2008-CA-00688-SCTE

CERTIFICATE OF INTERESTED PERSONS

Pursuant to M.R.A.P. 28(a)(1), 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 this Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Graceland Care Center of Oxford, LLC, Graceland Management Company, Inc., Graceland Holdings, L.P., Gracelands, Inc., Lafayette LTC, Inc., Katie M. Overstreet QTIP Trust, Katie M. Overstreet Trust, Larry Overstreet, and John B. "Ley" Falkner (Appellees).

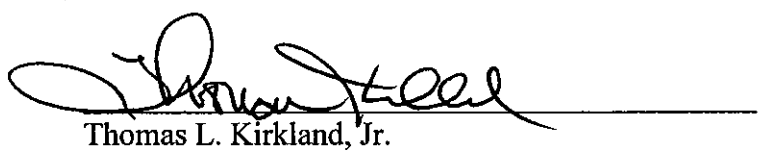
2. Thomas L. Kirkland, Jr. and Andy Lowry, of Copeland, Cook, Taylor & Bush, P.A. (counsel for Appellees).

3. Alice ("Allie") Shaw as executrix of Estate of Ardelua Johnson (Appellant).

4. Susan N. Estes, Esq., Douglas Bryant Chaffin, Esq., Gale Nelson Walker, Esq., and Cameron C. Jehl, Esq., of Wilkes & McHugh, P.A. (counsel for Appellant).

5. The Honorable Henry L. Lackey (circuit judge).

Respectfully submitted,



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Attorney of Record for Appellees

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STATEMENT REGARDING ORAL ARGUMENT

Inasmuch as the present case involves issues of first impression in the interpretation of Miss. Code Ann. § 15-1-36 and in the viability of a fiduciary-duty claim brought as a substitute for a medical-malpractice claim, Defendants request oral argument if this Court believes that it would benefit thereby.

STATEMENT OF THE ISSUES

I. Whether the Savings Statute, Miss. Code Ann. § 15-1-59, Applies in This Case.

II. Whether Plaintiff's Complaint Was Untimely Under Miss. Code Ann. § 15-1-36.

III. Whether Plaintiff Can Plead Around the Medical Malpractice Statute of Limitations.

STATEMENT OF THE CASE

I. Course of Proceedings Below

Plaintiff sued the various Defendants in Lafayette Circuit Court on September 11, 2006, alleging four counts of "negligence," one count of medical malpractice, one of gross negligence, one of fraud, one of breach of fiduciary duty, one of "statutory survival," and one of wrongful death, all arising out of allegations that Defendants had provided inadequate care and supervision to Ardelua Johnson ("Johnson") during her residency at the Graceland Care Center of Oxford, a licensed institution for the aged and infirm (more commonly called a "nursing home").

Defendants moved to dismiss on October 26, 2006, citing the statute of limitations. A hearing was conducted on January 3, 2007, and on July 30, 2007, the circuit court (Lackey, J.) issued a letter indicating its intent to dismiss the Complaint. Plaintiff objected to the proposed order and moved for reconsideration, and a second hearing was held on September 17, 2007. On March 31, 2008, the circuit court issued its Opinion and Order dismissing the Complaint. Plaintiff filed her notice of appeal on April 18, 2008.

After the filing of Appellant's brief, this Court on December 12, 2008, issued an Order in the cause numbered 2008-M-01762-SCT, *Desoto Healthcare, Inc. v. Conley*, granting a petition for interlocutory appeal, and finding that the present appeal should be consolidated with that matter and stayed pending completion of the record in the *Conley* matter, which has now been done.

II. Statement of Relevant Facts

The present appeal is from the granting of a Rule 12(b)(6) motion to dismiss, so that the appeal turns upon matters of law, not fact.

As regards Plaintiff's statement of the case, we clarify that Johnson's unsoundness of mind was stipulated below for purposes of the Rule 12(b)(6) motion, upon which Plaintiff's version of the facts was to be taken as true. Defendants have not conceded that Johnson was in fact of unsound mind during her entire residency, and do not do so here. Nor do Defendants concede any other facts which must be taken as true under Rule 12(b)(6) (such as that "Ms. Johnson died . . . as a result of the injuries she suffered at Defendants' facility," Plf. at 5).

Given the importance of dates to the legal arguments, we offer this timeline:

Sept. 1, 2001	Johnson enters Graceland facility (R.5)
June 8, 2004	Johnson leaves Graceland facility (R.5)
July 16, 2004	Johnson passes away (R.5)
Oct. 6, 2004	Plaintiff contacts Graceland seeking medical records (R.242)
Oct. 15, 2004	Plaintiff told that HIPAA authorization needed for release of records (R.248)
Apr. 8, 2005	Plaintiff provides HIPAA authorization (R.250)
May 19, 2005	Plaintiff furnished with records (R.255)
May 19, 2006	One year since records furnished to Plaintiff
June 8, 2006	Two years since Johnson left facility
July 7, 2006	Plaintiff serves notice of intent to sue (R.172)
Aug. 7, 2006	Two years and 60 days since Johnson left facility
Sept. 11, 2006	Plaintiff files Complaint

We now turn to the merits of the case.

SUMMARY OF THE ARGUMENT

Plaintiff filed her medical malpractice suit against Defendants more than two years and 60 days after the decedent left the nursing home where the alleged malpractice occurred, and thus after the statute of limitations had expired. She argues, first, that the savings clause of Miss. Code Ann. § 15-1-59 allows the statute of limitations to run from the decedent's date of death. However, this general statute is superseded in the present case by the specific statute regarding unsoundness of mind in medical malpractice suits, § 15-1-36.

Section 15-1-36, at subsection (6), allows no more than one year after the death of a person of unsound mind in which to bring suit, and thus does not help Plaintiff. That one-year limit is borrowed from § 15-1-55, and Plaintiff cites a 19th-century precedent as her basis for arguing that this latter statute does not mean what it says on its face; but that precedent applies only to § 15-1-55 itself, not to § 15-1-36(6), which merely sets a time period by reference to the time period stated in § 15-1-55. Alternatively, this Court should either set aside its predecessors' misreading of § 15-15, or else recognize that, by its careful avoidance of direct incorporation of § 15-1-55 in subsection (6), the Legislature sought to avoid carrying over that misreading.

Last, Plaintiff urges this Court to effectively abolish the two-year statute of limitations for medical malpractice by allowing it to be pleaded as fraud, breach of fiduciary duty, simple negligence, etc. This Court should resist Plaintiff's invitation to set the Legislature's wishes aside, and affirm the trial court's order dismissing the suit.

ARGUMENT

Because the present case involves an appeal from a judgment rendered under Rule 12(b)(6) as a matter of law, this Court's standard of review is de novo. *Rose v. Tullos*, 994 So. 2d 734, 737 (Miss. 2008). Because the "application of a statute of limitations is a question of law," the issue of whether the statute has run is reviewed de novo. *Jackson Miss. Riverboat, Inc. v. Smith*, 874 So. 2d 959, 960 (Miss. 2004). Dismissal for failure to state a claim is likewise reviewed de novo. *Rose*, 994 So. 2d at 737. Where the statute of limitations has run before the filing of the complaint, dismissal is proper. *Stockstill v. State*, 854 So. 2d 1017, 1023 (Miss. 2003).

