appeal is whether the two-year statute of limitations governs Chitty's tort claims. The application of a statute of limitation is a question of law to which a *de novo* standard also applies. *Windham v. Latco of Mississippi, Inc.*, 972 So.2d 608, 611 (Miss. 2008) (citing *Sarris v. Smith*, 782 So.2d 721, 723 (Miss. 2001)).

## B. The Two-Year Statute of Limitation Found in Miss. Code Ann. § 15-1-36 is Applicable to Chitty's Claims.

Chitty filed her Complaint on November 22, 2006, seeking damages arising out of the performance of a dermatology procedure by Dr. Terracina that occurred nearly three (3) years earlier on or about January 26, 2004, at the Skin Institute in Greenville, Mississippi. The Complaint was amended on or about November 12, 2007. R. 133-144. Chitty's Amended Complaint alleged that Dr. Terracina was guilty of certain tortious conduct consisting of fraud, fraudulent inducement, conspiracy, medical battery and intentional infliction of emotional distress, all arising out of the course of medical, surgical or other professional services provided to her by Dr. Terracina. Chitty failed to properly file her claim within the time constraints proscribed by the provisions of Miss. Code Ann. § 15-1-36(2), which requires that a plaintiff pursue any claim in tort against a physician arising out of medical, surgical or professional services within two (2) years from the date of the event, act or omission.

### 1. Miss. Code Ann. § 15-1-36 is Applicable to the Complaint Filed by Chitty.

The guiding and applicable statute of limitations referable to a health care provider such as a physician is found in Miss. Code Ann. § 15-1-36 and in relevant part, it states as follows:[4]

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

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4 In the Brief of Appellants, at 8, Chitty cites § 15-1-36(1), an inapplicable subsection of Miss. Code Ann. § 15-1-36, as the controlling statute.

> or neglect shall or with reasonable diligence might have been first known or discovered, and, except as described in paragraphs (a) and (b) of this subsection, in no event more than seven (7) years after the alleged act, omission or neglect occurred....

Miss. Code Ann. § 15-1-36(2) (emphasis added).

This Court has repeatedly stated "that words used in a statute should be given their ordinary and popular meaning in an attempt to glean legislative intent from the statute." *Bell v. West Harrison County Dist.*, 523 So.2d 1031, 1033 (Miss. 1988). It is abundantly clear from the provisions of this statute, that any claim "in tort" which arises out of the rendering of "professional services" by a "physician" must be pursued within two years. By examining the terms "tort", "arising out of", and "professional services", the Court should easily conclude that the claims at issue in the present lawsuit fall squarely within the legislative intent of Miss. Code Ann. § 15-1-36 and are, thus, untimely.

**2. Chitty's Claims are "In Tort".**

Chitty seeks to avoid the limitations of Miss. Code Ann. § 15-1-36 and other applicable statutory provisions by disclaiming that her complaint does not allege "medical malpractice" and that she is not seeking recovery for "medical malpractice". *See* Amended Complaint, introduction and ¶ 14, R. 133-144. Her attempted disclaimer cannot be effective. *See Arnona v. Smith*, 749 So.2d 63, 66 (Miss. 1999) (Court looks to content of pleading to determine nature of the action; substance controls over form.) Moreover, the statute is clear that its application is not limited to "medical malpractice" claims.

Most notably, the phrase "medical malpractice" appears nowhere in Miss. Code Ann. § 15-1-36. Instead, the legislature used the phrase "in tort" in framing this limitations provision against

licensed health care providers. By not using the phrase "medical malpractice" within this limitations statute, the legislature clearly did not limit the two-year limitations period to only medical negligence actions against health care providers. Rather, the two-year limitations period applies to all alleged "torts" by a licensed health care provider, so long as the tort arises out of medical, surgical or other professional services. Further reflection of the legislature's intent to broaden the applicability of § 15-1-36(2) beyond medical negligence is evident in its use of the alternative conjunction "or" in the phrase "filed within two (2) years from the date the alleged **act, omission or neglect**..." (Emphasis added).

