IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ANGELIA H. CHITTY — APPELLANT

V. — 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

BRIEF OF APPELLANT

On Appeal From the Circuit Court of Washington County, Mississippi
Case Number CI-2006-277

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ORAL ARGUMENT REQUESTED

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.

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STATEMENT OF ISSUE ON APPEAL

1. Whether the trial court erred in finding that all tort claims brought against the medical providers listed in Mississippi Code Annotated § 15-1-36 are subject to the two-year medical malpractice statute of limitations.

2. Whether the lower court erred in granting Appellees' Rule 12(b)(6) motion to dismiss upon finding that the two-year medical malpractice statute of limitation of Mississippi Code Annotated § 15-1-36 barred Appellant's claims for fraud, fraudulent inducement, civil conspiracy, medical battery, intentional infliction of emotional distress, and unjust enrichment as stated in Appellant's First Amended Complaint.

STATEMENT OF THE CASE

This case involves claims brought by the Appellant, Angelia Chitty, for (1) fraud, (2) fraudulent inducement, (3) civil conspiracy, (4) medical battery, (5) intentional infliction of emotional distress, (6) and unjust enrichment against a medical doctor, Joseph R. Terracina, and his three affiliated medical businesses. Appellant presents no explicit claim for medical malpractice, and none of her claims may be properly characterized as medical malpractice claims. Rather, Appellant's claims arise from Dr. Terracina's self-dealing in his medical businesses by performing a medical procedure on Ms. Chitty, then submitting a false invoice for the pathological testing of the skin sample from another pathology laboratory in Texas, when in fact Dr. Terracina himself performed the pathological testing, as well as collected substantial money from Ms. Chitty for such testing. Appellant's claims against Dr. Terracina arise solely from his fraudulent business dealings, and not from any assertion by Ms. Chitty that the medical care rendered by Dr. Terracina was negligent or harmful.

In the case below, Defendants filed an early motion for summary judgment asserting, *inter alia,* that the causes of action stated in the First Amended Complaint fell within the mandate of Mississippi Code Annotated § 15-1-36, including the two-year statute of limitations found in the statute. The Washington County Circuit Court, Honorable W. Ashley Hines, accepted Defendants' argument that the two-year limitation period applied and Ms. Chitty's claims were barred. The case was dismissed and this appeal followed.

Therefore, the narrow issue presented by this appeal is whether the conduct described in Appellant's First Amended Complaint is of the type which falls under the two-year medical malpractice statute of limitation of Mississippi Code Annotated § 15-1-36.

STATEMENT OF FACTS RELEVANT TO THIS APPEAL

Appellant Angelia H. Chitty (hereinafter "Mrs. Chitty") is an adult resident of Holmes County, Mississippi. R. at 133.

Appellee Joseph R. Terracina, M.D. (hereinafter "Dr. Terracina"), is an adult resident of Washington County, Mississippi. *Id.* The remaining Appellees in this appeal, Regional Surgical Centre, Inc., About Face, Inc., Skin Consultants, LLC, and The Skin Institute, are businesses owned by Dr. Terracina through which he performs services and sells products related to his practice of dermatological medicine. R. at 133-134.

On January 26, 2004, Mrs. Chitty went to see Dr. Terracina because she had a small, red, raised spot on her cheek under her left eye that she was concerned about. R. at 136. Dr. Terracina examined the spot and determined that he needed to perform a biopsy to ascertain whether or not the spot was cancerous. *Id.* On the same visit, Dr. Terracina numbed the spot, took a small portion of the spot, and gave Mrs. Chitty one or two stitches to close the would. *Id.*

Dr. Terracina gave Plaintiff a list of recommended products that she should use for her face, which he sold through his company About Face. R. at 136. Dr. Terracina told Mrs. Chitty how to care for the incision and charged her $391.00 for her office visit and treatment on January 26, 2004. *Id.* At the time of this treatment, Mrs. Chitty did not have health insurance to cover payment of her medical bills. *Id.*

