2008-CA-00686 RT

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Appellant Angelia Chitty respectfully submits the following Reply to the Opposition Brief submitted herein by Appellees.

## A. THE TRIAL COURT'S RULING ASSIGNS AN OVERLY BROAD INTERPRETATION TO MISS. CODE ANN. § 15-1-36(1)

The statute at issue in this appeal states as follows:

> (1) For any claim accruing on or before June 30, 1998, and except as otherwise provided in this section, no claim in tort may be brought against a licensed physician, osteopath, dentist, hospital, institution for the aged or infirm, nurse, pharmacist, podiatrist, optometrist or chiropractor for injuries or wrongful death arising out of the course of medical, surgical or other professional services unless it is filed within two (2) years from the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered.

Miss. Code Ann. § 15-1-36(1).

In their Opposition Brief, Appellees have failed to demonstrate that the interpretation of the above statute by the Circuit Court of Washington County was correct. The trial court interprets the statute to mean that every conceivable tort claim brought against the listed medical providers must meet the procedural and substantive requirements of Miss. Code Ann. § 15-1-36. *See* R. at 115. In reality, the plain language of the statute provides that only tort claims "arising out of the course of medical, surgical, or other professional services" fall within the purview of the statute. The statute was meant to cover claims of medical negligence by doctors, not fraudulent conduct by doctors.

The Appellant, who brought only non-treatment related claims against the Defendant-Appellees and specifically disclaimed any medical malpractice cause of action, has suffered dismissal of her case because of the trial court's incorrect interpretation of the statute. Mrs. Chitty has a business dispute with her doctor, Dr. Terracina, and several businesses that he owns that happened to arise after she had seen Dr. Terracina for possible treatment of a skin condition. R. at 136. Mrs. Chitty was aggrieved over Dr. Terracina's alleged fraudulent billing conduct and

falsification of records and invoices, and filed suit against him and his constituent businesses alleging fraud, fraudulent inducement, civil conspiracy, medical battery, intentional infliction of emotional distress, and unjust enrichment. R. at 137-142.

Defendant-Appellees have failed to provide any logical explanation as to how these non-medical malpractice claims should be barred by the two-year medical malpractice statute of limitations. They have merely repeated their argument that the trial court's broad ruling should stand. Mrs. Chitty's claims arose out of Dr. Terracina's deliberate misrepresentation to her that she had cancer in order to induce her to undergo additional procedures that were not necessary under the circumstances. R. at 138. These misrepresentations did not arise from professional medical services; they arose from Dr. Terracina's ill will in attempting to obtain financial gain through inducement to undergo unnecessary procedures. The claims asserted by Mrs. Chitty are not claims for medical malpractice, and it is clear that the legislature, in enacting the two year statute of limitations for medical malpractice, did not intend to include every conceivable tort against physicians and hospitals in the coverage of the statute.

There is a categorical difference between, on the one hand, intentional fraudulent actions undertaken by a doctor and, on the other hand, medical negligence committed by a doctor while providing medical treatment. The claims in this case arise from intentional fraudulent actions that happened to be committed by a doctor. The trial court's summary judgment opinion, and Dr. Terracina's position on appeal, ignores this distinction in favor of a one-size-fits-all interpretation of the statute as covering any and all torts against medical personnel. Such a rule is unworkable, and should not be endorsed by this Court. Indeed, Appellants offer unintentional support for this argument when they assert in their Brief that Mrs. Chitty "never turned to Dr. Terracina for treatment..." *Appellant's Brief* at p. 9.

The trial court's ruling is founded upon an incorrect interpretation of Mississippi Law, and led to the harsh result of dismissal with prejudice of Mrs. Chitty's legitimate fraud and other intentional tort claims against Dr. Terracina and his medical businesses. For this reason, the trial court's ruling should be reversed and this case should be remanded to the trial court.

### B. MRS. CHITTY'S POSITION IS SUPPORTED BY APPELLEES' OWN DEFINITION OF "ARISING OUT OF THE COURSE OF MEDICAL, SURGICAL, OR OTHER PROFESSIONAL SERVICES"

The record in this case indicates that Mrs. Chitty is not seeking to avoid compliance with statutory requirements by disclaiming a medical malpractice recovery, and then asserting a claim for medical malpractice. Mrs. Chitty has legitimate claims for fraud, fraudulent inducement, civil conspiracy, emotional distress and unjust enrichment. In their Brief, Appellees define a claim arising out of medical, surgical or other professional services as a claim which has a "causal connection" to such services. This argument actually provides support to Mrs. Chitty's position on appeal. Under Appellees' causation analysis, it becomes clear that the alleged fraudulent actions of Dr. Terracina have no causal connection to the medical treatment of Mrs. Chitty. Mrs. Chitty does not claim that her face was deformed or scarred by the minimal treatment provided to her by Dr. Terracina. She does not allege physical harm resulting from the medical treatment provided to her; therefore, there is no causal connection between the medical and surgical services provided by Dr. Terracina and the tort claims asserted in this case.

