# 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 APPELLANT


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

1. Desoto Healthcare, Inc. d/b/a Desoto Healthcare Center (Appellant).

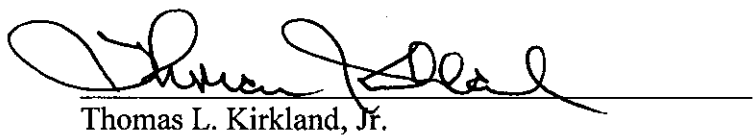
2. Thomas L. Kirkland, Jr. and Andy Lowry, of Copeland, Cook, Taylor & Bush, P.A. (counsel for Appellant).

3. Timothy Conley and the Estate of Ester B. Conley (Appellees).

4. Bobby F. Martin, Esq. of The Cochran Firm 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,



Thomas L. Kirkland, Jr.
Attorney of Record for Appellant

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## STATEMENT OF THE ISSUES

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

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

## STATEMENT OF THE CASE

### I. Course of Proceedings Below

Plaintiff sued Defendant in DeSoto Circuit Court on May 19, 2008, alleging negligence, gross negligence, medical malpractice, breach of contract, breach of fiduciary duty, and violation of the "Mississippi Unfair and Deceptive Trade Practices Act," all arising out of allegations that Defendants had provided inadequate care and supervision to Ester B. Conley ("Conley") during her residency at Desoto Healthcare Center, a licensed institution for the aged and infirm (more commonly called a "nursing home").

Defendant moved to dismiss on June 19, 2006, citing the statute of limitations. A hearing was conducted on August 22, 2008, and on October 2, 2008, the circuit court (Chamberlin, J.) entered its order denying the motion to dismiss.

Because identical legal issues were pending before this Court in the cause numbered 2008-CA-00688, *Estate of Johnson v. Graceland Center of Oxford, LLC*, Defendant filed its petition for interlocutory appeal on October 23, 2008, which this Court granted in its order of December 12, 2008, consolidating the two appeals.

### II. Statement of Relevant Facts

The present appeal is from the granting of a Rule 12(b)(6) motion to dismiss, so that the appeal turns upon matters of law, not fact. Given the importance of dates to the legal arguments, we offer this timeline:

| | |
|---|---|
| August 2005 | Conley enters Desoto facility |
| Dec. 20, 2005 | Conley (via counsel) requests medical records from Desoto |
| Feb. 23, 2006 | Conley leaves Desoto facility |

| | |
|---|---|
| Feb. 27, 2006 | Plaintiff receives Conley's records from Desoto |
| March 19, 2006 | Conley passes away |
| Jan. 10, 2008 | Plaintiff serves notice of intent to sue |
| Feb. 23, 2008 | Two years since Conley left facility |
| Apr. 23, 2008 | Two years and 60 days since Conley left facility |
| May 19, 2008 | Plaintiff files Complaint |

Notably, Plaintiff was already seeking Conley's medical records in December 2005, two months before Conley even left the facility, but did not file suit until May 2008.

We now turn to the merits of the case.

## SUMMARY OF THE ARGUMENT

Plaintiff filed his medical malpractice suit against Defendants more than two years and 60 days after the decedent left the nursing home where the alleged malpractice occurred, and thus after the statute of limitations had expired. Miss. Code Ann. § 15-1-36(6) allows no more than one year after the death of a person of unsound mind in which to bring suit, and thus does not help Plaintiff. That one-year limit is borrowed from § 15-1-55, and Plaintiff cites a 19th-century precedent as his basis for arguing that this latter statute does not mean what it says on its face; but that precedent applies only to § 15-1-55 itself, not to § 15-1-36(6), which merely sets a time period by reference to the time period stated in § 15-1-55. Alternatively, this Court should either set aside its predecessors' misreading of § 15-1-55, or else recognize that, by its careful avoidance of direct incorporation of § 15-1-55 in subsection (6), the Legislature sought to avoid carrying over that misreading.

Plaintiff's other causes of action would effectively abolish the two-year statute of limitations for medical malpractice by allowing it to be pleaded as breach of contract, breach of fiduciary duty, simple negligence, etc. The case as a whole sounds purely in medical malpractice, so that it was error for the trial court not to dismiss it.

provider" (emphasis added) must be construed as including "institutions for the aged or infirm." Of course, this term includes nursing homes like the present facility. *See* Miss. Code Ann. § 43-11-1(a). Thus, the two-year limitations period applies in this case.

