IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2010-CA-01676-COA

FRANKLIN WINFIELD **APPELLANT**

VS.

BRANDON HMA, INC. et al. **APPELLEES**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following list of persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

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Respectfully submitted this the 3rd day of June, 2011.

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REPLY BRIEF

Appellees have separately filed three different briefs: one brief on behalf of Defendant Dr. Faulkner; a second brief of behalf of Defendant Dr. Smith; and a third on behalf of three Defendants Brandon-HMA, Inc., Health Management Associates, and Nurse Kim Bishop ("the HMA Defendants"). Winfield files this his Reply Brief in response to all three Appellee briefs collectively.

Winfield requests this Court reverse the trial court and remand this matter for further proceedings.

REPLY TO APPELLEES' STATEMENT OF FACTS

At least one common thread runs through the statement of the facts asserted by all Appellees -- there is no denial or dispute regarding the fact that the Plaintiff Franklin Winfield was told by all Defendants that the fractured catheter piece would not cause him harm or risk for infection. Defendant Dr. Faulkner even concedes that the physicians at CMMC told Winfield, when he was at CMMC years after the broken-off chemo port piece was left inside him, that the piece was not the source of his problems. (Brief of Appellee Faulkner, 1.) Thus, there can remain little question about Winfield's reasonable diligence as he was consistently told -- albeit incorrectly -- that the fractured catheter would cause him no harm.

Defendants instead focus their entire arguments on the premise that Winfield is simply wrong in not remembering when the piece was left inside his body and in not remembering being told as much. However, even if all of this were to be assumed true in favor of the Defendants, it does not change the fact that Winfield was never told of the harm, both actual and potential, resulting from the broken catheter port. He was in fact told the exact opposite. This fact is

critical of course because, as Defendant Dr. Faulkner concedes in his brief, the discovery rule dictates that the statute of limitations is tolled until the discovery of negligent and actionable conduct. Before Winfield knew of the negligent and actionable conduct, regardless of when he knew of the existence of the piece, the statute of limitations could not even begin running.

Both Dr. Smith and the HMA Defendants also argue facts which are simply not in the record. The HMA Defendants assert that the consult with Dr. Smith was a brief and "informal encounter." (Brief of HMA Defendants, 2.) The HMA Defendants also assert that the consult took place in the hospital hallway and centered on discussion of the "physiological response of human blood vessels to catheters." (Brief of HMA Defendants, 2.) Such is the subject matter of expert depositions; however, no such depositions can take place in this matter for the time being by Order of the trial court. At the suggestion of defense counsel, all counsel of record entered into an Agreed Order filed February 25, 2010, limiting discovery to any motion or responsive pleading on the precise issue of whether the statute of limitations had run against Winfield. (R. 283-85, 486-88.) As a result of this, Winfield's was the only deposition which took place, limited in subject matter to the statute of limitations issue. (R. 286-87, 290-91, 390-401, 418-34.) Ironically, the HMA Defendants insinuate that "unsupported" allegations may be appropriate subject matter for a motion to strike, referencing Winfield's statement of the facts, but assert several unsupported allegations of their own. (Brief of HMA Defendants, 4, n.2.) Of course, Defendants cannot have their cake and eat it, too. The HMA Defendants also refer to Winfield's claims that the standard of care was breached -- central to any medical malpractice prima facie case -- as "irrelevant." (Brief of HMA Defendants, 4, n.2.)

