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

REPLY BRIEF FOR APPELLANT

ORAL ARGUMENT NOT REQUESTED

Of Counsel:

Thomas L. Kirkland (MSB #[redacted]
Andy Lowry (MSB #[redacted]
COPELAND, COOK, TAYLOR & BUSH, P.A.
Post Office Box 6020
Ridgeland, Mississippi 39158
Telephone: (601) 856-7200
Facsimile: (601) 856-8242

Counsel for Appellant

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STATEMENT REGARDING ORAL ARGUMENT

Desoto believes that this Court can sufficiently evaluate the present case without oral argument.

REPLY ARGUMENT

I. The Complaint Was Filed Outside the Statute of Limitations.

Apparently conceding that the Complaint could not have been timely filed under Miss. Code Ann. § 15-1-36(2), Plaintiff hangs his case on the theory that suit was timely under § 15-1-36(5). However, for the reasons stated in the Brief for Appellant (Argument, section I.B), subsection (5) is limited by the plain language of subsection (6).

Plaintiff's response is to argue (Plf. at 6-7)[1] that such a result is unwise on policy grounds. That is not an issue properly before this Court. To the extent that this Court may look to "the purpose and policy which the legislature had in view of enacting the law" in interpreting same, *Tunica County v. Gray*, 13 So. 3d 826, 830 (Miss. 2009), it makes as much sense to consider the Legislature's desire to provide shorter limitations periods for medical providers as to assume that allegedly injured plaintiffs are the only class of people whom the Legislature thinks worth protecting. As one federal court has ruefully observed, "through excursions into legislative history, a writer can find support for virtually any position." *Jewish Hosp., Inc. v. Sec'y of Health & Hum. Servs.*, 19 F.3d 270, 274 (6th Cir. 1994). If, as Desoto contends, the statute acts to curtail the time for Plaintiff to file suit, then the wisdom of that policy is not material: "It is our job to apply the law as it is written, not to

[1]We will cite Plaintiff's brief as "Plf." and the reply brief filed in *Estate of Johnson* as "Estate."

rewrite it in view of public policy considerations which we think the Legislature failed to address." *Falco Lime, Inc. v. Mayor & Aldermen of City of Vicksburg*, 836 So. 2d 711, 725 (Miss. 2002).

II. Plaintiff's Attempt at Argument by Incorporation Fails.

Rather than address the issues regarding negligence, breach of contract, fiduciary duty, and the Mississippi Consumer Protection Act raised by Desoto, Plaintiff simply punts, referring this Court to the briefs filed in the other case consolidated with this one, *Estate of Ardelua Johnson v. Graceland Care Center of Oxford, LLC*. Plf. at 9. Most obviously, this amounts to no argument at all on the issue of the Consumer Protection Act, because the plaintiff in the consolidated case did not plead or argue that cause of action. Desoto should thus prevail on that issue for the reasons stated in the Brief for Appellant and unanswered by Plaintiff.

To the extent that this Court allows "argument by reference," Desoto will briefly rebut the contentions in the Reply Brief filed in *Estate of Johnson*, considering that the arguments in the plaintiff's initial brief are sufficiently addressed in the defendants's Brief for Appellees.

The plaintiff in *Estate of Johnson* cited recent case law for her proposition that nursing-home services may be the subject of an "ordinary negligence" cause of action.[2] Those cases do not however support her claim.

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[2]The plaintiff attacked the defendants for "lack of diligence or lack of candor" in not citing to two of the three cases she says were issued after the plaintiff filed her initial brief. Estate at 11. Given that the defendants' brief was filed July 28, 2009, it would have been

In *Chitty v. Terracina*, 16 So. 3d 774 (Miss. Ct. App. 2009), the court of appeals addressed whether the plaintiff's claims were a "business dispute" or medical malpractice for purposes of the statute of limitations. *Chitty*, 16 So. 3d at 776-77. The court properly noted that § 15-1-36 applies only to those tort claims which "aris[e] out of the course of medical, surgical or other professional services." *Id.* at 777. The court had no difficulty in holding that Chitty's claims, which arose out of a biopsy performed by a dermatologist, did indeed so "arise." *Id.* at 779. In so holding, the court of appeals applied the six-factor test it adopted in *Howell v. Garden Park Community Hospital*, 1 So. 3d 900 (Miss. Ct. App. 2008). That test, borrowed from Louisiana case law (and not yet, so far as our "diligence" uncovers, approved by this Court), sets forth a six-factor analysis:

> [1] whether the particular wrong is "treatment related" or caused by a dereliction of professional skill,
> [2] whether the wrong requires expert medical evidence to determine whether the appropriate standard of care was breached,....
> [3] whether the pertinent act or omission involved assessment of the patient's condition,
> ....
> [4] whether an incident occurred in the context of a physician-patient relationship, or was within the scope of activities which a hospital is licensed to perform,
> [5] whether the injury would have occurred if the patient had not sought treatment, and
> [6] whether the tort alleged was intentional.

