

IN THE SUPREME COURT OF MISSISSIPPI

**DESOTO HEALTHCARE INC. d/b/a
DESOTO HEALTHCARE CENTER**

APPELLANT

V.

CAUSE NO. 2008-IA-01762-SCT

**TIMOTHY CONLEY, INDIVIDUALLY AND
AS SURVIVOR AND HEIR OF ESTER B. CONLEY,
DECEASED**

APPELLEE

**INTERLOCUTORY APPEAL FROM THE DECISION OF THE
DESOTO CIRCUIT COURT**

BRIEF FOR PLAINTIFF/APPELLEE

ORAL ARGUMENT REQUESTED

Of Counsel:

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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 judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Desoto Healthcare, Inc. d/b/a Desoto Healthcare Center (Appellant).
2. Thomas L. Kirkland, Jr. and Andy Lowry, of Copeland, Cook, Taylor & Bush, P.A. (counsel for Appellant).
3. Timothy Conley and the Estate of Ester B. Conley (Appellees).
4. Bobby F. Martin, Jr., Esq. of The Cochran Firm – Memphis and Michael Skouteris, Esq. and Russell Lewis, Esq. of Skouteris & Magee (counsel for Appellees).
5. The Honorable Robert P. Chamberlin, Jr. (circuit judge).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Bobby F. Martin, Jr.", written over a horizontal line.

Bobby F. Martin, Jr.
Attorney of Record for Plaintiff/Appellee

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STATEMENT OF THE ISSUES

- I. Whether Plaintiff's Complaint was timely filed under Miss. Code Ann. § 15-1-36.
- II. Whether Plaintiff's other claims were pleaded properly and timely filed.

STATEMENT OF THE CASE

I. Course of Proceedings Below

Plaintiff agrees with, and incorporates herein by reference, the “Course of Proceedings” as submitted in Defendant’s Brief.

II. Statement of Relevant Facts

Plaintiff agrees with, and incorporates herein by reference, the “Statement of Relevant Facts” and timeline as submitted in Defendant’s Brief, however, Plaintiff’s counsel has no knowledge of records from Defendant being requested December 20, 2005 or received on February 27, 2006, as present counsel did not represent Plaintiff at that time. What actions other law firms or lawyers might have taken are of no relevance to this Appeal.

SUMMARY OF THE ARGUMENT

Ester B. Conley was a resident of Defendant nursing home from approximately August 2005 until February 23, 2006. At the time she left the facility, Ester B. Conley was under the disability of unsound mind. Ms. Conley sustained severe and permanent injuries as a result of the neglect and abuse of the Defendant. Ms. Conley passed away on March 19, 2006. Plaintiff filed the instant suit on May 19, 2006, two years and 60 days from Ester B. Conley's death.

Miss. Code Ann. § 15-1-36 provides for a tolling of the limitations period, and specifically states 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**.

Miss. Code Ann. § 15-1-36(5)(emphasis added).

Since the statute of limitation on Plaintiff's claims was tolled for 60 days due to Plaintiff's notice letter pursuant to Miss. Code Ann. § 15-1-36(15), Plaintiff filed suit squarely within two years and 60 days of Ester B. Conley's date of death. Any attempt to shorten a well settled statute of limitations from two years to one year is contradictory to this Court's precedent and an abomination to the most vulnerable members of our society.

Furthermore, Plaintiff's additional theories of recovery (negligence, breach of contract, breach of fiduciary duty and violation of Mississippi Consumer Protection Act) fall outside of the arena of medical malpractice. Not all failures of duties by Defendants are subject to Miss. Code Ann. § 15-1-36. Defendant's claim that these causes of action were included to

circumvent the medical malpractice two-year statute of limitation is further belied by the fact that Plaintiff's Complaint was timely filed within the period prescribed in Miss. Code Ann.

§ 15-1-36.

ARGUMENT

I. Plaintiff's Complaint was Filed Timely Under § 15-1-36.

1. The Statute of Limitations Began to Run Upon the Death of Ester B. Conley, Not From the Date She Left the Facility.

Ester B. Conley was a resident of Defendant nursing home from approximately August 2005 until February 23, 2006. Ms. Conley sustained severe and permanent injuries as a result of the neglect and abuse of the Defendant. At the time she left the facility on February 23, 2006, Ester B. Conley was under the disability of unsound mind. Ms. Conley passed away just weeks later on March 19, 2006. The disability of "unsoundness of mind" is addressed in the medical malpractice statute for purposes of determining when the statute of limitations begins to run. Miss. Code Ann. § 15-1-36(5) 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**.

