

IN THE SUPREME COURT OF MISSISSIPPI

MARY SCAGGS

APPELLANT

VERSUS

NO. 2208-CA-00983

GPCH-GP, INC.

APPELLEE

**APPEAL FROM THE CIRCUIT COURT
OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT**

BRIEF OF APPELLEE, GPCH-GP, INC. d/b/a GARDEN PARK MEDICAL CENTER

ORAL ARGUMENT NOT REQUESTED

Respectfully submitted by:

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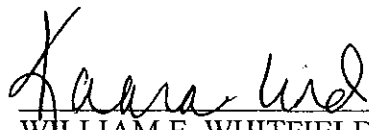
APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following people have an interest in the determination of this case. These representations are made in order that the Justices of the Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Mary Scaggs, Appellant
2. GPCH-GP, Inc. d/b/a Garden Park Medical Center, Appellee
3. Woodrow W. Pringle, III, Attorney for Appellant
4. William E. Whitfield, III, Attorney for Appellee
5. Kaara L. Lind, Attorney for Appellee
6. Honorable Jerry O. Terry, Circuit Court Judge

Respectfully submitted, this the 16th day of February, 2009.



WILLIAM E. WHITFIELD, III
KAARA L. LIND

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STATEMENT OF THE ISSUES

- I. *Whether the trial court properly granted the Motion to Dismiss the Amended Complaint by finding that the Plaintiff failed to file her Amended Complaint within the applicable statute of limitation provisions found in Miss. Code Ann. § 15-1-36 and that said Amended Complaint did not relate back to the date of the original Complaint due to the requirements of Miss. Civ. P. 15(c) not being met.*

STATEMENT OF THE CASE

A. Statement of Facts.

On April 12, 2004, the Appellant, Mary Scaggs [hereinafter "Scaggs"], filed the original Complaint in the First Judicial District of Harrison County, Mississippi, naming "Garden Park Medical Center" as the Defendant. (Complaint, RA, p.8). In her Complaint, Scaggs seeks damages against "Garden Park Medical Center" relating to an incident that occurred on March 14, 2002, while Scaggs, then a patient, was undergoing various medical procedures at Garden Park Medical Center. In particular, Scaggs claims that a technician/employee required her to sit on a procedure table which allegedly moved causing her to fall and injure her knee, back, and neck. Scaggs asserts that Garden Park Medical Center was negligent in several respects, including: (1) failing to secure the table it required her to climb onto; and, (2) failing to properly assist her. Scaggs alleges that she was injured as a proximate result of the negligence of Garden Park Medical Center and was entitled to damages for medical expenses, pain and suffering, and emotional anguish.

B. Course of Proceedings.

As previously stated, Scaggs filed the original Complaint on April 12, 2004 in the First Judicial District of Harrison County, Mississippi and named "Garden Park Medical Center" as the Defendant. (Complaint, RA, p.8). The name or identity of "GPCH-GP, Inc. d/b/a Garden

Park Medical Center” appears nowhere in the original Complaint.

On May 7, 2004, GPCH-GP, Inc. d/b/a Garden Park Medical Center (erroneously identified as “Garden Park Medical Center”) filed a Motion to Dismiss and/or for Summary Judgment in response to the original Complaint. (Motion, RA, p. 12). In this Motion to Dismiss, GPCH-GP, Inc. alerted Scaggs that she improperly named “Garden Park Medical Center” as the defendant, such that process and service of process was insufficient.¹ Additional arguments raised in the Motion to Dismiss included: (1) Expiration of the applicable two year medical negligence statute of limitations found in Miss. Code Ann. § 15-1-36; and the (b) Failure of the plaintiff in filing an affidavit of her attorney with the Complaint (“expert certificate”), certifying that the matter had been reviewed by an expert and found to be meritorious in accordance with Miss. Code Ann. § 11-1-58.