I. The Savings Statute, § 15-1-59, Does Not Apply in This Case.

Plaintiff argues that Miss. Code Ann. § 15-1-59, which on her reading would allow a *twenty-one-year* tolling of the statute of limitations when an adult was "under the disability of unsoundness of mind," applies to the present case:

> If any person entitled to bring any of the personal actions mentioned shall, at the time at which the cause of action accrued, be under the disability of infancy or unsoundness of mind, he may bring the actions within the times in this chapter respectively limited, after his disability shall be removed as provided by law. However, the saving in favor of persons under disability of unsoundness of mind shall never extend longer than twenty-one (21) years.

On that theory, when Johnson passed away while unsound of mind, her disability tolled the statute until her disability was "lifted" by her death.

The main problem with this theory, which Plaintiff is well aware of from briefing in the trial court and which she still does not address on appeal, is that the Legislature has enacted a specific statute regarding the statute of limitations in medical-malpractice cases, with its own provisions regarding unsoundness of mind. It is well settled that "a specific

statute controls over a general statute." *State ex rel. Hood v. Madison County ex rel. Madison County Bd. of Supervisors*, 873 So. 2d 85, 91 (Miss. 2004) (citing cases). In the specific situation of unsoundness of mind in medical malpractice cases, § 15-1-36 must control over the general savings clause at § 15-1-59.

Therefore, § 15-1-59 simply does not control in this matter, meaning that this Court need not decide the question whether the "shall never extend longer than twenty-one (21) years" language in that statute, and its frequent description as the "minors savings" clause or statute, *see, e.g., Curry v. Turner*, 832 So. 2d 508, 517 (Miss. 2002), raise an issue as to whether the statute is really aimed at minors, rather than intended to allow medical malpractice suits to be filed 21 years after an elderly person departs this life.[1]

On that latter theory, which Plaintiff here advances, a nursing home resident unsound of mind could leave a facility on January 1, 2010; live for another 20 years in the same condition of mental disability; pass away on January 1, 2030; and file suit (via her estate or wrongful-death representative) against the facility on January 1, 2032 (or even two months later, assuming that the notice of claim statute is still in effect), leaving the facility to figure out what it could about an alleged tort from 22 years previous. That result would be absurd, which is a good basis for inferring that it is not what the Legislature intended.

Given the unfortunate mental conditions which lead many people to become nursing-home residents, a 21-year tolling of the statute would become the norm, not the exception,

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[1]Plaintiff certainly has a point when she notes that the statute's language is broad enough to cover both minorship disability and the disability of senility; still, it's noteworthy that in *none* of the cases she cites does this Court address the situation of an elderly person suffering dementia, Alzheimer's, or similar unsoundness of mind. Of course, this question is foreclosed in the present case by the specific enactment of § 15-1-36; what to do in the situation where medical malpractice is not alleged, and a suit is brought 20 years after senility ensues, falls outside the scope of this appeal.

in cases alleging nursing-home malpractice. The Legislature's provision of a specific medical-malpractice tolling provision redresses this otherwise absurd result.

As for Plaintiff's claims that § 15-1-59 applies in the case of her non-malpractice causes of action, that argument is only as good as those causes, which we shall see at Issue III below are merely attempted end-runs around the two-year malpractice limitations period.

II. Plaintiff's Complaint Was Untimely Under § 15-1-36.

A. Because the Statute Ran from the Last Day at the Facility, the Complaint Was Filed Untimely.

Johnson passed away on July 16, 2004. On July 7, 2006, counsel for Plaintiff sent the notice of intent to sue that is required under Miss. Code Ann. § 15-1-36(15). The Complaint was filed on September 11, 2006.

Because the tolling provision at § 15-1-59 does not here apply, the present case must be decided under Miss. Code Ann. § 15-1-36, subsection (2) of which demonstrates its scope:

> 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 or neglect shall or with reasonable diligence might have been first known or discovered . . . .

(emphasis added). Thus, the defendant and the alleged damages in the present suit match up with those envisioned by § 15-1-36. Subsection (15)'s reference to "*the* health care provider" (emphasis added) must be construed as including "institutions for the aged or infirm." Of course, this term includes nursing homes like the present facility. *See* Miss. Code Ann. § 43-11-1(a). Thus, the two-year limitations period applies in this case.

Subsection (15) of § 15-1-36 tolls the statute of limitations for up to 60 days if the complaint is filed within 60 days' of the statute's expiration:

> If the notice is served within sixty (60) days prior to the expiration of the applicable statute of limitations, **the time for the commencement of the action shall be extended sixty (60) days from the service of the notice** for said health care providers and others.

(emphasis added). Under this Court's interpretation of subsection (15) in *Pope v. Brock*, 912 So. 2d 935 (Miss. 2005), the statute of limitations in medical-malpractice actions runs for two years plus sixty days. *Id.* at 939; *see also Proli v. Hathorn*, 928 So. 2d 169, 174 (Miss. 2006) (clarifying that "the time period is *extended*, not tolled"—hence the "two years plus 60 days").

Thus, Plaintiff argues, the statute of limitations ran "two years and sixty days from Ms. Johnson's death" on July 16, 2004, expiring upon September 14, 2006. Plaintiff therefore contends that her suit was within the statute when it was filed on September 11, 2006.

However, the statute in fact began to run no later than June 8, 2004, the last date upon which Johnson was in the care of the facility, which certainly cannot have committed malpractice against her after that date. The wrongful-death claim does not change the analysis, because that statute of limitation "is subject to, and limited by, the statute of limitations associated with the claims of specific wrongful acts which allegedly led to the wrongful death." *Jenkins v. Pensacola Health Trust, Inc.*, 933 So. 2d 923, 926 (Miss. 2006) (overruling *Gentry v. Wallace*, 606 So. 2d 1117 (Miss. 1992)). *Id.* at 926 (emphasis added). Thus, the statute cannot have begun to run from the date of Johnson's death.

Two years plus sixty days from June 8, 2004 is Monday, August 7, 2006. Thus, the statute had indeed run by September 11, 2006 when Plaintiff filed her suit, for nothing in the Complaint alleges that Defendants did anything to Johnson after she left the facility. The last possible date for any malpractice allegation to accrue is June 8, 2004.[2]

Although Plaintiff does not argue the discovery rule in her brief, it is clear from the Complaint's allegations of "catastrophic injuries, extreme pain and suffering, [and] mental anguish," Complaint at ¶ 20, and from the claim that Johnson perished "as a result of the injuries she suffered at Defendants' facility," Complaint at ¶ 18, that the discovery rule would not apply.

The quelling of a tort action by operation of the statute of limitations may seem "harsh," but the statute of limitations is set by the Legislature for good reason and must be honored. *Miss. Dep't of Pub. Safety v. Stringer*, 748 So. 2d 662, 665-66 (Miss. 1999).

