IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO.: 2008-IA-01233-SCT

ROGER COLLINS, M.D. AND
LEFLEUR FAMILY MEDICAL CLINIC **APPELLANTS/PETITIONERS**

vs.

JEANNE HOLMES HICKS **APPELLEE/RESPONDENT**

REPLY BRIEF OF APPELLANTS

INTERLOCUTORY APPEAL FROM DECISION OF THE
CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI
CIVIL ACTION NO. 251-02-1171 CIV

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUE

Whether Jeanne Holmes Hicks is entitled to go forward with her case despite the fact that she did not file suit against Dr. Collins or LeFleur Family Medical Clinic for allegedly causing her addictions until more than two (2) years after the date she knew that she was addicted to pain medication as evidenced by her words (in her sworn deposition) and by her actions (in obtaining multiple pain medications from multiple doctors through deception in violation of MISS. CODE ANN. § 41-29-144).

INTRODUCTION

Appellee/Respondent Jeanne Holmes Hicks suffered from a severe cervical condition that ultimately required surgery. The first surgery by Dr. Lynn Stringer on October 5, 1999, did not relieve her pain, and she underwent a second surgery by Dr. Robert A. McGuire, Jr., on January 23, 2001, because the graft at her C5-6 from her first surgery had collapsed and because she had a kyphotic deformity and compensatory hyperlordosis at the C6-7. Appellant/Petitioner Roger Collins, M.D., treated Ms. Hicks' severe pain problems during this time, prescribing OxyContin and other pain medicine. These medicines were appropriate given her medical condition and level of pain.

Unknown to Dr. Collins, however, Ms. Hicks was obtaining pain medicine from multiple other physicians. Ms. Hicks first saw Dr. McGuire on August 25, 2000. According to her sworn deposition testimony (which she never corrected or contradicted), she admitted that she was addicted to OxyContin before her first visit with Dr. McGuire and had even tried (with her husband's help) to detoxify herself. [R. 111 (page 126, line 14 – page 127, line 1); *see also* Appendix 1 to Brief of Appellants]. Both before and after this, Ms. Hicks obtained narcotics from various physicians including Dr. Collins through various means of deception (i.e., by obtaining pain medicine from various doctors, including Dr. Collins, without informing them of the narcotic prescriptions she was receiving from other physicians; seeking pain medicine from other doctors after being refused a prescription for pain medicine by one; and by continuing to seek prescriptions for OxyContin after she determined she was addicted to that medication and without informing Dr. Collins of her addiction), all in violation of MISS. CODE ANN. § 41-29-144.

Nonetheless, more than two years after concluding she had become addicted as a result of the prescriptions she had improperly obtained, Ms. Hicks filed a suit in the Circuit Court of the First Judicial District of Hinds County, Mississippi, against Dr. Collins and LeFleur Family Medical

Clinic and others,[1] in which she alleged that the conduct of the various defendants had resulted in her addiction to OxyContin. [R. 4, 9-15, 22-25]. During her deposition, Ms. Hicks admitted her own wrongful conduct in obtaining narcotics through deception in violation of MISS. STAT. ANN. § 41-29-144.

Dr. Collins moved the trial court for summary judgment on the following separate and independent grounds, either of which would have warranted dismissal of Ms. Hicks' claims against Dr. Collins: (1) that Ms. Hicks' claims against Dr. Collins were time-barred by MISS. CODE ANN. § 15-1-36, and (2) that Ms. Hicks' claims against him were barred by her own unlawful conduct in violation of MISS. CODE ANN. § 41-29-144. [R. 73]. The trial Court denied Dr. Collins' motion for summary judgment by an order entered on June 26, 2008. [R. 132].

Thereafter, Dr. Collins and LeFleur Family Medical Clinic petitioned this Court for permission to file an interlocutory appeal from this ruling, which was granted. Dr. Collins and LeFleur Family Medical Clinic seek an order from this Court reversing the June 26, 2008 Order of the trial court denying Dr. Collins' motion for summary judgment and rendering a judgment dismissing Dr. Collins and LeFleur Family Medical Clinic[2] from this action with prejudice.