What is a claim "in tort"? *Prosser and Keeton on Torts* suggest that a satisfactory definition of a "tort" is yet to be found. W. Page Keeton, *Prosser and Keeton on Torts* § 1 (5th ed. 1984). But, generally speaking, "a tort is a civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages." *Id.*; *see also, Black's Law Dictionary* 1489 (6th ed. 1990). A tort consists of the breach of duties fixed and imposed upon the parties by the law itself, without regard to their consent to assume them, or their efforts to evade them. *Id.*

While it is difficult to understand Chitty's claims as she never turned to Dr. Terracina for treatment, the gravamen of Chitty's claims are her allegations that Dr. Terracina somehow defrauded her by inducing her to undergo a surgical procedure when she claims it was unnecessary, even though she never underwent this surgical procedure. See Amended Complaint, First and Second Claims, R. 133-144. In any event, all of the counts of the amended complaint spring from the initial medical visit and biopsy. Since at least 1860 this Court has recognized that claims of fraud are claims "in tort", exactly as that phrase is used in § 15-1-36(2). *Fellows v. Brown*, 9 George 541, 38 Miss. 541 (Miss. Err & App. 1860) (claim of fraud and deceit "sounds wholly in *tort*"). The Court

has continued, in modern times, to recognize that common law actions for fraud and deceit are actions "in tort". *Bryan Constr. Co. v. Thad Ryan Cadillac, Inc.*, 300 So.2d 444, 448-49 (Miss. 1974).

Applying this principle to the present case, Chitty's fraud-based claims against the Appellees are torts.[5] Based on the face of her Amended Complaint, Chitty's claims against the Defendants are "in tort", and should be covered by the two-year limitation period of Miss. Code Ann. § 15-1-36(2), if her injuries are found to "arise out of the course of" Dr. Terracina's "medical or other professional services."

### 3. Chitty's Claims "Arise out of the Course of" Medical, Surgical or Other Professional Services She Received from Defendants.

Miss. Code Ann. § 15-1-36(2) next requires that for the two-year limitations period to apply, the claim in tort must "arise out of the course of" medical, surgical, or professional services of the licensed health care provider. In the context of a workers' compensation claim, this Court has held that the term "arising out of" employment means there is a causal connection between the employment and the injury. *Singley v. Smith*, 844 So.2d 448, 453 (¶ 20) (Miss. 2003); *see also*, *Mathis v. Jackson County Bd. of Supervisors*, 916 So.2d 564 (Miss. Ct. App. 2005) (same). Using this definition, for the two-year limitation provision found in Miss. Code Ann. § 15-1-36(2) to apply, there must be a causal connection between medical, surgical, or other professional services received by a plaintiff and her alleged injuries.

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5 Ironically, Chitty conceded in the trial court that all of her claims constitute "torts". "Plaintiff does not dispute that her claims of fraud, conspiracy, medical battery and emotional distress are torts". R. 102.

As applied to the present case, for the two-year limitation period to apply, Chitty's injuries and damages must be causally connected to medical or other professional services she received from Dr. Terracina on January 26, 2004. Again, looking to the face of her Amended Complaint, Chitty alleges that on January 26, 2004, she sought and received medical and surgical services from Dr. Terracina. Amended Complaint, ¶ 18, R. 133-144. Chitty alleges that Dr. Terracina committed fraud when he "deliberately misrepresented medical tests and biopsies to plaintiff". *Id.*, ¶ 27. Chitty further alleges that all of the Defendants are guilty of fraudulent inducement because they "tried to induce Plaintiff to agree to unnecessary medical procedures". *Id.*, ¶ 32. Chitty goes on to allege in her Amended Complaint that "the operation/procedure performed by Dr. Terracina was without her informed consent" and, thus, constitutes medical battery. *Id.*, ¶ 48. Throughout her Amended Complaint, Chitty alleges that her alleged injuries and damages are a "direct and proximate result" of the purported conduct arising from the medical and surgical procedures performed by Dr. Terracina. *Id.*, ¶¶ 30, 38, 46, 50 and 52.