On February 5, 2004, Mrs. Chitty received a letter from Dr. Terracina's office stating that the spot was cancerous and that she would need to return to his office on February 24, 2004 to have the rest of the spot removed. R. at 136. When Mrs. Chitty called to inquire about the cost of the procedure, she was informed that the cost would be between $1,500.00 and $2,000.00. *Id.* Mrs. Chitty was very anxious and upset at this news because she did not have health insurance

and Dr. Terracina required payment in advance before he would perform the procedure to remove the remainder of the allegedly cancerous spot. *Id.*

In order to determine whether the tissue was cancerous, Dr. Terracina sent the tissue sample to his own laboratory, The Skin Institute, for testing. R. at 136. Dr. Terracina, now acting as pathologist as well as dermatologist, signed a report to himself dated February 23, 2004, as "requesting physician" stating that the tissue was cancerous ("squamous cell carcinoma, invasive"). *Id.* The report, however, instead of listing The Skin Institute as the laboratory, misleadingly lists Galveston Dermatological Laboratory as the laboratory where the testing was conducted. *Id.*

In the intervening period of time, Mrs. Chitty went to see another dermatologist, Dr. Bologna, who removed the remainder of the spot by a different method that did not require stitches and sent the tissue sample to Duckworth Pathology laboratory to determine if the tissue was cancerous. R. at 137. The report concluded that there was no cancer. *Id.* Mrs. Chitty then called and canceled her February 24, 2004 appointment with Dr. Terracina.

In his treatment of Mrs. Chitty, Dr. Terracina followed the scheme of removing a small portion of skin abnormality and testing it himself, but misleadingly putting Galveston Dermatopathology Laboratory as the testing center on the report. R. at 137. Dr. Terracina then reported the sample as cancerous and pressed Mrs. Chitty to have it removed immediately by Dr. Terracina himself, while planning to charge Mrs. Chitty in advance for the expensive surgical procedure. *Id.* Dr. Terracina also pressured his patients to purchase face products sold by his business, About Face, to minimize the scarring from the biopsy procedure which is, in fact, caused by using unnecessary stitches. *Id.*

Mrs. Chitty filed the suit which is the subject of this appeal on November 22, 2006. R. at 1. Mrs. Chitty filed an amended complaint on November 15, 2007. R. at 133. Appellees filed

their motion to dismiss or, in the alternative, for summary judgment, on December 27, 2007. R. at 59. The Washington County Circuit Court entered the Judgment of Dismissal of Mrs. Chitty's claims on March 5, 2008. R. at 116. Mrs. Chitty's case was dismissed despite the prominent statement in her complaint that "[p]laintiff hereby restates that this complaint does not allege medical malpractice, and Plaintiff is not seeking recovery for medical malpractice, but only for the causes and claims listed in this Complaint." R. at 135.

SUMMARY OF THE ARGUMENT

Because this appeal involves a question of law arising from the trial court's grant of summary judgment, the proper standard of review for this appeal is *de novo. See ABC Mfr. Corp. v. Doyle,* 749 So.2d 43, 45 (Miss. 1999).

The trial court dismissed the underlying case because, in its view, the applicable two year statute of limitation had expired when Appellant's case was filed on November 22, 2006. The actions giving rise to the underlying complaint occurred in January and February of 2004. In order to affirm the trial court's decision, this Court must accept the premise that Appellant's claims are medical malpractice claims. Appellant firmly maintains that her claims cannot be characterized as medical malpractice claims. Therefore, the two-year medical malpractice statute of limitation does not apply to her claim, and the trial court erred in dismissing her complaint with prejudice.

In the case of *Howell v. Garden Park Community Hospital*, 2008 WL 4042786 (Miss. Ct. App., September 2, 2008) the Mississippi Court of Appeals adopted a test for determining whether a case falls within the procedural and substantive requirements of Miss. Code Ann. § 15-1-36. Appellant maintains that, under the rule adopted in the *Howell* case, her claims clearly are not properly characterized as medical malpractice claims and, therefore, are not subject to the two-year medical malpractice statute of limitation. The rule of the *Howell* case and its application to this appeal are discussed in Appellant's argument proper.

After *de novo* review of the nature of the claims asserted and a comparison with the language of Miss. Code Ann. § 15-1-36, Appellant seeks reversal of the trial court's dismissal of her claims and a remand to the trial court for further proceedings.