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[1]Ms. Hicks also sued Purdue Pharma L.P.; Purdue Pharma, Inc.; The Purdue Frederick Co.; Abbott Laboratories; Abbott Laboratories, Inc.; and Walgreen Company, but no other physician. [R. 4]. Abbott Laboratories and Abbott Laboratories, Inc., were dismissed from this action by order of the trial court on April 19, 2005. Ms. Hicks recently settled her claims against the remaining defendants.

[2] Dr. Collins is employed by LeFleur Family Medical Clinic. If the claims against Dr. Collins are dismissed, the claims against LeFleur Family Medical Clinic should also be dismissed from this action per the Court's holding in *J & J Timber Co. v. Broome*, 932 So. 2d 1, 6 (¶6) (Miss. 2006) ("Where a party's suit against an employer is based on *respondeat superior*, the vicarious liability claim itself is extinguished when the solely negligent employee is released.") Since dismissal of Dr. Collins effectively dismisses LeFleur Family Medical Clinic, only Dr. Collins will be referenced throughout this brief.

SUMMARY OF THE ARGUMENT

The Trial Court's decision to deny Dr. Collins' Motion for Summary was erroneous as Mississippi Supreme Court precedent and Mississippi law mandated the dismissal of Ms. Hicks' claims on more than one grounds. First, Ms. Hicks' claims were barred by the statue of limitations found in MISS. CODE ANN. § 15-1-36 because she filed suit against Appellants more than two years after she became aware of her addiction to OxyContin. *See Sutherland v. Ritter*, 959 So. 2d 1004 (Miss. 2007). The statute of limitations was not tolled by the discovery rule, the Continuing Tort Doctrine, or Ms. Hicks unsupported claims of incompetence. Second, Ms. Hicks's own undisputed wrongful conduct in obtaining narcotics through deception in violation of MISS. STAT. ANN. § 41-29-144 barred her from pursuing her claims against Appellants. *See Price v. Purdue Pharma Co.*, 920 So. 2d 479 (Miss. 2006).

Ms. Hicks failed to demonstrate before the lower court that a genuine issue of material fact existed as to when she became aware of her addiction or as to her conduct in obtaining OxyContin by fraud or deception. Summary judgment was clearly proper in this case as to each of these grounds individually. However, it cannot be disputed that these grounds together required dismissal of Ms. Hicks' claims against Dr. Collins and LeFleur Family Medical Clinic as a matter of law. The trial court's denial of Dr. Collins' motion for summary judgment directly contradicted Mississippi Supreme Court precedent and was reversible error. Accordingly, Appellants respectfully request that this Court render a judgment dismissing the claims of Ms. Hicks against Dr. Collins and LeFleur Family Medical Clinic with prejudice.

ARGUMENT

I. Standard of Review

The appropriate standard of review is *de novo* because this appeal involves both a motion for summary judgment and the appeal of a question of law (i.e., the statute of limitations). *McMillan v. Rodriguez*, 823 So. 2d 1173, 1176-1177 (Miss. 2002); *Sheriff v. Morris*, 767 So. 2d 1062, 1064 (¶10) (Miss. Ct. App. 2006). Summary judgment was proper in this case because the pleadings and discovery show that there is no genuine issue of material fact regarding Ms. Hicks' failure to timely file suit within the applicable statute of limitation or the fact that her own wrongful conduct bars her claims against Dr. Collins and LeFleur Family Medical Clinic. *See* M.R.C.P. 56(c); *Galloway v. Travelers Ins. Co.*, 515 So. 2d 678, 682 (Miss. 1987); *Brown v. Credit Ctr., Inc.*, 444 So. 2d 358, 362 (Miss. 1983). Ms. Hicks' "mere allegations" of facts contrary to her own testimony were not sufficient to defeat Appellants' motion for summary judgment. *See Gorman-Rupp Co. v. Hall*, 908 So. 2d 749, 757 (Miss. 2005). As Ms. Hicks was unable to establish a genuine issue of material fact on either of these issues sufficient to withstand summary judgment, the Trial Court erred by denying Appellants summary judgment. *See Spartan Foods Sys., Inc. v. American Nat'l Ins. Co.*, 582 So. 2d 399, 402 (Miss. 1991).