Based on these allegations, Chitty's alleged injuries and damages clearly are causally connected to the medical and surgical services she received from Dr. Terracina on January 26, 2004. Accordingly, Chitty's injuries "arise out of the course of" medical or other professional services she received on this date such that this condition of Miss. Code Ann. § 15-1-36(2) has been met as well.

Chitty cites *Howell v. Garden Park Community Hosp.*, a recent decision from the Mississippi Court of Appeals, to support her argument that her claim is not governed by § 15-1-36(2). In *Howell*, the plaintiff suffered injuries when she fell from an x-ray table after a medical technician pressed a control knob to prepare for the procedure. *Howell v. Garden Park Community Hosp.*, No. 2007-CA-00726-COA, 2008 WL 4042786 (Miss. Ct. App., Sept. 2, 2008). The Court found that the

plaintiff's injury occurred while the defendant was performing a medical, professional, or surgical service and that the claims were governed and barred by the statute of limitations as set forth in § 15-1-36. *Id.* at *4.

Similarly, Chitty's claims against Dr. Terracina arose out of the rendering of medical, surgical and/or professional services, i.e., a medical visit in his clinic to examine a growth on Chitty's skin where Dr. Terracina performed a biopsy and sent the tissue for testing. Dr. Terracina was licensed to perform the biopsy in which he performed on Chitty. As a dermatologist/pathologist, he was licensed to make a diagnosis of whether the biopsy taken from Chitty was cancerous. Based on his professional opinion, Dr. Terracina found that the biopsy revealed squamous cell carcinoma in situ.

Chitty sought a second opinion from Dr. Bologna. Dr. Bologna opined that the growth on Chitty's cheek was not cancerous. Chitty, consequently, took issue with the procedure by which Dr. Terracina used to perform her biopsy and decided that the difference of opinion between Dr. Terracina and Dr. Bologna was somehow the result of fraud. R. 133-144. Clearly, Chitty's allegations arise out of the services rendered by Dr. Terracina. Her claims could not exist but for the biopsy performed by Dr. Terracina. Therefore, the trial court correctly found that her claims were governed and barred by the statute of limitations contained in Miss. Code Ann. § 15-1-36(2).

Chitty's reliance on *Howell* is misplaced. Indeed, if anything, *Howell* cements Dr. Terracina's position and supports the trial court's ruling below. In *Howell*, the Court of Appeals discussed six factors from a Louisiana Supreme Court opinion[6] which the Court of Appeals

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6 *Coleman v. Deno*, 813 So.2d 303, 315-16 (La. 2002).

considered as "guidance". *Howell* at ¶ 8. To the extent that this Court finds the *Coleman/Howell* factors persuasive[7], Chitty's tortured effort to apply them favorably to her case fails.

As noted above, all of Chitty's claims are "treatment related" (factor 1). But for Chitty seeking, and Dr. Terracina providing, medical services there would be no claims. With respect to the second *Coleman/Howell* factor, there can be no question that expert testimony would be necessary at a trial of these claims. The gravamen of all of Chitty's claims are that Dr. Terracina conducted a medical procedure, for monetary gain, when the procedure was unnecessary, i.e., because the growth was not cancerous. It would not be possible to prove the elements of her claims without the assistance of expert testimony. Ms. Chitty cannot testify about whether the growth on her face was cancerous or whether the biopsy was necessary or whether Dr. Terracina performed it properly. Nor can any other lay witness. These elements require expert opinion testimony regardless of whether Ms. Chitty's claims are denominated as fraud, medical battery or negligence.