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premature for them to cite *Chitty v. Terracina* (Aug. 25, 2009). We suppose that this oversight by the plaintiff was due to lack of diligence, not lack of candor.

Chitty, 16 So. 3d at 778 (quoting *Howell*, 1 So. 3d at 903-04) (ellipses & brackets in original). Rather than apply this analysis to any particular claim of hers, the plaintiff in *Estate of Johnson* merely recited numerous allegations from her fishing-expedition complaint (Estate at 15) and claimed that these self-evidently were "ordinary negligence." But all of the allegations by that plaintiff concerned exactly the type of services which a nursing home professionally provides: hygiene care, nutrition and hydration, and supervision are classic nursing-home services and constitute most of the business of custodial care for the aged and infirm.

Applying the *Howell* factors, (1) all of the services listed by the plaintiff in *Estate of Johnson* are "treatment related," that is to say, related to the professional service of custodial care for the aged and infirm which is at the core of the nursing home's professional duty. (2) Whether such care was substandard requires nursing testimony as to the standard of care. (3) Feeding, hygiene, and the other services listed all are inseparable from an assessment of the individual resident's ability to provide these services for herself or himself, and if so, to what degree — for example, self-feeding, ability to chew, continence, mobility, and so forth, all of which a nursing home must monitor and assess on a regular basis. (4) All of these activities fall within the scope of those services which a nursing home is licensed to perform, and indeed, any facility trying to provide such services without a nursing-home license ("mere" feeding, etc. though they allegedly be) would speedily find itself in several kinds of legal trouble. (5) None of the alleged injuries would or could have occurred had the

resident not sought and been provided nursing-home care. (6) Sounding as they do in "ordinary negligence" according to the plaintiff, clearly none of these alleged deficiencies is said to be intentional. The plaintiff's own proffered *Howell* analysis (Estate at 17) is implausible at best, relying chiefly on a refusal to make the necessary adaptations from *Howell* (a physician case) to a nursing-home case (for instance, "no physician-patient relationship is alleged in the context of these claims").

The plaintiff in *Estate of Johnson* merely asserts that "[n]othing in providing food and water, cleaning people up when they are incontinent, providing good hygiene and grooming involves the exercise of special skills, knowledge, or education." Estate at 15-16. Notice that this pronouncement comes from a law firm specializing in nursing-home cases, which evidently has grown so familiar with the practice that its lawyers could well open up a nursing home themselves, without any bother about nursing or nursing-home licenses. Until we have the benefit of observing that interesting experiment, however, we may rest on the obvious fact that *what kind* of food and water and *how much, how often* a diaper must be checked and *what care* must be provided as regards toileting, *what hygiene* is required by the standard of care for a nursing home, are all issues regarding the standard of care for a nursing-home facility, and thus questions for which the expert testimony of a nurse or other medical professional would be required. How much water does a given resident require, and how is that amount affected by her medical condition? May the fluid be administered by mouth, or is tube feeding required? Should a bed-bound

incontinent resident be diapered, or is that in itself negligence? Only expert testimony can provide the jury with the facts it needs to evaluate whether these measures meet the standard of care.

To give a particular example, common sense might tell the average juror that, if a facility doesn't want a resident to fall out of bed or out of a wheelchair, then restraints should be used. But in fact, use of restraints is heavily discouraged by the Medicare program, and itself can constitute a violation of the standard of care; studies suggest that use of restraints may even be more harmful on average than their omission. Similar complications abound in the nursing-home profession.

That is why a nursing home must be licensed by the state and must employ licensed nurses who supervise the non-nurse aides: because professional services are indeed being provided, however much the *Estate of Johnson* plaintiff may affect to despise them as beneath the level of true "professional services." The Legislature, we had thought, foreclosed that issue when it included nursing homes under § 15-1-36.

The plaintiff in *Estate of Johnson* also recites numerous alleged issues which supposedly sound in negligence, such as sufficient staffing, policies, investigations, management, budgeting, etc., etc. Estate at 16-17. All of these "issues" fall under professional negligence because, as this Court held regarding allegations of inadequate staffing, they cannot be material unless the plaintiff is alleging a "causal nexus" to "substandard care." *Mariner Health Care, Inc. v. Estate of Edwards*, 964

So. 2d 1138, 1150 (Miss. 2007). If the care is "substandard," then it is *below the standard of care*, i.e., professional negligence.

As for *Caldwell v. Warren*, 2 So. 3d 751 (Miss. Ct. App. 2009), its relevance to the present issue is questionable. The court of appeals quite properly held that fraud claims, where they alleged forgery and concealment of medical records, did not sound as medical malpractice; likewise negligence per se claims "regard[ing] a statutory duty to maintain true and accurate hospital records." *Caldwell*, 2 So. 3d at 759. But those are nothing like the claims in the *Johnson* case, where the plaintiff alleged fraud in the representation that the nursing home "could and would provide twenty-four hour a day nursing home care and supervision" to the resident. *Johnson* Complaint at ¶ 74. All of the plaintiff's claims, like Plaintiff's claims in the present case, amount to allegations that the nursing home failed to provide the care needed.