II. Ms. Hicks' claims are barred because she did not file suit until more than two (2) years after the date she admitted knowing that she was addicted to pain medication she obtained from Dr. Collins, especially given the fact she was obtaining multiple pain medications from Dr. Collins and multiple other doctors through deception in violation of MISS. CODE ANN. § 41-29-144.

Ms. Hicks does not dispute that the statute of limitations applicable to her claim is MISSISSIPPI CODE ANNOTATED § 15-1-36(2), which required her to file suit within two years from the date that she became aware of the alleged negligence of Dr. Collins. The key date for the commencement of the statute of limitations is the date when the patient can be reasonably held to

have knowledge of (1) her injury, (2) its cause, and (3) the "causative relationship" between her injury and the physician's conduct or omission. *Smith v. Sanders*, 485 So. 2d 1051, 1052 (Miss. 1986). It is clear from the discovery and depositions in this case that Ms. Hicks had all of the required knowledge to commence the running of the statute of limitations more than two years before filing suit. As a result, her claims against Appellants are barred. *Jackson Clinic for Women v. Henley*, 965 So. 2d 643, 650 (¶15) (Miss. 2007) (patient provided initial attorney with list of allegedly negligent acts more than two years before filing suit); *Sutherland*, 959 So. 2d at 1009 (¶¶16-17) (patient admits knowing of relationship between injuries and drug prescribed by physician at time checking into drug rehabilitation facility more than two years prior to sending notice of claim); *Joiner v. Phillips*, 953 So. 2d 1123, 1126 (¶6) (Miss. 2007); *Powe v. Byrd*, 892 So. 2d 223, 227 (¶16) (Miss. 2004).

In her Brief of Appellee, Ms. Hicks does not dispute that she had knowledge of the cause (pain medication) of her alleged injury or the person allegedly responsible (Dr. Collins) more than two years before she filed suit. Thus, the second and third prongs of knowledge for commencement of the statute of limitations have been met. Ms. Hicks disputes only whether she had knowledge of her alleged injury (pain addiction) more than two years prior to filing suit.

Ms. Hicks accuses Appellants of relying on confusing testimony to support their argument that she knew she was addicted to OxyContin more than two years before filing suit. *See* Brief of Appellee, page 5. However, it is Ms. Hicks who attempts to convolute her clear testimony that she was aware of her addiction before her first visit to see Dr. McGuire on August 25, 2000. Ms. Hicks argues that because (1) she testified that she did not *believe* that she ever received another OxyContin

prescription after she went through withdrawls[3] and (2) her last OxyContin prescription from Dr. Collins was on September 6, 2000, her claims against Appellants must have been filed within the statute of limitations when her complaint was filed on September 6, 2002. Ms. Hicks had thirty days following her deposition to make corrections to it, but did not make any corrections at all. Moreover, Ms. Hicks did not provide an affidavit explaining or correcting her allegedly incorrect deposition testimony in opposition to Dr. Collins' Motion for Summary Judgment.[4] Instead, Ms. Hicks now relies on a snippet of testimony – in which she claims not to have gotten another prescription for OxyContin following her attempt to detox herself – taken out of context to support her allegation that her claims were timely filed. Her argument ignores her response to the very next question in her deposition, in which Ms. Hicks specifically stated:

> Q. Okay. All right. But **you feel comfortable in** [sic] **own mind, before you ever saw Dr. McGuire the first time, your recollection is you had already come to the conclusion you had a problem with OxyContin and you had actually even tried to detox yourself with your husband?**
>
> A. **Yes, sir.**

[R. 111 (page 126, line 14 – page 127, line 1); *see also* Appendix 1 to Brief of Appellants] (emphasis added). Ms. Hicks also ignores her own testimony earlier in her deposition in which she specifically testified that she continued to seek and accept prescriptions for OxyContin even after she was aware of her addiction and had tried to detoxify herself (with her husband's assistance). [R. 101 (page 87, lines 6-13)]. Ms. Hicks repeatedly testified in her deposition that she was aware of her addiction to OxyContin prior to August 25, 2000 (her first visit to Dr. McGuire). [R. 110 (page 124, line 13)

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[3]For this statement, Ms. Hicks quotes her testimony on page 126 of her deposition. [R. 111].