It is therefore not strictly relevant, but perhaps of interest, that Plaintiff was less than diligent in pressing her claim. As shown in the Statement of the Case, above, Plaintiff was advised in October 2004 that the facility needed a HIPAA authorization if it was to release Johnson's medical records; yet Plaintiff did not provide this authorization until six months later, in April 2005. Then, having been provided those records in May 2005, Plaintiff had those records in her possession for *over one year* before the statute ran on August 7, 2006, and for over one year before she filed the notice of intent to sue. Section 11-1-58 expressly

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[2]Plaintiff appears to have discarded her continuing-tort theory of the case, which quite properly did not avail for her below: "To toll a statute of limitation, the tort must be 'occasioned by continual unlawful acts, not by continual ill effects from an original violation.' " *Randolph v. Lambert*, 926 So. 2d 941, 945 (Miss. Ct. App. 2006) (quoting *Stevens v. Lake*, 615 So. 2d 1177, 1183 (Miss. 1993)). Even if, on the face of the Complaint, Johnson suffered "continual ill effects" after June 8, 2004, those do not qualify as continuing torts.

provides that no expert review of the records is required where the plaintiff must file a complaint in order to avoid the statute of limitations, so possession of the records was not even an excuse. The statute of limitations is not intended to "allow non-diligent plaintiffs the opportunities to sleep on their rights indefinitely." *Doe v. Miss. Blood Servs., Inc.*, 704 So. 2d 1016, 1019 (Miss. 1997).

For whatever reason, Plaintiff sat on her rights rather than timely file the Complaint, which must now be dismissed as a matter of law.

B. "Unsoundness of Mind" Does Not Save the Complaint.

1. Subsection (6) of § 15-1-36 Controls Here.

The "disability of unsoundness of mind," § 15-1-36(5), does not assist Plaintiff here. Subsection (5) of the statute reads as follows:

> If at the time at which the cause of action shall or with reasonable diligence might have been first known or discovered, the person to whom such claim has accrued shall be under the disability of unsoundness of mind, then such person or the person claiming through him may, notwithstanding that the period of time hereinbefore limited shall have expired, commence action on such claim at any time within two (2) years next after the time at which the person to whom the right shall have first accrued shall have ceased to be under the disability, or shall have died, whichever shall have first occurred.

Plaintiff argues that subsection (5) allows two years after the death of Johnson in which to "commence action on" her claim, it being taken as true for present purposes that Johnson passed away without her disability's having lifted.

Subsection (6) of the same statute, however, expressly limits subsection (5):

> When any person who shall be under the disabilities mentioned in **subsections (3), (4) and (5) of this section** at the time at which his right shall have first accrued, **shall depart this life without having ceased to be under such disability**, no time shall be allowed by reason of the disability of such

> person to commence action on the claim of such person beyond **the period prescribed** under Section 15-1-55, Mississippi Code of 1972.

Miss. Code Ann. § 15-1-36(6) (emphasis added).[3] Subsection (6) provides that "no time shall be allowed by reason of the disability of such person to commence action on the claim of such person beyond the period prescribed under Section 15-1-55, Mississippi Code of 1972." That period is "within one year after the death of such person." Miss. Code Ann. § 15-1-55. Thus, the savings clause provides no effective extension in the present case, as it would extend only to July 16, 2005, "one year after the death" of Johnson. This is the same reading given to the statute in the *Encyclopedia of Mississippi Law*: "If the person under the disability of unsoundness of mind dies before the disability is removed, a malpractice action may be commenced within one year of that person's death." Jackson & Miller, 6 *Ency. of Miss. Law* § 58:22.

Subsection 6 thus restricts the scope of subsection 5 by incorporating § 15-1-55's one-year-after-death time limit. This is not the same effect as the mere separate action of §§ 15-1-36 and 15-1-55 previously noted by this Court:

> Additionally, Miss. Code Ann. § 15-1-36 (Supp. 2002) states that medical malpractice claims must be brought within two (2) years from the date of the alleged negligent act or omission, while the estate savings statute, Miss. Code Ann. § 15-1-55 (Rev. 1995), provides that the estate of a person who dies before the expiration of the applicable statute of limitations may sue or be

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[3]The language of subsection (6) has carried over with no material change from the first enactment of a medical-malpractice statute of limitations. Miss. Laws 1976 ch. 473, § 1 (last sentence). It then formed an exception to the language now at subsection (5), which was the preceding sentence in chapter 473 but included "the disability of infancy" as well as that of unsoundness of mind; infancy is now addressed at subsections (3) and (4), and the language of subsection (6) was modified to refer to "the disabilities mentioned in subsections (3), (4), and (5)" rather than to "either of the disabilities mentioned." The original effect, as now, was to create a one-year-after-death limit on bringing suit where the person of unsound mind passes away without that disability's having previously ceased.

> sued after the running of the applicable statute **and within one (1) year after the death of the person**.

Necaise v. Sacks, 841 So. 2d 1098, 1104 (Miss. 2003) (emphasis added). As the emphasized language shows, § 15-1-55 provides no extension beyond "one (1) year after the death of the person." But one need not look to § 15-1-55 in that regard, because "the period prescribed" in that statute is expressly incorporated into § 15-1-36(6) as a deliberate limitation on the tolling provided by subsection (5), in the particular instance where the patient's disability persists to the end. There was no need for the Legislature to enact subsection (6) if all that was meant was that § 15-1-55 was also to be followed; § 15-1-55 was already good law, and applicable by its own terms to "any of the personal actions herein mentioned." *Cf. Hayes v. Lafayette County Sch. Dist.*, 759 So. 2d 1144, 1148 (Miss. 1999) (§ 15-1-59, with similar language, covers "periods of limitation within that chapter," i.e., chapter 1 of title 15).

There can be no question that subsection (6) *expressly limits* the scope of subsection (5). There is a direct reference to subsection (5) in the language of subsection (6), which expressly says that, where a potential plaintiff dies without ceasing to be under disability, the extension shall not run longer than provided at § 15-1-55. Whatever subsection (5) may mean, it cannot have any effect greater than that provided for in subsection (6). And that is why Plaintiff's claim must fail.

If conflict be alleged between subsections (5) and (6), the rule is that the later-stated of the provisions is controlling, that is, subsection (6). *Miss. State Hwy. Comm'n .v Rives*, 271 So. 2d 725, 728 (Miss. 1972) (citing *Coker v. Wilkinson*, 142 Miss. 1, 106 So. 886, 887 (1926)), *overruled on other grounds, Kiddy v. Lipscomb*, 628 So. 2d 1355, 1359-60 (Miss. 1993). The rule of *Coker* has likewise been applied in other cases, though not to "destroy

the legislative policy, nullify the main provisions of the act, and entirely defeat the manifest intention and purpose of the lawmakers." *Ford v. Holly Springs Sch. Dist.*, 665 So. 2d 840, 844 (Miss. 1995) (applying *Coker*) (quoting *Roseberry v. Norsworthy*, 135 Miss. 845, 100 So. 514, 517 (1924)). No such destruction or nullification is at issue in the present case; subsection (6) does not *remove* any statute of limitation (imposition of which was "the manifest intention and purpose" of § 15-1-36), but merely itself *imposes* a limitation. As we've seen, nothing is clearer than that, whatever the Legislature may have granted with one hand in subsection (5), it expressly limited that grant with subsection (6). To hold otherwise would be to rewrite the statute, and this Court should decline Plaintiff's invitation to do so.

2. Subsection (6) Refers to "the Period Prescribed Under" § 15-1-55, and Does Not Merely Incorporate That Statute by Reference.

Plaintiff finally relies on the argument that a 122-year-old precedent of this Court negates the literal, plain meaning of § 15-1-36(6). It does not.