On May 17, 2004, Scaggs filed her Response to the Motion to Dismiss. (Response, RA, p. 15). In response to the argument that Scaggs sued the wrong entity, she requested (in a one sentence response request) that she “be allowed to amend her Complaint to name GPCH-GP, Inc. as the proper defendant in the event the Court concluded that the wrong entity had been named.” Scaggs, however, did not attach a proposed amended complaint to her Response and made no “affirmative effort” whatsoever to rectify this obvious error which was called to her attention in one of the earliest pleadings. Scaggs also did not file a formal motion seeking leave to amend the Complaint, nor did she notice or call up for hearing her request to amend the Complaint.

On August 6, 2004, the trial court heard the Motion to Dismiss filed by GPCH-GP, Inc.

¹ Scaggs issued the original Summons to “Garden Park Medical Center.” The Summons was not issued to GPCH-GP, Inc. d/b/a Garden Park Medical Center. Therefore, process and service of process was insufficient under Rules 4(h), 12(b)(4) and (5) of the Mississippi Rules of Civil Procedure.

(Hearing Notice, RA, p. 28). At no time following this hearing did Scaggs file a formal motion seeking leave to amend the Complaint. Nor did Scaggs ever attempt to serve GPCH-GP, Inc. with process.

On April 29, 2005, the trial court entered a Memorandum Order dismissing the Complaint, holding that the statute of limitations period had run on the Complaint pursuant to the provisions of Miss. Code Ann. § 15-1-36. (4-29-05 Order, RA, p. 30). The trial court also acknowledged that other issues were raised by GPCH-GP, Inc. in its Motion to Dismiss, including whether Scaggs sued the correct defendant by name. The trial court, however, reserved and withheld ruling on this particular issue apparently believing that the limitations issue was dispositive. Therefore, based only on the statute of limitations argument, the Trial Court dismissed the Complaint with prejudice.

On May 3, 2005, Scaggs appealed the Trial Court's Order to the Mississippi Supreme Court for review. (Notice Appeal, RA, p. 38). On June 15, 2006, the Mississippi Supreme Court reversed the dismissal, holding that Scaggs' time to file suit was extended sixty (60) days beyond the two-year statute anniversary of her alleged injuries which occurred on March 14, 2004. (Opinion, RA, p. 40). Based on the holding of this Court, the statute of limitations in this case expired on May 13, 2004. Since Scaggs filed her Complaint on April 12, 2004, the original Complaint was considered to be timely filed. However, this Court did not consider the erroneous nature of the named defendant, instead properly focusing its attention on the basis of the trial court's dismissal of the Complaint.

On July 6, 2006, the Mississippi Supreme Court issued a Mandate and the case was remanded back to the trial court for further proceedings. (Mandate, RA, p. 52). On July 11, 2006, GPCH-GP, Inc. d/b/a Garden Park Medical Center (erroneously identified as "Garden Park

Medical Center” in the Original Complaint) filed a Renewed Motion to Dismiss (Second) and/or for Summary Judgment on two grounds: (1) Insufficiency of process and insufficiency of service of process due to Scaggs improperly naming “Garden Park Medical Center” as the Defendant; and, (2) Failure of Scaggs filing an affidavit of counsel with the Complaint in accordance with Miss. Code Ann. § 11-1-58, asserting that the matter has been reviewed by an expert and found to be meritorious. (Renewed Motion, RA, p. 49).

On July 13, 2006, Scaggs filed her Response to this Renewed Motion to Dismiss, merely stating that she relies upon her previous Response to the previous Motion to Dismiss. (Response, RA, p. 53). Scaggs did not make any independent request in this Response to amend her Complaint. Scaggs did not attach a proposed Amended Complaint to the Response. Scaggs did not file a separate motion to amend the Complaint. Scaggs did not call up for hearing her prior request to amend the Complaint.

On August 24, 2007, the trial court heard the Renewed Motion to Dismiss (Second) and/or for Summary Judgment filed by GPCH-GP, Inc. d/b/a Garden Park Medical Center (erroneously identified as “Garden Park Medical Center” in the Complaint). (Hearing Notice, RA, p. 59). At this hearing, counsel for Scaggs requested, *ore tenus*, for permission to amend the Complaint. On September 7, 2007, the trial court issued an Order granting Scaggs permission to amend her Complaint in lieu of dismissal. (09-07-07 Order, RA, p. 63). On September 12, 2007, Scaggs filed her Amended Complaint, changing the name of the defendant from “Garden Park Medical Center” to GPCH-GP, Inc. (Amended Complaint, RA, p. 64).