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

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

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

If, as Plaintiff argues, the statute of limitations ran two years and 60 days from Conley's death on March 19, 2006, then it would run two years to March 19, 2008, and then 60 more days, expiring upon May 18, 2008. Plaintiff therefore contends that his suit was within the statute when it was filed on May 19, 2008 (the Monday after Sunday, May 18).

However, the statute in fact began to run no later than February 23, 2006, the last date upon which Conley was in the care of the facility, which certainly cannot have committed malpractice against her after that date. The wrongful-death claim does not change the analysis, because that statute of limitation "is subject to, and limited by, the statute of limitations associated with the claims of specific wrongful acts which allegedly led to the wrongful death." *Jenkins v. Pensacola Health Trust, Inc.*, 933 So. 2d 923, 926 (Miss. 2006)

(overruling *Gentry v. Wallace*, 606 So. 2d 1117 (Miss. 1992)). *Id.* at 926 (emphasis added). Thus, the statute cannot have begun to run from the date of Conley's death.

Two years plus sixty days from February 23, 2006 is April 23, 2008. Thus, the statute had indeed run by May 19, 2008 when Plaintiff filed his suit, for nothing in the Complaint alleges that Defendants did anything to Conley after she left the facility. The last possible date for any malpractice allegation to accrue is in April 2006.

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

It is therefore not strictly relevant, but perhaps of interest, that Plaintiff was less than diligent in pressing his claim. As shown in the Statement of the Case, above, Plaintiff requested Conley's medical records from the facility even before Conley had left the facility, and received them before Conley had passed away. Then, having been provided those records in February 2006, Plaintiff had those records in his possession for almost two years before he filed the notice of intent to sue, and filed suit on the very last day possible on his own theory of when the statute ran. Section 11-1-58 expressly provides that no expert review of the records is required where the plaintiff must file a complaint in order to avoid the statute of limitations, so possession of the records was not even an excuse. The statute of limitations is not intended to "allow non-diligent plaintiffs the opportunities to sleep on their rights indefinitely." *Doe v. Miss. Blood Servs., Inc.*, 704 So. 2d 1016, 1019 (Miss. 1997).

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

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

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

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

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

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

Subsection (6) of the same statute, however,[1] expressly limits subsection (5):

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

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

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

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

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

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

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

*Hambrick v. Jones*, 64 Miss. 240, 8 So. 176, 177 (1886) (emphasis added). The 1880 text[2] was substantively identical to that of § 15-1-55:

> If any person, entitled to bring any of the personal actions hereinbefore mentioned, or liable to any such action, shall die before the expiration of the time herein limited therefor, such action may be commenced by or against the

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

> executor or administrator of the deceased person, after the expiration of said time, and within one year after the death of such person.

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

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

"Whatever the Legislature says in the text of the statute is considered the best evidence of the legislative intent." *Miss. Dep't of Transp. v. Allred*, 928 So. 2d 152, 155 (Miss. 2006). "It is not the proper role of a court to construe an unambiguous statute in a way contrary to its plain meaning." *Sandefer v. State*, 952 So. 2d 281, 287 (Miss. Ct. App. 2007). These longstanding rules were disregarded by the *Hambrick* Court, calling that decision into serious question.

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

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

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

This ruling in *Caves* must be distinguished from the instance of the Legislature's "reenacting" a statute merely by virtue of adopting a new code.[3] The ample United States

[3]In rejecting the rule that "mere silence is [not] enough," this Court thus very properly rejected the glib principle that "[t]he legislature has met many times . . . without any enactment directed toward the [statute in question] and thereby has approved the construction

Supreme Court authority cited in *Caves*, and the Mississippi cases relying in whole or part upon same, stand against the factual background of the United States Code, which rarely has been "reenacted" *in toto* in the manner of the Mississippi Code when a new codification issues.[4]