(Emphasis added). Therefore, subsection (5) allows two years after the death of Ms. Conley within which to commence an action.

As correctly stated in Defendant's Brief at P. 6, subsection (15) of § 15-1-36 tolls the statute of limitations for up to 60 days. This Court interpreted this subsection to mean that the statute of limitations in medical-malpractice actions runs for two years plus 60 days. *Pope v.*

Brock, 912 So.2d 935, 939 (Miss. 2005). Plaintiff's notice letter triggered the application of the above tolling, thus giving Plaintiff two years plus 60 days to file suit. Ms. Conley passed on March 19, 2006. The "unsoundness of mind" provision above provides that the statute of limitations begins to run on the date of her death. Thus, using the tolling calculation, two years and 60 days from her date of death is May 18, 2008. That date fell on a Sunday, so the limitations period extended to Monday, May 19, 2008, the date on which Plaintiff filed his Complaint.

Defendant devotes several paragraphs in its brief questioning the diligence of Plaintiff in filing his Complaint. (Def. Brief at 7) Whether a complaint is filed on the first day a statute of limitations begins to run or on the last day, it is still timely filed. What investigation another lawyer or law firm conducted has no bearing on this appeal. The only portion of Defendant's dialogue that is pertinent is the first few words of the first sentence of said paragraph, "It is therefore not strictly relevant," Defendant should keep the issues in its brief relevant rather than what it thinks may be "perhaps of interest."

Taking the facts as alleged in the Complaint as true, the "unsoundness of mind" provision of Miss. Code Ann. § 15-1-36(5) controls in this case. The statute of limitations did not begin to run until Ms. Conley's death. Therefore, the limitations period on Plaintiff's claims did not commence until Ms. Conley's death on March 19, 2006. Pursuant to the notice provision of Miss. Code Ann. § 15-1-36(15), the statute is tolled and runs for two years and 60 days. Accordingly, Plaintiff's Complaint was timely filed on May 19, 2008.

2. **Miss. Code Ann. § 15-1-36(6) does not supersede the provisions of § 15-1-36(5), reducing the applicable statutory period to one year after death of the patient.**

Miss. Code Ann. § 15-1-36(2) limits Plaintiff's medical malpractice claims to those acts occurring within two years before Plaintiff's Complaint was filed. Miss. Code Ann. § 15-1-36(2) provides:

- (2) 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**, and, except as described in paragraphs (a) and (b) of this subsection, in no event more than seven (7) years after the alleged act, omission or neglect occurred

Id. (emphasis added). Miss. Code Ann. § 15-1-36(5) tolls the commencement of the two year limitations period until the removal of Ms. Conley's disability, in this case her death.

Defendant argues that if the Court were to look at the "unsoundness of mind" provision and date of Ms. Conley's death, then § 15-1-36(6) makes clear that Plaintiff's claims could not be filed later than one year after her death in any event. Defendants allege that § 15-1-36(6) does not remove any longer limitations periods but merely imposes a limitation in the event that a person dies while still under a disability. Yet, the reading proposed by Defendants clearly, significantly reduces the limitations period allowed to a disabled resident...a class of people that laws are generally made to protect!

The medical malpractice statute makes clear in §15-1-36(2) that all plaintiffs are allowed two years in which to assert their medical malpractice claims. Yet, under Defendants' theory, patients of unsound mind would be allowed **significantly less** time in which to assert any claims stemming from actions that occurred while still under the disability of unsound mind. Such a

construction of the statute, reducing the universally applied two year limitations period because an incompetent has died, is ridiculous. The result for which the Defendant advocates is essentially that if you are mentally healthy, your statute of limitations is two years; however, if you cannot look out for yourself because of your mental capacity, your statute of limitations is half than that of a competent person. Such a Draconian result is an absurdity. That one is of unsound mind should extend, not shorten, the applicable limitations period.

The more logical reading of Section 15-1-36(6) is that it provides an extension of the time allowed for individuals who were subject to the disability of unsound mind but who died shortly before the statute of limitations has run on a particular claim. This is the construction that has long been applied to § 15-1-55, which is specifically mentioned and incorporated into § 15-1-36(6). There was no need to reference that statute had the Legislature intended that the statutes be construed separately.

Section 15-1-55 “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 this injury.” See *Triplett v. U.S.*, 213 F.Supp. 887, 889 (S.D. Miss. 1963) (citing *Weir v. Monachan*, 67 Miss. 434, 7 So. 291 (Miss. 1890)); *Hambrick v. Jones*, 64 Miss. 240, 8 So. 176 (Miss. 1886); *Hughston v. Nail*, 73 Miss. 284, 18 So. 290 (Miss. 1895).