On October 15, 2007, GPCH-GP, Inc. [“GPCH”] filed a Motion to Dismiss the Amended Complaint, asserting that it is entitled to dismissal of the claim due to the failure of Scaggs to file her Amended Complaint within the applicable statute of limitations provisions found in Miss.

Code Ann. § 15-1-36 and properly serve process. (Motion Dismiss II, RA, p. 67). GPCH pointed out that based on the guidelines provided by the Mississippi Supreme Court, the statute of limitations in this case expired on May 13, 2004 (i.e., two years and sixty days from March 14, 2002, the date of the incident in question). GPCH further pointed out that both the requests by Scaggs to amend the Complaint and the actual filing of the Amended Complaint were made after the expiration of the statute of limitations. In addition, GPCH argued that the Amended Complaint did not relate back to the date of the original Complaint because Scaggs could not meet the requirements of Miss. R. Civ. P. 15(c)(2). In particular, there was no mistake as to the identity of GPCH. First, in response to the original Complaint, GPCH filed a Motion to Dismiss on May 7, 2004 some six (6) days prior to the expiration of the statute of limitations and specifically alerted Scaggs to the fact that she improperly named “Garden Park Medical Center” as the defendant such that process and service of process was insufficient. Second, the attorney for Scaggs had previously instituted claims against GPCH in times past and knew full well, prior to the time of the filing of the original Complaint, the nature of the correct name of the hospital. Even after being advised of the proper identity of the defendant *via* the Motion to Dismiss filed six (6) days prior to the statute of limitations expiring, Scaggs and her attorney wholly failed to make any reasonably diligent effort to add GPCH as a defendant to the Complaint.

On May 2, 2008, the trial court heard oral arguments. (5-2-08 Hearing Transcript). Thereafter, on May 22, 2008, the trial court entered an Order of Dismissal, granting the Motion to Dismiss and ordering dismissal of the Amended Complaint on the grounds that it is time barred. (05-22-08 Order, RA, p. 91). In so ordering, the trial court found that Scaggs knew that “Garden Park Medical Center” was not the proper party defendant such that there was no mistake as to the identity of the hospital. The trial court further found that even if a “mistake” had been

made, Scaggs took no action to correct the matter in a timely fashion. For these reasons, the trial court found that the requirements of Miss. R. Civ. P. 15(c) had not been met. Scaggs has now appealed the May 22, 2008 decision of the Circuit Court.

SUMMARY OF THE ARGUMENT

The Circuit Court was correct in granting the Motion to Dismiss the Amended Complaint filed by GPCH-GP, Inc. d/b/a Garden Park Medical Center. This is a medical malpractice lawsuit arising out of an incident that occurred on March 14, 2002 when the Appellant, Mary Scaggs, was a patient at Garden Park Medical Center. Scaggs filed her Complaint on April 12, 2004 and erroneously named "Garden Park Medical Center" as the defendant. The correct name of this hospital facility is "GPCH-GP, Inc." d/b/a Garden Park Medical Center. Scaggs was timely notified of her mistake when GPCH filed its Motion to Dismiss the Complaint on May 7, 2004. Moreover, counsel for Scaggs was and had been fully aware of the fact that the GPCH-GP, Inc. was the correct identity of the hospital both because he was told in the Motion to Dismiss the Complaint, and had actually sued this hospital previously where this fact was known. Despite being well informed that the identify of the hospital was incorrect, Scaggs took no action for over three years to address this error other than to give passing reference to a request to amend her Complaint in her earliest response to GPCH's Motion to Dismiss. Because Scaggs waited until August 24, 2007 to actually pursue any relief in this regard; i.e., seeking actual permission to amend her Complaint, GPCH asserted, and the trial court correct agreed, that the Amended Complaint should be dismissed with prejudice as the "relation back doctrine" does not apply and the statute of limitations has expired in this matter.