[4]Even if Ms. Hicks had provided an affidavit, she would not have been able to contradict her previous sworn testimony in this case. *Foldes v. Hancock Bank*, 554 So. 2d 319, 321 (Miss. 1989).

through R. 111 (page 125, line 10); *see also* Appendix 1 to Brief of Appellants]. Her testimony on this point is clear.

Ms. Hicks' attempts to muddy her unambiguous testimony are focused on the date she alleges she received her last prescription for OxyContin – September 6, 2000. She argues based on a convoluted amalgamation of testimony that her deposition testimony that she knew she was addicted to OxyContin prior to her first visit to Dr. McGuire cannot be true. She asserts that this is the case because that would mean that she had gone through withdrawals before getting her last prescription to OxyContin and that she had continued to see Dr. Collins following her withdrawals. *See* Brief of Appellee, page 4. Despite the fact that Ms. Hicks claims her deposition testimony was mistaken, she did not make any corrections to it during the thirty days following receipt of the transcript or by affidavit in response to Dr. Collins' Motion for Summary Judgment.

Once again, Ms. Hicks' own clear testimony refutes her argument. The date of her last prescription for OxyContin (September 6, 2000) is irrelevant for determining when the statute of limitations commenced because Ms. Hicks testified that she continued to seek OxyContin even after she became aware of her addiction.[5] Specifically, she testified:

> Q. Okay. The – once you decided that you were dependent or addicted, did you seek or accept any more prescriptions for OxyContin?
> A. Sure I did.
> Q. So even after you decided and tried this self-treatment idea, you continued to receive prescriptions for OxyContin?

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[5]Interestingly, this Court has already rejected a claim for injuries arising from a plaintiff's voluntary use of intoxicants even in a setting where the purveyor should have known that the plaintiff was already suffering from the intoxicants effects. In *Bridges ex rel. Bridges v. Park Place Entertainment*, 860 So. 2d 811, 818 (¶19) (Miss. 2003), this Court held that a plaintiff could not recover for injuries allegedly arising from his intoxicated state despite an allegation that the intoxicated state was caused by the conduct of the defendant in providing him intoxicants. Consequently, the September 6, 2000, prescription does not by itself create a claim. Ms. Hicks' claim is that Dr. Collins' caused the addiction which was clearly complete before the last prescription.

A. That's correct.

[R. 101 (page 87, lines 6-13)].

It is abundantly clear from Ms. Hicks' testimony, that Ms. Hicks knew she was addicted to OxyContin (i.e., had knowledge of her alleged injury) before her first visit to see Dr. McGuire on August 25, 2000. As this date was more than two years prior to the date she filed suit against Appellants, her claims against Dr. Collins and LeFleur Family Medical Clinic are barred by the two-year statute of limitations found in MISS. CODE ANN. § 15-1-36. The Trial Court's decision denying Dr. Collins' Motion for Summary Judgment was erroneous and should be reversed.

Ms. Hicks attempts to avoid the statute of limitations by arguing that her addiction caused her to suffer from the disability of unsoundness of mind, tolling the statute of limitations under MISS. CODE ANN. § 15-1-59. This argument is wholly without merit. Ms. Hicks presented no proof whatsoever to the lower court in response to Dr. Collins' motion for summary judgment which supported her claim that the statute of limitations should have been tolled due to her unsoundness of mind, nor does she present any now. Bare assertions in a brief cannot create a genuine issue of fact sufficient to withstand summary judgment. *Magen v. Transcontinental Gas Pipe Line Corp.*, 551 So. 2d 182, 186 (Miss. 1989). The record on appeal contains no evidence in support of Ms. Hicks' claim that she suffered from unsoundness of mind. This Court cannot rely on unproven allegations to uphold the Trial Court's decision denying summary judgment where there are no genuine issues of fact. *Jacox v. Circus Circus Miss., Inc.*, 908 So.2d 181, 184 (¶6) (Miss. App. 2005). Ms. Hicks' unsupported claim that she was incompetent did not create a genuine issue of material fact sufficient to withstand summary judgment before the lower court, and does not now create one. *See Brumfield v. Lowe*, 744 So. 2d 383, 387-88 (¶22) (Miss. App. 1999) ("[T]he statute of limitations was not tolled for unsoundness of mind in this case because it was not proven").