Dr. Smith likewise makes many assertions of supposed fact wholly unsupported in the record. Examples of this include that Dr. Smith and Dr. Faulkner "felt that the catheter was

similar to pacemaker leads, which remain in the patient for a lifetime without causing problems." (Brief of Defendant Dr. Smith, 3.) Dr. Smith states that "There has been no allegation or evidence of infection." (Brief of Appellee Smith, 3.) Of course, a simple reading of the Complaint and Amended Complaint instantly proves otherwise. Dr. Smith also argues that he never accepted Winfield as a patient, did not treat or examine Winfield, had no contact or relationship with Winfield, had no personal knowledge of Winfield's condition, and did not review any film, test results, or medical records; Dr. Smith refers to his consult as a "one time discussion" about the fragment "reported to him to have grown into the vessel wall." (Brief of Defendant Dr. Smith, 3-4.) There is simply no evidence of any of this in the record anywhere, nor could there be, as Winfield was complying with the order and taking no discovery, which is limited to the statute of limitations issue. All of this effort also belies Dr. Smith's argument that the finding of a physician's duty is simply a matter of law -- in truth, Dr. Smith builds his entire lack-of-duty argument on his own allegations of "facts," despite none of those "facts" having been proven.

Winfield requests this Court reverse the trial court and remand this matter for further proceedings.

SUMMARY OF THE REPLY ARGUMENT

Winfield agrees that the applicable statute of limitations is section 15-1-36. Defendants also appear to agree that – because of what is known as the "discovery rule" – that statute's two-year period in which a claim must be made begins running only after the act of neglect and harm complained of shall have been first known or discovered. The dispute in this matter largely centers around the reading of another subparagraph within the same statute to determine whether

the discovery rule applies in this specific matter. The statute also provides that all cases must be brought ***within seven years of the occurrence***, not the discovery, of any actionable conduct except in two precise circumstances identified in those subparagraphs: fraudulent concealment and foreign-body retention. Defendants, however, argue that the discovery rule simply does not apply to cases of foreign-body retention. This is not the statutory intent or interpretation in the court system.

Additionally, Defendant Dr. Smith cannot sidestep the liability a radiologist owes simply by arguing in essence that a radiologist owes no duty absent a doctor-patient relationship. The *Scafide* case does in fact not support Dr. Smith's argument. Dr. Smith entered into an agreed order, violated that order, and now is attempting to use the violation of that order to accuse Winfield of some procedural failure. This Court should see right through these efforts.

Thus, Winfield now respectfully requests that this Court reverse the lower court, and render a new ruling that the statute of limitations has not run against Winfield, who is protected by the discovery rule and his own reasonable diligence in seeking medical treatment before learning of the actionable harm and neglect.

REPLY ARGUMENT AND AUTHORITY

I. The "discovery rule" controls; the foreign body language is an exception to the seven year time limit, not the discovery rule.

A. The foreign body language is an exception to the seven year time limit.

The Defendant Appellees argue that the correct statute of limitations time period is two years and that the discovery rule simply does not apply to this case as Mississippi law carves out an exception to the discovery rule in cases of foreign object retention. However, Defendants

misunderstand the statute. The exception found in the statute is an exception to the ultimate seven-year bar of medical malpractice actions, not an exception to the discovery rule. The crux of the statute of limitations dispute in this case concern itself in part with how the statute is to be properly read.

The applicable two-year statute of limitations is Section 15-1-36 of the Mississippi Code Annotated. However, because of the "discovery rule" found within that statute, the time period under that statute did not begin to run until the discovery of the harm and neglect. This rule begins calculating the 2-year time period from the date of discovery of any negligent and actionable conduct, not from the occurrence of such conduct.

The Defendants all attempt to twist the statute to state that the time period begins running from the date of discovery of any negligent and actionable conduct in all instances ***except*** when a foreign body is left inside a patient. This, of course, while helpful to the defense, is a misreading of the statute. The clear intent of the statute's drafters, looking to courts interpreting the statute, is to begin the time period from running from the date of the discovery of the negligent and actionable conduct.

The statute operates in the following manner:

1) Medical malpractice claims shall be brought within ***two (2) years*** following the ***discovery*** of the negligent and actionable conduct, and
2) Medical malpractice claims shall also be brought within ***seven (7) years*** following the ***occurrence*** of the negligent and actionable conduct, ***except*** in cases of:
    a. fraudulent concealment, or
    b. a foreign body left inside a patient's body.