The two federal precedents particularly relied upon in *Caves*, *id.*, addressed *specific* reenactments of *particular* statutes, which was the situation present in *Caves* itself. *Helvering v. Hallock*, 309 U.S. 106, 130-32, (1940) (Roberts, J., dissenting) ("Congress has three times reenacted the law without amending § 302(c) in respect of the matter here in issue"); *Lorillard v. Pons*, 434 U.S. 575, 580-81, 585 (1978) ("where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law"; fact of Congress's "selective incorporation and amendment of the FLSA provisions for the ADEA" made it unlikely "that Congress was unaware" of judicial interpretation). The logic of *Lorillard* and of *Helvering* does not apply to a wholesale reenactment of the Mississippi

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of the legislative intent placed thereon." *Crosby v. Alton Ochsner Med. Fdn.*, 276 So. 2d 661, 670 (Miss. 1973). Such self-exonerating logic seems more appropriate to the little boy whose mother did not notice any unauthorized withdrawals from the cookie jar, than to a court of justice with a duty to apply the laws as they are enacted by the people of this State through their Legislature.

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

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

Code, in the course of which the Legislature can scarcely be thought to have perused the *Mississippi Reports* and *Southern Reporter* to make sure none of its many thousands of statutes had been amended by the courts.

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

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

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

The present case, therefore, is of the sort this Court recognized in *Caves* when it said "we do not agree that the Legislature's mere silence is enough" from which to infer that the Legislature has "incorporate[d] an incorrect interpretation of a statute." *Caves*, 991 So. 2d at 153. This Court's duty is not to rationalize its past mistakes, but to apply statutes as

enacted by the Legislature, and it has the opportunity now to rectify a past mistake — *if* this Court should in fact reach the question of whether § 15-1-55 must be construed in reading § 15-1-36(6) — which, we reiterate, we do not think is required, because of our above argument that the one-year span of time mentioned in § 15-1-55 is all that is included in § 15-1-36(6).

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

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

In short, a person of unsound mind may die with the statute of limitations about to run on her medical-malpractice action, but that period of limitation is extended to no more than one year past her death by § 15-1-36. In the present case, Conley's cause of action accrued more than two years *before* her death, allowing ample time for Plaintiff to file suit. Plaintiff, as shown above, slept on his rights and did not do so, and now is prevented from suit by the plain language of § 15-1-36. This Court should honor the Legislature's will and reverse the trial court's decision below.

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

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

An "institution for the aged and infirm" is defined, in the regulations promulgated by the Mississippi State Department of Health, as "a place . . . which provides group living arrangements for four (4) or more persons who are unrelated to the operator and who are being provided food, shelter, and personal care . . . includ[ing] nursing homes . . . provided that these institutions fall within the scope of the definition set forth above."[5] Therefore, failure to meet any duty to provide such care, as alleged by Plaintiff, *just is* a failure to provide the services required of a nursing home, and thus, is medical malpractice under Miss. Code Ann. § 15-1-36.

This Court is not bound by Plaintiff's tactical mischaracterization of the alleged wrongs at issue in deciding which statute of limitations should apply. *See Lynch v. Liberty Mut. Ins. Co.*, 909 So. 2d 1289, 1292 (Miss. Ct. App. 2005) (plaintiff's characterization did not determine whether alleged tort was intentional or negligent); *see also Harrison County Devel. Comm'n v. Daniels Real Estate, Inc.*, 880 So. 2d 272, 276-77 (Miss. 2004) ("mere recitation of such words as 'negligent' and 'reckless disregard' " does not turn breach-of-contract action into tort claim) (overruled on other grounds by *City of Jackson v. Estate of*

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

*Stewart ex rel. Womack*, 908 So. 2d 703, 710 (Miss. 2005)). Allegations which sound in medical malpractice must be governed by that statute of limitations, however artfully Plaintiff may have sought to plead himself into a three-year limitations period.

### *A. Negligence.*

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

Everything alleged by Plaintiff as "mere" negligence is concerned with the alleged failure to care for Conley and keep her safe — which is to say, concerned with the alleged failure to provide nursing-home care.[6]

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

The case most closely on point is one expressly concerned with when allegations go to "professional negligence" under § 15-1-36: *Bell v. West Harrison Hospital District*, 523 So. 2d 1031 (Miss. 1988). Where a nurse had not raised bed rails and the resident fell out of the bed, the plaintiffs alleged that this was merely "ordinary" negligence. *Bell*, 523 So. 2d at 1032-33. The circuit court and this Court both held otherwise:

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

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

Where the allegations by the resident against the nursing home amount to a failure to provide the care required of a nursing home, those allegations sound in medical malpractice, not ordinary negligence. Plaintiff simply seeks to disregard the medical-malpractice cause of action. The negligence claims should have been dismissed as a matter of law.