Moreover, even if Ms. Hicks had presented some form of evidence to support this argument, she still cannot meet the test for proving incompetency sufficient to toll the statute of limitations. To support her claim of incompetence, Ms. Hicks argues Appellants' negligence in allegedly over medicating her and outlines the number of prescriptions she alleged received. Whether or not Ms. Hicks was addicted to OxyContin is not the test for incompetency. The test for determining whether she was so incompetent so as to toll the statute of limitations was set forth succinctly by the Mississippi Supreme Court in *Shippers Express v. Chapman*:

> [T]he test as to whether the claimant is so "mentally incompetent" as to toll the running of the statute of limitations, is this: Is his mind so unsound, or is he so weak in mind, or so imbecile, no matter from what cause, that he cannot manage the ordinary affairs of life?

364 So. 2d 1097, 1100 (Miss. 1978); *see also United States Fidelity & Guaranty Co.v. Conservatorship of Melson*, 809 So. 2d 647, 653 (¶23) (Miss. 2002); *Brumfield*, 744 So. 2d at 387 (¶20).

The Mississippi Court of Appeals' case of *Brumfield v. Lowe* demonstrates how this test is to be applied. In *Brumfield*, the Court of Appeals affirmed the trial court's decision that the statute of limitations was not tolled for the plaintiff, despite his claims of unsoundness of mind due to schizophrenia, because there was no evidence of incompetency. *Brumfield v. Lowe*, 744 So. 2d 383, 387-88 (¶22) (Miss. App. 1999). The trial court's decision was based on its finding that the statute of limitations was not tolled for the plaintiff was based on its finding that he was "capable of managing his own affairs," as evidenced by the fact that "'[h]e was married, had children, managed his own money, hired an attorney to file three lawsuits and testified very coherently and competently at his discovery depositions.'" *Brumfield*, 744 So. 2d at 387 (¶22).

Likewise, the uncontradicted evidence in the record shows that Ms. Hicks was not so unsound or weak of mind due to her addiction that she was unable to manage the ordinary affairs of her life. The evidence in the record shows just the opposite – Ms. Hicks was quite capable of managing her own affairs. Between September 24, 1999 (the date that she alleges in her complaint that Dr. Collins first prescribed OxyContin for her), and August 25, 2002 (two years after the date by which the plaintiff admits she knew she was addicted to OxyContin), Ms. Hicks married, cared for her disabled husband, cared for her daughter; and worked as a cashier and floor manager at McAlister's Gourmet Deli.[6] [R.116; R.84 (page 18, lines 3-4); R.104 (page 98, lines 12-16); R.107 (page 110, lines 22-25); and R.108 (page 114, lines 9-12)]. Obviously, Ms. Hicks was capable of and did manage her own affairs during this time period. Ms. Hicks' unsupported claims that she was incompetent do not create a genuine issue of material fact sufficient to allow her withstand summary judgment and reach a jury. *Magen*, 551 So. 2d at 186. Ms. Hicks has presented no evidence to support her claim that she suffered unsoundness of mind at all, much less unsoundness of mind sufficient to warrant a tolling of the statute of limitations. The trial court erred when it failed to grant Dr. Collins' motion for summary judgment. Its decision should be reversed and summary judgment rendered in Appellants' favor.