As to the third factor, Chitty's entire claim revolves around assessment of her condition. It is undisputed that she came to Dr. Terracina seeking an assessment of the growth on her cheek. It is undisputed that Dr. Terracina conducted that assessment. She now claims that Dr. Terracina acted improperly in conducting that assessment. But the fact remains, the alleged improprieties "involved assessment of the patient's condition."

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While the Court of Appeals relied on the six *Coleman* factors as guidance, the Court did not, as argued by Chitty, "set forth an **important new rule** for deciding when a case falls within the two-year statute of limitations." (Emphasis added.) Brief of Appellant at 12. The decision of whether a claim is time-barred by § 15-1-36(2) is a function of Mississippi statutory and decisional law. To the extent that the *Coleman* factors considered by the Court of Appeals are consistent with Mississippi law, they provide useful guidance. Where, however, Louisiana law diverges from Mississippi law, as explained further herein, the usefulness ceases.

Chitty's argument concerning the fourth factor is non-sensical. When Chitty sought medical treatment and Dr. Terracina agreed to provide it, the physician-patient relationship was created. It did not "dissolve" until Chitty advised Dr. Terracina's office that she would obtain follow-up treatment elsewhere. At that point any alleged improper conduct had already occurred. Thus, the "incident" occurred in the context of a physician-patient relationship". Any argument to the contrary is illogical.

Chitty cavalierly dismisses the fifth factor as unimportant, explaining that "[t]his factor has little bearing on the issues presented by this case." Brief of Appellant at 14. To the contrary, it is probably the most important of the six factors.[8] If Ms. Chitty had not sought treatment, the alleged fraud, etc., could never have occurred.

Finally, the sixth *Coleman/Howell* factor -- whether the tort alleged was intentional -- has no applicability **under Mississippi law**. The Louisiana statute governing claims against healthcare providers is significantly more comprehensive than Miss. Code Ann. § 15-1-36. Containing a wealth of definitions, the Louisiana Medical Malpractice Act specifically defines medical malpractice as "any unintentional tort". See LSA-R.S. 40:1299.41(A)(13). Miss. Code Ann. § 15-1-36 has no such definition or limitation. The sixth *Coleman/Howell* factor simply does not apply in determining the applicability of Miss. Code Ann. § 15-1-36(2) to Chitty's claims.

Fitting all the pieces of the puzzle together, the allegations made by Chitty in her Amended Complaint fall within the purview of Miss. Code Ann. § 15-1-36(2). Chitty claims the fraudulent

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It is the factor that distinguishes the improper analogies Chitty attempts to draw at pages 8 and 9 of the Brief of Appellants. In neither the "trucking company" scenario or the business dispute case involving Copiah Medical Associates did a patient seek treatment and then sue to recover damages as a result.

acts of Dr. Terracina occurred on January 24, 2004. Applying this two-year statute of limitation, Chitty was required to bring her claims on or before January 26, 2006[9]. Because Chitty did not file her initial Complaint until November 22, 2006, her claims are time-barred, and the trial court properly dismissed the case, as a matter of law.

**4. <u>The Trial Court's Ruling Would Not Lead to Untenable Results.</u>**

Chitty argues that the trial court's decision would lead to untenable results. However, the untenable results which Chitty describes are hypothetical and are based on an incorrect interpretation of the trial court's findings. First, she hypothetically argues that a claim for a tortious breach of contract and business disputes between physicians and hospitals would be governed by § 15-1-36(2) under the trial court's ruling. The abstract, hypothetical illustrations cited are distinguishable from the facts *sub judice*. Moreover, they would require a trial court to ignore a significant portion of statutory language -- i.e., "arising out of the course of medical, surgical or other professional services". In both illustrations the torts are remotely related, if at all, to the services rendered by the hospital. Clearly, a hospital's non-payment of a bill to a trucking company and business transactions between a hospital and its physicians are not what the legislature intended to regulate because those types of services are administrative and transactional in nature and do not relate to medical, surgical or other professional services.