The statute recognizes the absolute truth that negligent or actionable conduct can ***occur*** on one date, yet not ***be discovered*** until a later date. This is very simple – the first part of the statue deals with the ***discovery*** of negligent or actionable conduct, and the second part of the statute deals with the ***occurrence*** of negligent or actionable conduct. Regarding the ***discovery*** of negligent or actionable conduct, medical malpractice cases must be brought within two years of the discovery of such conduct.

The statute also cuts off the period of time to file a medical malpractice suits at seven (7) years, maximum, ***unless*** the case is one of fraudulent concealment or one of a foreign body left inside a patient's body. Thus, in those two instances, the statute-of-limitations time period is actually extended beyond the seven-year cutoff. The statute reads:

> 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:
>
> > (a) In the event a foreign object introduced during a surgical or medical procedure has been left in a patient's body, the cause of action shall be deemed to have first accrued at, and not before, the time at which the foreign object is, or with reasonable diligence should have been, first known or discovered to be in the patient's body.
> >
> > (b) In the event the cause of action shall have been fraudulently concealed from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence should have been, first known or discovered.

Miss. Code. Ann. § 15-1-36(1).

The word "and" in the main body of the statute is critical to see that the statute has two primary purposes – first, to institute a two-year statute of limitations from the date of the discovery of negligent or actionable conduct; and second, to cap the time period at seven years from the date of the occurrence, with two notable exceptions of fraudulent concealment and foreign body retention. Further, the word "except" in the main body of the statute shows that paragraphs (a) and (b) are simply exceptions to the seven-year rule. Thus, the statute operates as follows: 1) Medical malpractice claims must be brought within two (2) years the "alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered," and 2) medical malpractice claims must be brought "***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). Paragraphs (a) and (b) go on to explain the two exceptions to the seven-year rule. Thus, in instances of either fraudulent concealment or foreign-body retention, the seven-year-from-the-date-of-occurrence rule does not apply. This contemplates that those two exceptions allow for lawsuits under this statute after seven years where, for example, discovery of the actionable conduct may in fact occur more than seven years after the occurrence of the conduct. This reading of the statute certainly makes sense, because the legislature wanted to give claimants who were victims of either fraudulent concealment or foreign body retention an opportunity to be free of the harsh seven-year rule, and not subject to the arbitrary bar of seven years, regardless of when the negligent and actionable conduct was discovered.

Under the Defendants' contrary reading of the statute, no foreign-body claim would ever be allowed to move forward if it were to be brought more than two years after the occurrence of the act giving rise to the claim. This is of course nonsensical as the statute clearly allows 1)

certain suits to be brought as late as ***seven years*** after the negligent or actionable conduct, and 2) certain ***exceptions to that seven-year bar***, occurring even later in time than seven years. If the legislature intended as the Defendants argue, there would be no need for the "seven year" language or the exception language at all, particularly regarding foreign object, as the time limit would expire in every instance two years following the occurrence of the negligent or actionable conduct.

Thus, though the procedure complained of actually took place on or about April 10, 2003, it was not until almost four (4) years later that Winfield could have known or discovered the foreign body to be inside his body when Winfield went to the University of Mississippi Medical Center in Jackson and was treated by Dr. Wade Banker, who immediately performed surgery to remove the piece of port inside Winfield's body. (R. 272-73.) The critical language is "the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered," for only when the neglect is discovered, can the statutory time period begin running. Miss. Code Ann. § 15-1-36(2).

The Mississippi Supreme Court has made it clear that "[t]he discovery rule tolls the statute of limitations until a plaintiff should have reasonably known of some negligent conduct . . . ." *Neglen v. Breazeale*, 945 So. 2d 988, 990 (Miss. 2006) (denying defendant doctor's motion for summary judgment in a wrongful death action, based on medical malpractice). Thus, the question is when Winfield knew not only of the conduct complained of and the injury, but also when Winfield knew that such conduct was *negligent*, and caused the injury. "In other words, statute of limitations begins to run when the patient can reasonably be held to have knowledge of the injury itself, the cause of the injury, and the causative relationship between the injury and the conduct of the medical practitioner." *Id.* (citing *Wayne Gen. Hosp. v. Hayes,* 868 So. 2d 997,

1000-01 (Miss. 2004)). Only when the plaintiff knows all of these things, including the relationship between the injury and the defendants' conduct, can the time period begin.