Ms. Hicks' next argument in an effort to avoid the statute of limitations is that Appellants' conduct was a continuing tort which extended the statute of limitations. This argument is also without merit. Although Ms. Hicks' injury (her addiction to OxyContin) occurred over a period of

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[6] Ms. Hicks was employed at McAlister's Gourmet Deli from September 1998 to July 2000. She quit her job there because she had a disagreement with the manager regarding the owner's instructions. [R.108 (page 113, lines 3-11)]. Ultimately, she was offered her job back by the owner of the deli, but chose not to return. [R.108 (page 113, lines 20-24)]. The fact that she was offered her job back after she quit indicates that Ms. Hicks must have been doing an adequate and capable job during her employment there – certainly not something one would expect of someone as unsound of mind as Ms. Hicks now claims she was.

time, this fact does not make the Continuing Tort Doctrine applicable to this case. "Continual ill effects from an identified unlawful act is insufficient to invoke the continuing tort doctrine." *Winters v. AmSouth Bank*, 964 So. 2d 595, 600 (¶19) (Miss. App. 2007). By her own admission in her deposition, Ms. Hicks was already addicted to OxyContin – and the alleged tort complete – prior to the date of her last prescription. Ms. Hicks' testimony provides an ascertainable date by which the alleged tort was completed, which was by at least the date of her appointment with Dr. McGuire on August 25, 2000. By that time, she had concluded that the prescription of pain medicine by Dr. Collins had caused her addiction. Accordingly, while the "ill effects" of Dr. Collins' alleged wrongful acts, i.e., her addiction, may have occurred over a period of time, Dr. Collins' alleged tort was complete by at least August 25, 2000, and her claim is barred by the statute of limitations. *See Id.* at 600 (¶20).

To hold otherwise would defeat the purpose of the Continuing Tort Doctrine as the Fifth Circuit found in the case of *Allgood v. R.J. Reynolds Tobacco Co.*, 80 F.3d 168, 170 (5th Cir. 1996). In *Allgood*, the plaintiffs sought recovery for the wrongful death of Samuel Allgood, a life long smoker who died from throat cancer related complications. *Allgood*, 80 F.3d at 169. The evidence showed that Allgood continued to smoke even after being told by his physician that he had emphysema and should stop. *Id.* at 170. Plaintiffs argued that the doctrine of continuing tort tolled the statute of limitations until "the tortious injury ceased – that is when Allgood stopped smoking." *Id.* The Court noted that Texas had applied the doctrine of continuing tort to a drug addiction case, but had "limited its application to cases where the causal relation between action and injury remained unknown to the plaintiff" because the rationale for the continuing tort doctrine would cease to be applicable once the plaintiff discovered his injury and its cause. *Id.* Applying this law, the Fifth

Circuit found that the Continuing Tort Doctrine did not apply to plaintiffs' claims because Allgood was aware of his injury and its cause before he stopped smoking. *Id.*

In the case at hand, Ms. Hicks admitted that she continued to seek and obtain prescriptions for OxyContin after she had determined that she was addicted to the drug. [R. 101 (page 87, lines 6-13)]. To allow her to extend the statute of limitations based upon the date of her last prescription for OxyContin as opposed to the date she admitted she was aware of her injury and its cause would completely defeat the purpose of the Continuing Tort Doctrine. Under Ms. Hicks' interpretation of the Continuing Tort Doctrine, there is no limit to how long a plaintiff could wait before suing for negligence in a drug addiction case. As long as she occasionally returns to the physician to get a prescription (and fails to disclose that she is addicted),[7] she can maintain her potential cause of action indefinitely. This would be patently unfair to physician defendants as it would allow plaintiffs to effectively set their own limitations period. The record is clear in this case. Ms. Hicks was aware of her addiction to OxyContin, its cause, and the person allegedly responsible by at least August 25, 2000. At that point, the statute of limitations began to run, and it expired on August 25, 2002 (before Ms. Hicks filed suit in this case). The Continuing Tort Doctrine cannot save her claims against Appellants.

Like her other arguments, Ms. Hicks' argument that her claim was tolled by the discovery rule is also meritless. In her deposition and pleadings, Ms. Hicks has admitted that she had knowledge of her injury (addiction), its cause (pain medication), and the person allegedly responsible for her injury (Dr. Collins) prior to August 25, 2000, which was more than two years before she filed suit. [R.110 (page 124, line 13) through R. 111 (page 125, line 10); R.111 (page 126, line 21– page

[7]Ms. Hicks' silence was fraud. *See Guastella v. Wardell*, 198 So. 2d 227, 230 (Miss. 1967) (fraud can be based in silence when there is a duty to speak).

or deception is an illegal act.[8] *Price,* 920 So. 2d at 484 (¶12). Ms. Hicks used subterfuge and deception to obtain multiple prescriptions for various controlled substances from multiple doctors. Moreover, she was silent about her addiction as she continued to seek prescriptions for OxyContin and other controlled substances. This conduct was immoral and illegal and the cause of her alleged damages. Despite that, she now seeks to benefit from her own wrongful conduct by suing the physician, who she deceived, to receive a financial windfall for the very injury she, herself, caused. This is not acceptable. Ms. Hicks should not be allowed to use her deception of Dr. Collins (and her other physicians whom she did not sue) to maintain an action for her own drug addiction.