On the other hand, Chitty's tort claims are directly related to the medical services provided by Dr. Terracina. Her claims would not exist but for Dr. Terracina's biopsy. Unlike the examples cited in the Brief of Appellant, the services rendered by Dr. Terracina are not administrative or

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9 At the latest, Chitty would have been required to bring her claims no later than February 18, 2006, two (2) years after she received the "second opinion" from Dr. Bologna. Amended Complaint, ¶ 22, R. 137.

transactional in nature. It is apparent that Chitty is aware of the direct medical connection between her claims and Dr. Terracina's biopsy because she attempts to evade the statute by disclaiming any medical negligence claims. Her attempted disclaimer is ineffective. *See Arnona v. Smith*, 749 So.2d 63, 66 (Miss. 1999) (Courts look to content of the pleading to determine the nature of an action; substance is considered over form). Nonetheless, regardless of her disclaimer, Chitty's claims arise from the medical services rendered by Dr. Terracina and are barred by the statute of limitations as contained in § 15-1-36(2).

Chitty's entire argument is based upon a flawed interpretation of the trial court's ruling. She has completely disregarded the basis upon which the trial court's finding was made and has taken a single statement in the trial court's opinion out of context to form the basis of argument:

> Looking at the language used in Miss. Code Ann. § 15-1-36(2) and its plain meaning, this Court finds that the statute is unambiguous and that the intent of the legislature was to *include all tort claims*, including those brought by the Plaintiff, against the listed individuals, including physicians, under the two year statute of limitations.

R. 115; R.E. 9.

Before reaching this conclusion, the trial court was clear to explain that it was simply interpreting the statute's "ordinary meaning" and not expanding the meaning of the statute as Chitty suggests. R. 114; R.E. 8. (Explaining that the Mississippi Supreme Court has repeatedly stated that words used in a statute should be given their "ordinary" and "popular" meaning in an attempt to glean legislative intent from the statute) (citing *Bell v. West Harrison County Dist.*, 523 So.2d 1031, 1033 (Miss. 1988); *Allgood v. Bradford*, 473 So.2d 402 (Miss. 1985); *Roberts v. Miss. Republican Party State Executive Comm.*, 465 So.2d 1050 (Miss. 1985); *Lambert v. Ogden*, 423 So.2d 1319 (Miss. 1985)).

In the context of the motion and arguments before the trial court, it is evident that the trial court concluded, correctly, that the legislature, by its clear, unambiguous use of the phrase "claim in tort", did not intend to restrict the applicability of § 15-1-36(2) to medical negligence, but instead intended it to apply to "all torts" arising out of the course of medical, surgical or other professional services.

When taken in full context, the trial court in no way attempted to expand the meaning of the statute to include any and all possible torts that could be brought against physicians, hospitals, and other named individuals in the statute. Its ruling, instead, only sought to encompass those torts that arise out of medical, surgical, or other professional services. Moreover, based on the ordinary language of the statute, it is clear that Chitty's allegations fall within this group of tort claims because her claims of fraud, fraudulent inducement, civil conspiracy, medical battery, intentional infliction of emotional distress and unjust enrichment arose from Dr. Terracina's performance of the biopsy. Consequently, Chitty's contention that the trial court's ruling would cover all possible tort claims that could be brought against physicians and hospitals is unfounded and without merit.

### 5. Alternatively, Chitty's Amended Complaint Must Also be Dismissed Because She Failed to Comply with Statutory Pre-Suit Requirements.

Even though the trial court did not find it necessary to reach the statutory compliance issues raised by Defendants' Motion to Dismiss and/or for Summary Judgment, Chitty's failure to comply with the pre-suit expert witness consultation requirement of Miss. Code Ann. § 15-1-36(15) provides independent grounds for dismissal.