Turning to the case law analysis offered by Defendants, Defendant Dr. Faulkner relies on *Sutherland v. Estate of Ritter*, 959 So. 2d 1004 (Miss. 2007) to make his point that discovery of an injury is not the same as the discovery of alleged negligence. Winfield wholeheartedly agrees, and argued as much in his initial Brief to this Court. This statement by Dr. Faulkner is of course a good description of the reason for the discovery rule. In fact, the *Sutherland* case to which the Defendants so tightly cling, demonstrates this point:

> [I]n the medical malpractice context, the discovery rule may apply in cases where the injury is not latent at all, but where the negligence which caused the known injury is unknown. For instance, a patient who undergoes a medical procedure may develop serious complications which are clearly known. However, if the patient has no reason to know that the doctor's negligence in performing the procedure caused the complications, the discovery rule will apply, even though the injury itself is not latent at all.

Id. at 1008-09. *Sutherland*, while helpful illustration of the discovery rule, is not a foreign-body case. In *Sutherland*, the defendant doctor there prescribed a problematic drug in June 1999, but the plaintiff there did not check himself into the hospital until April 2001. *Id.* at 1006. In 2004, the plaintiff provided the required notice to and filed suit against the defendants. *Id.* at 1006. The Court found that the plaintiff there had actually known since 2001 the cause of his injuries, in part because the plaintiff admittedly "originally knew or suspected" at that time that the drug "was destroying my life" and that "[i]t was not a belief, it was a knowing." *Id.* at 1009. For that reason, the Court found the discovery rule would not toll the statute of limitations beyond 2001, when the plaintiff was discharged from the hospital. *Id.* at 1009-10. In contrast to the plaintiff in *Sutherland*, Winfield did not have a "knowing" or a "belief" of the cause of his injury until he presented to Dr. Banker at UMC. In fact, he had been told that the catheter piece

was not causing him harm at all. Thus, the same knowledge imputed to the *Sutherland* plaintiff cannot be imputed to Winfield.

The HMA Defendants argue that *Sutherland* footnotes recognize an exception to the discovery rule, when *Sutherland* does no such thing. In fact, the Court in *Sutherland* held "in medical malpractice cases, we must focus our inquiry on when a plaintiff, exercising reasonable diligence, should have first discovered the negligence." *Id.* at 1008. The footnote number 8 in Sutherland does refer to the statute's two exceptions, but does not identify those as exceptions to the discovery rule -- in fact, they are exceptions to the seven-year bar. *Id.* at 1008, n.8.

Similarly, as Dr. Faulkner correctly points out, the plaintiff in *Jackson Clinic for Women, P.A., v. Henley* was also imputed to have knowledge of the actionable cause of her injury because she had a conversation with her physician sister that something was wrong making her aware of "some type of negligence." 965 So. 2d 643, 644-49 (Miss. 2007). The brief of Defendant Dr. Faulkner actually illustrates some good points in this way which are in fact helpful to Winfield's case. The plaintiff in *Williams v. Kilgore* was also told and reassured that there was no foreign body causing her harm. 618 so. 2d 51, 52 (Miss. 1992). These cases would have likely yielded different results if the plaintiffs had not been advised of potential actionable conduct. In stark contrast to these cases, Winfield was told the opposite, and not by only the Defendants. Winfield eventually sought out medical opinions as to the cause of his injuries when he presented to Central Mississippi Medical Center ("CMMC") in January of 2007, complaining of severe chest pain and shortness of breath, which he had been experiencing for months, along with nausea and vomiting. (R. 152-53, 272.) He was ultimately diagnosed with a pulmonary embolism and deep vein thrombosis, and required coagulation before discharge. (R. 153, 272.) Winfield's treatment continued at CMMC on-and-off into February of 2007, and he

was told he had "blood clots" in both lungs and was ultimately diagnosed with a pulmonary embolism, deep vein thrombosis, and pulmonary hypertension. He however was told by his treating CMMC staff that the foreign body inside his body was not causing him the problems he was suffering. (R. 153, 272, 396-97.) Thus, the discovery of the cause of his harm and the actionable and negligent conduct of Defendants could not have occurred any earlier in time than Winfield saw Dr. Banker.