Mississippi Courts, though a long line of precedent, have held that allowing plaintiffs to benefit from their own wrongful conduct is an affront to public policy. *See Parkinson v. Williamson*, 262 So. 2d 777 (Miss. 1972); *Smith v. Maryland Casualty Co.*, 172 So. 2d 574 (Miss. 1965); *Morrissey v. Bologna*, 123 So. 2d 537 (Miss. 1960); *Downing v. City of Jackson*, 24 So. 2d 661 (Miss. 1946); *Capps v. Postal Telegraph-Cable Co.*, 19 So. 2d 491 (Miss. 1944); *Western Union Tel. Co. v. McLaurin*, 66 So. 739 (Miss. 1914). The wrongful conduct varies in these cases, but the outcome is the same – the courts of this state will not aid a person whose cause of action directly results from her own immoral or illegal actions. *Price v. Purdue Pharma Co.*, 920 So. 2d 479, 486 (¶17).

There is a case which is directly on point, however – *Price v. Purdue Pharma Co.*, 920 So. 2d 479 (Miss. 2006). In *Price*, the Mississippi Supreme Court, in a nearly identical situation, applied

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[8]Ms. Hicks claims the statute of limitations did not run on her claims until after her last prescription for OxyContin. However, she admitted in her deposition that she continued to seek OxyContin even after she became aware of her addiction [R. 101 (page 87, lines 6-13)]. She continued to seek and obtain prescriptions for OxyContin from Dr. Collins while purposefully neglecting to tell him that she had become addicted to the drug. *See Guastella v. Wardell*, 198 So. 2d 227, 230 (Miss. 1967) (fraud by silence occurs when one party to a transaction has a duty to speak but fails to do so). Ms. Hicks should not be allowed to used her own deceptive acts as the basis on which she avoids the statute of limitations.

the Wrongful Conduct Rule to prohibit the plaintiff from suing the same physician and others for his drug addiction. Contrary to Ms. Hicks' assertion in her brief, a review of the facts in the case at hand and those in *Price* shows that the two cases are factually analogous. Price sued pharmaceutical companies, pharmacies, Dr. Collins, and other doctors alleging negligence in the manufacture, prescription, and distribution of OxyContin, which caused him injury (i.e., drug addiction). *Price*, 920 So. 2d at 481-482 (¶3). Likewise, Ms. Hicks filed suit against pharmaceutical companies, pharmacies, and Dr. Collins and LeFleur Family Medical Clinic alleging that they were negligent in the manufacture, prescription, and distribution of OxyContin, which allegedly caused her injury (i.e., drug addiction). [R.4]. The evidence revealed that Price had seen ten (10) different physicians to obtain OxyContin and had his prescriptions filled at seven (7) different pharmacies. *Id.* at 482 (¶6). In the case at hand, Ms. Hicks has admitted that she received prescriptions for various controlled substances from ten (10) different physicians, which she had filled at eight (8) different pharmacies. [R. 118-120, 124-125; *see also* Appendix 2 attached to Brief of Appellants]; *see also* [R. 87-95, 97]. "Price never informed Dr. Collins that he was seeing other doctors and obtaining other prescriptions." *Id.* Likewise, Ms. Hicks admitted in her deposition that she kept the fact that she was getting narcotics from other doctors from Dr. Collins. [R. 93 (page 54, lines 18-20); R. 94 (page 57, lines 17-19); R. 94 (page 60, lines 5-7); R. 95 (page 61, lines 11-18); *see also* Appendix 1 attached to Brief of Appellants].