ARGUMENT

A. STANDARD OF REVIEW

The case below was dismissed by the trial court before any discovery was conducted. The sole issue was whether this case should be characterized as a medical malpractice case falling within the two year medical malpractice statute of limitations contained in Miss. Code Ann. § 15-1-36. Because this appeal involves a question of law arising from the trial court's dismissal on a question of law, not fact, the proper standard of review for this appeal is *de novo*. *See ABC Mfr. Corp. v. Doyle,* 749 So.2d 43, 45 (Miss. 1999).

The trial court did not consider any matters outside of the pleadings in this case. Therefore, although Dr. Terracina's motion was styled as a "Motion to Dismiss and/or Motion for Summary Judgment," *see* R. at 59, the trial court granted the motion to dismiss under Miss. R. Civ. P. 12(b)(6), and not the alternative motion for summary judgment under Miss. R. Civ. P. 56. Whether the motion is treated as one under Miss. R. Civ. P. 12(b)(6) or 56, this Court's standard of review is the same – *de novo*. *See Lee v. Thompson,* 859 So.2d 981, 986 (Miss. 2003).

When considering a motion to dismiss, the allegations in the complaint must be taken as true, and the motion should not be granted unless it appears beyond doubt that the plaintiff will be unable to prove any set of facts in support of his claim. *T.M. v. Noblitt,* 650 So.2d 1340, 1342 (Miss. 1995), citing *Overstreet v. Merlos*, 570 So.2d 1196 (Miss. 1990); *Defoe v. Great Southern National Bank*, 547 So.2d 786 (Miss. 1989). In light of these rules, the *de novo* question for this Court to determine is whether the trial court erred in deciding that it was beyond doubt that Mrs. Chitty, the Appellant, could prove that none of her claims, including fraud, fraudulent inducement, civil conspiracy, emotional distress and unjust enrichment, survived the two year statute of limitations.

B. THE TRIAL COURT ERRED IN HOLDING THAT ALL TORT CLAIMS AGAINST A MEDICAL PROVIDER ARE SUBJECT TO THE TWO-YEAR MEDICAL MALPRACTICE STATUTE OF LIMITATIONS

1. If Affirmed, the Rule Set Forth in This Case Would Lead to Untenable Results in Mississippi Cases

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 the trial court's Opinion filed with its judgment of dismissal, the Honorable W. Ashley Hines wrote categorically that "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 (2) year statute of limitations." R. at 115. It is instructive to examine the logical results of the trial courts' ruling. The trial court's rigid rule would lead to untenable results. For instance, the cause of action of "tortious breach of contract" is recognized in Mississippi. *See Amsouth Bank v. Quimby*, 963 So.2d 1145 (Miss. 2007); *Era Franchise Systems, Inc. v. Mathis*, 931 So.2d 1278 (Miss. 2006). Under the trial court's reasoning, claim for tortious breach of contract would certainly fall under the broad definition of "all claims in tort." To provide an example of the results of the trial court's ruling, if a breach of contract claim were brought by a trucking company against a hospital for nonpayment of the bill of a vendor, the rule established by the trial court would pull such a case under the medical malpractice statute of limitations because the tort claim (tortious breach of

contract) was brought against an entity listed in the medical malpractice statute (a hospital). Such a result was not intended by the legislature.

Another demonstration of the untenable results of such a rule is shown in the case of *Copiah Medical Associates v. Mississippi Baptist Health Systems*, 898 So.2d 656 (Miss. 2005). There, a group of medical doctors known as the Copiah Medical Associates brought claims for breach of contract, breach of duty of good faith and fair dealing, and breach of fiduciary duties against a hospital corporation, Mississippi Baptist Health Systems. *Id.* There can be no question that the case was simply a business dispute between a physician's group and a hospital which led to a lawsuit containing tort claims against the hospital. The case was not a medical malpractice case. However, under the strict rule set forth by the trial court in the case below, a group of medical doctors suing a hospital (an entity listed under Miss. Code Ann. § 15-1-36) over a business dispute would be subject to the two-year medical malpractice statute of limitations. Such a result was certainly not intended by the legislature.