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"substandard": falling *below the standard of care*, i.e., professional negligence.

### *B. Breach of Contract.*

As we saw above from the *Harrison County* case, a breach of contract claim cannot be turned into a tort claim by reciting "negligent" or "reckless disregard" in the complaint. Conversely, it should not be possible to turn a medical malpractice action into a breach of contract action merely by reciting "consideration" and "warranty." The alleged "contract" in this case is merely the agreement to provide nursing home services. Complaint at ¶ 29. Likewise, Plaintiff's argument for a "breach of contract" is premised on the alleged failure to "use reasonable care and diligence in providing nursing care." Therefore, the Complaint alleges, Conley was "caused to suffer pain and suffering, unnecessary medical treatments, disfigurement, infected bedsores, humiliation and infections" — in other words, the consequences of medical malpractice by a nursing home.

Leaving aside the uncertain relief available to Plaintiff here — a refund? — this tactic would, if allowed by this Court, erase the two-year statute of limitations enacted by the Legislature, at least in those instances where a prospective patient signs an agreement with the health care provider, that is to say, in 90% or more of the provider-patient relationships in today's marketplace.

The better rule is to apply *Tramell v. State*, 622 So. 2d 1257 (Miss. 1993), to the present case. In *Tramell*, the plaintiff sued the State's park bureau, alleging that the State "entered into a private contract with the Plaintiff . . . and charged a fee for the use of the premises of John W. Kyle State Park," where she was injured by a stray tennis ball. *Tramell*, 622 So. 2d at 1259. The plaintiff included various tort allegations allegedly arising out of the contract as a "breach of duty" by the State:

The STATE OF MISSISSIPPI was negligent in the following respects:

> (a) In the design, construction and maintenance of the multipurpose gym;
> (b) In the design, construction and maintenance of the outdoor tennis courts;
> (c) In failing to provide a qualified person on duty at all times when the gym facility was in use;
> (d) In failing to warn of the danger of participating in several games at the same time in the multipurpose facility;
> (e) In failing to post proper rules and regulations concerning the use of the gym;
> (f) In failing to maintain the outdoor tennis courts in a proper state of repair;
> (g) In failing to maintain proper control over the use of the gym;
> (h) In failing to require that all groups using the gym are to be accompanied by properly qualified certified personnel.

*Id.* at 1260 (quoting complaint). This Court looked to black-letter law on statutes of limitation for the rule that

> where a statute, specific in terms, limits the time within which an action for injuries to the person may be brought, such statute governs all actions the real purpose of which is to recover for such an injury whether based upon contract or tort. So too, **whether an action is ex contractu or ex delicto does not ordinarily affect the applicability of a statute declaring that an action for damages for injury resulting from negligence must be commenced within a prescribed time after the cause of action accrues, where the nature and origin of the liability asserted are, regardless of form, a liability for damages caused by negligence.**

*Id.* (quoting 51 Am. Jur. 2d, *Limitation of Actions*, § 105 (1970)) (emphasis in decision). This Court also looked to its precedents on legal malpractice, which had held that "actions arising from contractual relations but sounding in negligence" were governed by the tort statute of limitations, not by the limitations period for contracts. *Id.* at 1260-61. The *Tramell* Court thus held that "tort actions arising from contractual obligations should be controlled by and subject to" the tort statute of limitations. *Id.* at 1261. Although *Tramell* was decided when the tort period of limitations was six years, not the present three, its precedent has continued to hold good for the shorter period. *Am. Bankers' Ins. Co. of Fla. v. Wells*, 819

So. 2d 1196, 1200 (Miss. 2001) ("tort actions arising from contractual obligations controlled by" tort statute).

In the present case, the "nature and origin of the liability asserted are, regardless of form, a liability for damages caused by negligence" — professional negligence of the type governed by Miss. Code Ann. § 15-1-36. This Court should continue to apply the rule announced in *Tramell* rather than allow plaintiffs "untramelled" liberty to file malpractice actions as breach-of-contract suits.