Ms. Hicks makes much of the fact that Price was attempting to obtain OxyContin from various doctors while she claims she only received OxyContin from Dr. Collins. This minor distinction is irrelevant. In her complaint, Ms. Hicks alleges that OxyContin "along with other narcotic and addictive drugs were prescribed to her by Defendants . . ., all at a time during which Defendants knew or should have known that Plaintiff was or would become, addicted to such

narcotics when prescribed, dispensed and sold to Plaintiff . . . ." [R.9]. Based on the allegations of her complaint, the fact that she was seeking various controlled substances, as opposed to just OxyContin, from multiple doctors makes no difference. She is alleging that Appellants caused her to become addicted to various narcotics, not just OxyContin, although OxyContin is the main focus of her complaint.

Ms. Hicks' claim that she did nothing to cause her own addiction to pain medication is disingenuous. In addition to admitting how she deceived her doctors regarding the controlled substances she was taking, she also admitted in detail in her deposition her improper use of narcotics. Specifically, Ms. Hicks admitted that

(1) she took pain medication, including OxyContin, in larger doses than prescribed hundreds of times;
(2) took pain medication, including OxyContin, more frequently than prescribed;
(3) sought pain medication from other health care providers when she was refused pain medication by one; and
(4) altered OxyContin by crushing it or chewing it up to get it into her system faster.

[R. 99 (page 78, line 8 – page 79, line 7; page 80, lines 6-12); R. 100 (page 83, lines 8-25); *see also* Appendix 1]. Ms. Hicks' conduct was immoral and illegal, and she should not be allowed to benefit from it.

Price was directly on point to the case at hand and mandated that the lower court grant Dr. Collins' Motion for Summary Judgment. Ms. Hicks' own transgressions caused her addiction to OxyContin. She is barred by the Wrongful Conduct Rule from suing Dr. Collins and LeFleur Family Medical Clinic for the very injury her own actions caused. The trial court erred by ignoring this precedent and denying Dr. Collins' Motion for Summary Judgment.

CONCLUSION

The trial court committed reversible error by denying Dr. Collins' motion for summary judgment. The dismissal of Ms. Hicks' claims against Dr. Collins and LeFleur Family Medical Clinic was mandated by Mississippi law and Supreme Court precedent on two separate grounds – the statute of limitations and the Wrongful Conduct Rule. Either these grounds alone would have been sufficient to bar Ms. Hicks' claims, but taken together they most certainly required dismissal of her claims against Appellants. Ms. Hicks failed to file suit against Appellants within the statute of limitations found in MISS. CODE ANN. § 15-1-36, and as a result, her claims are barred. By denying Dr. Collins' Motion for Summary Judgment, the Trial Court's decision ignored the Mississippi Supreme precedent found in *Sutherland v. Ritter*. *Sutherland* mandated the dismissal of Ms. Hicks' claims because Ms. Hicks, like the plaintiff in *Sutherland*, "knew who, when, how, and by what [s]he had been injured" more than two years before she filed suit against appellants. 959 So. 2d at1009 (¶¶16-17). Under the law, Ms. Hicks was not incompetent or so unsound of mind so as to toll the statute of limitations. The evidence in the record shows that she was perfectly capable of managing her own affairs and was capable of maintaining an action had she so desired. Further, the Continuing Tort Doctrine does not apply to this case because while Ms. Hicks' alleged injury was continual, there was an ascertainable date upon which the alleged tort became complete. Nor does the discovery rule save her claims from the statute of limitations because Ms. Hicks has admitted that she was aware of her injury, its cause, and the person who alleged caused it more than two years prior to filing suit.

Moreover, Ms. Hicks' own wrongful conduct in obtaining narcotics through deception in violation of MISS. CODE ANN. § 41-29-144 also barred her claims. The Mississippi Supreme Court precedent found in *Price v. Purdue Pharma Co.*, mandated dismissal of Ms. Hicks' claims. Ms.

CERTIFICATE OF SERVICE

I do hereby certify that I have this day caused to be mailed, via United States Mail, postage prepaid, a true and correct copy of the foregoing document to:

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SO CERTIFIED this the 8th day of June, 2009.

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