A more consistent interpretation is that the one-year time limit provided under § 15-1-36(6) and § 15-1-55 would apply if the patient’s death had been nearly two years after the removal of her disability or the termination of her residency at a health care facility. This one-year time limit should not, however, apply to shorten the specific two-year limitations period set forth in §15-1-36(2) and § 15-1-36(5), when Ms. Conley died just weeks after leaving

Defendants' facility. Defendant's interpretation is ambiguous, at best, and, at worst, would eviscerate the rights of the most vulnerable people in our society.

"It is a general rule in construing statutes this Court will not only interpret the words used, but will consider the purpose and policy which the legislature had in view of enacting the law." *State ex rel. Hood v. Madison County ex rel. Madison County Board of Supervisors*, 873 So.2d 85, 88 (Miss. 2004) (citing *Aikerson v. State*, 274 So.2d 124, 127 (Miss. 1973)). "[The] doctrine of *in pari material* ... provides that if a statute is ambiguous, then this Court must resolve the ambiguity by applying the statute consistently with other statutes dealing with the same or similar subject matter." *James v. State*, 731 So.2d 1135, 1138 (Miss. 1999). Because the Legislature specifically incorporates the period prescribed under §15-1-55, it necessarily intended that such period be construed under §15-1-36(6) in the same manner. Since Ms. Conley died just weeks after her discharge from Graceland, § 15-1-36(6) has no application on the construction of the applicable limitations period. Instead, § 15-1-36(5) controls. As such, the period began to commence upon her death according to the words of the statute, "...two years next 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." Miss. Code Ann. § 15-1-36(5). Applying the one-year limitation proposed by Defendant would be a model of inconsistency.

II. Plaintiff's Other Claims Were Properly Pleaded and Timely Filed.

Defendant alleges that the sole reason for Plaintiff's other causes of action is to "dispense with the medical-malpractice statute of limitation..." (Def. Brief at 19) That argument is tantamount to putting the cart before the horse. The assumption made above is that Plaintiff did not file his claim within the applicable statute of limitation, which, as demonstrated above, is not

the case. The issues surrounding Plaintiff's other claims are not ripe at this point and need not be addressed.

However, in the event the Court deems them ripe necessitating argument, Plaintiff would incorporate by reference, as if briefed herein, the Brief of Appellant in *Estate of Ardelua Johnson, et al v. Graceland Care Center of Oxford, LLC, et al*, No. 2008-CA-00688 (Miss. filed Oct. 2, 2008) at pp.18-35 and Reply Brief of Appellant in the same cause at pp. 9-19. These portions of Appellant's Brief and Reply accurately and thoroughly address why Plaintiff's additional theories of recovery fall outside of the arena of medical malpractice. Not all failures of duties by Defendants are subject to Miss. Code Ann. § 15-1-36.


CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that the Order of the Trial Court be affirmed and for whatever other relief the Court may deem just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

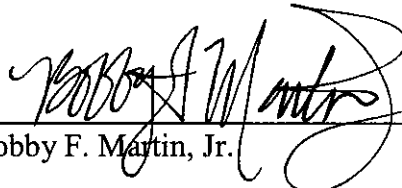
The undersigned counsel for Plaintiff/Appellee does hereby certify that he has on this day caused to be sent via United States mail, postage prepaid, a true and complete copy of the above and foregoing document to:

The Honorable Robert P. Chamberlin, Jr.
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So certified, this the 30th day of October, 2009.




Bobby F. Martin, Jr.

CERTIFICATE OF FILING

I hereby certify that I, Bobby F. Martin, Jr., counsel for the Plaintiff/Appellee, on this 30th day of October, 2009, deposited with Federal Express for overnight delivery to the Mississippi Supreme Court Clerk's Office, the following original document and copies:

The original and 4 copies of the above Appellee's Brief.

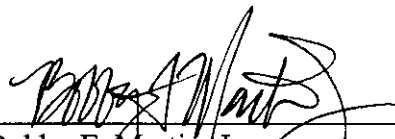
This Certificate of Filing is made pursuant to Rule 25(a) of the Mississippi Rules of Appellate Procedure.



Bobby F. Martin, Jr.
Attorney for Plaintiff/Appellee

CERTIFICATE OF VIRUS-FREE COMPUTER DISK

I certify that the computer disk accompanying this brief has been scanned and is virus free.



Bobby F. Martin, Jr.
Attorney for Plaintiff Appellee