STANDARD OF REVIEW

A Rule 12(b)(6) Motion to Dismiss based upon the expiration of the applicable statute of limitations raises an issue of law, and as such, review of an order granting same is *de novo*. Children's Medical Group, P.A. v. Phillips, 940 So. 2d 931, 933 ¶ 5 (Miss. 2006); Hood v. Mordecai, 900 So. 2d 370, 376-77 ¶ 18 (Miss. Ct. App. 2005); Newell v. Southern Jitney Jungle Co., 830 So. 2d 621, 622 ¶ 5 (Miss. 2002). "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 [her] claim." Lang v. Bay St. Louis/Waveland Sch. Dist., 764 So. 2d 1234 (Miss. 1999) (citing T.M. v. Noblitt, 650 So. 2d 1340, 1342 (Miss. 1995)); see also, Miss. R. Civ. P. 12(b)(6) cmt. (to grant a Rule 12(b)(6) motion to dismiss, "there must appear to a certainty that the plaintiff is entitled to no relief under any set of facts that could be proved in support of the claim"). On appeal, the ruling of the trial court will not be disturbed unless it is manifestly wrong, clearly erroneous, or an erroneous legal standard was applied. Bell v. City of Bay St. Louis, 467 So. 2d 657, 661 (Miss. 1985).

ARGUMENT

I. TRIAL COURT DID NOT ERR IN DISMISSING THE AMENDED COMPLAINT.

The trial court correctly dismissed the Amended Complaint as time barred because the requirements of Miss. R. Civ. P. 15(c) were not met.

A. The Amended Complaint Was Untimely Filed.

Scaggs alleges she was injured on March 14, 2002. Applying the medical negligence statute of limitations, Scaggs had two years from March 14, 2002 in which to commence an action (actually to submit her “notice of claim”) based on the alleged malpractice. Miss. Code Ann. § 15-1-36(2). Scaggs was also required to provide at least sixty (60) days’ prior written notice of her intent to begin the lawsuit. Miss. Code Ann. § 15-1-36(15). Scaggs provided two separate notices of her intent to file a claim – the first on December 10, 2002, the second on April 14, 2004. By providing the requisite notice of intent to sue, Scaggs’ time to file suit was extended sixty (60) days past the two-year anniversary of her alleged injuries. Scaggs vs. GPCH-GP, Inc., 931 So. 2d 1274 (Miss. 2006).

Applying these principles, Scaggs had until May 13, 2004 (2 years plus 60 days) to file her Complaint. Scaggs filed her original Complaint on April 12, 2004, which was admittedly within the limitations period established by the Legislature-as construed by the Court.

(Complaint, RA, p. 8). However, because the original Complaint and Summons incorrectly named “Garden Park Medical Center” as the defendant, the trial court never obtained personal jurisdiction over the correct entity, GPCH-GP, Inc. d/b/a Garden Park Medical Center.

(Complaint, RA, p. 8; Summons, RA, p. 10). For the trial court to have obtained personal jurisdiction, it was necessary for Scaggs to **timely** amend her Complaint to name GPCH-GP, Inc. as the correct defendant and serve it with process in accordance with Rule 4 of the Mississippi

Rules of Civil Procedure.

Scaggs was advised on May 7, 2004 that she incorrectly named “Garden Park Medical Center” as the defendant. (Motion Dismiss, p. 12). Because the statute limitations and notice period would expire on May 13, 2004, Scaggs, at that time, had six (6) days to file an amended complaint. Scaggs took no action whatsoever during these six (6) days. Instead, Scaggs waited years later until August 24, 2007 to seek permission from the trial court to amend the Complaint. The Amended Complaint was thereafter filed on September 12, 2007. (Amended Complaint, RA, p. 64). The Amended Complaint was filed well after the statute of limitations expired and well over three (3) years and three (3) months after being advised that she sued the wrong defendant.