### *C. Fiduciary Duty.*

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

Alleging a "special relationship" and "positions of confidence" between Plaintiff and Desoto, apparently arising out of the ordinary circumstance of providing nursing-home care to Conley, Plaintiff claimed a breach of fiduciary duty by Defendants in the supposed failure to provide that care. Complaint at ¶¶ 32-38. Again, what this Court will find in this cause of action is that Plaintiff merely pleads medical malpractice under another name, in the hopes of securing a three-year statute of limitations rather than the two-year limit set by § 15-1-36.

There is no Mississippi case holding that a nursing home automatically owes a fiduciary duty to its aged and infirm residents. This Court has in fact suggested the opposite. Mere "general claims that by the type of care the Howards and the other defendants were providing, the Plaintiffs and their families held a 'special confidence and trust which the Defendants accepted' " do not suffice. *Howard v. Estate of Harper*, 947 So. 2d 854, 862 (Miss. 2006) (holding nursing home administrator owes no fiduciary duty to residents). The same reasoning applies to nursing homes, which are arms'-length providers of medical services, not fiduciaries.

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

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

*Robley v. Blue Cross/Blue Shield of Miss.*, 935 So. 2d 990, 995 (Miss. 2006) (holding no fiduciary duty between health insurer and policyholder) (quoting *Univ. Nursing Assocs. v. Phillips*, 842 So. 2d 1270, 1274 (Miss. 2003)). An analysis of these criteria, all of which must be met for a fiduciary duty to be shown, demonstrates that no fiduciary duty arises automatically from the ordinary circumstances of admission to, and residency in, a nursing home. Looking to the allegations of the Complaint (¶¶ 84-90), the activity of Conley did not go beyond operating on her own behalf; she simply sought nursing care. Defendants did not "repose trust" in Conley or in Plaintiff. And the provision of nursing care does not exercise "dominion" or "control" over a resident.[7] There is no allegation that Desoto became Johnson's guardian, had any legal authority over her, or acted in any other manner than a provider of healthcare services.

Were this Court to agree with Plaintiff that the provision of nursing-home services, without the allegation of something more, creates a fiduciary duty, then every nursing home in the state owes a fiduciary duty to provide nursing care to its residents, and § 15-1-36 is a dead letter as regards the two-year statute of limitations which the Legislature expressly

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

intended to apply to suits against nursing homes for alleged failure to meet their standard of care. Indeed, if a nursing home resident is under the "dominion and control" of her nurses, then what about a patient under anesthesia and undergoing surgery? A fiduciary duty would be at least as plausible, if not moreso, in such a case. Why plead medical malpractice, when that cause of action is equally to be pleaded as a "breach of fiduciary duty"? Need expert evidence be adduced to prove a breach of this alleged duty? There is no need to recognize any such "fiduciary duty" when the tort of medical malpractice already provides relief.

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

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

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

and services. Complaint at ¶¶ 39-48. The first obstacle to Plaintiff's cause of action here is that § 75-24-15(2) requires as a condition precedent to suit that "plaintiff must have first made a reasonable attempt to resolve any claim through an informal dispute settlement program approved by the Attorney General," and there is no averment in the Complaint that Plaintiff met this condition. Dismissal of this cause of action is thus proper. *Taylor v. So. Farm Bureau Cas. Co.*, 954 So. 2d 1045, 1049 (Miss. Ct. App. 2007).

Moreover, this cause of action is yet another attempt to judicially abolish § 15-1-36. Plaintiff alleges that "Defendant represented that the quality of services provided in [sic] nursing home residents and/or hospital patients met or exceeded the minimum standards established by the State of Mississippi and the federal government." Complaint at ¶ 40. No particular representation is referred to; apparently, Desoto made this "representation" merely by operating as a nursing home. If this be held to constitute a violation under Miss. Code Ann. § 75-24-5(2)(g) — "Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another" — then no plaintiff ever again need be bound by § 15-1-36. We do not think that such an implicit "representation" can be held to swallow up the tort of medical malpractice, or that the Legislature intended that to be the effect of the Consumer Protection Act. This cause of action should thus have been dismissed with the rest of the Complaint.

## 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:

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So certified, this the ***31st*** day of July, 2009.

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