Plaintiff relies on a 1963 federal trial court decision, *Triplett v. United States*, 213 F. Supp. 887 (S.D. Miss. 1963), in which Judge Harold Cox ruled that the statutory language of § 15-1-55 (which was before that court as Miss. Code 1942, § 728) does not mean what it says, relying upon three 19th-century decisions:

> Section 728 Mississippi Code 1942 has been repeatedly held not to apply in such cases **unless the death of the injured decedent occurs within the last year in which a suit may have been brought for his injury**. This suit was brought in the second year after the injury and death of the decedent and the statute does not, therefore, apply as the Mississippi Supreme Court held in construing this statute in *Weir v. Monahan*, 67 Miss. 434, 7 So. 291; *Hambrick v. Jones*, 64 Miss. 240, 8 So. 176; *Hughston v. Nail*, 73 Misc. 284, 18 So. 920. These cases hold that when a decedent dies in the last year in which a suit may be brought for his injury that this statute then applies, and then adds another year to the time within which the suit may be brought by his personal representatives.

Triplett, 213 F. Supp. at 889 (emphasis added). There is no need here to delve into *Triplett*'s precedents, because, like *Triplett*, they deal strictly with the construction of § 15-1-55 itself.

For as we saw above, § 15-1-36(6) does not merely incorporate § 15-1-55; indeed, there would be no reason for it to do so, as both statutes would have full legal effect even if neither mentioned the other. That would make subsection (6) mere surplusage; the Legislature did not need to enact a reminder that the rest of the Mississippi Code, including § 15-1-55, still was good law. If subsection (6) does not incorporate § 15-1-55, then neither does it incorporate the strange reading imposed upon that statute by *Hambrick* and its progeny.

Nor does the plain language of subsection (6) support any such "reminder" argument. Let us look again at the statutory text:

> When any person who shall be under the disabilities mentioned in subsections (3), (4) and (5) of this section at the time at which his right shall have first accrued, shall depart this life without having ceased to be under such disability, **no time shall be allowed** by reason of the disability of such person to commence action on the claim of such person **beyond the period prescribed under Section 15-1-55**, Mississippi Code of 1972.

(emphasis added). Subsection (6) does not incorporate § 15-1-55; it incorporates *only* "the period prescribed" and prohibits any time's being "allowed by reason of the disability of such person to commence action" beyond that period. Obviously and unquestionably, "the period prescribed" is "one year after the death of such person." In other words, the present case does not apply § 15-1-55 to Plaintiff's claim, but rather the "period prescribed under" that statute. The issue of the correct interpretation of § 15-1-55, and whether this Court should reconsider its earlier precedents recited in *Triplett*, need not and should not arise.

As we shall see below (at subissue II.B.4), there may have been good reason for the Legislature to refer to "the period prescribed" rather than simply invoking the entirety of § 15-1-55. The fact remains however that, good reason or not, that is what the Legislature undoubtedly did, and to undo that plain language is to undo subsection (6). Before deciding to rewrite the statute, this Court should prefer the interpretation that defers to the Legislature and effects the plain meaning of its words, and that plain meaning is a one-year "period prescribed" after death, within which a complaint may be filed — and after which, no complaint may be filed, if the statute has otherwise run.

3. Alternatively, If § 15-1-55 Is Merely Incorporated by Subsection (6), then Earlier Misreadings of § 15-1-55 Should Be Corrected.

a. Section 15-1-55 Does Not Support Its Reading in *Hambrick*.

We do not believe that the correct interpretation of § 15-1-55 need be reached by this Court, because the controlling specific statute is § 15-1-36(6), which simply "borrows" the time span mentioned in § 15-1-55 without reproducing that statute. However, if this Court were inclined to disagree, and to look to the meaning of § 15-1-55 itself, then the issue would arise of a blatant imposition of a foreign meaning upon the plain language of that statute — an imposition at odds with the text of the statute and with the constitutional position of this Court as against the Legislature.

The precursor of § 15-1-55 is Miss. Code 1880 § 2683, and the reading of the statutory language in *Triplett* extends back to an 1886 decision by this Court:

> Section 2083 [sic] of the Code of 1880 did not apply, **because it is applicable only where the death of the person occurs within the last year of the time limited**, and, if it was retroactive, so as to govern in case of the death of a person before it took effect, it did not apply in this case, because the death of the party did not occur within the last year of the time for the completion of the bar.

Hambrick v. Jones, 64 Miss. 240, 8 So. 176, 177 (1886) (emphasis added). The 1880 text was substantively identical to that of § 15-1-55:

> If any person, entitled to bring any of the personal actions hereinbefore mentioned, or liable to any such action, shall die before the expiration of the time herein limited therefor, such action may be commenced by or against the executor or administrator of the deceased person, after the expiration of said time, and within one year after the death of such person.

Miss. Code 1880 § 2683.[4] As this Court can see, there is nothing in this text limiting its application to situations "where the death of the person occurs within the last year of the time limited." *Hambrick* does not cite any authority for that interpretation, which was simply an erroneous, unfounded construction of the statute — the kind this Court is duty-bound *not* to make. "[T]his Court has no right, prerogative, or duty to bend a statute to make it say what it does not say." *Franklin Collection Serv., Inc. v. Kyle*, 955 So. 2d 284, 288-89 (Miss. 2007).

One of the other two cases cited in *Triplett* is simply an unquestioning application of the rule invented in *Hambrick*. *See Weir v. Monahan*, 67 Miss. 434, 7 So. 291 (1890). The third case does not even apply the *Hambrick* rule, but simply observes that the one-year period runs from the date of death as per the 1880 Code, not from the appointment of an administrator as per the 1871 Code. *See Hughston v. Nail*, 73 Miss. 284, 18 So. 920, 921 (1895).

"Whatever the Legislature says in the text of the statute is considered the best evidence of the legislative intent." *Miss. Dep't of Transp. v. Allred*, 928 So. 2d 152, 155

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[4]No substantive change to the language of this statute appears in any Code after that of 1880, in which § 2683 had been amended from its previous incarnation as Miss. Code 1871 § 2162, which had set the savings period at one year after the issuance of letters testamentary. The 1972 Code made immaterial edits to the text ("herein" for "hereinbefore" and suchlike).

(Miss. 2006). "It is not the proper role of a court to construe an unambiguous statute in a way contrary to its plain meaning." *Sandefer v. State*, 952 So. 2d 281, 287 (Miss. Ct. App. 2007). These longstanding rules were disregarded by the *Hambrick* Court, calling that decision into serious question.

b. *Stare Decisis* Does Not Require this Court to Follow *Hambrick*.

Only two rationales can support this Court's arrogation to itself of power to rewrite a statute. One is "the canon of construction that when the legislature leaves statutory language unchanged, it presumably ratifies settled judicial interpretations of that language." *Tolbert v. Southgate Timber Co.*, 943 So. 2d 90, 96 (Miss. Ct. App. 2006). The other rationale, which in practice amounts to the same thing, is *stare decisis*, which in the present case would amount to the veneration of past error, or as Justice Randolph recently put it, "the sanctification of ancient fallacy." *Mississippi Comm'n on Judicial Performance v. Martin*, 995 So. 2d 727, 733 n.5 (Miss. 2008) (Randolph, J., concurring) (quoting *Morrow v. Commonwealth*, 77 S.W.3d 558, 559 (Ky. 2002)).