Exactly the same incongruous result has been reached by the Circuit Court of Washington County in the present case. The Appellant, Mrs. Chitty, has a business dispute with her doctor, Dr. Terracina, and several businesses that he owns. R. at 136. Mrs. Chitty is aggrieved over Dr. Terracina's alleged fraudulent billing conduct and falsification of records and invoices. *Id.* To seek redress for Dr. Terracina's fraudulent conduct, Mrs. Chitty filed a lawsuit listing causes of action for fraud, fraudulent inducement, civil conspiracy, medical battery, intentional infliction of emotional distress, and unjust enrichment. R. at 137-142. Mrs. Chitty specifically disclaimed any recovery for medical malpractice and included a statement in her complaint that the complaint "does not allege medical malpractice, and Plaintiff is not seeking recovery for medical malpractice, but only for the causes and claims listed in this Complaint." R. at 135 (emphasis in original).

Under these circumstances, Mrs. Chitty's claims against Dr. Terracina and his businesses did not "arise out of the course of medical, surgical or other professional services" under the terms of the statute. *See* Miss. Code Ann. § 15-1-36(1). To the contrary, 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.

2. The Claims Set Forth By Mrs. Chitty Fall Within the General Three-Year Statute of Limitations of Miss. Code. Ann. § 15-1-49

Every claim stated by Mrs. Chitty falls within the three-year purview of Miss. Code Ann. § 15-1-49, which states as follows:

> (1) All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after.

Miss. Code Ann. 15-1-49(1)

This statute covers actions for fraud. *See Parker v. Mann Life Ins. Co.*, 949 So.2d 57 (Miss. App. 2006) (Three-year statute of limitations for fraud action begins to run when a person, with reasonable diligence, first knew or should have known of the fraud). All of the other claims set forth in Mrs. Chitty's First Amended Complaint are covered by the three-year statute of limitations because no other period of limitations is prescribed by the Mississippi Code.

In sum, this is not a situation where a claimant seeks to avoid complying with statutory requirements by disclaiming a medical malpractice recovery, and then going forward in the complaint to state a claim that plainly arises from medical malpractice. Mrs. Chitty has legitimate claims for fraud, fraudulent inducement, civil conspiracy, emotional distress and unjust enrichment. She has stated those claims, and explicitly disclaimed any sort of recovery for actions arising out of professional medical services, such as medical negligence. Under these circumstances, the ruling of the Washington County Circuit Court should be reversed. The trial court wrongly interpreted the statute to include any and all torts asserted against an individual or entity listed in Miss. Code Ann. § 15-1-36. The trial court ignored a crucial phrase in conducting its analysis. The correct interpretation is: all torts **arising out of the course of medical, surgical or other professional services** which are brought against an individual or entity listed in Miss. Code Ann. § 15-1-36. The fraud of Dr. Terracina was not a medical, surgical, or professional service. Therefore, claims brought 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

At the time that the Washington County Circuit Court decided the subject motion to dismiss, on March 4, 2008, this issue was a matter of first impression in the State of Mississippi. Since that time, the Mississippi Court of Appeals has issued an important opinion that sets forth a systematic test for determining whether a particular cause of action falls within the two-year medical malpractice statute of limitations. *See 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 answering the claim, the defendants asserted, *inter alia*, that the negligence claim was one for medical negligence, and the suit should be dismissed because the two-year statute of limitations for a medical malpractice claim had expired. *Id.* The trial court agreed, and granted the defendants' motion for summary judgment on the basis of the expiration of the two-year statute of limitations. *Id.* The Mississippi Court of Appeals affirmed the dismissal, but in the course of its analysis it 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).