The other cases mentioned by the plaintiff in *Estate of Johnson* may be dealt with quickly. Nothing in her treatment of the *Estate of Guillotte* case impugns the analysis provided by Desoto in the present case. As for the unpublished intermediate-court decision in *Turner v. Steriltek, Inc.*, 2007 WL 4523157 (Tenn. Ct. App. Dec. 20, 2007), preserving a claim against a hospital for failing to have in place a policy of sterilizing "batteries and instruments used for surgery," that decision is sufficiently removed from Mississippi law and nursing-home services that its application is dubious at best. The decision relied heavily on an earlier Tennessee court of appeals decision which had held that failure to adequately screen blood for HIV was not

"medical malpractice" because, *inter alia*, it involved no "matter of medical science or art requiring specialized skills not ordinarily possessed by lay persons." *Estate of Doe v. Vanderbilt Univ.*, 958 S.W.2d 117, 120 (Tenn. Ct. App. 1997) (citation omitted). However, the question of whether nursing-home services are "professional services" has, as we've previously explained, been foreclosed by the Mississippi Legislature when it included "institutions for the aged and infirm" under Miss. Code Ann. § 15-1-36.

The *Doe* case was valuably distinguished by the Illinois Supreme Court in a case where the issue before it "involved the exercise of medical judgment or some other type of judgment. The only inquiry is whether plaintiff's cause of action arose from patient care. This is a completely different standard from the one involved in *Doe*." *Orlak v. Loyola Univ. Health Sys.*, 885 N.E.2d 999, 1005 (Ill. 2007). The "arising from patient care" standard addressed in *Orlak* is much more comparable to the "arising out of the course of medical, surgical or other professional services" standard in § 15-1-36 than to the rather exiguous "exercise of medical judgment" rule applied by the Tennessee courts on which the *Estate of Johnson* plaintiff, and by incorporation the present Plaintiff, rely.

To conclude our discussion of "ordinary negligence," the argument incorporated by Plaintiff really does too little: it preserves, at best, *only* those claims which are ultimately held *not* to involve professional services, i.e., *not* to meet the *Howell* factors. Any of the "ordinary negligence" claims advanced by Plaintiff which

are ultimately deemed to fall under "professional services" of a nursing home, would then be held untimely under the statute of limitations. If this Court finds itself inclined to heed Plaintiff's argument on the issue of "ordinary negligence," then Desoto would respectfully suggest that the just-stated exception form part of this Court's ruling, and this Court should let Plaintiff find a nursing expert who will testify that the allegedly negligent care was *not* part of the professional duty of a nursing home.

Finally, other than waving towards the *Howell* factors, the plaintiff in *Estate of Johnson* did nothing to rebut the defendants' arguments regarding breach of contract and fiduciary duty causes of action, and Plaintiff in the present case has thus likewise failed to "incorporate" any such arguments.

Plaintiff sued for professional negligence, and did so untimely under § 15-1-36. Dismissal of Plaintiff's case was proper, and the trial court erred by failing to do so.

CONCLUSION

For the reasons set forth above and in the Brief for Appellant, the opinion and order of the DeSoto Circuit Court should be reversed, and a decision rendered for Defendant, Desoto Healthcare, Inc.

Respectfully submitted, this the ***16th*** day of December, 2009.

DESOTO HEALTHCARE, INC.

By: Andy Lowry

Andy Lowry
Counsel for Appellant

Of Counsel:

Thomas L. Kirkland, Jr. (MSB [redacted]
Andy Lowry (MSB [redacted]
COPELAND, COOK, TAYLOR & BUSH, P.A.
Post Office Box 6020
Ridgeland, Mississippi 39158
Telephone: (601) 856-7200
Facsimile: (601) 856-8242

Counsel for Appellant

CERTIFICATE OF SERVICE

The undersigned counsel for Appellant 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.
DESOTO CIRCUIT COURT
Post Office Box 280
Hernando, Mississippi 38632

Bobby F. Martin, Jr., Esq.
THE COCHRAN FIRM - MEMPHIS
One Commerce Square, 26th Floor
Memphis, Tennessee 38103-2500

Michael Skouteris, Esq.
SKOUTERIS LAW FIRM
50 North Front Street, Suite 590
Memphis, Tennessee 38103

Cameron C. Jehl, Esq.
WILKES & MCHUGH, P.A.
1 Information Way, Suite 300
Little Rock, Arkansas 72202

So certified, this the ***16th*** day of December, 2009.

Andy Lowry

Andy Lowry