This Court has recently recast the law of *stare decisis* in *Caves v. Yarbrough*, 991 So. 2d 142 (Miss. 2008), rejecting the unworkably vague " 'pernicious/mischievous' test," which as observed in *Caves* had "virtually never been met," and had simply been disregarded when this Court did "not hesitate[ ] to reverse numerous prior cases which wrongly interpreted a statutory provision." *Caves*, 991 So. 2d at 153. Rejecting the old notion that "the Legislature's mere silence is enough," this Court held that, where the Legislature has "amended or reenacted" a statute "without correcting the prior interpretation" placed on it by this Court, *stare decisis* will require continued application of said prior interpretation, regardless of that interpretation's merits. *Caves*, 991 So. 2d at 153.

This ruling in *Caves* must be distinguished from the instance of the Legislature's "reenacting" a statute merely by virtue of adopting a new code.[5] The ample United States Supreme Court authority cited in *Caves*, and the Mississippi cases relying in whole or part upon same, stand against the factual background of the United States Code, which rarely has been "reenacted" *in toto* in the manner of the Mississippi Code when a new codification issues.[6]

The two federal precedents particularly relied upon in *Caves*, *id.*, addressed *specific* reenactments of *particular* statutes, which was the situation present in *Caves* itself. *Helvering v. Hallock*, 309 U.S. 106, 130-32, (1940) (Roberts, J., dissenting) ("Congress has three times reenacted the law without amending § 302(c) in respect of the matter here in issue"); *Lorillard v. Pons*, 434 U.S. 575, 580-81, 585 (1978) ("where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law"; fact of

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[5]In rejecting the rule that "mere silence is [not] enough," this Court thus very properly rejected the glib principle that "[t]he legislature has met many times . . . without any enactment directed toward the [statute in question] and thereby has approved the construction of the legislative intent placed thereon." *Crosby v. Alton Ochsner Med. Fdn.*, 276 So. 2d 661, 670 (Miss. 1973). Such self-exonerating logic seems more appropriate to the little boy whose mother did not notice any unauthorized withdrawals from the cookie jar, than to a court of justice with a duty to apply the laws as they are enacted by the people of this State through their Legislature.

(Amazingly, the *Crosby* Court immediately went on to declare, without any learned justice's head exploding from cognitive dissonance, that "a decision of this Court interpreting the statute becomes in effect a part of the statute. Therefore, *if the statute is to be amended, it should be done by the legislature and not by judicial decision.*" *Id.* (emphasis added). So one would have thought! Of course, *Crosby* allowed the Court to "amend" by "interpreting" and thus to usurp the Legislature's constitutional function. *Stare decisis* mean never having to say you're sorry.)

[6]The first official codification of federal statutes appears to have been the Revised Statutes of 1874, reenacted in a corrected version in 1878, and replaced by the United States Code in the 1920s.

Congress's "selective incorporation and amendment of the FLSA provisions for the ADEA" made it unlikely "that Congress was unaware" of judicial interpretation). The logic of *Lorillard* and of *Helvering* does not apply to a wholesale reenactment of the Mississippi Code, in the course of which the Legislature can scarcely be thought to have perused the *Mississippi Reports* and *Southern Reporter* to make sure none of its many thousands of statutes had been amended by the courts.

It may bear mentioning that, in *Caves*, this Court did not mention that it was relying in part upon a *dissenting* opinion in *Helvering*, rather than upon the majority opinion; the *Helvering* majority did not hesitate to reject, in no uncertain terms, the wisdom of mistaking legislative silence for legislative consent:

> It would require very persuasive circumstances enveloping Congressional silence to debar this Court from re-examining its own doctrines. To explain the cause of non-action by Congress when Congress itself sheds no light **is to venture into speculative unrealities**. Congress **may not have had its attention directed to an undesirable decision**; and there is no indication that as to the St. Louis Trust cases it had, even by any bill that found its way into a committee pigeon-hole. . . . Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction of the Treasury and of Congress, but they would only be sufficient to indicate that **we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle**.

Helvering, 309 U.S. at 119-21 (emphasis added). Whatever the merits of Justice Frankfurter's opinion for the Court in *Helvering*, those merits surely apply all the more when we are asked to suppose that a Legislature, reenacting "every statute in the book" as a new codification, has first paused to consult this Court's interpretations of each and every one of those statutes, to ensure that nothing "pernicious, impractical, or mischievous" has crept in between the lines.

The present case, therefore, is of the sort this Court recognized in *Caves* when it said "we do not agree that the Legislature's mere silence is enough" from which to infer that the Legislature has "incorporate[d] an incorrect interpretation of a statute." *Caves*, 991 So. 2d at 153. This Court's duty is not to rationalize its past mistakes, but to apply statutes as enacted by the Legislature, and it has the opportunity now to rectify a past mistake — *if* this Court should in fact reach the question of whether § 15-1-55 must be construed in reading § 15-1-36(6) — which, we reiterate, we do not think is required, because of our above argument that the one-year span of time mentioned in § 15-1-55 is all that is included in § 15-1-36(6).

4. Subsection (6) Indicates Legislative Intent to Bypass This Court's Construction of § 15-1-55.

Even if this Court is disinclined to revisit the *Hambrick* precedent, and thus prefers to allow its predecessors' mistake to stand, the wording of § 15-3-36(6) indicates that the Legislature opted not to incorporate § 15-1-55 (and thus this Court's previous, mistaken construction thereof), but rather to pluck out the one-year-after-death timespan mentioned therein. If this Court is indeed to attribute to the Legislature the near-omniscience implied in that August, but mortal, institution's supposed cognizance of every judicial interpretation of every statute it has enacted, then the careful wording of § 15-1-36(6) should be taken to indicate that the Legislature sought to avoid carrying over *Hambrick* and its progeny into § 15-1-36(6).

In short, a person of unsound mind may die with the statute of limitations about to run on her medical-malpractice action, but that period of limitation is extended to no more than one year past her death by § 15-1-36. In the present case, Johnson's cause of action

accrued more than two years *before* her death, allowing ample time for Plaintiff to file suit. Plaintiff, as shown above, slept on her rights and did not do so, and now is prevented from suit by the plain language of § 15-1-36. This Court should honor the Legislature's will and affirm the trial court's decision below.

III. Plaintiff's Attempts to Plead Around the Medical-Malpractice Statute of Limitations Fail as a Matter of Law.

The rest of Plaintiff's arguments all amount to pleading medical malpractice as if it were something else. They all have in common that they invite this Court to dispense with the medical-malpractice statute of limitation enacted by the Legislature, an invitation which this Court should decline to accept.

Despite the plethora of Defendants in this case, each corporation, company, or trust is alleged to have been "engaged in the custodial care of elderly, helpless individuals who are chronically infirm, mentally impaired, and/or in need of nursing care and treatment at GRACELAND CARE CENTER OF OXFORD." Complaint at ¶¶ 3-9. Individuals are sued either as licensee (Larry Overstreet) or as administrator (Ley Falkner). Complaint at ¶¶ 10-11. Such care is of course what an "institution for the aged and infirm" is licensed to provide, as set forth at the regulations promulgated by the Mississippi State Department of Health: "a place . . . which provides group living arrangements for four (4) or more persons who are unrelated to the operator and who are being provided food, shelter, and personal care . . . includ[ing] nursing homes . . . provided that these institutions fall within the scope of the definition set forth above."[7] Therefore, failure to meet any duty to provide such "custodial

[7]The quotation is from § 100.12 of the Minimum Standards for Institutions for the Aged and Infirm, promulgated by MSDH at its website, at http://www.msdh.state.ms.us/msdhsite/_static/resources/119.pdf (visited July 28, 2009).

care" as alleged by Plaintiff *just is* a failure to provide the services required of a nursing home, and thus, is medical malpractice under Miss. Code Ann. § 15-1-36.