Inasmuch as Scaggs did not file the Amended Complaint or serve process on GPCH-GP, Inc. on or before May 13, 2004, Scaggs’ claims against GPCH expired and were barred by the two-year statute of limitations. The position of GPCH is supported by Curry v. Turner, 832 So. 2d 508 (Miss. 2002), a case in which the Mississippi Supreme Court held that “if an amended complaint is filed after the statute of limitations has run – regardless of when the motion to amend was made – the statute of limitations bars suits against newly named defendants.” Id. at 511.

For these reasons, the trial court correctly found that the Amended Complaint was filed well after the expiration of the medical negligence statute of limitations.

B. The Amended Complaint Must Relate Back To Be Timely.

Scaggs argues that the filing of the Amended Complaint on September 12, 2007 relates back in time to the filing of the original Complaint on April 12, 2004, meaning that the case would be treated as if GPCH-GP, Inc. d/b/a Garden Park Medical Center was named as a

defendant before the expiration of the statute of limitations. An amended pleading which adds a new party² against whom a claim is asserted relates back to the date of the original pleading under Mississippi Rule Civil Procedure 15(c) only when certain requirements are met. Miss. R. Civ. P. 15(c). This Rule provides:

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by Rule 4(h) for service of the summons and complaint, the party to be brought in by amendment:

(1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining the party's defense on the merits, and

(2) knew or should have known that, but for a mistake concerning the identity of the property party, the action would have been brought against the party. An amendment pursuant to Rule 9(h) is not an amendment changing the party against whom a claim is asserted and such amendment relates back to the date of the original pleading.

Miss. R. Civ. P. 15(c).

Rule 15 clearly applies to the instant case because the Amended Complaint adds and essentially changed (not substituted) the named defendant from "Garden Park Medical Center" to "GPCH-GP, Inc. d/b/a Garden Park Medical Center." Miss. R. Civ. P. 15 cmt. For the Amended Complaint to relate back to the date she filed the original Complaint, the following three requirements must be met: (1) the claim in the Amended Complaint must arise out of the same conduct, transaction or occurrence as that set forth in the original Complaint; (2) GPCH must have received notice of the action within 120 days of the original Complaint; and, (3) GPCH

²

Because Scaggs did not initially sue "fictitious party" defendants, she cannot be said to have "substituted" a party under the definition of "substitution" under the Rules. Rather, Scaggs is "adding" a brand new party under the provisions of Miss. R. Civ. P. 15(c).

must have or should have known that an action would be brought against it within the 120 days unless a mistake existed as to the party's identity. Bedford Health Properties, LLC v. Estate of Williams, 946 So. 2d 335, 345 (Miss. 2006).

GPCH has not disputed that the "same conduct, transaction, or occurrence" requirement is met in this case. This is because both the original Complaint and the Amended Complaint refer to the same March 14, 2002 incident. With respect to the second requirement, the question is whether GPCH received sufficient notice within 120 days after the filing of the Complaint, so that it would not be prejudiced in maintaining its defense on the merits. GPCH initially took issue with this second requirement. However, at the time of the May 2, 2008 hearing, GPCH stated it did not dispute that it knew enough information within 120 days of the original Complaint that it would not have suffered prejudice to be named a party. (05-02-08 Hearing Transcript, pp. 25, 34-35). It is the third requirement of Rule 15(c) that GPCH disputes. The question is whether, but for a mistake on the part of Scaggs, GPCH knew, or should have known, that an action would be brought against it. GPCH asserted, and the trial court correctly agreed, that there was no mistake on either the part of Scaggs or her counsel as to its identity.

II. APPELLANT'S ARGUMENT FAILS TO ADDRESS THE BASIS FOR THE DISMISSAL OF THE AMENDED COMPLAINT.

The argument raised by Scaggs in this appeal is not in dispute and in fact, was not the basis for the trial court dismissing the Amended Complaint in its May 22, 2008 Order and Dismissal. The trial court dismissed the Amended Complaint because it was filed well over three years after the expiration of the medical negligence statute of limitations. (5-22-08 Order, RA, p. 91). The trial court found that the Amended Complaint did not relate back to the date of filing of the original Complaint under Miss. R. Civ. P. 15(c) because there was no mistake by

Scaggs or her attorney concerning the identity of GPCH. Miss. R. Civ. P. 15(c)(2). The trial court further found that even assuming a “mistake” was made, Scaggs took no action to correct the identity of GPCH in a timely fashion even though there was time to do so prior to the expiration of the statute of limitations. It was for these reasons that the trial court dismissed the Amended Complaint.