Thus, Winfield now respectfully requests that this Court reverse the trial court, and hold that the statute of limitations has not run against Winfield, remanding this matter for further proceedings.

B. Plaintiff exercised reasonable diligence through medical visits, and was never told of the harm the foreign body was causing him.

As previously stated herein, even if all of the facts asserted by the Defendants were to be assumed true in favor of the Defendants, the fact remains that Winfield was never told of the harm, both actual and potential, resulting from the broken catheter port. He was in fact told the exact opposite.

All of the Defendants make much of Winfield's testimony that he was not advised of the presence of the catheter piece and cannot overcome the Defendants' summary judgment motions. On the outset, Winfield should state that the simple fact that he and the Defendants swear to different versions of events is sufficient to merit a denial of the Defendants' summary judgment motions: "'Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite.'" *Buchanan v. Ameristar Casino Vicksburg, Inc.*, 957 So. 2d 969, 976 (Miss.

2007) (quoting *Tucker v. Hinds County*, 558 So.2d 869, 872 (Miss.1990)). See also *Gorman-Rupp Co. v. Hall*, 908 So. 2d 749, 753-54 (Miss. 2005). "[I]f one party swears to one version of events and the another party swears to a different version, summary judgment should be denied." *Robinson v. Cobb*, 763 So. 2d 883, 886 (Miss. 2000). That is precisely the case here; however, even if the Defendants' versions of the events were assumed to be true, the analysis continues.

Additionally, the argument of the Defendants here focuses on the "retention" of the foreign object, but not the harm caused – even though the medical records all Defendants rely on underscore the fact that Winfield was advised he was in no harm. Not one single time do the Defendants deny that Winfield was advised there would be no resultant harm. They cannot do so in good conscience, either, as doing such would betray their own arguments. Thus, contrary to Defendants' arguments, Winfield does not wish for his testimony to be seen in a vacuum and have his memory treated as conclusive; Winfield actually implores this Court to look at the undisputed medical records and testimony that Winfield was advised that the catheter piece was causing him no harm. The law is and has been a focus on the harm. Dr. Faulkner even accuses Winfield numerous times of putting forward an argument that is "blatantly contradicted" by the medical records found in the court record. (Brief of Defendant Dr. Faulkner, 7, 15.) Although Winfield did swear he has no memory of being told of the existence of the piece, a fact in dispute, it is undisputed that he was told the catheter piece was not causing him harm. The fact Winfield was advised no harm would result from the catheter piece is in truth entirely supported by the record, and pointed out several times by all Defendants.

The HMA Defendants argue that "when to his benefit, Mr. Winfield accepts these [medical] records as true and accurate," asserting somehow that Dr. Smith's involvement in

Winfield's medical care and the lack of a diagnosis of risk actually benefitted Mr. Winfield. (Brief of the HMA Defendants, 6.) To characterize these two facts as to "benefit" Mr. Winfield borders on laughable. Mr. Winfield would no doubt wish that he could go back to the day the fractured tubing piece was left inside him, and have had another radiologist – one who would have advised the Defendants to remove the dangerous piece – provide a consult on his case. Winfield would also certainly wish he could have been advised of the true danger of the piece; however, as Winfield was told the exact opposite when the Defendants opined incorrectly that the piece would cause him no harm.

Winfield now respectfully requests that this Court reverse the trial court, and hold that the statute of limitations has not run against Winfield, remanding this matter for further proceedings.