This Court is not bound by Plaintiff's tactical mischaracterization of the alleged wrongs at issue in deciding which statute of limitations should apply. *See Lynch v. Liberty Mut. Ins. Co.*, 909 So. 2d 1289, 1292 (Miss. Ct. App. 2005) (plaintiff's characterization did not determine whether alleged tort was intentional or negligent); *see also Harrison County Devel. Comm'n v. Daniels Real Estate, Inc.*, 880 So. 2d 272, 276-77 (Miss. 2004) ("mere recitation of such words as 'negligent' and 'reckless disregard' " does not turn breach-of-contract action into tort claim) (overruled on other grounds by *City of Jackson v. Estate of Stewart ex rel. Womack*, 908 So. 2d 703, 710 (Miss. 2005)). Allegations which sound in medical malpractice must be governed by that statute of limitations, however artfully Plaintiff may have sought to plead herself into a three-year limitations period.

A. Fraud.

Plaintiff claims to have pleaded fraud. However, the Complaint fails to plead fraud with the particularity required under M.R.C.P. 9(b) and Mississippi law. Rule 9(b) requires that "the circumstances constituting fraud or mistake shall be stated with particularity." To allege that "Defendants," including two trusts, two administrators, one other individual, and five corporate entities *all* "concealed and/or misrepresented" (which is it?) "material facts" from Johnson, continuously over a period of three years, is to allege *nothing* with particularity. "Everybody was defrauding us all the time" is not pleading with particularity.

The Complaint does not allege a single specific act of misrepresentation on any particular date, with the possible exception of the occasion of Johnson's admission on or about September 1, 2001 (in which case the three-year statute of limitations on fraud actions

would have run long before the Complaint was filed). We are told merely that "Defendants either personally, or through their agents or employees, specifically misrepresented that they could and would provide twenty-four-hour-a-day nursing care and supervision to Ardelua Johnson during her residency at Graceland Care Center-Oxford." R.29.

Nor does the Complaint, while alleging that "Defendants, either personally, or through their agents or employees" (which is it?) made misrepresentations, ever specify any particular person who actually made a misrepresentation. Rather, Plaintiff has "vaguely referenced misrepresentations and concealment attributable to [Defendants] without specifying any factual basis for these assertions." *Robinson v. S. Farm Bur. Cas. Co.*, 915 So. 2d 516, 519 (Miss. Ct. App. 2005). Although Plaintiff has occupied ten paragraphs of the Complaint (¶¶ 74-83) with their repetitive allegations of fraud, mere wordiness is not particularity.

Not *one specific person* is alleged to have made any specific representation at any specific time. The Complaint does not explain whether the alleged misrepresentations were oral or written, express or implied. Defendants can only conclude that they are being accused of "misrepresentations" based on the mere fact that they were operating a nursing home. That will not do, as it amounts merely to an "end run" around the medical-malpractice statute of limitations. If any health-care provider can be held to "represent" that he, she, or it will provide good care, simply by the act of *being* a health-care provider . . . and thus be liable for fraud if the care turns out to be faulty . . . then what is left of the medical malpractice statute of limitations, or of the tort itself?

In its *Howard* decision, this Court addressed exactly the type of fraud count pleaded in the present case, stating:

> In their complaints, the Plaintiffs **simply allege the collective defendants (not each defendant specifically)** misrepresented the qualitative and quantitative care and supervision they would receive, and made those misrepresentations to the Plaintiffs and their families. The complaint **does not specify the date or locations** the allegedly fraudulent statements were made. **We find these general allegations and missing content fatal** under the pleading standards of Rule 9(b). As such, the Plaintiffs' claims of fraud against the Howards must be dismissed.

Howard v. Estate of Harper, 947 So. 2d 854, 861 (Miss. 2006) (emphasis added). As this Court can readily ascertain by reference to ¶¶ 74-83 of the Complaint, the supreme court's language quoted above is directly applicable to the present case. Therefore, the Complaint fails to state its fraud claims with particularity, so that the fraud count against all Defendants must be dismissed.

Plaintiff attempts to distinguish *Howard*: "without the benefit of the record in *Howard* to demonstrate, Plaintiff submits that the details, dates, and reliance by Ardelua Johnson are set out more specifically here than they were in *Howard*." Br. at 30. We must note that Plaintiff's brief is signed by one of the counsel for the plaintiffs in *Howard*, which leads us to believe that Plaintiff could have enjoyed "the benefit of the record in *Howard*," had that proved advantageous to her. Regardless, the conclusory allegation of greater specificity in "details, dates, and reliance" is not borne out by the actual language of the Complaint, which precisely fits this Court's holding in *Howard* that the plaintiffs "simply allege[d] the collective defendants (not each defendant specifically) misrepresented the qualitative and quantitative care and supervision they would receive." That is *exactly parallel* to the present claim that "Defendants either personally, or through their agents or employees, specifically misrepresented that they could and would provide *twenty-four-hour-*

a-day [quantity] *nursing care and supervision* [quality] to Ardelua Johnson during her residency at Graceland Care Center-Oxford."

Plaintiff also has alleged "concealing or failing to disclose the material facts that there was an epidemic of resident harm and injury, as well as a practice of utilizing insufficient numbers of nursing aides who were not qualified to render care or services in accordance with the law." R.30.[8] Leaving aside the truth of these bare allegations (as we unfortunately must on a Rule 12(b)(6) motion), Plaintiff here alleges *concealment* or *failure to disclose*, which are not elements of a fraud claim; fraud requires positive *representation.* The Complaint does not even allege (and would be legally in error if it did so) any legal duty to communicate the alleged "material facts" to Plaintiff, and without such a duty, there can be no claim for nondisclosure. *Mabus v. St. James Epicopal Ch.*, 884 So. 2d 747, 762-63 (Miss. 2004).

Plaintiff's fraud count is simply a dressed-up version of her malpractice claim: Defendants supposedly breached their duty to care for Johnson. There is no allegation of any fraud going beyond the identical allegations supporting the malpractice account. To allow such a cause of action to sound in fraud would be to disregard the Legislature's express intention to set a two-year statute of limitations for actions alleging professional negligence by institutions for the aged and infirm. The trial court's dismissal of the fraud claim should be affirmed.

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[8]Plaintiff's rhetoric trips over itself here: Defendants hired an *insufficient* number of *unqualified* aides? We would certainly hope so.

B. Fiduciary Duty.

1. There Is No Fiduciary Duty of a Caregiver to a Patient.

Alleging "a special confidence and trust" between Plaintiff and Defendants, apparently arising out of the ordinary circumstance of "provid[ing] necessary care" to Johnson, Plaintiff alleged a breach of fiduciary duty by Defendants in the supposed failure to provide that care. R.32. Again, what this Court will find in this cause of action is that Plaintiff merely pleads medical malpractice under another name, in the hopes of securing a three-year statute of limitations rather than the two-year limit set by § 15-1-36.