In this appeal, however, Scaggs appears to argue that the Amended Complaint should relate back under Rule 15(c)(1) because GPCH “received such notice of the institution of the action that the party will not be prejudiced in maintaining the party’s defense on the merits.” Miss. R. Civ. P. 15(c)(1). To support her argument, Scaggs cites to Meiger v. Pearl River County, 986 So. 2d 1025 (Miss. Ct. App. 2008), a case in which the Court of Appeals noted that the plaintiff mistakenly named Pearl River County Sheriff’s Department as the defendant as opposed to Pearl River County in accordance with the Mississippi Tort Claims Act. The Court of Appeals in Meiger felt a mistake had been made in the identity of the defendant such that the focus of the argument was on whether Pearl River County received notice within 120 days of the original complaint being filed; i.e., the second requirement of Rule 15(c). Thus, the third requirement regarding mistake was not an issue before the Court of Appeals. The same cannot be said for the present appeal and therefore, Meiger is inapplicable.³

3

Meiger is also distinguishable because in that case, there was no issue as to whether the plaintiff made a reasonably diligent effort to add Pearl River County to the complaint sooner than she did. In Meiger, the defendant filed a motion to dismiss on March 15, 2006 and advised the plaintiff of the incorrect name. On March 28, 2006, which was less than two weeks later, the plaintiff filed a motion to amend the complaint. In the present case, however, Scaggs did not make the same diligent effort to amend, as will be further discussed herein.

III. TRIAL COURT CORRECTLY FOUND THERE TO BE NO MISTAKE IN THE IDENTITY OF GPCH.

As to the third requirement for relation back found in Miss. R. Civ. P. 15(c)(2), the question is whether, but for a “mistake” on the part of Scaggs, GPCH knew, or should have known, that an action would be brought against it. If the answer is in the negative, the Amended Complaint should not relate back to the date of the original Complaint, such that the lawsuit is time-barred by the medical negligence statute of limitations.

The Mississippi Supreme Court has held that the purpose of the third requirement of Rule 15(c) “‘is to allow some leeway to a party who made a mistake, so long as the party does what is required within the time period under the rule.’” Bedford Health Properties, LLC, 946 So. 2d at 352 (quoting Ralph Walker, Inc. v. Gallagher, 926 So. 2d 890, 896 (Miss. 2006)). In Wilner vs. White, 929 So. 2d 315 (Miss. 2006), the Mississippi Supreme Court examined the Rule 15(c) federal counterpart, Fed. R. Civ. P. 15(c)(3)(B), and found that the United States Supreme Court noted this subsection to apply “only in cases involving ‘a mistake concerning the identity of the proper party.’” Id. at 323-24 (quoting Nelson v. Adams USA, Inc., 529 U.S. 460, 467 (2000)).

In Wilner, the plaintiff alleged that following a diagnostic laparoscopy performed by Dr. Neil White at Singing River Hospital on January 27, 1997, she was diagnosed with compression neuropathy. Wilner, 929 So. 2d at 317. The plaintiff filed suit against Singing River Hospital and a nurse on February 12, 1998. Id. Exactly two years after the laparoscopy and one year after the named defendants filed responsive pleadings, the plaintiff, without leave of court, filed an amended complaint on January 27, 1999 naming four additional defendants, including Dr. White and Gulf Coast OB/GYN, P.A. Id. at 317-18. On the same day that the plaintiff filed the amended complaint, she also filed a motion for leave of court to amend the complaint. Id. at 318.

The trial court denied the plaintiff's motion for leave to amend and dismissed the putative amended complaint. Id. The trial court also found that the putative amended complaint could not relate back to the original complaint. Id.