Section 11-1-58, Miss. Code Ann. provides, in pertinent part:

> (1) In any action against a licensed physician, health care provider or health care practitioner for injuries or wrongful death arising out of the course of medical, surgical or other professional services where expert testimony is otherwise required by law, the complaint shall be accompanied by a certificate executed by the attorney for the plaintiff declaring that:
>
> > (a) The attorney has reviewed the facts of the case and has consulted with at least one (1) expert qualified pursuant to the Mississippi Rules of Civil Procedure and the Mississippi Rules of Evidence who is qualified to give expert testimony as to standard of care or negligence and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis of such review and consultation that there is a reasonable basis for the commencement of such action; or
> >
> > (b) The attorney was unable to obtain the consultation required by paragraph (a) of this subsection because a limitation of time established by Section 15-1-36 would bar the action and that the consultation could not reasonably be obtained before such time expired. A certificate executed pursuant to this paragraph (b) shall be supplemented by a certificate of consultation pursuant to paragraph (a) or (c) within sixty (60) days after service of the complaint or the suit shall be dismissed; or
> >
> > (c) The attorney was unable to obtain the consultation required by paragraph (a) of this subsection because the attorney had made at least three (3) separate good faith attempts with three (3) different experts to obtain a consultation and that none of those contacted would agree to a consultation.

Chitty did not accompany the Complaint with a certificate of pre-suit expert consultation as required by § 11-1-58. R. 100. Indeed, Chitty made clear in the trial court that she had not consulted with an expert because she did not think the pre-suit consultation requirement applied to her case. R. 104. This Court recently made clear that where a plaintiff admittedly failed to satisfy the pre-suit

consultation requirement of § 11-1-58, the Complaint must be dismissed. *Forest Hill Nursing Center and Long Term Care Management, LLC v. Brister*, No. 2006-IA-00364 - SCT, ¶¶ 32-35 (decided October 23, 2008).

Section 15-1-36(15), Miss. Code Ann., provides, in pertinent part:

> (15) No action based upon the health care provider's professional negligence **may be begun** unless the defendant has been given at least sixty (60) days' prior written notice of the intention to begin the action.

Emphasis added.

Chitty did not provide Dr. Terracina with prior written notice of her intention to file suit. R. 100. The requirement to provide prior written notice imposed by § 15-1-36(15) is both "mandatory and jurisdictional". *Saul v. Jenkins*, 963 So.2d 552, 554 (Miss. 2007). This Court has said that a plaintiff's "failure to send to defendants a notice of intent to sue is an inexcusable deviation from the Legislature's requirements for process and notice under Miss. Code Ann. § 15-1-36(15), and such failure warrants dismissal of [the] claim." *Pitalo v. GPCH-GP, Inc.*, 933 So.2d 927, 929 (Miss. 2006); *Arceo v. Tolliver*, 949 So.2d 691, 697 (Miss. 2006) (explanatory material added).

## VI. CONCLUSION

For all of the foregoing reasons, this Court should affirm the Judgment of the Circuit Court of Washington County and assess all costs to Appellant.

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

UPSHAW, WILLIAMS, BIGGERS,
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By: _____
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## CERTIFICATE OF SERVICE

I, Lonnie D. Bailey, Attorney for Appellees, do hereby certify that I have this day mailed via U.S. Mail, postage prepaid, true and correct copies of the above and foregoing document to the following:

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Honorable Ashley Hines
Circuit Judge, 4th Judicial District
P.O. Box 1315
Greenville, MS 38702-1315

This the 11th day of November, 2008.

Lonnie D. Bailey

## CERTIFICATE OF FILING

I, Lisa Roberts, legal secretary to Lonnie D. Bailey, one of the counsel for the Appellees, do hereby certify that, pursuant to Rule 25(a), M.R.A.P., I have filed the original and three copies of Brief of Appellees by depositing them in the United States Mail, first class, postage prepaid, on this the 11th day of November, 2008, addressed as follows:

Ms. Betty W. Sephton, Clerk
Supreme Court of Mississippi
Post Office Box 249
Jackson, MS 39205-0249

This the 11th day of November, 2008.

Lisa Roberts

Lisa Roberts