What this Court will *not* find in Plaintiff's discussion of the fiduciary issue, is any citation to a Mississippi case holding that a nursing home automatically owes a fiduciary duty to its aged and infirm residents. This Court has in fact suggested the opposite. Mere "general claims that by the type of care the Howards and the other defendants were providing, the Plaintiffs and their families held a 'special confidence and trust which the Defendants accepted' " do not suffice. *Howard*, 947 So. 2d at 862 (holding nursing home administrator owes no fiduciary duty to residents). The same reasoning applies to nursing homes, which are arms'-length providers of medical services, not fiduciaries.

This Court has set forth the criteria which must be met for a fiduciary duty to arise:

> (1) the activities of the parties go beyond their operating on their own behalf, and the activities [are] for the benefit of both; (2) where the parties have a common interest and profit from the activities of the other; (3) where the parties repose trust in one another; and (4) where one party has dominion or control over the other.

Robley v. Blue Cross/Blue Shield of Miss., 935 So. 2d 990, 995 (Miss. 2006) (holding no fiduciary duty between health insurer and policyholder) (quoting *Univ. Nursing Assocs. v. Phillips*, 842 So. 2d 1270, 1274 (Miss. 2003)). An analysis of these criteria, all of which

must be met for a fiduciary duty to be shown, demonstrates that no fiduciary duty arises automatically from the ordinary circumstances of admission to, and residency in, a nursing home. Looking to the allegations of the Complaint (¶¶ 84-90), the activity of Johnson did not go beyond operating on her own behalf; she simply sought nursing care. Defendants did not "repose trust" in Johnson or in Plaintiff. And the provision of nursing care does not exercise "dominion" or "control" over a resident.[9] There is no allegation that any Defendant become Johnson's guardian, had any legal authority over her, or acted in any other manner than a provider of healthcare services.

Were this Court to agree with Plaintiff that the provision of nursing-home services, without the allegation of something more, creates a fiduciary duty, then every nursing home in the state owes a fiduciary duty to provide nursing care to its residents, and § 15-1-36 is a dead letter as regards the two-year statute of limitations which the Legislature expressly intended to apply to suits against nursing homes for alleged failure to meet their standard of care. Indeed, Plaintiff's argument proves more than that. If a nursing home resident is under the "dominion and control" of her nurses, then what about a patient under anesthesia and undergoing surgery? A fiduciary duty would be at least as plausible, if not moreso, in such a case. Why plead medical malpractice, when that cause of action is equally to be pleaded as a "breach of fiduciary duty"?

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[9]The analysis in an unpublished trial court decision, *Isby Brandon v. Beverly Enterprises, Inc.*, 2007 WL 1087490, at *3 (N.D. Miss. Apr. 9, 2007), merely assumes that a nursing home and its resident "obviously repose trust in one another," "have a common interest and profit from the activities of the other," "go beyond their operating on their own behalf," etc. Normally, the federal courts are less carefree in their *Erie* guesses; one can only wonder why such a momentous alteration of Mississippi law did not even seem to the district court to merit publication.

The *Madden* case cited by Plaintiff, which involved the personal caretaker of a bedridden patient, is instructive here, as the facts in that case were remarkable precisely because they went outside what would be expected in the context of healthcare — the allegations concerned misappropriations of safe deposit keys, mink coats, etc. No such facts are pleaded or alleged in the Complaint, which would have it merely that Defendants' alleged failure to meet the standard of care violated an alleged fiduciary duty to Johnson.

2. Alternatively, Any Fiduciary Duty Inheres in the Standard of Care, and Thus Is Subsumed in the Medical Malpractice Cause of Action.

If this Court is inclined to find a fiduciary duty of a caregiver to a patient, then, rather than create a new cause of action that might replace the suit for medical malpractice, the better course is for this Court to hold that claims of breach of fiduciary duty, in the medical context, are subsumed in the cause of action for medical malpractice. That would exactly follow what this Court has done in the parallel instance of legal malpractice. *See Edmonds v. Williamson*, No. 2007-CA-00751-SCT, at ¶ 19 (Miss. June 25, 2009) ("claims of breach of fiduciary duty fall under claims of legal malpractice") (citing *Hartford Accident & Indem. Co. v. Foster*, 528 So. 2d 255, 285 (Miss. 1988)) ("[L]egal malpractice may be a violation of the standard of care of exercising the knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession similarly situated, or the breach of a fiduciary duty."). In *Foster*, this Court quoted with approval the following:

> Some courts seem to distinguish a breach of the fiduciary obligations from legal malpractice. The prevailing and more reasonable view, however, is that **legal malpractice encompasses any professional misconduct whether attributable to a breach of the standard of care or of the fiduciary obligations**. In recognition of the dual bases of an attorney's liability, some courts have referred to the fiduciary obligations as setting forth a standard of "conduct." Thus, under the theoretical approach legal malpractice may be

> defined as "a breach by an attorney of either the standard of care or of the standard of conduct."

Foster, 528 So. 2d at 284 (quoting Mallin & Levit, *Legal Malpractice* § 1 (2d ed. 1981)) (emphasis ours). The *Foster* Court went on to hold that the plaintiff has alleged "a fiduciary violation as the basis for this malpractice action." *Id.*

Similar reasoning should apply in the instance of medical malpractice. To the extent that a medical provider allegedly fails to meet some fiduciary duty *arising out of the caregiver-patient relationship* (as opposed to an extraneous duty as in the *Madden* case), that alleged breach of duty would fall within the scope of medical malpractice, rather than arising as a separate cause of action. The cause of action for medical malpractice already affords plaintiffs with sufficient opportunity to seek relief, and need not be expanded merely for the purpose of providing plaintiffs with a three-year statute of limitations.

In short, the Legislature has shown its intent that suits for medical malpractice against nursing homes must meet the requirements of § 15-1-36. Plaintiff's theory of the case would render § 15-1-36 a nullity, not only in nursing-home cases, but in a wide range of other medical-malpractice actions as well. That cannot comport with the intent of the Legislature, and would create a new variety of "fiduciary duty" which the courts of this State have never yet seen necessary or fit to recognize. The trial court's dismissal of Plaintiff's fiduciary-duty claim was proper and should be affirmed.

C. "Ordinary" Negligence.

Plaintiff claims that her suit sufficiently pleaded acts of ordinary negligence, which carry a three-year statute of limitations. However, she cites no authority on this issue. An appellant's "failure to cite any authority in support of a claim of error precludes this Court

from considering the specific claim on appeal." *Grenada Living Ctr., LLC v. Coleman*, 961 So. 2d 33, 37 (Miss. 2007).

Regardless, Plaintiff's allegations, while strategically alleged as "negligence," are obviously allegations that the nursing home failed in its duty *as a nursing home*. A jury could not determine proper hygiene standards for nursing-home care, required policies and procedures for a nursing home, sufficient staff for a nursing home, the quality and quantity of food and water to be provided by a nursing home (and in what manner), without expert testimony. This Court recently reversed summary judgment for nursing home staff where the record showed expert testimony that the staff breached the standard of care as regarded nutrition and hydration. *Estate of Guillotte v. Delta Health Group, Inc.*, 5 So. 3d 393, 399-402 (Miss. 2009). The detailed expert testimony reviewed by this Court in *Guillotte* makes it clear that issues of nutrition and hydration do indeed sound in medical malpractice, not ordinary negligence.