On appeal, the Mississippi Supreme Court found that the plaintiff failed to meet the Rule 15(c)(2) test. Id. at 323. This is because there was no mistake on the part of the plaintiff concerning the identity of Dr. White. Id. at 324. The Court also found that the plaintiff failed to make a "diligent effort" to add Dr. White's name to the complaint sooner than she did. Id. The Court pointed out that Dr. White's name appeared in the body of the original Complaint. Id. Moreover, the plaintiff admitted that months before she filed the motion to amend, she was well aware of the possibility of a claim she might have against Dr. White. Id. Based on these particular facts, the Court found that the amended complaint could not be treated as an original complaint such that the trial court properly dismissed the putative amended complaint. Id.

Like the facts in Wilner, there was no mistake as to the identity of GPCH-GP, Inc. d/b/a Garden Park Medical Center during the statute of limitations or 120 days after the statute of limitations ran. Scaggs filed the Complaint on April 12, 2004 against "Garden Park Medical Center." (Complaint, RA, p. 8). GPCH immediately filed a Motion to Dismiss the Complaint on May 7, 2004, putting Scaggs on notice that she incorrectly named "Garden Park Medical Center" as the defendant. (Motion Dismiss, RA, p. 12). This notification occurred prior to the expiration of the statute of limitations. ^{May 13, 2004} In its Motion to Dismiss, as well as at the hearing, GPCH pointed out that the attorney for Scaggs was also well aware that GPCH-GP, Inc. d/b/a Garden Park Medical Center was the correct name of the hospital based on prior lawsuits in which he was counsel of record. (Exhibit "A" to Motion Dismiss II, RA, p. 78). Based on these facts, Scaggs cannot attempt to assert that a mistake was made regarding the correct identity of the hospital and

simply did not exercise “reasonable diligence” in pursuing any amendment to correct this error. It was as if counsel was simply content to let the clearly erroneous Complaint fester while other things were addressed. .

For all the foregoing reasons, the trial court correctly found that there was no mistake concerning the identity of GPCH, thereby resulting in a dismissal of the Amended Complaint due to the expiration of the statute of limitations.

IV. TRIAL COURT CORRECTLY FOUND THERE TO BE NO DILIGENT EFFORT ON THE PART OF SCAGGS TO ADD GPCH AS A PARTY.

In addition, and like the plaintiff in Wilner, Scaggs failed to make a reasonably diligent effort to add GPCH’s name to the Complaint sooner than she did. As discussed above, Scaggs was notified of the proper name on May 7, 2004. Scaggs, however, took no action whatsoever to amend the Complaint until August 24, 2007, when the trial court heard the second Motion to Dismiss filed by GPCH. This was well over three years after having received notice. It can hardly be said that Scaggs was reasonably diligent in amending her Complaint and simply cannot meet any definition of “diligence” that could be found in case law in Mississippi.

For these reasons as well, the trial court correctly found that even assuming a “mistake” was made as to the identity of GPCH, Scaggs did not take action to correct the matter in a reasonably diligent, timely fashion, such that the Amended Complaint does not relate back to the date of the original Complaint.

CONCLUSION

For all the foregoing reasons, this Court should affirm the trial court’s Order of Dismissal on the grounds that the two-year limitations period of Miss. Code Ann. § 15-1-36 expired prior to filing of the Amended Complaint and that the Amended Complaint does not relate back to the

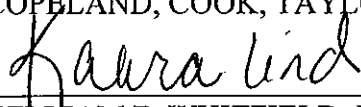
date of the original Complaint.

Respectfully submitted,

GPCH-GP, INC. d/b/a
GARDEN PARK MEDICAL CENTER

BY: COPELAND, COOK, TAYLOR & BUSH, P.A.

BY:



WILLIAM E. WHITFIELD, III

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CERTIFICATE OF SERVICE

I, undersigned counsel, of the law firm of Copeland, Cook, Taylor & Bush, P.A., do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the within and foregoing Appellee's Brief to the following at their record mailing addresses:

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Supreme Court of Mississippi
Post Office Box 117
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Woodrow W. Pringle, III, Esq.
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Hon. Jerry O. Terry
Harrison County Circuit Court
P.O. Box 1461
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This, the 16th day of February, 2008.



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