Under the analysis set forth by the Mississippi Court of Appeals in the *Howell* case, the present case should not fall within the two-year statute of limitations. First, the wrong to be addressed in this case is not "treatment related." Rather, the wrong arises from Mrs. Chitty's allegations of fraud against Dr. Terracina. In particular, Mrs. Chitty alleges that in spite of

having in his possession a test result indicating that she did not have skin cancer, Dr. Terracina misrepresented to her that she did have skin cancer. R. at 138. The wrong is the misrepresentation, and the misrepresentation is not treatment related. The "particular wrong" was not the medical testing itself, but the misrepresentation by Dr. Terracina of the test results in order to make more money with more treatment. Further, the allegations of the complaint are that Dr. Terracina misrepresented that the pathological testing was done at Galveston Dermatopathology Laboratory when, instead, he performed the testing himself. R. at 136. This type of misrepresentation is not treatment related, but is a deliberate misrepresentation which stands alone and apart from medical treatment.

Second, this case will not require expert medical testimony in order to establish that misrepresentations took place. There will be no need to present evidence about Dr. Terracina's skill as a physician or the accuracy of his medical testing. Rather, the evidence of misrepresentations can be deduced from an objective examination of the events of this case. The jury will not need to be aided by expert testimony in reaching its conclusion about whether fraud was committed.

Third, the pertinent act did not involve assessment of Mrs. Chitty's condition. The allegations of the First Amended Complaint are that Dr. Terracina knew that Mrs. Chitty did not have cancer, but told her that she did have cancer in order to perform an additional surgical procedure and reap more medical fees. R. at 138. This allegation does not turn upon whether the assessment of Mrs. Chitty's condition by Dr. Terracina was right or wrong, or whether the assessment of her condition was negligent. The allegation is grounded upon the assumption that Dr. Terracina's provision of medical care and test results were competent and accurate. The problem arose when Dr. Terracina committed the intentional act of misrepresenting the test results. In this light, Mrs. Chitty's allegations cannot be considered allegations of medical

malpractice. The allegations arise from dishonesty and fraudulent actions, not from any assertion of medical negligence.

As to the fourth factor in the *Howell* analysis, the incident at issue in this case did not occur within the physician-patient relationship. Indeed, the fraudulent actions of Dr. Terracina should properly be viewed as the point at which the patient-physician relationship between Mrs. Chitty and Dr. Terracina dissolved. The physician-patient relationship was the broad context for the fraud that Dr. Terracina is alleged to have committed, but the fraud is an intentional act separate and apart from the physician-patient relationship. For that reason, the fourth *Howell* factor does not support a decision that this is a medical malpractice case. The actions leading to this complaint were not an integral part of the physician-patient relationship between Dr. Terracina and Mrs. Chitty. The fraud of Dr. Terracina was an intentional act committed in direct violation of the physician-patient relationship.

The fifth factor of the *Howell* analysis asks "whether the injury would have occurred if the patient had not sought treatment." This factor has little bearing on the issues presented by this case. In a formulaic sense, Mrs. Chitty would not have been defrauded if she had never seen Dr. Terracina. However, that does not make this case a medical malpractice case.

The sixth and final factor set forth in the *Howell* case, whether the tort alleged was intentional, is the most important with regard to the fact presented here. 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 fall from the x-ray table was the result of a mistake with the electric controls of the 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 a Mrs. Chitty's complaint, which is based completely on the intentional conduct of Dr. Terracina.

For these reasons, the Appellant submits that the decision of the Circuit Court of Washington County, Mississippi is in error, and this case should be remanded for further proceedings.

CONCLUSION

This Court's affirmation of the rule set forth by the Circuit Court of Washington, Mississippi would lead to untenable circumstances. Every conceivable tort claim against a physician, osteopath, dentist, hospital, institution for the aged or infirm, nurse, pharmacist, podiatrist, optometrist or chiropractor would fall under the medical malpractice two-year statute of limitations, no matter what type of claim is asserted. This result was not intended by the legislature when it enacted the law codified as Miss. Code Ann. § 15-1-36.

Further, the rule recently set forth in *Howell v. Garden Park Community Hosp.*, 2008 WL 4042786 (Miss. App. Sept. 2, 2008), establishes that Appellant's claims are not claims for professional negligence subject to the two-year statute of limitations. Instead, her claims involve the intentional acts of Dr. Terracina, and are subject to the general three-year statute of limitations found in Miss. Code Ann. § 15-1-49.

For all of the above reasons, 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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