Everything alleged by Plaintiff as "mere" negligence is concerned with the alleged failure to care for Johnson and keep her safe — which is to say, concerned with the alleged failure to provide nursing-home care.[10]

The case most closely on point is one expressly concerned with when allegations go to "professional negligence" under § 15-1-36: *Bell v. West Harrison Hospital District*, 523

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[10]This is true for instance of the Complaint's allegations of insufficient staffing. A nursing home does not have a duty *to its residents* to provide *n* number of staff; a nursing home has a duty to provide adequate care (or better), and if it does not have enough staff, it may not be able to provide that care; but there is no violation merely due to insufficient staff if adequate care nonetheless is provided. Plaintiffs are free to present evidence of inadequate staffing where they can show a "causal nexus" to "substandard care," *Mariner Health Care, Inc. v. Estate of Edwards*, 964 So. 2d 1138, 1150 (Miss. 2007), but note the term "substandard": falling *below the standard of care*, i.e., professional negligence.

So. 2d 1031 (Miss. 1988). Where a nurse had not raised bed rails and the resident fell out of the bed, the plaintiffs alleged that this was merely "ordinary" negligence. *Bell*, 523 So. 2d at 1032-33. The circuit court and this Court both held otherwise:

> A nurse's decision as to whether or not bed rails should be utilized entails a degree of knowledge concerning the subject patient's condition, medication, history, etc. The rails themselves are **but another instrumentality by which the safety of patients may be insured**. This plainly calls for the rendition of a medical or professional service, even under the most basic rationale. The failure to raise Mrs. Bell's bed rails may have been a negligent omission on the part of the nurse, but if it were, **it was negligence inherently connected with the providing of a professional medical service so as to fall within the purview of § 15-1-36.**

Id. at 1033 (emphasis added). Nursing homes were not covered under § 15-1-36 at the time of *Bell*, but there can be no doubt that nutrition, hydration, and hygiene are "inherently connected with the providing of [the] professional medical service" of nursing-home care, which is now a category of "professional medical service" under the statute.

But Plaintiff seeks to have this Court rely upon various out-of-state precedents and Justice McRae's opinion for the Court in *Burton v. Choctaw County*, 730 So. 2d 1 (Miss. 1997). That case involved, not the statutory definition of "professional negligence" at § 15-1-36, but a "professional services exclusion" in the county's insurance policy, which was relevant for Mississippi Tort Claims Act purposes. *Burton*, 730 So. 2d at 5. Construing the policy against the drafter, *id.* at 8, the opinion held that allegations arising strictly out of a bath administered to a nursing-home resident by a nurse's aide were not so clearly based upon "nursing treatment" as to trigger the policy's exclusion. *Id.* at 4. It was this fact pattern that the passages quoted by Plaintiff addressed. *Burton* is a case about insurance coverage and nursing services, not about § 15-1-36 and nursing-home services.

Leaving aside the issue of whether *Burton* was correctly decided and whether Justice McRae's reasoning would be affirmed or overturned by the Court today, the fact remains that *Burton* is not on point with the present case, which is addressing not whether a bath is a "*nursing* treatment," but whether the wide-ranging allegations of the Complaint are not directed to services rendered by an *institution for the aged and infirm* as part of its professional services. And we see no way, taking the Complaint as true on its face, for Plaintiff to argue that they are not, for the reasons already stated above.

The would-be-persuasive authorities from other states cited by Plaintiff are easily distinguishable. The *Bailey* case (Br. at 22-23) is obviously inapposite, as nothing comparable to the resident's sneaking out of the facility and being struck by a car is alleged in the present Complaint, which confines itself to classic issues of nursing-home care. The Arkansas court held that an allegation of failure to supervise "merely requires the jury to decide whether the nursing home used ordinary care in furnishing Mr. Dowdy the care and attention reasonably required by his mental and physical condition." *Bailey v. Rose Care Ctr.*, 817 S.W.2d 412, 414-15 (Ark. 1991). Whether or not the case was correctly decided (and thus potentially persuasive to a Mississippi court), the situation is too different for it to be persuasive on the present facts.

Similarly, the allegations at issue in *McQuay v. Guntharp*, 986 S.W.2d 850 (Ark. 1999) (physician's fondling patient's breasts during examination held not medical malpractice) were simply too different to be applicable here,[11] and the discussion in *Advocat v. Sauer*, 111 S.W.3d 346, 365-66 (Ark. 2003), merely assumes the distinction between

[11]Likewise, the New York case quoted (not merely "cited") in *McQuay* dealt with a patient who "was assaulted by another patient while he was walking in a hospital corridor." *Borillo v. Beekman Downtown Hosp.*, 537 N.Y.S.2d 219, 220 (N.Y. App. Div. 1989).

negligence and malpractice without discussing or illuminating it. The *Alcoy* case from Virginia likewise involves a sexual assault upon a resident, completely distinguishable from the present case.

In the Illinois case of *Owens*, a particular state statute addressing "medical, hospital, or other *healing art* malpractice" (emphasis added) was at issue, and the intermediate court of appeals took into account various learned authorities' definition of the "healing arts" as "restoration to a normal physical or mental condition," and so forth. *Owens v. Manor Health Care Corp.*, 512 N.E.2d 820, 822-23 (Ill. Ct. App. 1987). Unfortunately for residents of institutions for the aged and infirm, age and infirmity are not conditions from which they can typically hope to be restored to a normal condition. *Owens* thus hinges upon statutory language peculiar to Illinois that is neither reflected in Miss. Code Ann. § 15-1-36 nor appropriate to the interpretation of our statute. Moreover, the particular allegation of inadequate supervision of a patient who fell from her wheelchair, whatever Illinois courts may hold, obviously raises the issue of what the nursing standard of care requires: must a resident in a wheelchair be monitored constantly? periodically? can he or she be restrained? Such are the questions which would require expert testimony to resolve.[12]

Where the allegations by the resident against the nursing home amount to a failure to provide the care required of a nursing home, those allegations sound in medical malpractice, not ordinary negligence. Plaintiff again seeks to eviscerate the medical-malpractice cause of action. The trial court's ruling to the contrary was correct and should be affirmed.

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[12]For instance, whereas a jury might commonsensically think that a resident in a wheelchair ought to be strapped down so as not to fall out, a nursing expert would be aware of federal regulations placing strict controls on the use of restraints.

CONCLUSION

For the reasons set forth above, the opinion and order of the Lafayette Circuit Court, dismissing with prejudice the Complaint below, should be affirmed.

Respectfully submitted, this the ***28th*** day of July, 2009.

Graceland Care Center of Oxford, LLC, Graceland Management Company, Inc., Graceland Holdings, L.P., Gracelands, Inc., Lafayette LTC, Inc., Katie M. Overstreet QTIP Trust, Katie M. Overstreet Trust, Larry Overstreet, and John B. "Ley" Falkner

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CERTIFICATE OF SERVICE

The undersigned counsel for Appellees does hereby certify that he has on this day caused to be sent via United States mail, postage prepaid, a true and complete copy of the above and foregoing document to:

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