The causal connection in this case is between Dr. Terracina's fraudulent assertions and the resultant claims by Mrs. Chitty that Dr. Terracina lied to gain financial benefit for his medical practice and constituent businesses. There is a discernible breach in the chain of causation from the time of the basic medical treatment to the fraud that led to the claims in this case. If the facts of this case had ended with Dr. Terracina treating Mrs. Chitty and telling her the truth - that she had no cancer – there never would have been any tort claims asserted against

Dr. Terracina. The claims asserted by Mrs. Chitty arose subsequent to, and entirely apart from, the medical treatment involved. The claims are for fraud, fraudulent inducement, civil conspiracy, medical battery, intentional infliction of emotional distress, and unjust enrichment. R. at 137-142. These claims had nothing to do with the basic medical care provided to Mrs. Chitty by Dr. Terracina.

The fraud of Dr. Terracina was not a medical, surgical, or professional service. Therefore, Mrs. Chitty's claims seeking redress for such fraud are not subject to the two-year medical malpractice statute of limitations.

### C. THE TRIAL COURT ERRED IN GRANTING APPELLEES' RULE 12(B)(6) MOTION TO DISMISS UPON FINDING THAT THE TWO-YEAR MEDICAL MALPRACTICE STATUTE OF LIMITATIONS BARRED APPELLANT'S CLAIMS

Appellant's Principal Brief provides an analysis of *Howell v. Garden Park Community Hosp.*, 2008 WL 4042786 (Miss. App. Sept. 2, 2008). In *Howell,* the plaintiff, Patricia Howell, was injured after she fell from an x-ray table at Garden Park Community Hospital. *Id* at *1. She filed suit, alleging general negligence as a result of the medical technician's mishandling of the x-ray table. *Id.* In setting forth its opinion, the Court of Appeals set forth an important new rule for deciding when a case falls within the two-year statute of limitations, as follows:

> (1) whether the particular wrong is "treatment related" or caused by a dereliction of professional skill,
>
> (2) whether the wrong requires expert medical evidence to determine whether the appropriate standard of care was breached,
>
> (3) whether the pertinent act or omission involved assessment of the patient's condition,
>
> (4) whether an incident occurred in the context of a physician-patient relationship,

or was within the scope of activities which a hospital is licensed to perform,

(5) whether the injury would have occurred if the patient had not sought treatment,

(6) whether the tort alleged was intentional.

*Howell v. Garden Park Community Hosp.*, 2008 WL 4042786 at *3, citing *Coleman v. Deno*, 813 So.2d 303, 315-16 (La. 2002).

The crux of this appeal, and an important factor in the *Howell* decision, is whether the tort was intentional. The decision in *Howell* that the case involved medical malpractice claims was founded in part upon the fact that the hospital was negligent, and had not committed any intentional acts. *See Howell* at *3. The plaintiff's injury was the result of a mistake with the electric controls of a table, causing it to lean the wrong way and throw the patient head first onto the floor. *Id.* at *2. The dispute in *Howell* was whether the negligence in the case was ordinary negligence or professional negligence subject to the medical malpractice statute of limitations. *Id.*

There is no such dispute present in this case. Every allegation in Mrs. Chitty's First Amended Complaint involves intentional conduct by Dr. Terracina. By its nature, intentional conduct cannot fall under the rubric of professional negligence. Therefore, there is no legal justification for applying the two-year medical malpractice statute of limitations to Mrs. Chitty's complaint, which is based completely on the intentional conduct of Dr. Terracina.

### D. THE STATUTORY PRE-SUIT FILING REQUIREMENTS OF MISS. CODE ANN. § 15-1-36(15) HAVE NO BEARING ON THIS APPEAL

As they did in the trial court, Appellees urge that an independent ground of dismissal is that Mrs. Chitty did not comply with the pre-suit requirements of Miss. Code Ann. § 15-1-36(15), which require a plaintiff, *inter alia*, to consult with medical experts and provide the defendant with notice of intent to file suit. This argument fails for the same reasons discussed in

Mrs. Chitty's Principal Brief and in this Reply. The conduct alleged was intentional and does not fall within the procedural and substantive requirements of Miss. Code Ann. § 15-1-36. Appellees' argument on this point should be rejected by this Court.

## CONCLUSION

For all of the above reasons, as well as the reasons expressed in her Principal Brief, Appellant Angelia H. Chitty requests that this Court reverse the March 4, 2008 decision of the Circuit Court of Washington County, Mississippi dismissing her claims, and remand this case for further proceedings

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Katherine B. Riley, hereby certify that I have this day served a true and correct copy of the foregoing Brief of Appellant upon:

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This the 4th day of December, 2008.

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