II. A radiologist owes a duty to a patient whose X-rays he consults and for whom he provides a supportive consulting opinion as to treatment and diagnosis.

A. Dr. Smith actually owes a duty to Winfield under the reasoning of the *Scafide* case for reasons of public policy.

Similar to his argument in the trial court, Dr. Smith relies heavily on this Court's opinion in *Scafide v. Bazzone*, 962 So. 2d 585 (Miss. Ct. App. 2006), for the proposition that a consulting physician such as Dr. Smith owed no duty to Winfield because there was no doctor-patient relationship; thus, Dr. Smith argued, Winfield is unable to make a prima facie case of medical negligence. As Winfield has previously argued in his initial brief to this Court, that case is distinguishable and Dr. Smith's reliance on *Scafide* is misplaced.

First, Dr. Smith even concedes that a duty can arise absent a doctor-patient relationship. (Brief of Appellee Dr. Smith, 10, n.2.) Second, a doctor-patient relationship likely did arise in this matter. Third, *Scafide* is both limited in its application and in fact discusses several public

policy issues which should weigh on a court's mind when determining liability arising from a consult. These public policy concerns include forseeability of harm to the plaintiff, certainty of plaintiff's injury, connection between the defendant's conduct and the injury suffered, and the policy of preventing future harm. *Id.* at 594. All of these policy concerns in the present case weigh in favor of Winfield.

The existence of such a relationship can only be fully evaluated by a determination of the facts in the case. Thus, whether such a relationship existed between Dr. Smith and Winfield is a question of fact which must be further explored in depositions and which must be determined by a jury. This issue, therefore, is not appropriate for summary judgment in Dr. Smith's favor.

Winfield fully examined the *Scafide* case and the question of a doctor-patient relationship in his initial Brief to this Court and does not intend to waste this Court's time now with repetitive argument. Winfield simply incorporates all of his previous argument and authority on this issue herein by reference, and again asks this Court to reverse the trial court and remand this matter.

B. The duty issue is premature, and pursuing it violates the agreed order in the trial court sought by Defendants.

Dr. Smith presents several attempted arguments as to why the duty issue was ripe for appeal, but all fail.

1) Winfield did raise this issue before the trial court.

Dr. Smith argues Winfield waived this issue as he did not raise this issue before the trial court. First of all, Winfield must point out to the Court that this is wholly false. Winfield did in fact raise the issue in paragraphs 44 and 45 of his Response to Defendants Health Management Associates, Inc., Brandon HMA, Inc., and Kim Bishop's Cross-Motion for Summary Judgment . (R. 402-34), as well as in paragraph 6 of Response to Defendant's Memorandum of Law

Following Briefing and Hearing, and Motion to Strike and for Attorney's Fees, and paragraph 20 of his Rebuttal to Defendant's Response to Motion to Strike and for Attorney's Fees.

2) The agreed order suggested and drafted by defense counsel prevented any discovery as to Dr. Smith's duty and as to Dr. Smith's involvement in the facts.

Additionally, this issue was premature partially because of an Agreed Order which defense counsel sought between the parties which allowed limited discovery regarding only the statute of limitations. (R. 283-85, 486-88.) Although the agreed order states that defendants could file cross-motions, those motions were to be limited in scope to statute of limitations issues. Winfield does not take issue with the fact that the defense filed cross-motions; indeed, portions of those cross-motions were compliant with the order -- Winfield does however take issue with the portions outside the scope of the statute of limitations. The Agreed Order, prepared by defense counsel, reads in pertinent part: "The parties agree that, until the court rules upon Plaintiff's motion and any cross-motion filed by any Defendant . . ., said discovery shall be limited to those facts and documents designated to promote or defeat Plaintiff's pending motion and/or any cross-motion on the same issue." (R. 283-85, 486-88.) Thus, raising this issue by Dr. Smith in the court below was clearly outside the scope of the Agreed Order limiting discovery to issues in Plaintiff's Motion, "and/or any cross-motion *on the same issue*." (R. 283-85, 486-88) (emphasis addded).

3) Because Winfield was obeying the Agreed Order, there was no need to seek an amendment.

Defendant Dr. Smith actually insinuates that Winfield is at fault for abiding by the Order as agreed to among the parties, arguing Winfield should have sought to amend the Order. This

borders on the ridiculous, of course. The entire purpose of the *agreed* order was that its terms were *agreed to*, and would not require amendment. Winfield was operating under the understanding – mistakenly, as matters have proven – that all Defendants would not posture the case to require amendment, and would instead limit all argument and discovery to the statute of limitations issue, as suggested by defense counsel and laid out in the order drafted by defense counsel.

4) Winfield is not at fault for not taking depositions as he was complying with the Agreed Order.

Despite Dr. Smith's attempts to argue otherwise, Winfield was at fault for not taking any depositions. Dr. Smith acknowledges the agreed order in one breath, and then accuses Winfield of failing to prove his case by not taking depositions specifically forbidden by the agreed order in the next breath. (Brief of Appellee Dr. Smith, 13.) This case has truly been a lesson for the undersigned not to enter into any more agreed orders with the defense counsel in this case. The clear text of the Agreed Order limited discovery to issues in Plaintiff's Motion, "and/or any cross-motion *on the same issue*." (Emphasis added; See "Exhibit 2.") Dr. Smith seems to imply that Winfield never would have taken the Defendant's deposition on the duty issue. Of course, Winfield would have addressed such a basic element of the prima facie case in Dr. Smith's deposition. Winfield has simply not had that opportunity because doing so would violate the agreed order of the trial court. In truth, Dr. Smith entered into the agreed order, violated that agreed order, and now attempts to use Winfield's compliance with the agreed order to posture a winning argument for the defense.

5) Dr. Smith's own argument relies on assertions of "facts," yet attempts to characterize his issue as one as a question of law.

Dr. Smith argues duty is a question of law. This of course belies all of the asserted "facts" that Dr. Smith argues require a ruling in his favor; all of these assertions of fact – the alleged hallway consultation, Dr. Smith's long-distance relationship to Winfield and his medical case, the nature of the discussion between Dr. Smith and Dr. Faulkner – are appropriate subject matter for discovery to determine. Dr. Smith would like to have his cake and eat it, too – he may assert unproven facts to support his claim for summary judgment, but also claims discovery of those facts by the Plaintiff is unneeded for this Court to make its determination.

For these reasons, the trial court should have denied Defendant Dr. Smith's Cross Motion for Summary Judgment. Winfield now respectfully submits that this Court should reverse the trial court and enter a ruling on this issue in Winfield's favor, and remand this matter for further proceedings consistent with this Court's opinion.

CONCLUSION

No Appellee addresses the primary factual issue head on -- when Winfield knew of the negligent and actionable conduct because of his own reasonable diligence. All Defendant/Appellees also attempt to create an exception to the "discovery rule," which is simply not there and Defendants have no case law to show otherwise.

Winfield now respectfully requests that this Court reverse the trial court's grant of the Defendants' Motions for Summary Judgment, and hold that the statute of limitations has not run

against Winfield, because of the discovery rule and Winfield's own reasonable diligence. Winfield further requests this Court find that a doctor-patient relationship arose between Dr. Smith and Winfield, and that Dr. Smith owed Winfield a duty of care.

Respectfully submitted, this the 6th day of June, 2011.

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CERTIFICATE OF SERVICE

I, Jerry Mills, one of the attorneys for the Plaintiff Franklin Winfield, do hereby certify that I have this day served a true and correct copy of the above and foregoing document by U.S. Mail, postage pre-paid to the following:

Honorable Samac Richardson
Rankin County Circuit Court Judge
Post Office Box 1885
Brandon, MS 39043
TRIAL COURT JUDGE

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Dated this the 3rd day of June, 2011.

Jerry Mills